EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101552/2022

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Held in Glasgow on 31 October to 3 November 2023 and 15 to 17 January 2024; Members' Meeting on 26 January 2024

Employment Judge R Bradley
10 **Tribunal Member: Ms J Smillie**
Tribunal Member: Mr J McCaig

Ms Agnes Connor	**Claimant** **Represented by:** **Ms L Hunter -** **Solicitor**
South Lanarkshire Council	**Respondent** **Represented by:** **Mr S O'Neill -** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

1. In respect of the incident identified as item xv (questions 1 and 2) the
25 respondent discriminated against the claimant because of something arising from a disability;

2. In respect of the incident identified as item xv (questions 1 and 2) the respondent harassed the claimant contrary to section 26 of the Equality Act 2010;

30 3. The respondent is ordered to pay to the claimant the sum of **FIVE THOUSAND FOUR HUNDRED AND FIFTY TWO POUNDS AND THIRTY FIVE PENCE (£5,452.35)**;

4. The respondent is ordered to pay to the claimant the sum of **EIGHT THOUSAND FIVE HUNDRED AND SIXTY POUNDS AND SEVENTY FIVE**
35 **PENCE (£8,560.75)**;

5. The respondent is ordered to pay to the claimant the sum of **NINE THOUSAND SEVEN HUNDRED AND TWENTY POUNDS AND EIGHTY NINE PENCE (£9,720.89)**; and

6. The respondent is ordered to pay to the claimant the sum of **TEN THOUSAND FIVE HUNDRED AND ELEVEN POUNDS AND SEVENTY EIGHT PENCE (£10,511.78)**.

REASONS

Introduction

1. On 16 March 2022 the claimant presented an ET1 form with a paper apart in which she made various claims of discrimination. The protected characteristic is disability. The claims were resisted. After some initial correspondence the case was sisted in about May 2022.

2. On the sist being recalled and on 4 May 2023 the claimant amended her pleadings to which there was no objection. On 31 May 2023 the respondent lodged a separate paper apart with its comments on the amendment. It became pages **A31 and 32** in the joint bundle about which we comment further below.

3. Case management hearings took place on 5 June and 13 September 2023. For present purposes it is relevant to note from June that:

    a. The first period of this hearing was fixed;

    b. A timetable was ordered for; mutual disclosure of documents and preparation of a bundle; and agreeing; a list of issues, a chronology and an indicative witness timetable; and

    c. There was a discussion about the instruction of an expert psychiatric report.

4. Noteworthy from the September hearing was "*an attempt at point-scoring*" between the solicitors and a dispute between them as to the existence of

notes of certain meetings. It was regrettable that in the final hearing there were occasional similar exchanges.

5. On 16 October and as per the Order from June the parties' solicitors presented a witness order and timetable which suggested that evidence would conclude by Wednesday 1 November. As it turned out their time predictions were unrealistically optimistic; by Friday 3 November we had heard from only the first witness (of five) for the respondent. It was therefore necessary to continue the hearing on the next days available to all parties, which were 15 to 17 January 2024.

The Bundle

6. The relevant Orders required the hearing bundle to be finalised (and sent) by 18 September. As it turned out, it was necessary to have a supplementary bundle. Even then, it became necessary to add things during the hearing. The primary bundle (**A1 to A379**) was added to. The supplementary bundle (which we called "**B**") contained 63 pages at the start of the first day. By the conclusion of the hearing it numbered to **B71.**

Chronology

7. A respondent's chronology was lodged on 16 October. It was not complete. At our request an amended version was lodged on 15 January 2024. It was *"redlined",* which markings recorded highlighted text where the parties and their solicitors were unable to agree.

8. The use of neutral chronologies in litigation (including in the employment tribunal) is common. Their primary purpose is to assist the decision-makers in understanding the important incidents in what is often a lengthy period of time. Indeed the copies produced in this case spanned (in substance) over 3 years. It was regrettable that even by January of this year and at an advanced stage of the litigation the final version was not agreed and of limited assistance to us.

The Issues

9. The list provided for the start of the first hearing was incomplete. It was first amended to reflect section 19(2)(b) of the Equality Act 2010. We say a little more on that when considering the indirect discrimination claim. Ms Hunter then lodged a further version on 22 December 2023. For reasons which were not fully explained the respondent did not agree that list until the time of making submissions. Solicitors appearing in the employment tribunal do not need to be reminded that our reasons must identify the issues which we have to determine. It is frequent and common for parties to be required to liaise and co-operate in preparing a joint list before the start of hearing any evidence. It is regrettable that this did not happen.

10. We have set out in an Appendix what was the final list of agreed issues.

11. We have also referred to them in our decision on them below.

Witnesses

12. As well as the claimant we heard from David Morgan, Stephen Smellie (trade union branch secretary) and Joyce Cuthbertson (home carer). With the respondent's agreement Mr Morgan (the claimant's partner) gave evidence first.

13. The respondent led evidence from Pat Logan (community support co-ordinator), Kirsty Allan (community support co-ordinator), Joyce Martin (team leader), Faye Meldrum (personnel adviser) and Michelle McLellan operations manager (Home Care).

14. The claimant also relied on a report dated 9 September 2023 from Dr Saduf Riaz, consultant psychiatrist. There was no suggestion from the respondent that we could not treat him as an expert, and thus we did. While not affecting our acceptance of his opinion we noted (at paragraph 9 of the report) his statement that *"it is our position that such questioning should have been unnecessary."* In its context the reference to "*our*" could only mean the claimant and others who shared her view on the matter. That tended to suggest that Dr Riaz had copied from material provided to him by the claimant or her advisers.

The protected characteristic/disability

15. The Note from the June hearing recorded the respondent's concession of the claimant's *"status"* as disabled. In her agenda for that hearing and in answer to the question, the claimant said, *"I had a stroke in 2019 and have permanent loss of peripheral vision. I now suffer with mental health issues."* Prior to hearing evidence on 31 October, Ms Hunter clarified that the claimant's combined disability was that she (i) was registered as being severely sight impaired and (ii) had mental health issues.

16. We should say that in some references in her written submission the claimant appeared to blur the lines about what she said was her disability. For example, on her claim of harassment she said*, "Ms Martin and Ms Allan's behaviour in the meeting on 20 October 2021 by advising the Claimant that a colleague or colleagues did not want to work with her, did not want to be responsible for her, not in relation to any concerns regarding the standard of her work but rather to do with her stroke [thus her disability]."* In doing so she clearly equates her stroke with her disability. That is not correct. The combined disability is as noted above, and that is based on what we were told by Ms Hunter on 31 October.

Findings in Fact

17. Taking account of what was agreed, what was uncontentious from the paperwork, from some judicial knowledge, and the evidence that we heard we made the following findings in fact.

18. The claimant is Agnes Connor.

19. The respondent is South Lanarkshire Council. It is the fifth largest council area in Scotland. It employees about 16,000 staff.

20. On 30 May 2006 the claimant began employment with the respondent as a home carer.

21. In that role her duties included; moving and handling service users; support with *"mobility transfer"* for those users; attending to personal care and showering; dressing and undressing; making meals, snacks, drinks and feeding; supporting with medication, eye drops and creams; catheter and stoma care; toileting; occasional housework; and recording relevant information on Medication Administration Record (MAR) charts.

22. The claimant worked in an area which included parts of Cambuslang and Rutherglen.

23. She worked with a number of other home carers. She reported to a community support co-ordinator. The hierarchy then was to a team leader, an operations manager and a service manager.

24. The claimant worked a two week rota. In Week 1, she worked 8am to 1pm and then 4pm to 9pm on Monday, Tuesday then Friday to Sunday. In week 2, she worked the same hours but on only Wednesday and Thursday.

25. Some of the respondent's home carers work (for the most part) alone. They visit service users' homes and provide their care alone. Other home carers operate in pairs, known as "*Double Up teams*." The need for a Double Up team is primarily determined by the needs of the service user. Most of those service users are bed bound. The carers invariably require to use equipment such as sliding sheets, hoists or stand aids in order to provide care for the users. In the main the work of a Double Up team is heavier work. It requires two people to carry it out effectively. It was customary that a Double Up team travelled together in a van provided by the respondent.

22 December 2019 to 19 October 2020

26. On or about 22 December 2019 while at home the claimant became ill. The next day she attended her doctor. He referred her to hospital. She attended hospital that day.

27. At that time the claimant reported to Pat Logan, community support coordinator.

28. On 24 December 2019 the claimant reported absent from work as a result of a stroke. She was then continuously absent from work for about 10 months, until 19 October 2020.

29. Prior to 24 December 2019 the claimant had primary responsibility for the running of the house which she shared with Mr Morgan. At that time she enjoyed a busy and active life. Those activities included swimming, pilates, going out with friends, and caring for her family, which included grandchildren.

30. On or about 17 January 2020 she was prescribed 10mg of citalopram hydrobromide. The claimant's understanding is that the suggestion of that prescription was made in order to "*slow her down*". At the time the claimant was anxious. She was keen to return to work.

31. It appears that Ms Logan was in contact with the claimant either in person or by telephone on 7 January, 6 February, 6 March, and 7 and 19 May 2020. By about 19 May the claimant had in large measure returned to her fitness activities. She had used a number of resources to assist her recovery. It also appears that on 20 May Ms Logan referred the claimant to the respondent's occupational health adviser Dr Murray Herbert.

32. On 6 March the claimant was offered referrals by the respondent to physiotherapy and cognitive behavioural therapy (CBT).

33. On 23 March 2020 the Prime Minister ordered the nation to "*stay at home*" as a result of which the first *"lockdown*" started.

34. In March or April 2020 the claimant returned to her swimming activities.

35. On 7 May she was offered and declined referrals to physiotherapy and cognitive behavioural therapy.

36. On 19 May the claimant advised Ms Logan that her latest sick line was for 13 weeks, thus to 14 August 2020.

37. On or about 27 May Ms Logan completed an online medical referral form (**pages A108 and 109**). It noted Posterior *"Circulation Ischemic stroke resulting in her balance and peripheral. vision being affected. There are no*

other side effects." It asked; "Will Agnes's peripheral vision affect her ability to complete all the tasks required of her during her working day?"

38. On 4 June Dr Herbert carried out an assessment of the claimant by telephone. He prepared a report on 8 June 2020 (**pages A110 to 111**). He reported, *"I cannot adequately give you advice here about her ability as I was unable to assess her face to face but it is clearly going to be important to make sure that she is safe in the context of her work before returning her to work. Therefore we need to know that she has sufficient vision to be able to operate safely and secondly that her balance and physical ability has returned to a relatively normal level. Firstly with regard to the vision she describes visual loss in part of her visual field and that would reduce her awareness. We talked about therefore the safety of her walking and working in poorly lit areas or times and it would seem reasonable to conclude that she probably should avoid work in the evenings or when it is dark. The same of course would apply to mornings in the winter and you may have to think about that in the long term. The second issue at the moment is about her relative safety and it would certainly be preferable when returning to work that she works with a buddy. But of course with the social distancing restrictions that has its own problems at the present time and she would have to travel independently and she does not drive. There are some real ongoing issues therefore in terms of getting her back to work at this time but I still hope that she might get improved sufficiently to allow this. In the meantime I am going to write to her Doctor for some additional information as I hope in gathering this we might get a clearer picture of her overall ability. I will update this report when I have heard back."*

39. It appears that Ms Logan saw that report on 10 June.

40. On 15 June the claimant telephoned Ms Logan whose note of it recorded, (**page A95**) *"Telephone call received from Agnes advising she has contacted her GP asking if it was possible for her to return to work. Agnes also advised Dr Herbert said she could be paired up with another worker, possible in the double up van. I advised Agnes a meeting will be arranged for her to attend the office to discuss the outcome of Dr Herbert's report."*

41. On 2 July 2020 the claimant met Ms Logan and Andrew Crookston, team leader. Ms Logan made a note of the meeting (**pages A95 to 96**) within a *pro forma* ***"Absence reporting form"*** (**pages A91 to 98**). It appears that those notes were not made contemporaneously with the various occasions of contact with the claimant. They were not shared with the claimant at the time. She had not seen them prior to the presentation of this claim.

42. At the meeting on 2 July the claimant was advised that if there was no return to work, the respondent may consider the termination of her employment on grounds of capability. Ms Logan's note of the meeting does not record that advice.

43. In summary the note of the meeting of 2 July recorded a number of things including; the fact that that the claimant had seen Dr Herbert's report prior to the meeting; the claimant's disclosure of being *"visually impaired",* the negative impact on her peripheral vision and how that might impact on some work tasks; the claimant's wish to return to work *"on the vans"* or do *"any work in the office"*; the possibility of ill health retirement; and a further offer of CBT.

44. The note also recorded that Mr Crookston undertook to contact Dr Herbert *"to see if he has had a report from Agnes's GP regarding her eyesight."*

45. On 3 July 2020 Ms Logan wrote to the claimant (***page A112***). It appears that she received it. In it she said, *"At this meeting, we discussed the outcome of your Occupational Health assessment, held on the 4th June 2020, from Dr Herbert. The major issue with yourself is your peripheral vision. You advised you would not be able to work alone during the dark mornings and nights. At this point you advised you are keen to get back to work and asked if you could work along with the carers on the vans. You also asked if there was any possibility of working in the office, may be helping with the PPE. Andrew advised that Dr Herbert has asked to see the report the hospital has sent to your GP regarding your vision. Once we have had feedback from Dr Herbert, we will be in a better position to offer supports you require. Based on this information there was no agreement made and no relevant timescale considered for a return to work. Should you require any further information*

regarding the above information please do not hesitate to contact myself on the number above, or Andrew Crookston …".

46. After the meeting on 2 July, the claimant contacted her trade union, UNISON. She was referred to Helen Clancy because she had *"more experience".*

5 47. In the period between 2 July 2020 and the end of her employment the claimant was disabled. In particular her impairments were she (i) was registered as being severely sight impaired and (ii) had mental health issues.

48. The claimant did not reply to the letter of 3 July.

49. On 8 July, the claimant had a telephone consultation with her GP. The record of it says (**page A71**) *"Feels that mood is fine on this low dose citalopram. continue. Oc health report done. Keen to try back at work as home carer as balance now fine. concerned that night vision not as good as normal so would want to work from van rather than walking as apparently did before."*

50. On 17 July Dr Herbert wrote a memo to Ms Logan (**page A113**). In it he said; he had by then heard from the claimant's GP; it indicated progress on mobility; there was some hip pain nothing to do with her stroke; she should be progressing towards a return to work *"if she has not already done so";* and it may be necessary for him to review her by telephone. It concludes, *"In the meantime the trajectory seems satisfactory and we can only hope that things settle and allow her to engage in work much in the fashion I described in my earlier report."*

51. The GP medical records show that the next entry is on 22 July. The first of two entries that day (**page A71**) noted, *"patient req call back looking increase citalopram to 20mg instead of 10 either number as at home."* The second records*, "increased stress and anxiety related to issues returning to work. Pt keen to return but employer has said she is a 'danger due to poor night vision. Calling her daily and saying she can't return. In talks with union rep and awaits cc health report also. Reports increased anxiety. slep and appetite variable and motivation down last few weeks."*

52. On 18 August the claimant met again with Ms Logan and Mr Crookston. Ms Clancy accompanied the claimant at it. Ms Logan recorded (for 11 August) the fixing of the date and time of the meeting (**page A96**). There was no record in the absence reporting form of the discussion (**see page A96**). On 18 August Ms Logan wrote to the claimant following the meeting (**pages A117 to 118**). In it she said, *"You advised us you are fit to return to work and work on the double up team. Andrew confirmed we would not be able to agree a return to work until further update has been received from Dr Herbert. Andrew also advised he will process a medical to Dr Herbert. Once this information is received this will confirm how to progress with your current absence. Andrew explained we need to ensure Dr Herbert can confirm there are no risk relating to your return to work with your eyesight and mobility, which was highlighted in the first medical you received. You advised you would not be able to work at night — time and dark mornings although this could be alleviated by working on the double up team. Andrew advised there was opportunity whereby we could not guarantee working whilst it is dark, due to dark nights and mornings. At this point you advised you could not work in a house that was poorly lit. Therefore, we need to seek advice from Dr Herbert in relation to risks. You advised you were okay until the last meeting. now you are on 50mg of antidepressants. You advised your eyesight is fine."* There is no reference to either of the two comments attributed to Mr Crookston from the 2 July meeting. It is probable that during the meeting Ms Clancy said that the respondent would need to get used to older people in the workplace; staff didn't want to work past retirement age but the government were forcing *"us"* to do so; or words to that effect. The claimant's understanding from this meeting was that she could not return to work until further medical advice had been obtained. The claimant was advised as being fit to return to the double-up team. Parties agreed to wait on an update from occupational health.

53. On 21 August Mr Crookston emailed Avril Mitchell (clerical assistant) (**pages A119 to 120**). He set out 6 questions which he wished to ask of Dr Herbert. They were; (1) referring to her tasks (noted above) Did she have sufficient vision and mobility to be able to work on her own and perform all tasks relating to the job role? (2) If she is unfit to undertake the full duties of a Home carer

is she fit enough to undertake any other jobs? (3) Relative to Dr Herbert's earlier statement as to walking and working in the dark, Does she require to work alongside another person at all times in relation to ensuring her safety with working in poorly lit areas and within dark nights and mornings? And does her vision and mobility afford her the opportunity to work in poorly lit areas within a service user home and in the community on her own? (4) As a Home carer it cannot be guaranteed that she will be able to work alongside another Home carer therefore can she work on her own in the community? (5) is she able to use equipment such as hoists, steady and slide sheets when moving in and assisting service users and would there be any risks relating to her partaking in this activity? and (6) if she is fit for a return to work can you advise how long she would need supported via this process before being able to undertake all tasks relating to a Home carer and within the community on her own? It appears that the claimant was unaware of the questions at the time.

54. On 18 September the claimant had a telephone assessment by Dr Herbert (**pages A123 to 124**). He then sent a memo dated 18 September to Mr Crookston. In it he said; *"the questions you have put are very reasonable and practical but the bottom line here will be that a trial of work is likely to be the only way to assess her ability to undertake the kind of tasks you describe or not"; she is very keen to return to work; her visual loss is such that she lacks vision in part of her visual field and this is likely to be a permanent difficulty; and the only way of assessing her for the various tasks is a trial of work. His conclusion was to "suggest therefore that she returns to work in a double up situation and undertakes this for certainly some weeks to see how she copes before considering another adjustment."* He also recorded that the claimant *"is hopeful herself that she could remain in a double up situation because she is anxious about being out and about on her own and you may need to address this in the long term."* Dr Herbert does not expressly answer any of the six questions.

55. On 8 October 2020 the claimant attended a meeting with Mr Crookston. John Duffy, trade union representative, accompanied her. She was offered a phased return to work and agreed to work with a colleague of her choice, with

a view to moving into the double-up team. There is no record of the discussion in the form. At the meeting the claimant asked Mr Crookston why a home carer (about whom she was aware) had been given work in the office distributing PPE. She contrasted her own situation in that she had not been given that work. He said that the other carer had been asked because she was *"high risk".* The claimant said that in her view she was also high risk. By that time, the claimant was aware that about 11 home carers had worked in the office doing that work. She was unhappy that she had not been permitted to do it. She agreed to a phased return to work. This was to involve work shadowing a colleague. There was nothing in writing to or from the claimant following the meeting.

19 October 2020 to 1 June 2021

56. On 19 October 2020 the claimant returned to work. She shadowed the work of a carer colleague Karen Maguire. She was part of a Double Up team with Ms Maguire. That shadowing work continued for several weeks. On about three occasions the claimant (with Ms Maguire's agreement) carried out the services for the service user. This included the provision of medication and food and the recording of it on an MAR chart. The claimant telephoned Ms Logan to tell her that she had carried out those duties on those occasions.

57. In about January 2021 the claimant continued with her normal duties and rota working. She worked as one half of a Double Up team with another home carer, Jackie Stewart. Ms Stewart drove them to the homes of service users. She used a van provided by the respondent. The claimant's fortnightly shift pattern remained as previously:

<u>Week 1</u>

Monday; Tuesday; Friday to Sunday: 8am to 1pm and 4pm to 9pm

<u>Week 2</u>

Wednesday and Thursday: 8am to 1pm and 4pm to 9pm

58. On 22 April she was prescribed sertraline hydrochloride 100mg to be taken once per day (**page A67**).

59. In about this period and prior to May 2021 the claimant was aware of comments made about her by other carers. For example she heard it questioned (or words said to the effect of); *"can't you afford to go part time?"; "can't you access a private pension at 60 years of age?"* and *"do you need someone to work with you at all times, I thought it was only at night time?"*

60. The claimant's impression was that at the start of her working time with Ms Stewart things worked well. Latterly, she believed that Ms Stewart wanted *"off the van".*

61. In about May 2021 the claimant's work was assessed by Ms Logan. She attended the home of a service user to do so. The claimant's belief is that it was obvious from that visit that she was doing the *"harder part"* of the job. The claimant did so because she believed that Ms Stewart was less able for those tasks.

62. On 1 June Ms Logan telephoned the claimant at home. She said that it was necessary *"to see about you working on your own."* The claimant's impression was that she was being required to do so. She explained to Ms Logan that; she was afraid to do so because of her vision; and that she could not do it. The claimant was upset as a result of the call. On the advice of Mr Morgan she called her GP practice. At 15.04 that day the claimant spoke to Ms Logan. Ms Logan made a note of the call (**pages A126-127**). It recorded the claimant's comment that; she would not be at work that night (due to start at 16.00) because of high anxiety levels; and she would be contacting her GP. In answer to the pro forma question (7) *"Is there anything else we need to know?"* Ms Logan noted the claimant's answer, *"Yes do not take me off the double up van."* In answer to the pro forma question (8) *"Is there anything I can do to help?"* Ms Logan noted the claimant's answer, *"Yes, keep me on the double up van."* It appears from her medical records (**page A66**) that the claimant told her GP that all of the various adjustments put in place following her stroke *"are now all being taken away".* As a result, she felt unable to work,

anxious and tearful. That record also notes that she was provided with a *"sick note"* for two weeks.

From 2 June to 16 June 2021

63. On 2 June the claimant's GP certified that she was unfit for work in the period 2 to 16 June (page B69). The stated reason was anxiety.

64. On 6 June the claimant texted to John Duffy (**page A128**). In it she said, *"Spoke with Joyce Martin she said Pat is just trying to learn the new system but I told her what Pat said and I had a witness I hav[e] to go to see Dr Herbert so I will see what the outcome is and let you know."* The claimant had earlier called Mr Duffy after her conversation with Ms Logan on 1 June. His advice was to speak to Ms Martin which she had done. Ms Martin was the Team Leader. She was thus the person to whom Pat Logan reported. In their call, Ms Martin told the claimant that Ms Logan had made an error and that she was trying to learn about a new system for allocating carers to service users called *"Total Mobile".* That system produced schedules for carers via an App on their mobile telephone. It had *"gone live"* on or about 31 May.

65. On 10 June the claimant met with Ms Logan and Ms Martin (**page A127**). The claimant's recollection was that at that meeting she was shown, on a laptop belonging to the respondent, her photo ID which had the reference *"DUT",* meaning Double Up Team. Ms Martin referred the claimant to that material and said, *"look, you're not getting removed off and you are on DUT".* She trusted what Ms Martin told her and was reassured.

66. On or about 15 June the claimant telephoned Ms Stewart to let her know that she was returning to work. Ms Stewart explained that she would no longer be working with the claimant. The claimant told Ms Stewart that neither Ms Logan nor Ms Martin had told her of this change. Ms Stewart said words to the effect of; *"I'm off the Double Up Team, and if that appears on my phone I'll be phoning the office to refuse to do it so if you're expecting me to be working with you I won't be."*

67. The claimant then telephoned Ms Logan to explain what she had been told by Ms Stewart. By that time, it is likely that Ms Stewart had told Ms Logan that she no longer wanted to work with the claimant. Ms Logan did not tell the claimant about Ms Stewart's wishes at that time. Ms Logan told the claimant to go down to the Cambuslang office and work with another carer in that area.

17 June to 20 October 2021

68. On 17 June the claimant returned to work.

69. Around this time, Ms Logan telephoned the claimant. The purpose of the call was to invite her to meet again with Ms Logan. The claimant understood that the meeting was to discuss her work schedule. The claimant's assumption was that she was only meeting Ms Logan. As it turned out, Ms Logan was accompanied at the meeting by Kirsty Allan, a Community Support Co-ordinator. They met towards the end of June. No written record was kept of the discussion. Ms Allan told the claimant that; their discussion was to be confidential, *"nothing was to leave the office";* the respondent did not have anyone to work with her, like a driver; they would need to see about her working on her own. The claimant explained that she was afraid to work on her own and that she felt intimidated. Ms Allan said, *"what if I came out of the house and fell?"* or words to that effect. Ms Allan said amongst other things, *"we can't go on "what ifs",* or words to that effect. The claimant felt that Ms Allan believed that she was exaggerating how she felt. Accordingly she initially agreed to work on her own and then said that she could not do so. Ms Logan intervened in the discussion. She said that she could see that the claimant was becoming upset. She said that in her opinion the claimant had initially agreed to work on her own because she believed it was what Ms Allan wanted to hear. Ms Logan then asked the claimant if she was willing to change her shift pattern, or as Ms Logan described it *"flip her shift".* The claimant agreed. The effect of this was that the claimant did two consecutive *"Week 1s"* (see paragraph 57 above). Ms Logan's reason for making this request was that Ms Stewart had said that she did not want to work with the claimant. Ms Logan understood Ms Stewart's reason to be that she *was "fed up"* listening the claimant talking about her health issues *"all the time".* Neither

Ms Allan nor Ms Logan told the claimant about what Ms Stewart had said. Ms Logan's rationale for not doing so was that she felt the claimant was going through enough with her health issues and her state of anxiety at the time so it was better not to disclose Ms Stewart's opinions.

70. On 29 June 2021 Ms Logan submitted an online medical referral to do with the claimant (**pages A129 to 131**). It referred to an attached memo (**page A131**). In the memo, Ms Logan said (amongst other things) that following an initial period of work shadowing the claimant *"has worked on a double up team providing care alongside a colleague to people who require 2 carers for moving and assisting purposes however in the course of daily duties there is an expectation that carers are able to work on their own as well as travel on their own between service users. Agnes has informed that this would be problematic as she is unable to see in the dark evenings therefore would be unable to travel between the homes of service users on her own."* The memo contains several references to the possibility of the claimant having to work on her own. The questions posed in it are; is the claimant *"medically fit to undertake the full remit of tasks including walking on her own between service users homes? if not, what alternatives would you suggest ensuring support?"*

71. On 5 July the claimant began the new shift pattern with Joyce Cuthbertson. The next day, 6 July she was contacted by Dr Herbert (see **page A132 and 133**). His record, made that day, says, *"I was asked to contact this lady by you today and did so. Unfortunately, she was not expecting my call and was actually walking between service users when I contacted her. I offered to rearrange the appointment as I did not think this was entirely satisfactory, but she was keen to proceed and took a short break for me to be able to discuss the issues with her as far as I could."* Later he says*, "Essentially I see her having difficulty with independent work because of the visual impact she has described. She cannot drive, and she has a lack of awareness, but this can I think be alleviated satisfactorily if working in double ups."*

72. On a couple of occasions between 5 July and 1 October Ms Logan asked the claimant if she would do a *"single visit",* meaning carry out her duties on her

own, not as part of a Double Up Team. In answer to the second request, the claimant was clear and definitive that she could not work on her own.

73. On an occasion of Ms Cuthbertson being on holiday on or around 13 September 2021, the claimant was working with carer Jackie Rooney. At about 4pm that day Ms Rooney asked the claimant who she was working with the next day. The claimant believed that they were to be working again together the next day and said so. Ms Rooney explained that she was scheduled to work with another colleague, Theresa Talent. The claimant understood from that exchange that Ms Talent had been asked to work (i) with Ms Rooney instead of her and in doing so (ii) work an overtime shift. The claimant believed that she was being replaced on the shift by Ms Talent. The claimant therefore telephoned the office to try to clarify the position. She spoke to Susie McLean. Ms McLean told the claimant to check her phone to see the work she had been allocated. She did. She could see that her schedule for the morning of 14 September 2021 involved five single visits (B **page 64**). She could see from it that there was more than one *"mismatch"* of finish and start times. For example, the fourth visit was scheduled to start at 09.00 when the third visit was scheduled to end at 09.15.

74. The claimant was upset at what the schedule required her to do on 14 September. She was crying. She returned home. She asked her husband to *"screenshot"* her schedule on his phone from her phone, which he did. She did so because she was fearful that it would; *"disappear"* from her phone overnight into the morning of 14 September; and be replaced by a different schedule.

75. At about 09.57am on 14 September the screenshotted schedule was replaced with another schedule. The work scheduled on it was *"double up"* work. It did not involve the provision to the claimant of a lift in a respondent's van. She was therefore required to make her own way to the homes of the various service users. She visited two service users that day with a colleague, Susie Kelso. She visited two other service users that day with colleague, Kelly Sharp. Thereafter and on Ms Cuthbertson's return from holiday the claimant resumed working with her.

76. On 1 October the claimant spoke by telephone with Stephen Smellie, her union's branch secretary. Mr Smellie took a note of the call at the time (**page A134**). His note recorded (amongst other things) that; she had declined a request to do single visits; the respondent had wanted her to do *"another schedule"* of single visits; and Kirsty Allan had asked her to work on her own. Mr Smellie emailed both Mr Crookston and Ms Allan that morning (**page A135**). In it and referring to the claimant's return to work in October 2020 he said, *"the advice of her doctor and Occupational Health that she should not work alone due to a sight impairment that is a result of the stroke. In a telephone consultation with Dr Herbert OHP, recently that advice was confirmed. Agnes advises me that in recent times she has been asked to work on her own and to do single visits, rather than being on a double-up team. This has caused her stress and she worries about what happens when her partner takes leave. I asked her if she had a written tailored adjustment agreement in place where the reasonable adjustment advised by OH was recorded. She did not think this existed. Could you re-assure me, and Agnes, that she will continue to work as part of a double-up team and could this be recorded appropriately. There may be a need to ensure that this information is recognised within the Team Mobile scheduling tool."* There had been no reference to a written tailored adjustment agreement prior to 1 October 2020.

77. There was no evidence within the bundle of a reply to Mr Smellie's email.

78. A meeting was arranged for either 12 or 13 October. The claimant understood that the meeting was to be with Ms Allan. The claimant had arranged for a friend, Caroline Donaldson, to accompany her. Ms Allan cancelled the meeting about 15 minutes prior to its start time.

79. On 14 October the claimant's GP increased her prescription of sertraline hydrochloride 100mg to be taken twice per day (**page A67**). At the same time she was prescribed Zoplicone, a type of sleeping pill.

80. For 16 October the claimant was scheduled to do 15 visits (**pages A188 to 197**). Of them; 3 were of 20 minutes; 5 were of 25 minutes and 7 were of 30

minutes. The claimant believed that two of them had been reduced from 45 minutes.

81. On 20 October 2021 the claimant met with Joyce Martin, Team leader and Kirsty Allan. She was accompanied by Mr Smellie. No-one took notes at it.

5 82. By the time of the meeting the claimant was working as part of a double up team whose schedule included a tower block of flats called Sherry Heights in Cambuslang. In carrying out their duties there, the claimant and her colleague visited service users on different floors within the block.

83. During the meeting Ms Allan asked the claimant how she managed at home. 10 In that context, she asked her, *"who did the shopping?"* During the meeting Ms Allan asked where would the respondent stand legally if the wrong medication was dispensed to a service user or developed food poisoning. Those questions upset the claimant. She believed that it was the respondent's intention to return her from a double up team to doing single 15 user visits alone. Ms Allan's rationale for discussing the various things mentioned on 20 October was to obtain a better understanding of what was/not working and what was/not needed to do with the claimant's work. Her rationale for asking about medication and food poisoning was concern to do with circumstances in which the claimant may have been present and 20 assisting a colleague who was on a single visit. She referenced the policy of REHIS (The Royal Environmental Health Institute of Scotland). She referenced as an example circumstances when the claimant may have been with her colleague David Adams and he had been doing single visit duties. Ms Allan indicated that when the claimant and her work colleague did not have 25 a 'double-up' client to visit, the respondent is not able to allocate a client to her who requires only one carer. The effect of that would be to require the claimant to sit in the van on her own when her colleague attends a such a client. The claimant's impression was that Ms Allan was unhappy that that situation could occur.

30 84. In the meeting Ms Martin said that the respondent could not always guarantee that her double up colleague would be with her at all times of a visit to a

service user. She had in mind circumstances such as a colleague being called away in an emergency situation or taking ill during a visit. Ms Martin also said that if the claimant's double up colleague was on holiday there could be no guarantee that she could work with someone else; in answer to a question from Mr Smellie she said that a few people had said that they did not want to work with the claimant. Ms Allan confirmed that that was her understanding. Mr Smillie said that such a statement should never have been made. The claimant became angry and upset. She asked why colleagues had said that they did not want to work with her. In doing so she raised her voice. She was told that it was because they did not want to feel responsible for her, and this was because she had had a stroke (see **page A163** as an example of the claimant's recollection). The claimant became more upset because she knew that a number of the respondent's service users had themselves had strokes. Mr Smillie said that in his view the respondent should have told the colleagues that their position (in their unwillingness to work with the claimant) was unacceptable. The claimant became very upset. She left the meeting abruptly.

85. On leaving the meeting the claimant suffered chest pains. She attended an accident and emergency department of a hospital that night (see **page A65**). She was told at the hospital that she was suffering from angina.

21 October 2021 to 16 March 2022

86. **Page B70** bears to be a GP certificate vouching a period of sickness absence from 21 October 2021 for 28 days. The reason for absence was *"work related stress."* The claimant did not return to work after that date.

87. **Pages B71 to B74** bear to be GP certificates vouching a continuous period of sickness absence from 19 November 2021 to 15 July 2022. The reason for absence on each was *"work related stress."*

88. On 10 November 2021 the claimant raised a grievance. She did so by a hand written letter to Scott McNeill an Operations Manager employed by the respondent (**pages A137 to 146**). The respondent did not receive it.

89. On 22 November 2021 Mr Smellie completed a *pro forma* form in which he raised, for the claimant, a grievance (**pages A147 to 149**). It alleged discrimination on the grounds of a disability and bullying. It referred to *"Details …attached".*

5 90. On 7 December 2021 the claimant's GP referred her to hospital (**A156 and 157**). The main presenting complaint was *"chest pain."*

91. By letter dated 15 December 2021 (**page A159**) the claimant's GP opined (to whom it may concern) that; she had been depressed since August 2020; it had worsened despite medication; and the stress to the claimant seems to
10 have brought on chest pain for which she was attending cardiology. It noted the claimant's views that; in June and October the worsening of her condition seemed to be related to work; she felt bullied as a result of which she felt unable to work.

92. On 20 December the claimant met with Michelle McLellan (Operations
15 Manager) and Caroline Murray (Personnel Officer) to discuss Mr Smellie's grievance for the claimant. Mr Smellie took a handwritten note of the meeting (**pages A160 and 161**). Amongst other things he noted Ms McLellan's comment that the respondent would do a tailored adjustment. It was agreed that further investigation into the complaints would follow, and an outcome
20 meeting would be arranged in due course. Ms McLellan did not read at the time **page A149** being Mr Smellie's outline of the grievance. She had not seen it until her evidence in this hearing.

93. On 10 January 2022 Ms McLellan held a grievance investigatory meeting with Joyce Martin. On 18 January 2022 Ms McLellan held a grievance
25 investigatory meeting with Kirsty Allan. No notes were taken at either meeting.

94. On 20 January 2022 the claimant's GP referred her to Camglen Psychological Therapies Team (**pages A168 and 169**). By letter dated 26 January that Team's counselling psychologist replied to say that the claimant would not be accepted at that time. The letter suggested alternative support and resources.
30 The claimant accessed them *"to try to relax."*

95. On 25 January 2022 the claimant emailed the respondent to ask for minutes from grievance meeting (**page A173**). Caroline Murray replied that day to say, (**page A173**). *"Hi Agnes, sorry the minutes from the meeting are not available at this time, you will receive the details in writing alter the outcome meeting."*

96. On 1 February the respondent received notification of the claimant's application for early conciliation.

97. On 8 February Ms McLellan held a grievance outcome meeting with claimant. It was agreed that the grievance could not be concluded that day and additional information would be required to be investigated. Mr Smellie took a hand written note of the meeting (**pages A174 and 175**). In it he noted (amongst other things); that the sharing of information should not have happened (referring to complaints from colleagues about the claimant); a recommendation of a referral to occupational health and a tailored adjustment; and that Ms McLellan was to carry out further investigations.

98. On 14 February the claimant attended an Absence Support Meeting with Ms Logan and Ms Murray. She was accompanied by Mr Smellie. Mr Smellie took a handwritten note of the meeting (**page A176**). In it he recorded; the claimant's comment that she had been told that there other carers who *"did not want to be responsible for"* her; and the respondent's comments that (i) there were no *"double ups"* in central Cambuslang at that time and (ii) Ms Logan would look for a suitable double up for her. At 5.35pm that day the claimant sent a WhatsApp message to Ms Cuthbertson (**pages A179 to 185**). In it she; said that Ms Logan had told her that there were no double ups in Cambuslang; noted the adverse impact on her health; and expressed her opinion that the respondent did not want her to return to work.

99. Ms Logan wrote to the claimant on 14 February following the meeting that day (**pages A177 and 178**). In it she noted; there was no double up team in Central Cambuslang, but there could be a need for one in Rutherglen; the parties' discussion about responsibility to *"get to work";* and that the claimant wanted to come back to work but had no confidence in anyone. The letter

concluded, *"I would look to introduce a double up team to support you back to work. It is my responsibility to find a reasonable adjustment to accommodate you. In principle I must support you to return to work. To support you on your return to work a tailored adjustment agreement will be put in place beforehand, alongside a possibility of access to work to assist you to and from your place of work."*

100. On 23 February Ms McLellan held a second grievance investigatory meeting with Ms Allan. No note was taken.

16 March 2022 to 12 October 2022

101. On 16 March 2022 the claimant presented her ET1 in this case. The next day, 17 March, Ms McLellan sent a letter to the claimant with her outcome to the grievance raised for her by Mr Smellie (**pages A198 to 202**). She believed that the detail of the grievance was contained within **page 148.**

102. The outcome letter is laid out under two headings. Preceding the first (on **page A198**) Ms McLellan summarised the grievances and the timeline of their meetings. Under the first heading of *"Findings"* Ms McLellan summarised the evidence which she had sourced from Ms Martin, Ms Allan and from various documents and records she had reviewed. She appeared to reach some conclusions on some aspects of the complaints. Under the second, she set out her "*Decision"* which upheld her grievance in part. In it she; acknowledged that in October 2020 there had been a verbal agreement that she would not undertake lone working but that it had not been reflected in *a "formal tailored adjustment plan";* did not uphold a claim of victimisation on the basis that Ms Allan was unaware of any complaint prior to the alleged act of victimisation; agreed that Ms Martin ought not to have disclosed (on 20 October) that a colleague had refused to work with her; and proposed (amongst other things) that a formal tailored adjustment plan was to be agreed following advice from Occupational Health.

103. On 23 March, and following a referral, Dr Colin Muir consultant stroke physician replied to the claimant's GP (**pages A207 and 208**). He recorded

that he had reassured the claimant about her future stroke risk, that he was not concerned about her symptoms and discharged her from his clinic.

104. On 30 March 2022 (16.34) the claimant emailed Lesley Anne Newall with an appeal from the grievance outcome (**pages A209 and 210**).

5 105. Also on 30 March (16.36) the claimant forwarded her appeal email to Ms McLellan (**pages A211 to 213**). Within 20 minutes that day Ms McLellan replied (**page A211**) to say that she had forwarded the appeal email to Personnel to progress. The appeal set out 9 numbered appeal points. In the email the claimant said, *"It may be that my union rep will provide further*
10 *grounds."*

106. The next day, 31 March, the claimant attended an Attendance Support Meeting. She was accompanied by Mr Smellie. A tailored adjustment plan was shown to the claimant. She said that she needed to read it and await the outcome of her grievance appeal before deciding what to do.

15 107. On 5 April Mr Smellie submitted, using a *pro forma* with papers attached, an appeal for the claimant (**pages A217 to 222**). **Page 222** is a replica of the claimant's original appeal email.

108. On 19 April the respondent lodged its ET3 form with Grounds of Resistance.

109. On 29 April the claimant applied for Ill Health retirement.

20 110. From the end of April the claimant's pay reduced from full to half pay.

111. On 26 May Faye Meldrum, personnel adviser wrote by email to the claimant, copied to Mr Smellie, to acknowledge her grievance email of 30 March (**page A226**). Ms Meldrum also said, *"In order to progress your grievance appeal you require to complete a PER/GP/1/15 form including what your resolution*
25 *would be. I have partially completed this with the information you provided on your email and would ask that you now complete this and send back to me."* By that time, Ms Meldrum had not seen Mr Smellie's appeal *pro forma*. She did not see it until her evidence in this hearing. The claimant replied to Ms

Meldrum that day (12.16pm, **page A229a**) to advise she would like more time to consider her appeal.

112. The respondent's grievance procedure at its final stage (3) (5.3) says (**page B5**) *"Where an employee remains dissatisfied, a written appeal may be submitted to Personnel Services through the trade union within 14 days of the date of the letter, requesting that the matter be heard by the Grievance & Disputes Panel. The Grievance & Disputes Panel will be held in accordance with the terms of reference."* The Panel referred to includes Councillors of the respondent. Stage 3 of the procedure ends, *"NB Prior to the appeal being heard by the Panel, a meeting of the parties concerned will be convened in an attempt to resolve the matter. This will be co-ordinated by Corporate Personnel. If it is not within the Appeal panel's powers to grant the resolution sought or is contrary to existing Council policies and/or agreements, this will be deemed as the end of the internal process."* This is known as Stage 3A of the grievance procedure.

113. On 15 July 2022 the claimant's GP certified that for an indefinite period from that date the claimant was unfit for work (**page B75**). The reason for absence was *"work related stress."*

114. On 23 August the claimant's GP wrote to Dr P Milosevic, Occupational Medicine at the respondent's address in Hamilton. It said that it was in response to a request for a report about the claimant. The information was to do with her ill health retirement application.

115. On 24 August Ms Meldrum emailed the claimant, copied to Mr Smellie (**page A250**). She said, *"Please accept my apologies for the delay in coming back to you. I note that I have not yet received your completed form and indication of how your grievance could be resolved to allow me to schedule your grievance appeal. Please provide this to me by 31 August 2022. If I do not hear back from you I will assume that you no longer wish to pursue your grievance appeal."*

116. On 30 August the claimant emailed Ms Meldrum copied to Mr Smellie (**page A251**) saying, *"Please find attached completed form. I do wish to proceed with*

my grievance appeal." The attached form repeated the nine numbered paragraphs from her email of 30 March (**pages A253 and 254**). The form included the claimant's opinion on how her grievance could be resolved. She did so by saying, *"1 An apology 2 My employer could uphold my appeal 3 Compensation for my loss of earnings."*

117. After several exchanges between the claimant and Ms Meldrum as to the fixing of a meeting, on 4 October the claimant emailed Ms Meldrum to that she was unable to indicate when she would be fit to participate in a grievance appeal meeting.

12 October 2022 to 17 March 2023

118. On 12 October 2022 (**pages A265 to 269**) Dr R Reetoo certified that in their opinion the claimant was not permanently incapable of discharging efficiently her duties as a result of ill-health or infirmity of body or mind. In his report he said, *"On balance of probabilities no evidence of permanent medical incapacity has been provided on this instance. It is also possible that with appropriate resolution of work issues and support for her mental health Ms Connor may be fit to return to work in at least some capacity."* He had seen the GP's letter (**page A244**).

119. On 14 October the respondent wrote to the claimant to advise that her application for ill health retirement was not awarded (**pages A270 and 271**) (replicated in part at **page A313**).

120. From the end of October 2022 the claimant's pay reduced to nil.

121. On 3 November (**page A314**) the claimant emailed Jackie Govan to; acknowledge the letter about ill health refusal; seek the OH and GP reports to do with it and the full decision; ask if she could reapply *"given a change in my medical condition";* and make a data subject access request. On 23 November (**page A315**) she sought an update from Ms Govan. On 5 December (**pages A316 and 217**) the claimant emailed in identical terms to Ms Govan and Ms Meldrum. Amongst other things, she sought to postpone her ill health retirement application until she saw an ophthalmologist as *"this*

would enable me to provide additional medical evidence to support my application."

122. On 9 November the claimant met with Lorna Black, community support coordinator. On 11 November Ms Black wrote to the claimant, referring to the meeting (**pages A278 and 279**). In it she noted; that the purpose of the meeting was to determine the claimant's fitness to return and explore if there were any adjustments or supports that could be put in place to facilitate a return to work; that if an agreement could not be made for you to return to work, the process of termination on grounds of incapability would be explored; that the claimant's her eyesight and mental health has deteriorated; the latter had deteriorated as a result of a previous issue with management within the department where you felt that you had been discriminated against about which there was to be a grievance appeal; and in light of those issues did not feel able to return to work in any capacity at that time or fit to return as a result of your poor mental health and deterioration with your eyesight. The letter noted agreement that a further medical referral would be made highlighting that her wish to apply for Ill health retiral again.

123. On 22 November 2022 Ms Meldrum wrote to the claimant by email (**pages A284 to 287**). It is headed *"Stage 3a Grievance Appeal".* It referred to; a meeting which had been scheduled for 3 October and which the claimant had been unable to attend; and to the claimant's email of 4 October. It recorded that she addressed each part of the grievance in turn. It said, *"You have requested as part of your resolution that you be awarded compensation however it is not within the grievance procedures to provide this"*, and *"I have reviewed the information presented to me to determine what further outcomes you are seeking that can be provided by the appeals panel. Therefore, given my comments above, I would advise that it is not within the gift of the Appeals Panel to grant your required outcome, and this now concludes the internal grievance process."*

124. In Ms Meldrum's opinion given that an award of compensation was not within the Appeal Panel's gift, there was no requirement on her part to have addressed any of the grounds of grievance or appeal.

125. On 22 December (**page A318**) the claimant emailed both Ms Govan and Ms Meldrum as she had had no response from either since 23 November.

126. On 23 December (**page A288**) the claimant's GP provided a report to the respondent's occupational health doctor relative to her second ill health retirement application. His opinion was that she *"would no longer be able to work."* He referred to various matters being; her stroke; her admission for a similar episode which investigations suggested a migraine without aura; anxiety and work related stress; reduction in central vision and poor peripheral vision; and arthritis in both hands.

127. On 6 January 2023 (**page A319**) the claimant again emailed Ms Govan referring to her three previous emails and seeking a reply. She copied it to Ms Meldrum. Ms Meldrum replied that day (**page A320**). On 18 January Ms Govan replied to the claimant (**page A323**).

128. On 25 January Dr Aaron Jamieson, consultant ophthalmologist reported to the claimant's GP (**page A289**). In it he said that given the peripheral visual loss in both eyes he registered her as severely sight impaired that day.

129. On 16 March (**pages A299 to 301**) Dr Reeto opined that the claimant was permanently incapable of discharging efficiently her duties as a result of ill-health or infirmity of body or mind. He referred to *"OHP opinion now unfit with worsening of overall health including reduced mobility and severely impaired vision. This is supported by GP letter dated 23/12/22 and ophthalmology report dated 05/01/23."* As part of the certificate for the claimant's ill health retirement approval the respondent referred to OHP opinion *"now unfit with worsening of overall health including reduced mobility and severely impaired vision"* and referred to the same material. On 17 March the claimant's second application for ill health retirement was permitted on that basis.

130. The claimant's effective date of termination of employment was 27 April 2023.

131. From 28 April 2023 the claimant has received ill health retirement pension of £589.78 (net) per month.

132. The total Employment Support Allowance received by the claimant was £3603.50 (**page A54e**).

133. On 7 August and 4 September 2023 the claimant was assessed by Dr Saduf Riaz, Consultant Psychiatrist. He prepared a report dated 9 September 2023 (**pages A342 to 359**).

134. In his opinion, Dr Riaz said (**page A358**)

"The claimant is severely mentally unwell and has disabling mixed anxiety and depression as well as is markedly traumatised from her experiences at work and due to her deteriorating physical health.

Her mental health (as well as physical health) impacts on every aspect of her life, with her not being able to function within her home, engage in employment, socialise, go out on her own or work. She has lost weight, cannot sleep without medication, has night terrors and has lost interest in all her usual pursuits. This likely will have an ongoing impact to her personality and is affecting her relationship with her partner, her grandchildren as well as friendships.

The combination of her physical health deteriorating and her mental health is likely going to have long-term consequences with it being unlikely that she will ever return to work or her pre-morbid functioning."

Comment on the evidence

135. We were surprised that the respondent held meetings with the claimant where no minutes were taken. It is a local authority. It says (**page A19**) it employs 16,000 staff. Various meetings took place with a representative of HR present. Of particular surprise was that at various grievance meetings (including with witnesses interviewed at the time of the grievance) the respondent's position was that no minute or note was taken. There was evidence to the effect that this was the respondent's normal practice. Unfortunately, Mr Smellie was not asked if this was his experience of the respondent's approach to grievances. We express our disquiet as to how candid the respondent's witnesses were on this point. Ms Murray's reply on 25 January 2022 (**page A173**) clearly

implies that minutes from the meeting on 20 December existed; she explained that they were *"not available at this time".* We also express our disquiet about the respondent's approach to candid disclosure in this litigation. The most obvious example is a note apparently taken by Ms Logan about her discussion with the claimant on 1 June 2021. She said that she still had the notes *"in her notebook".* There was an important dispute which concerned what had/not been said in that discussion. It is reasonable to assume that Ms Logan's contemporaneous notes would be relevant and of assistance in this hearing. Yet they were not produced. We had no explanation from the respondent as to why that was not done as one might have expected in light of EJ McPherson's Order from the PH on 5 June 2023.

136. While we found that the respondent had not received the claimant's handwritten grievance (**pages A137 to 146**) it was nonetheless a useful point of reference for what the claimant believed at the time, and prior to writing it. This was particularly relevant where there was no other contemporaneous material. An example was the meeting on 20 October which had occurred three weeks prior.

137. Despite an Order for mutual disclosure of relevant material and a subject access request from the claimant before the start of the hearing, the bundle did not contain all of the relevant contemporaneous material. This was particularly unfortunate where there was a dispute about certain episodes. For example an issue for determination and which recurred in the evidence was whether or not a meeting had been fixed for 13 October 2021. The bundle contained nothing to assist either way. Yet Ms Allan's evidence was that there was a paper trail with Mr Smellie after his email of 1 October (**page A135**) which vouched the postponement of a meeting from *"the day before"* to 20 October. Separately, Ms Martin's evidence was that as per her usual practice she took a note pad with her to the meeting on 20 October, but did not write much down. A related point occurred in relation to what appeared to be a "gap" in the recording of the claimant's absence within the Form at **pages A239 to 243**. On the face of it, the respondent did not record any information in the period between 20 October 2021 and 16 August 2022, a period of about

10 months. Given that the claimant was continuously absent in that period and there were meetings with her in that time, the gap in that paperwork was surprising. Ms Hunter cross-examined about it seeking an explanation. We did not get one. That all said and given that the parties were to exchange documents for the hearing by 14 August what was equally surprising was that Ms Hunter had not, apparently, sought to clarify the position with Mr O'Neill before the hearing started. At the end of it, however, nothing in our view turned on the gap in the respondent's absence records.

138. Where a witness was taken to an excerpt in a document we worked on the assumption that they had identified the document in its entirety and thus relied on other entries in it in making our findings. The most obvious examples are the claimant's medical records and the respondent's absence reporting forms.

139. We treated Ms Logan's evidence with caution. While she had typed notes of many interactions with the claimant it was not clear when they had been prepared. She accepted in cross examination that on at least one occasion they were incomplete. One example was that in her evidence in chief she said that the claimant had asked if she could work handing out PPE. The note makes no reference to that activity, instead recording her asking *"was there any work in the office that she could do"* (**page A95**). She also accepted that in one letter she misrepresented the position. In answer to many questions her answer was that she could not recall. Those answers increased in frequency in cross examination. Her answers became clipped. She gave the impression of being indignant at being asked some questions. Our impression was that she became quite defensive.

140. Ms Allan was for the most part an unimpressive witness. On a number of things she was unable to recall what had been said or what had occurred. For example, she could not recall several things that occurred in the meeting on 20 October. Even if she had not been privy to them at the time, we expected that she would have become familiar enough with them prior to this hearing so as to be able to recall some of it. Our impression was that she was trying to tailor her answers to best suit the respondent. For example, on several occasions when asked if she had said something which could be construed

as damaging to the respondent's case, her reply was that it had not been said *"in that context."* On one view that qualification did not make sense. She had either said the words attributed to her or she had not. When pressed, she accepted that she had used the attributed words but then sought to explain their use in a light which benefitted the respondent. That approach to questions undermined her credibility.

141. There was a sharp contrast between the parties on aspects of the meeting on 2 July. On the issue of trade union representation at meetings, the letter of 3 July said that the claimant *"chose not to be accompanied."* In our view that is misleading. There was no evidence that the respondent had made the claimant aware prior to it that she could be accompanied. There was no evidence that (in contrast with an understanding that she could) she had opted not to. In short there was no suggestion of any choice having been made. The respondent's note (**page A95**) says, *"Andrew also advised Agnes to have a representative present at the next meeting. maybe a Union rep. where they can advice* [sic] *Agnes on policies and procedures."* The tenor of that note tends to suggest that the suggestion was being made for the first time. Had there been previous suggestions the more natural language would have been to either refer to it or to say that she was *"reminded"* of her ability to be accompanied at it. That said, we preferred the claimant's evidence that it was she who first mentioned trade union involvement at future meetings. This was because (i) she was adamant and clear that she had suggested it; (ii) Ms Logan's note was admittedly incomplete; (iii) her evidence was that on several aspects of the meeting she was unable to recall what had been said and (iv) the reference to advice on *"policies and procedures"* was not consistent with the discussion on 2 July or what was to happen next (which was to seek further information from the respondent's occupational health adviser, Dr Herbert). However, we did not find (contrast Issue A/1/i) that Mr Crookston advised the claimant that she was too much of a risk and should be paid off with 12 weeks' notice. The direct evidence that we heard was starkly contrasting. The claimant asserted that he had said both things to her. Ms Logan denied both. We did not hear from Mr Crookston. We did not draw any inference from not hearing from him. As regards Ms Logan's note of the

meeting it assisted neither version. On the one hand, it did not record him having said so. On the other, Ms Logan accepted that the note was incomplete. A number of issues weighed against it being likely. First, the steps which followed the meeting did not support a conclusion that either comment was made. The letter of 3 July makes no reference to either. If terminating the contract (or paying the claimant off) had been mentioned in the meeting, it is more likely than not that the letter would have said something about it. Second, there is no contemporaneous record by the claimant of either being said. We took account of the GP's note of what the claimant said on 20 July. It is not contemporaneous. It records the claimant as saying that the respondent was *"calling her daily and saying she can't return."* There was no evidence before us from the claimant that the respondent was at that time calling her daily. That is not supported by the absence management notes. Third (and related to the second) it is more likely than not that (given her evidence to us about it *"I was totally shocked"* and its relevance as an issue) the claimant would have said something to the respondent or to her partner about it, which she did not. Fourth, and given the reference to it in the *pro forma* completed by Dr Herbert (see question 6 on **page 111**), it is more likely than not that (as per Ms Logan's note) Mr Crookston referred to ill health retirement as opposed to paying the claimant off.

142. There were four different accounts of the meeting on 20 October from each of the witnesses at it. We heard contrasting evidence about the demeanour of Ms Allan and the claimant at the start of the meeting. We were more concerned about evidence to do with the agreed issue (item xv). Ms Allan's evidence about it was inconsistent. In examination in chief her evidence on whether she asked about the respondent's legal position on medication was that she had not asked the question "*using those words*". In cross examination she agreed that she had asked the question and then provided an answer as to why. Despite the apparent importance of the meeting on both sides no-one produced notes from it. Equally, no-one followed up the meeting with any communication to record what had been said at it. The claimant spoke to her GP record the next day. We attributed little weight to it as an accurate record of what had been said at the meeting because (i) Mr

Smellie did not reflect what it said in his evidence and (ii) it was not put specifically to either Ms Martin or Ms Allan. In our view it was more likely that the claimant's grievance letter of 10 November 2021 was reasonably accurate as to what had been said on 20 October.

143. We accepted Dr Riaz as an expert witness and accepted his opinion. The respondent did not seek to challenge that opinion. It did not suggest that we could not accept it notwithstanding the fact that he did not appear and speak to it. On the contrary, in its submission the respondent criticised the report for failing to address an issue; that criticism could only properly be made if the report was material which was before us to consider.

Submissions

144. Both parties lodged written submissions which were supplemented orally. Ms Hunter's extended to 64 pages. Mr O'Neill's was 22 pages. We said at the hearing that we mean no disservice in not repeating or even summarising them here. Ms Hunter's submission followed the method or layout of the issues.

The legal framework

145. To the extent necessary we have referred to the relevant legislation and caselaw below.

Discussion and decision

146. On one view this case is a catalogue of errors, omissions, missing papers, actions of dubious practice, and half-truths. For example, it was not clear to us why the claimant did not say either to Mr Smellie or at any time to the respondent that she had written her own grievance letter. Nor is it clear why it was not until this hearing that Ms McLellan saw the detail of Mr Smellie's grievance form (**page A149**). We have already commented on the absence of notes or minutes from various meetings where one would ordinarily have expected an employer to have made some. Mr Smellie's first involvement for the claimant (his email of 1 October 2021) sought a straightforward answer to two questions which could have been easily given; and yet the meeting which

followed it (20 October) involved an enquiry into the claimant's activities which was unnecessary to answer either of them. We found it surprising that Ms McLellan had not seen Mr Smellie's detailed grievance for the claimant, and that she was not referred to it at any time while considering that grievance. Mr Smellie's appeal papers (**pages A217 to 222**) were not seen by the appeal hearer, Ms Meldrum, until her evidence in this hearing on 16 January 2024. We found Ms Meldrum's conclusion on the Stage 3a appeal process hard to fathom to the point of incredulity. Her evidence was that because the claimant sought compensation (which is apparently not within an Appeal Panel's gift) there was no need for her to provide any comment on the substance of the appeal. We had no explanation as to why; Ms Meldrum had not simply drawn this to the claimant's attention on receipt of the appeal form on 30 August; or why (when she did not require to do so) she responded to the appeal itself. It was unfortunate that the respondent had not pled anything in its Grounds of Resistance (or later) about the purpose or effect of what is known as the Stage 3A part of the grievance appeal process.

147. As the evidence progressed it appeared to us that there was a misunderstanding between the parties about exactly what it was that the respondent could and could not do to accommodate the claimant's disability. The absence of a written tailored adjustment agreement contributed to that confusion. That misunderstanding is focussed in issue E1, *"Did the Respondent fail to adhere to the informal adjustment agreed in conjunction with Occupational Health whereby the Claimant would not undertake any lone working duties and would always work on the double up team?"* Nowhere did Occupational Health definitively advise that the claimant should not undertake any lone working duties even as part of a double up team. The last advice from Dr Herbert in the bundle (6 July 2021, **pages A132 to 133**) says, *"I see her having difficulty with independent work because of the visual impact she has described She cannot drive, and she has a lack of awareness, but this can I think be alleviated satisfactorily if working in double ups."* Part of the context of that advice was Ms Logan's information (**page A131**) *"Due to the remit of the job, there is possibility that Agnes could be on her own at some point, even as part of the double up team."* Dr Herbert does not deal

definitively with that possibility. In light of the evidence we heard, the respondent's concern about the claimant carrying out work for a service user on her own (even with her double up partner in the same property) was understandable. But that concern did not mean that they were intent on removing the claimant from double up work.

148. The approach to the list of issues had the initial attraction of containing a comprehensive list of many (21) acts of alleged discrimination (items as Ms Hunter called them) which were then *"referenced"* under various of the statutory provisions which prohibit unlawful conduct. All 21 are relied on as acts of discrimination under sections 13, 15 and 26. The challenge (and perhaps the flaw) in this approach is that some of the listed acts do not readily fit into the particular prohibition. Ms Hunter accepted as much in her oral submission. Two examples will suffice. First, there was no evidence whatsoever to suggest that Ms Allan cut the claimant's allocated time to visit service users/clients from 45 to 25 minutes (item xiv) ***because of*** her disability (as section 13 requires). Indeed Ms Hunter's written submission does not address the issue at all. Second, the claimant alleges (item xx) that Ms Meldrum's decision to take additional evidence from Ms McLellan but not take any evidence from either the claimant or Mr Smellie is *"harassment"* within the meaning of section 26. We do not accept that that conduct could be harassment and we note that it is not one of the three incidents relied on in the claimant's written submission.

149. A logical way to approach the 21 items is; (first) decide whether or not they are in fact proved; only if so (second) decide if they are acts of direct discrimination; then decide (third) if they are acts in breach of section 15; then (finally) if any are in breach of section 26. We preface our views on the various sections of the 2010 Act with a summary of the relevant law.

Are the items proved?

150. **(i) The treatment of the Claimant by Andrew Crookston at a meeting on 2 July 2020 where he advised her that she was too much of a risk and should be paid off with 12 weeks' notice.** In our view it was more likely than

not that Mr Crookston did not say the words attributed to him. This is for a variety of reasons. First, those words suggest a definitive position, meaning the claimant's dismissal within a short time from 2 July. Such a position is inconsistent with the direction of travel in the period shortly before the meeting. The respondent had; suggested physiotherapy and CBT; and had made a medical referral which resulted in an assessment on 4 June. Those actions tend to suggest a desire to continue the employment. Second, both parties had seen the assessment prior to 2 July. Both were therefore aware that Dr Herbert was awaiting further information from the claimant's GP after which he would update his report. It would be inconsistent to have referred the claimant to occupational health, got an interim and inconclusive report from Dr Herbert, and then decide (in that incomplete state of affairs) to decide to end the claimant's employment. Third, the only definitively contemporaneous record from the meeting on 2 July is Ms Logan's letter to the claimant the next day, on 3 July (**page A112**). In summary it says; there is no stipulated timescale for a return to work; but is clear on what are the next steps with that in mind. In our view if Mr Crookston had said the words attributed to him then the claimant, on receipt of the letter, would have at least questioned why its message was at odds with his words. Fourth (and related to the third) is; if the Mr Crookston had said those words (which the claimant says were acts of direct discrimination and harassment) then it is more likely than not that she would have said or done something consistent with that view at the time. Fifth, the words attributed are inconsistent with the suggestion (noted on **page A95**) of ill health retirement. It is in our view inconsistent for the respondent to be (on the one hand) aware of ill health retirement as an option but (on the other) make a proposal which is obviously more detrimental for the claimant financially. Ms Hunter in her written submission says that the claimant's version is corroborated by *"the increase in medication"* and references the medical records at **page A71**. We do not agree. Increased medication *per se* is not corroboration of Mr Crookston's words. We took account of the GP's *"History"* comments there and while some of it is consistent with the claimant's version, the reference to her employer *"calling*

her every day" is an exaggeration and not borne out by any evidence which we heard.

151. **(ii) The failure by the Respondents from July 2020 onwards to ever consider the Claimant for a role handing out PPE within the Respondents office, despite repeated requests on her part.** In our view, reference to *"repeated requests"* adds little to the question. On our findings the respondent first noted the request at the meeting on 2 July and the letter of 3 July 2020. It was discussed later on 8 October 2020. Our findings from the October meeting include the respondent's answer as to why the claimant (in contrast with others) was not offered the role. Om one view the respondent did consider the claimant for the role but decided against it. The more accurate issue about which the claimant complains is; she was unhappy with what she saw as unfair treatment in comparison with others in that they got that work to do and she did not. Read more broadly, we decided that the respondent did *"fail"* on the question of properly considering the claimant for the role. In fact therefore we found for the claimant on this issue. As an aside we heard wholly artificial evidence from some of the respondent's witnesses that it was *"not a role".* The work of handing out PPE was clearly being done in 2020 and for a time thereafter. While it may not have been a defined and job-evaluated full-time recognised post within the respondent's structure it was incredible to suggest that there was no *"role".*

152. **(iii) The failure by the Respondents to give the Claimant written confirmation of the adjustment to her working practice whereby she would always work with another carer present.** The respondent does not seriously suggest that it did provide written confirmation of the *"adjustment"* that after a phased return to work the claimant would work as part of a double up team. Indeed the respondent's own grievance outcome was that it acknowledged that in October 2020 there had been (only) a verbal agreement that she would not undertake lone working and would work as part of a double up team. We make a distinction between that *"adjustment"* and the wording of the agreed issue, that *"she would always work with another carer present."* The respondent did fail to provide written confirmation of the agreed

adjustment. But that agreed adjustment did not go as far as the issue which specifies that the claimant *"would always work with another carer present".* We find that the failure (to put things in writing) related to a more limited adjustment.

5 153. **(iv) The decision by the Respondents from May 2021 onwards to react to a complaint or complaints by a carer or carers about working with the Claimant by altering the Claimant's working schedule rather dealing appropriately with the complaint or complaints; and (ix) Pat Logan asking the Claimant to change to the opposite shift pattern during a**
10 **meeting in June 2021, both in respect of the request and with regard to the request being made without advising the Claimant that this request was to allow her to work with different carers who had not complained.** The claimant treated items (iv and (ix) together; we have done so also. On our findings and as agreed in the chronology, on 5 July the claimant began a
15 new shift pattern. We found that it was to work with Joyce Cuthbertson. There is no real dispute about that. Again on our findings, the discussions with the claimant that resulted in that new shift pattern began in about mid-June. The *"nub"* of the complaint behind this issue is that (i) the shift pattern was changed and (ii) the respondent did not say at the time why the change was being
20 made. The respondent does not dispute that it did not advise her at the time.

154. **(v) The treatment of the Claimant by Pat Logan on 1 June 2021 where she asked the Claimant to work on her own; (xi) Two further requests made by Pat Logan that the Claimant work on her own over the period from June 2021 to October 2021.** As the claimant did, we consider these
25 items together. The nub of the issue is the making of requests of the claimant. It goes no further than that. On our finds the respondent made requests of the claimant that she work on her own in that period.

155. **(vi) The treatment of the Claimant in a meeting on 10 June 2021 whereby she was asked whether she felt another carer, Jackie Stewart did not**
30 **want to work with her causing concern.** In our view the crux of this issue is one of cause and effect. The *"cause"* is the suggestion to the claimant that her colleague Ms Stewart no longer wanted to work with her. The *"effect"* is

the claimant's concern that such a suggestion was made. The question which overarches all 21 items is whether the respondent treated the claimant in a certain way. That approach focusses this question on the cause. On our findings this suggestion was not made on 10 June. But it was indeed made on or about 17 June, in the claimant's meeting with Ms Logan and Ms Allan.

156. **(vii) Kirsty Allan's comments during a meeting towards the end of June 2021 – Agnes we will need to see about you working on your own (viii) Kisty Allan dismissing and belittling the Claimant's concerns re working alone by saying repeatedly - that's like me saying I could have a fall, anyone can have a fall - in a meeting towards the end of June 2021.** Again we deal with 7 and 8 together as the claimant did, albeit the kernel of each complaint is different. On 7, we have found that Ms Allan used the words attributed to her, or words to that effect. On 8, there are in our view two points. First; the words attributed to Ms Allan; second whether those words if used were dismissive or belittling of the claimant's concerns about working alone. It is sufficient for immediate purposes to say that we have found that Ms Allan used the words attributed to her.

157. **(x) The failure by the Respondents to advise the Claimant of the time and date of her Occupational Health assessment which resulted in her requiring to have the telephone appointment whilst walking between service users on 6 July 2021.** There is no real controversy on this issue. Dr Herbert's own record of the call supports the finding we have made.

158. **(xii) On 13 September 2021 Kirsty Allan allocating another carer, Theresa Talent to work on the double up van with Jackie Rooney in preference to the Claimant, leaving the Claimant to call the office and be told to "not panic" and initially given a schedule to work as a lone worker with overlapping times which was then deleted and then re allocated a walking double up shift requiring her to walk alone between service users during darkness requiring her partner David Morgan to accompany her.** This item raises a number of points. The conduct of the respondent which is relevant is; the allocation of Theresa Talent over the claimant for work; and the impact of that being; providing her with a lone

worker schedule which was then changed to a *"walking"* double up which required the claimant to walk to service users' homes. Based on our findings there is little doubt that the conduct complained of occurred.

159. **(xiii) On 13 October 2021, Kisty Allan cancelling the meeting arranged for 10am with the Claimant, Joyce Martin and the Claimant's companion Caroline Donaldson and not telling the Claimant until 9.47am, at which point the Claimant's companion was waiting in reception.** Again, based on our findings it is more likely than not that the meeting in question was cancelled at short notice.

160. **(xiv) On 16 October 2021 Kisty Allan cutting the Claimant's allocated time to visit service users/ clients from 45 minutes to 20 minutes.** Again our findings based on **pages A188 to 197** support the conclusion that the visit times that day were cut.

161. (xv) On 20 October 2021, Joyce Martin and Kisty Allan making a series of inappropriate comments to the Claimant as follows:

- Ms Allan asked where the council would stand legally should the Claimant give out the wrong medication or gave someone food poisoning.

- Ms Allan asked the Claimant how she managed at home, and who did her shopping.

- Ms Martin said that the council was unable to confirm that the Claimant would still work on a double up team when her partner was off as some of the carers did not want to work with her. Upon being questioned as to whether this was due to any issues with the standard of the Claimant's work Ms Allan confirmed it was not to do with that, but rather to do with her stroke.

- Ms Martin said that the other carers felt that they should not be made to feel responsible for the Claimant [and upon being asked if this was as a result of the Claimant's stroke] Ms Martin said yes, and you were the one who told them about your stroke.

162. This issue requires a consideration of whether each of the four alleged question/statement was made. On our findings each question/statement was made. Paragraph 5.7 of Equality and Human Rights Commission Statutory Code of Practice on the 2010 Act says a claimant *"must have been put at a disadvantage."* We find that the making of them put the claimant at a disadvantage in that she found them to be inappropriate.

163. **(xvi) The Respondents ignored the Claimant's handwritten grievance dated 10 November 2021.** To have ignored it, it is necessary to say that the respondent received it. There was no evidence to support that finding. The evidence around the raising and handling of the grievance was generally unsatisfactory. It was in our experience unusual for grievances to be raised twice, once in her letter and once using a *pro forma* by a union. The short point is that in our view the respondent did not ignore the handwritten version because it did not receive it.

164. **(xvii) Michelle McLellan of the Respondent failure to properly investigate and consider the Claimant's grievance**. In our view the most relevant indication of the claimant's view is whether she complained in her appeal about the investigation of her grievance. In two respects she did. In our view that criticism is sound. There was a failure to properly (fully) investigate the grievance by Ms McLellan.

165. **(xviii) The Respondents failure to adhere to their own policy by failing to allow the Claimant an appeal hearing within 28 days of the appeal being lodged on 30 March 2022.** This issue turns first on whether an appeal hearing was require to take place within 28 days as per the respondent's policy, page B1 to B9. The relevant part (5.3.2) says, *"The Panel hearing the grievance will normally be convened within 28 days …."* That part of the policy ends with a Note which requires the convening of a meeting *"in an attempt to resolve the matter".* This exercise is commonly known as Stage 3A. While that meeting did not take place here, in our view Stage 3 does not (quite clearly) make it mandatory for an appeal hearing to take place within 28 days. The fact that one did not take place in this case is not a failure to adhere to the policy. This item is not well founded.

166. **(xix) Faye Meldrum of the Respondents issued the letter of 22 November 2022 without telling the Claimant or giving the Claimant the opportunity to attend a meeting beforehand.** There is no doubt that this occurred. There was no meeting with the claimant before the 22 November letter.

167. **(xx) Faye Meldrum of the Respondents taking additional evidence from the grievance decision maker, but not taking any evidence from the Claimant or her union representative Stephen Smellie.** This sequence of events took place. But in our view there was nothing to suggest that Ms Meldrum's actions were *"less/un favourable".*

168. **(xxi) The repeated failure of the Respondent's HR department to respond to emails and request from the Claimant over the period from 3 November 2022 to April 2023.** This issue requires a consideration of **pages A314 to A325** and the evidence that we heard about them. They span the period 3 November 2022 to 26 January 2023. The bundle did not contain any emails from the claimant after 26 January. Matters came to a head on 6 January by which date the claimant had sent 4 unanswered emails. On 6 January, Ms Meldrum replied to the claimant (within 30 minutes). There is then an email exchange between the claimant and Jaquie Govan between 16 and 26 January. That exchange includes 3 emails from Ms Govan. On the face of it, the absence of any reply to the 4 earlier emails is explained by the claimant's use of an email address for Ms Govan which, apparently, meant that she would not have received them. We see no reason not to accept that explanation at face value. In our view there was not a repeated failure to by the HR department to respond to the claimant's emails.

169. On our analysis, items (ii) to (xv), (xvii), (xix) and (xx) occurred.

Direct discrimination

170. Are any or all of them *"less favourable"* treatment? At paragraph 3.5 the Code of Practice says, *"The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have*

treated – another person;" or (our words) treated that way. In our view it can reasonably be said that the claimant would have preferred that each instance had not occurred.

171. Assuming the answer is *"yes",* was any or all of that treatment *"because of"* the claimant's disability?

172. We note here a summary of the statutory framework and legal principles which we applied in answering the question.

173. Section 136 (1) to (3) of the Equality Act 2010 provides, *"(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."*

174. On the question of burden of proof, Ms Hunter referred to the decision of the Supreme Court in the case of ***Efobi v Royal Mail Group Ltd*** [2021] I.C.R. 1263. In that case, the court held (and confirmed) that there was a two-stage process for analysing complaints of discrimination, whereby, at the first stage, the burden was placed on the claimant to prove, on the balance of probabilities, facts from which an employment tribunal could conclude, in the absence of an adequate explanation, that an unlawful act of discrimination had been committed. But something more than less favourable treatment (compared with someone not possessing the claimant's protected characteristic) is required. The clearest indication that this is so comes from the judgment of Lord Justice Mummery in *Madarassy v Nomura International plc* 2007 ICR 867, CA, where he stated: *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

175. In ***Gould v St John's Downshire Hill 2021*** ICR 1, EAT, Mr Justice Linden, after summarising the established case law said, *"The question whether an*

alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision… [and] the influence of the protected characteristic may be conscious or subconscious."

176. In her written submission the claimant said that she *"has conclusively and compellingly proven facts from which the ET could conclude that the unlawful acts narrated in the list of issues have occurred. The burden has shifted to the Respondent, and the Respondent has wholly failed to discharge that burden."* We do not agree. In our view while we have found that the majority of the 21 items in the list of issues has occurred that is, (as per ***Madarassy***), a bare fact of difference in treatment. It is not sufficient material from which we could conclude that unlawful acts of discrimination occurred. On that analysis our view is that the first stage (***Efobi****)* has not been passed.

177. In our view, none of the conduct which was established is inherently discriminatory.

178. Looking at each in turn:

179. There was no evidence as to why the respondent failed to consider the claimant for a PPE role. After the first occasion of the question being asked (2 July 2020) the claimant remained absent. There were, on our findings, no *"repeated"* requests. There were more than one, but importantly there was no evidence to suggest that the claimant's disability had any influence on the respondent's decision-making.

180. On our findings, there was no evidence to support a conclusion that the admitted failure to write confirmation of an adjustment to the claimant's working practices was because of her disability. In her written submission the claimant said, "*this failure goes to the heart of the issue between the parties. The Respondents accept in their ET3 at paragraph 8 there was "a verbal agreement …in place that she [the Claimant] would not undertake any lone*

working duties and instead would work on the double up team", which in my submission is an acceptance that this was a reasonable adjustment in accordance with s20 of the Equality Act 2010 …………..The failure to reduce the adjustment to writing placed the Claimant at a clear disadvantage and was less favourable treatment, as it allowed the Respondents to challenge the arrangement as they saw fit – which they proceeded to do. To make matters worse, those managers who did challenge the arrangement and seek to ignore it then pretended they had not, doubling down on the less favourable treatment." We do not accept that the absence of writing *"allowed"* the respondent to challenge the arrangement; the idea of working in a double up team was encouraged by Dr Herbert. The respondent had sought his advice before the claimant returned to work. Any challenge to the arrangement could have been rebutted by reference to the *de facto* double up situation which operated for some months and Dr Herbert's advice. Indeed on one view that is what Mr Smellie did in his email of 1 October. Working backwards (so to speak) from that position, there was no clear disadvantage caused by the absence of writing. Even if there was, there is no evidence to support the view that it was *"less favourable treatment"* within section 13.

181. On the issues relating to changing the claimant's shift pattern (and not disclosing its reasons to her) on our findings the *"reason why"* was that Ms Stewart had tired of hearing from the claimant about her health issues and the respondent was concerned about passing that information on to the claimant. We make the point that the *"reason why"* is Mrs Stewart's reaction. That, in our view, is quite different from the health issues and quite different yet still from her disability. In her written submission the claimant argues that *"this is less favourable treatment on the grounds of disability – the vulnerable nature of the Claimant as an employee with a disability is being exploited here by the Respondents, and that is wholly unacceptable."* In our respectful view, that is an incorrect way to approach the question. In the first place it does not reflect the statutory test, *"because of"* which is distinct from *"on the grounds of".* Second, it might be that the claimant was being exploited but that was not happening *"because of"* her disability.

182. There is no evidence to support a finding that on the occasions relied on Ms Logan asked the claimant to work on her own *"because of"* her disability. In answer to the question Ms Hunter says *"the requests were unacceptable as a result of the Claimant's disability. They also amount to a clear divergence from a reasonable adjustment."* We might agree that the requests were unacceptable. It might be said that in the circumstances of the claimant's disability and the arrangements made for it the requests lacked care or consideration. But to say that they were unacceptable *"as a result of the Claimant's disability"* does not address the relevant question; was the request made *"because of"* the disability? In our view it was not.

183. Was the claimant asked whether she felt Ms Stewart did not want to work with her because of her disability? In our view the answer is no. She was asked the question because of what the questioner knew about Ms Stewart's reasons, albeit they were not disclosed. In her written submission the claimant says, *"The reason behind the question according to Ms Logan was the unwillingness of Ms Stuart to work with the Claimant because she talked about her stroke."* If that is correct it confirms that the reason for the question was Ms Stewart's unwillingness to work with the claimant. Importantly that is not the same as the disability.

184. We take a similar view to issue vii as we did to issues v and xi; the comment *"we need to see about you working on your own"* was not made because of the claimant's disability; Ms Allan could not recall aspects of that conversation. Her evidence on the specifics was equivocal. Even in her examination in chief, her initial position was that she could not recall using the words, then when the question was repeated, she denied using them. Our findings have broadly accepted the claimant's version of the meeting. But the evidence does not support a finding that this comment was made because of the disability. Indeed it was not put to Ms Allan in cross-examination that it was a reason why she used those words.

185. On issue viii, we have found that Ms Allan used the words complained of. To have done so in that context may have felt belittling. But the cause of them

being used was not the claimant's disability. There was no evidence to suggest that it was.

186. The claimant's approach to the concept of direct discrimination is exemplified by her assertion that (x) the respondent's failure to notify of her of an assessment by Dr Herbert was *"because of"* her disability. In her written submission the claimant said, *"the Respondent's actions, both in the discourteous lack of intimation to the Claimant of the date and time of an important call from Occupational Health, and in then denying that it happened is in line with their unacceptable treatment of the Claimant because of her disability."* What is absent from her text is reference to anything to connect the conduct complained of and the protected characteristic. There was no evidence whatsoever that even remotely suggested that the failure to notify her was *"because of"* her disability. It was clearly unfortunate that she was notified. It may even be reprehensible. But that is not enough. To say that it is *"is in line with their unacceptable treatment of the Claimant because of her disability"* and for that to be enough to succeed is to misunderstand section 13.

187. The key issues in (xii) are; the replacement by Ms Talent of the claimant; the provision of a *"lone working"* schedule; then being asked to do a *"walking double up".* In our view the first was the cause of or at least influential background behind the second. The third was a corrected version of the second. The schedule was not corrected because of the claimant's complaints about the second. In our view Ms Talent was not replaced onto the double up schedule with Ms Rooney because of the claimant's disability. The claimant's written submission says, *"Ms Talent was given overtime to essentially take the Claimant's shift because Ms Rooney wanted to work with Ms Talent rather than the Claimant, as I put to Kirsty Allan in cross, that was as a result of Ms Rooney not wanting to work with the Claimant, which was as a result of her disability."* Ms Allan's evidence in cross examination was to deny the suggestions being made. It was certainly *"put"* in cross examination to her that Ms Rooney wanted to work with Ms Talent rather than the Claimant. We accepted that. But what was not put in cross examination and which we did

not accept was that Ms Rooney wanted to work with Ms Talent instead of the claimant because of the claimant's disability. In the claimant's written submission she said that this *"less favourable treatment was inextricably linked to her disability – her stroke and her mental health issues."* The difficulty with that assertion is that the claimant's stroke is not her disability.

188. In our view (xiii) is akin to (x). We found that the conduct complained of (cancelling the meeting at short notice) occurred. That was unfortunate. And may be reprehensible. Without repeating the claimant's written submission on the point, it simply does not address the question; was it because of the claimant's disability? In our view the claimant's disability was not the cause of the late cancellation of the meeting.

189. The conduct complained of in (xiv) is cutting scheduled visiting times. In her written submission the claimant said that the impact of that conduct was that the schedule was *"impossible"* to fulfil. She said that *"the treatment of the Claimant here was linked to the attitude of Ms Allan to the Claimant, which was unacceptably patronising and tinged with contempt."* What is missing from the submission is any link between the conduct and the claimant's disability. Expecting any employee to work to an impossible schedule is unreasonable. But the question is did that occur in this situation because of the claimant's disability? In our view the answer is no because there was no evidence to suggest that it was. In cross examination Ms Allan was asked why visits on the schedule were cut short. She suggested that there had been *"various reasons".* When pressed she suggested that they might include staff shortages, annual leave, COVID absences, or reasons to do with the service user. Two points are relevant from that passage of evidence. First, no contrary reason was put to her. And more importantly, it was not put to her that the reason for cutting her schedule was because of the claimant's disability.

190. Item (xv) includes four separate statements all from 20 October 2020. In our view, Ms Allan's comments were not made because of the claimant's disability. Indeed there was no evidence to suggest that they were. Ms Martin's comments were not made because of the claimant's disability. The

items themselves suggest that if anything the focus was on the claimant's stroke.

191. Item (xvii) is akin to items (xiii) and (x). For present purposes we assume that in her appeal letter the claimant identified a number of failures in Ms McLellan's investigation of her grievance. Indeed in her evidence Ms McLellan said that perhaps she should have interviewed Mr Adams. But there is no evidence that those failures were *"because of"* the claimant's disability. Indeed it was not suggested to Ms McLellan that any failure in her investigation was *"because of"* the claimant's disability.

192. Item (xix) can be categorised along with items (xvii), (xiii) and (x). Ms Meldrum did indeed issue her letter without providing the claimant with a prior meeting. Not only is there no evidence to suggest that that action was in any way because of the claimant's disability, Ms Meldrum's evidence was that as per her understanding of stage 3A of the grievance procedure she did not require to.

193. Finally and for completeness there was no evidence that item xx occurred because of the claimant's disability.

Discrimination arising from disability

194. The claimant's case is that the 21 items are also discrimination arising from disability.

195. Section 15(1) of the 2010 Act provides, *"(1) A person (A) discriminates against a disabled person (B) if(a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."*

196. In the case of ***City of York Council v Grosset*** [2018] IRLR 746 the Court of Appeal said, *"On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in*

issue occurred by reason of A's attitude to the relevant "something"." "The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something"".

197. In this case the issue (D3) sets out that the claimant relied on *"her difficulties with her eyesight and her concern regarding working alone" as "the something arising".*

198. The question then is: did the respondent treat the claimant unfavourably because of her difficulties with her eyesight and her concern regarding working alone? Or as the agreed issue put it, *"Was the cause of the unfavourable treatment something arising in connection with the Claimant's disability? The Claimant relies upon her difficulties with her eyesight and her concern regarding working alone as something arising."*

199. In her submission the claimant said, *"The Claimant [wa]s clearly was extremely anxious about the risk inherent upon her working alone with vulnerable service users, as a result of her eyesight and her concern that she may suffer another stroke. She made that point several times in evidence. What also comes across very clearly is that to the Respondent the requirement that the Claimant work on a double up was an administrative pain. The entire thread of Kirsty Allan's interaction with the Claimant was to challenge the double up plan – Mr Smellie's evidence was excellent on that point. I would submit it is also clear that Ms Allan was the individual who scheduled the Claimant on 13 September and 16 October, both times pushing the boundaries towards the lone worker status."*

200. The application of the first part of ***Grosset*** to each of the items of unfavourable treatment requires us to consider whether the cause (of each) was the claimant's eyesight and her concern regarding working alone. The claimant's submission (noted above) does not provide an answer to each.

201. For some items, the answer is more obvious than others. For example, the claimant's eyesight and concern about working alone cannot possibly be the cause of Faye Meldrum's decision to issue the letter of 22 November 2022 without telling the Claimant or giving the Claimant the opportunity to attend a

meeting beforehand. The cause in that example was Ms Meldrum's belief that Stage 3A of the grievance process did not require a meeting with the claimant.

202. In our view, Ms Allan asked the two questions (item xv) because of the claimant's difficulties with her eyesight. The questions demonstrated a concern which arose because of the claimant's impaired eyesight. Looked at another way; had it not been for those difficulties there would have been no reason to ask those questions. Based on Ms Allan's own evidence, she asked them to gain a better understanding of what was and was not working for the claimant and what was (and was not) required to help her carry out those tasks. A reason or cause was the claimant's difficulties with her eyesight.

203. As we said above, the comments attributed to Ms Martin were to do with her stroke. It was neither the disability nor the *"something arising"* from the disability.

204. Regrettably and despite various iterations, the list of issues did not identify either a specific *"legitimate aim"* or how any of the alleged conduct was a proportionate means of achieving it. By the time of its written submission the respondent asserted that the aim was *"the attendance to vulnerable service users at home."* In our view (and as noted in our findings) given the questions asked by Mr Smellie before the meeting, there was no need for Ms Allen to ask either question. Those questions were not a proportionate means of achieving the (now) stated aim. They were in our view unnecessary given what had been verbally agreed between the parties long before the October 2021 meeting.

Harassment

205. Section 26 of the Equality Act 2010 read short for present purposes provides, *"(1) 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.(2) …..(3) ….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."

5 206. In our view the questions asked by Ms Allan on 20 October were harassment of the claimant. The questions were clearly unwanted. The claimant felt humiliated by them. That was her evidence and we had no reason to doubt that it was genuine. The relevant circumstances in our view included the way that the respondent had treated the claimant prior to 20 October. That 10 treatment (while not unlawful) was poor. The claimant was clear from an early stage that she could work as part of a double up team. On 1 June 2021 Ms Logan had noted the claimant's clear position as to what the respondent could do to help her at that stage; *"keep me on the double up van."* That was consistent with her position about a year previously (2 July 2020) and prior to 15 her return to work. At that time she said she could *"work on the vans."* There were a number of occasions since her return to work in October 2020 when the respondent had suggested that she should *"come off the vans"* or she should be working on single visits. While there may have been operational reasons (or technological errors) which prompted the suggestions, they in turn 20 caused the claimant some distress. Her concerns were the prompt for Mr Smellie's email of 1 October which was the catalyst for the meeting on 20 October. At the same time (and as conceded by the respondent) it should not have shared with her information about a colleague who had refused to work with her (see Ms McLellan's letter of 17 March 2022, (**pages A198 to 202**). In 25 our view the circumstances of the case include how that information made the claimant feel; she was upset by it. It was in the circumstances reasonable for the claimant to have felt humiliated by Ms Allan's questions. Put shortly, the claimant believed that it had been agreed that she should work as one half of a double up team. Indeed, an outcome from the grievance was a formal 30 tailored adjustment plan was *"to be agreed following advice from Occupational Health".* It is more than likely that that plan (had it ever been written) would have reflected Occupational Health's advice to that date. The advice was (by July 2021) that difficulties with independent work could be

"alleviated satisfactorily if working in double ups." It is more likely than not that any advice from Occupational Health after March 2022 would have been for the claimant to continue as part of a double up team. The questions asked by Ms Allan on 20 October tended to suggest that the respondent was trying to move away from or undo what the claimant believed had been previously agreed and an arrangement to which she had worked for some time.

Indirect discrimination

207. The claim of indirect discrimination does not succeed.

208. Section 19(1) of the 2010 Act states that indirect discrimination occurs when a person (A) applies to another (B) a provision, criterion or practice (PCP) that is discriminatory in relation to a relevant protected characteristic of B's. A PCP is discriminatory if the following four criteria are met: (1) A applies, or would apply, the PCP to persons with whom B does not share the relevant protected characteristic (S.19(2)(a)); (2) the PCP 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 the characteristic (S.19(2)(b)); (3) the PCP puts, or would put, B at that disadvantage (S.19(2)(c)), and (4) A cannot show that the PCP is a proportionate means of achieving a legitimate aim (S.19(2)(d)).

209. *"The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic",* (***Chief Constable of West Yorkshire Police and another v Homer*** at paragraph [2012] I.C.R. 704 at paragraph 17 (Lady Hale)). We note the relevance of *"people with a particular characteristic"* which is a reminder of section 19(2)(b) of the 2010 Act.

210. We reminded ourselves of what was said by The Honourable Mr Justice Langstaff (then the President of the EAT) in ***Dziedziak v Future Electronics Ltd*** UKEAT/0270/11/ZT at paragraph 42; *"the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice, secondly, that it*

disadvantaged women generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual who was claiming. Only then would the employer be required to justify the provision, criterion or practice, and in that sense the provision as to reversal of the burden of proof makes sense". While that case was obviously not considering a claim of disability discrimination, it does summarise what is necessary in an indirect claim so as to shift the burden.

211. There was in this case no evidence at all of *"group disadvantage."* The relevant issue (C3) was added after the start of the hearing following comment from us that the issues at that time did not address section 19(2)(b). The issue says, *"Would the application of the PCP to individuals sharing the same protected characteristic as the Claimant place that group at a particular disadvantage when compared to a group not sharing that protected characteristic?"* There was no evidence at all that could have allowed us to make a finding which addressed section 19(2)(b). Without repeating it here, the claimant in her written submission does not relevantly address the question.

Section 20 of the 2010 Act

212. Section 20(1) of the 2010 Act provides, *"Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A."*

213. Section 20(2) and (3) provide, *"The duty comprises the following three requirements. (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."* Subsections (4) and (5) (the second and third requirements) are not relevant here.

214. Section 21 provides, *"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable*

adjustments. (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person. (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

215. In our view it is important to recognise that the duty is to *"make"* reasonable adjustments. The purpose of the duty is clear from subsections (2) to (5); it is about avoiding a substantial disadvantage. We contrast that duty (and the statutory delict which is created by section 21) with the first agreed issue E1 which is headed "Failure to Make or Adhere to Reasonable Adjustments (s20 EQA)". E1 says, *"Did the Respondent fail to adhere to the informal adjustment agreed in conjunction with Occupational Health whereby the Claimant would not undertake any lone working duties and would always work on the double up team?"* It is clear that the issue strays outside the statutory duty. The duty is to *"make".* Via the heading and E1 the issue slides to an allegation of a *"failure to adhere".* For that reason, the claim under section 21 cannot succeed.

216. But even if we are wrong about that, it is important to be precise about what was the *"adjustment"* to the claimant's duties. E1 refers to what had been *"agreed in conjunction with Occupational Health."* In September 2020 and prior to a return to work the following month Dr Herbert suggested that *"she returns to work in a double up situation and undertakes this for certainly some weeks to see how she copes before considering another adjustment."* In July 2021 Dr Herbert said, *"Essentially I see her having difficulty with independent work because of the visual impact she has described. She cannot drive, and she has a lack of awareness, but this can I think be alleviated satisfactorily if working in double ups."* Our comments above are relevant here. In our view, in E1 the reference to *"lone working duties"* is a reference to working alone doing single visits as distinct from carrying out duties alone with a service user albeit as part of a double up team. From our discussions with Mr O'Neill when

submissions were being made it appeared that he accepted that the informal adjustment which we have clarified was (as E2 asks) a reasonable adjustment. On our findings, the claimant was asked on more than one occasion to work alone.

5 217. Issue E4 focusses three reasons why the claim under section 21 fails. First, the duty is to *"make"* an adjustment, not adhere to it. Second (and even if we are wrong on that) there was no such failure. The claimant did not work alone or *"undertake any lone working duties".* While she may have been asked to do so, she did not *"undertake"* those duties. Third (which follows logically from 10 the second) she was not put at a substantial disadvantage by undertaking those duties because she did not undertake them.

Victimisation

218. Section 27(1) and (2) provide, *"Victimisation (1) A person (A) victimises another person (B) if A subjects B to a detriment because—(a) B does a 15 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 20 person has contravened this Act."*

219. The issues identify two *"protected acts".* They identify two discrete lists of items from the 21 which are said to be "because of" each.

220. The first protected act relied on is Mr Smellie's email of 1 October 2021. The claimant relies on section 27(2)(d). We do not agree that the email makes an 25 allegation of a contravention of the Act. At best and by the reference to a *"reasonable adjustment"* it refers to section 21. But there is no allegation of a *"contravention."* It merely seeks a reassurance that the respondent will continue (in the face of requests to the contrary) to operate the adjustment.

221. Even if we are wrong on that, there is no evidence to support a finding that 30 any of items xii, xiii or xiv (which focus on the actions of Kirsty Allan) were

because of the email. There was no evidence of any connection between the email (on the one hand) and any of the items (on the other).

222. The second protected act is the claimant's grievance (and its appeal). On our findings the respondent did not receive her handwritten grievance. Logically therefore we are concerned only with the form submitted for the claimant by Mr Smellie (**pages A147 to 149**). It alleged discrimination on the grounds of a disability and bullying. That is sufficient for section 27(2)(d). The claimant relies on items xvi to xxi. On our analysis, there was no basis to support items xvi, xviii or xxi. There was (again) no evidence that would permit a finding that any of items xvii, xix or xx occurred because of the grievance. The claimant's written position on the question is brief; *"I cannot see another explanation, and none has been put forward."* That approach is incorrect. It is not for the respondent to prove that the issues occurred for a reason unconnected to the grievance. While all three items are related to the grievance there must be something that suggests that they *occurred "because of"* it; that they were acts of victimisation because of it. There was no such evidence.

Summary

223. The claimant succeeds on xv (questions 1 and 2) as acts of discrimination arising from disability and harassment. She does not succeed on any others of the 21 items, or on any other ground of discrimination.

Remedy

224. The bundle contained various versions of the claimant's schedule of loss and the respondent's counter-schedule. A number of them had been exchanged before the start of this hearing. Both parties thus had had the opportunity to comment on the other's schedules before 17 January 2024.

225. We first considered the question of loss of earnings. On our findings the claimant was continuously absent from work by reason of work related stress from 21 October 2021 until the end of her employment. A major cause of that stress was the unlawful discrimination which occurred at the meeting the day

before. At that time her net pay was £395.75 (see **page A51**). She received full pay until 21 April 2022. After that date her net weekly pay was £396.06. She received half pay in the period between 22 April and 21 October 2022 (26 weeks), (£5,148.78). She thus lost the equivalent amount in that period.

5 226. In the period from 22 October 2022 until her effective date of termination (27 weeks) the claimant's net pay would have been £10,693.62. Page **A54g** shows that in that period she was paid £2840.54 gross. By our reckoning the net version was £2,449.11. She thus was not paid £8,244.52 in that period.

227. In our view, the terminus for loss of earnings is 27 April 2023. From 28 April 10 the claimant received ill health retirement pension. The basis on which that was certified was predominantly based on *"reduced mobility and severely impaired vision"* (see **page A300**). The premise on which the claimant sought recovery of a sum representing loss of earnings after 28 April is that *"the discriminatory conduct caused her health to deteriorate to such an extent that* 15 *she could not work."* We do not accept that in light of the basis on which ill health retirement was allowed. Her written submission asserts that *"the additional disability of mental health issues was the barrier"* to her ability to work. We do not accept that. In large measure the material which formed the basis of the ill health retirement application was not to do with her mental 20 health.

228. On the question of solatium for injury to feelings as a result of the discrimination, the claimant referred to the case of ***Vento v Chief Constable of West Yorkshire Police*** [2003] ICR 318 and to the bands relevant to when the claim was presented. The premise on which the claimant sought £35,000 25 was *"a sustained, unpleasant and long term experience of less favourable treatment, culminating whilst still at work in the incident on the 20 October 2021."* Elsewhere she asserted that the total period of harm began in July 2020. It is obvious that while not underestimating the impact of what occurred on October 2021, that was the incident of unlawful discrimination on our 30 findings. The respondent's position in its submission was that *"if the Claimant has been discriminated against then compensation is considered in terms of the respondent's schedule of loss."* In its latest counter-schedule (**page A52c**,

lodged on 15 January 2024) it suggested £20,000.00 as that compensation. Mr O'Neill's oral submission was that that amount was a ceiling.

229. In our view, albeit a *"one off",* the impact on the claimant of her treatment on 20 October 2021 was substantial. That treatment, we found, was in breach of sections 15 and 26. *"Awards* [in the lower band] *are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence"* (***Vento***, paragraph 65).

230. The claimant was absent from work immediately afterwards and was consistently certified as unfit for work by reason of *"work related stress."* In her grievance letter shortly afterwards (**pages A137 to 146**) she described the immediate impact on her; humiliated, demoralised, hysterical and having difficulties breathing. It was not possible to identify that that impact arose from the discriminatory conduct as distinct from the other conduct (of Ms Martin). In our view, with ***Vento*** and that evidential difficulty in mind, this case is at the upper end of the lower band. That being so, we award £9100.00 for injury to feelings. Ms Hunter suggested apportioning two thirds of the award to the past and we saw no reason not do so. That amount is £6,066.00.

231. The claimant also seeks an award of damages for personal injury. In her written submission the claimant said:

a. *"It is the Claimant's position that she has been subjected to the statutory delicts listed above and these have caused her to suffer from serious mental health illness, such that her day to day life has been severely adversely affected"* (the list is of course the 21 items)

b. "the actions of the Respondent have led to the mental illness suffered by the Claimant"

c. "the cumulative effect of the various delicts proven led to her absence and eventual ill health retiral"

d. "events from 1 June 2021 to the final straw of the meeting of 20 October 2021 led to her mental illness"

e. *"the statutory delicts narrated above made a material contribution/led to the mental illness suffered by the Claimant"*

232. We took account of what was said in the Court of Appeal in ***Sheriff v Klyne Tugs (Lowestoft) Ltd*** 1999 ICR 1170 (to which the claimant referred). It is now settled that the employment tribunal *has "jurisdiction to award damages for the tort of racial discrimination including damages for personal injury caused by the tort"* (see paragraph 21 of the judgment in ***Sheriff***). We also noted (from paragraph 22 there) that *"the advantage of the statutory tort, from the claimant's point of view, is that this requirement* [that it was reasonably foreseeable that the conduct might cause the injury] *does not need to be established; all that needs to be established is the causal link."* And again (from paragraph 21) *"The question, which may be a difficult one, is one of causation."*

233. The claimant referred to the judgment of Lady Justice Hale (as she then was) in the Court of Appeal in the case of ***Hatton v Sutherland*** [2002] I.C.R. 613. We took account of what she said at paragraph 35 (it is enough to show that the breach of duty made a material contribution to the harm caused). We also took account of the 16 propositions set out at paragraph 43. In particular, we noted (as Ms Hunter identified) that proposition 15 is, *"Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment."* In turn reference was made there to paragraph 36 and 39 of her judgment. From paragraph 39 we took, *"if the* [apportionment] *point is never raised or argued by the defendant, the claimant will succeed in full."* In the same paragraph, she noted that in the earlier case of ***Holtby v Brigham & Cowan (Hull) Ltd*** [2000] ICR 1086 Lord Justice Clarke placed the evidential burden of establishing the case for apportionment upon the defendant but he acknowledged that "these cases should not be determined by the burden of proof: assessments of this kind are *"essentially a jury question which has to be determined on a broad basis"".*

234. We also had regard to what was said by Lord Justice Underhill in the Court of Appeal in ***BAE Systems (Operations) Ltd v Konczak*** [2018] I.C.R. 1. We summarise here what we took from ***Konczak***:

a. that an injury was single and indivisible where there was simply no rational basis for an objective apportionment of causative responsibility for the injury;

b. that an employment tribunal had to try to identify a rational basis on which the harm suffered could be apportioned between a part caused by the employer's wrong and a part that was not so caused, that exercise being concerned not with the divisibility of the causative contribution but with the divisibility of the harm;

c. that, in the case of psychiatric injury, where a claimant suddenly tipped over from being under stress into being ill, the tribunal should seek to find a rational basis for distinguishing between a part of the illness due to the employer's wrong and a part due to other causes;

d. that, if there was no such basis, the injury would be truly indivisible, and the claimant was required to be compensated for the whole of the injury, though, importantly, if the claimant had a vulnerable personality, a discount might be required to take account of the chance that the claimant would have succumbed to a stress-related disorder in any event;

e. that it would often be appropriate to look closely, particularly in a case where psychiatric injury proved indivisible, to establish whether the pre-existing state might not nevertheless demonstrate a high degree of vulnerability to, and the probability of, future injury.

235. In this case the respondent raised and argued the question of apportionment albeit without adducing evidence in support of its position. It cannot be said that it was "*never raised or argued.*" The respondent's submission on the issue was this:

"Dr Rias does not address apportioning what if element of her personal injury may be a result of any treatment by the claimant. He addresses that her work experience has caused her mental injury, however the respondent submits that this was not due to discrimination by the respondents, but the claimant's own perception of her experiences at work and the impact upon her mental health due to her declining physical health. However if the respondent is found to have been responsible for personal injury of the claimant due to discrimination then the respondent submits it was a minor element and apportionment should be considered accordingly and be in awarded in terms of the respondent's counter schedule of loss, being 10% of the sum sought by the claimant as a reasonable assessment in terms of apportionment."

236. At paragraph 84 of his report Dr Rias opines that the claimant's state of health has been affected by *"her experiences at work"* and *"due to her deteriorating physical health".* That is obviously not the same as was noted in ***Konczak*** (at paragraph 20) where reference was made to some psychiatric evidence given by the practitioner who appeared for the claimant who said in answer to a cross-examination question; *"the contribution of other events to that injury was of the order of 20% to 50%".*

237. But Dr Rias distinguishes between two unrelated issues, only one of which is relevant for us. Within the work experiences (which he narrates covering the period October 2020 to October 2021 at paragraphs 3 to 12 of his report) the relevant part is one aspect of what occurred on 20 October 2021.

238. The issue of apportionment has been raised and argued by the respondent.

239. As an *"industrial jury"* we take the view that we should assess the question on a broad basis and apply the ***Konczak*** approach.

240. In our view there is not *"no rational basis for an objective apportionment of causative responsibility."* A rational basis on which the harm suffered could be apportioned between the part caused by the respondent's wrong and the part that was not so caused is to focus on three factors. First, the deterioration of the claimant's physical health is irrelevant. Second the *"experiences at work"* referred to by Dr Rias are much more than the items of unlawful

discrimination. Third, those items (on 20 October 2021) were significant in the context of (i) the overall conduct of the respondent and (ii) its impact on the claimant.

241. The claimant sought £50,000.00 as damages for personal injury. As noted above, the respondent suggested 10% of that amount. In our view, damages should be awarded in the sum of £10,000 on the basis that 20% is broadly an apportionment reflecting the divisibility of the harm.

ACAS uplift

242. The claim for an uplift does not succeed. The factual bases for alleged failure to comply with the ACAS Code of Practice is the Code of Practice on Disciplinary and Grievance are (i) ignoring the claimant's handwritten grievance dated 10 November 2021 and (ii) in holding the grievance appeal without affording the claimant an opportunity to attend or considering any evidence from the claimant or her union representative. On our findings and analysis neither basis is sound. Neither was a failure to comply with the Code.

Remedy summary

243. The total award under each claim reflects the relevant interest due on each. We have set out how each amount of interest has been calculated below.

244. The claimant is entitled to be compensated for the loss of earnings in the period between 22 April and 21 October 2022. Our judgment (3) orders payment of the relevant amount (with interest).

245. The claimant is entitled to be compensated for the loss of earnings in the period between 22 October and 27 April 2023. Our judgment (4) orders payment of the relevant amount (with interest).

246. We have ordered payment of compensation for injury to feelings at (5) again with the interest on it.

247. We have ordered payment of compensation for personal injury at (6) and with interest.

248. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply to compensation for discrimination.

Interest

249. Ms Hunter recognised that interest on solatium is due on the past element. As noted above we have attributed £6,066.00 to the past element. Interest is awarded on that sum from the date of the act of discrimination (20 October 2021) to the date of our calculation of the compensation (11 April 2024), which is 467 days. At 8% per year over that period, interest is thus £620.89.

250. Interest is awarded on all other sums from the mid-point between the dates of the acts of discrimination and 11 April 2024 the date of our calculation. Respectively, therefore:-

a. On the award for loss of half pay (£5,148.78) the mid-point date between the date of loss (21 October 2022) and 11 April 2024 is 17 July 2023, and thus interest is due at 8% on 269 days. It is therefore £303.57.

b. On the award for loss of pay (£8,244.52) the mid-point date between the date of the loss (27 April 2023) and 11 April is (175 days) 19 October from which date interest runs. Interest at 8% over 175 days is £316.23.

c. On the award for personal injury the period between the date of loss and 11 April is the same as at paragraph 249, 467 days. Half of that is 233.5 days. Interest is due at 8% on the award for that period. The amount of interest is therefore £ 511.78.

R Bradley

Employment Judge

<u>11 April 2024</u>

Date

Date sent to parties **<u>11 April 2024</u>**

APPENDIX

LIST OF ISSUES IN CAUSA CONNOR V SOUTH LANARKSHIRE COUNCIL CASE NUMBER 4101552/2022

5 *A. Direct disability discrimination (s13 Equality Act 2010 – hereafter EQA)*

1. Did the Respondent treat the Claimant less favourably than it treated, or would have treated others (in this case a hypothetical comparator)? The alleged less favourable treatment relied upon is as follows:

    i. The treatment of the Claimant by Andrew Crookston at a meeting on 10 2 July 2020 where he advised her that she was too much of a risk and should be paid off with 12 weeks' notice;

    ii. The failure by the Respondent from July 2020 onwards to ever consider the Claimant for a role handing out PPE within the Respondent's office, despite repeated requests on her part;

15 iii. The failure by the Respondent to give the Claimant written confirmation of the adjustment to her working practice whereby she would always work with another carer present;

    iv. The decision by the Respondent from May 2021 onwards to react to a complaint or complaints by a carer or carers about working with the 20 Claimant by altering the Claimant's working schedule rather dealing appropriately with the complaint or complaints;

    v. The treatment of the Claimant by Pat Logan on 1 June 2021 where she asked the Claimant to work on her own;

    vi. The treatment of the Claimant in a meeting on 10 June 2021 whereby 25 she was asked whether she felt another carer, Jackie Stewart did not want to work with her causing concern;

    vii. Kirsty Allan's comments during a meeting towards the end of June 2021 – Agnes we will need to see about you working on your own;

viii. Kisty Allan dismissing and belittling the Claimant's concerns re working alone by saying repeatedly - that's like me saying I could have a fall, anyone can have a fall - in a meeting towards the end of June 2021;

ix. Pat Logan asking the Claimant to change to the opposite shift pattern during a meeting in June 2021, both in respect of the request and with regard to the request being made without advising the Claimant that this request was to allow her to work with different carers who had not complained;

x. The failure by the Respondent to advise the Claimant of the time and date of her Occupational Health assessment which resulted in her requiring to have the telephone appointment whilst walking between service users on 6 July 2021;

xi. Two further requests made by Pat Logan that the Claimant work on her own over the period from June 2021 to October 2021;

xii. On 13 September 2021 Kirsty Allan allocating another carer, Theresa Talent to work on the double up van with Jackie Rooney in preference to the Claimant, leaving the Claimant to call the office and be told to "not panic" and initially given a schedule to work as a lone worker with overlapping times which was then deleted and then re allocated a lone worker shift requiring her to walk between service users (which she did with the other lone worker also on that shift) ;

xiii. On 12 or 13 October 2021, Kirsty Allan cancelling the meeting arranged for 10am with the Claimant, Joyce Martin and the Claimant's companion Caroline Donaldson and not telling the Claimant until 947am, at which point the Claimant's companion was waiting in reception;

xiv. On 16 October 2021 Kirsty Allan cutting the Claimants allocated time to visit service users/ clients from 45 minutes to 20 minutes;

xv. On 20 October 2021, Joyce Martin and Kisty Allan making a series of inappropriate comments to the Claimant as follows:

- Ms Allan asked where the council would stand legally should the Claimant give out the wrong medication or gave someone food poisoning.
- Ms Allan asked the Claimant how she managed at home, and who did her shopping.
- Ms Martin said that the council was unable to confirm that the Claimant would still work on a double up team when her partner was off as some of the carers did not want to work with her. Upon being questioned as to whether this was due to any issues with the standard of the Claimant's work Ms Allan confirmed it was not to do with that, but rather to do with her stroke.
- Ms Martin said that the other carers felt that they should not be made to feel responsible for the Claimant [and upon being asked if this was as a result of the Claimant's stroke] Ms Martin said yes, and you were the one who told them about your stroke;

xvi. The Respondent ignored the Claimant's handwritten grievance dated 10 November 2021;

xvii. Michelle McLellan of the Respondent failure to properly investigate and consider the Claimant's grievance

xviii. The Respondent failure to adhere to their own policy by failing to allow the Claimant an appeal hearing within 28 days of the appeal being lodged on 30 March 2022;

xix. Fay Meldrum of the Respondent issued the letter of 22 November 2022 without telling the Claimant or giving the Claimant the opportunity to attend a meeting beforehand;

5 xx. Fay Meldrum of the Respondent taking additional evidence from the grievance decision maker, but not taking any evidence from the Claimant or her union representative Stephen Smellie;

xxi. The repeated failure of the Respondent's HR department to respond to emails and request from the Claimant over the period from 3
10 November 2022 to April 2023.

2. If the Tribunal finds that the Claimant was treated less favourably in terms of one or more of said items i. to xxi, was it because of the Claimant's disability?

B. Harassment (s26 EQA)

1. Did the Respondent engage in the following unwanted conduct, namely the
15 matters narrated at paragraph A above, items i to xxi inclusive?

2. Was the above unwanted conduct related to disability?

3. Did the unwanted conduct have the purpose or effect of violating the Claimant's dignity and/or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account the
20 required considerations of s26(4) of the Equality Act 2010?

C. Indirect Disability Discrimination (s 19 EQA)

1. Did the Respondent apply a provision criterion or practise to the Claimant by insisting/repeatedly suggesting /requesting that the Claimant work alone?

2. Was that practice applied to the Claimant by the Respondent from 1 June
25 2021 onwards?

3. Would the application of the PCP to individuals sharing the same protected characteristic as the Claimant place that group at a particular disadvantage when compared to a group not sharing that protected characteristic?

4. Did the application of that PCP to the Claimant place her at a particular disadvantage?

5. Was that particular disadvantage a proportionate means of achieving a legitimate aim, where the Respondents position is that the legitimate aim is ensuring the care needs of vulnerable service users is met?

D. Discrimination Arising from Disability (s15 EQA)

1. Has the Respondent treated the Claimant unfavourably for something arising in consequence of her disability contrary to s. 15 EQA?

2. Were any or all of the matters narrated above under paragraphs A from i to xxi unfavourable treatment?

3. Was the cause of the unfavourable treatment something arising in connection with the Claimant's disability? The Claimant relies upon her difficulties with her eyesight and her concern regarding working alone as something arising?

4. Was the unfavourable treatment a proportionate means of achieving a legitimate aim?

E. Failure to Make or Adhere to Reasonable Adjustments (s20 EQA)

1. Did the Respondent fail to adhere to the informal adjustment agreed in conjunction with Occupational Health whereby the Claimant would not undertake any lone working duties and would always work on the double up team?

2. Did the informal adjustment amount to a reasonable adjustment in terms of s20 EQA?

3. Did the Respondent ask the Claimant to work alone over occasions from 1 June 2021, as narrated in part A paras v, vii, xi, and xv?

4. If so, did the failure to adhere to the reasonable adjustment place the Claimant at a substantial disadvantage compared to persons who are not disabled?

F. Victimisation

5 1. Did the Claimant make a protected act in accordance with s27(2) of the Equality Act 2010 in complaining about the failure on the part of the Respondent to adhere to the reasonable adjustment suggested by Occupational Health and agreed by the Respondent as an informal adjustments, said complaint being sent by the Claimants union representative
10 Stephen Smellie via an email dated 1 October 2021?

2. Did Ms Allan of the Respondent subject the Claimant to the detriments as narrated in paragraphs

A xii, xiii and xiv because she made the protected act as narrated above in paragraph F1?

15 3. Did the Claimant make a protected act by lodging her grievance and grievance appeal?

4. Did the Respondent subject her to the detriments as narrated at paragraphs A xvi, xvii, xviii, xix, xx, and xxi because she made the protected acts narrated at paragraph F3?

20 *G. Personal Injury (s124 EQA)*

1. On the balance of probabilities have the act or acts of unlawful discrimination (assuming they are found proven) caused or materially contributed to a psychological injury or to an exacerbation of the Claimant's existing condition.

H Injury to Feelings

25 1. Has the Claimant suffered injury to feeling as a result of the discriminatory acts as a narrated above in paragraphs A, B, C, D, E and /or F?

I ACAS Code

1. Is the claim one which raises a matter to which the ACAS code applies?

2. If so, have the Respondents breached the ACAS code in their response to the Claimant's handwritten grievance dated 10 November 2021 (by ignoring it), and in their response to the Claimant's further grievance dated 30 November 2021, and in holding the grievance appeal without affording the Claimant an opportunity to attend, or considering any evidence from the Claimant or the Claimants union representative?

3. If so, was the failure to comply with the Code reasonable?

4. Is it just and equitable to award an uplift because of the failure to comply with the ACAS Code and, if so, by what percentage, up to 25%?