EMPLOYMENT TRIBUNALS

Claimant: A

Respondent: Ministry of Defence

HELD AT: Manchester **ON:** 12 – 15 February 2019

IN CHAMBERS: 13 and 14 March 2019
2 May 2019

BEFORE: Employment Judge Porter
Mrs A L Booth
Mr W Haydock

REPRESENTATION:

Claimant: In person

Respondent: Mr R Moreto, counsel

RESERVED JUDGMENT

1. The claim under s13 Equality Act 2010 is not well-founded and is hereby dismissed.

2. The respondent, in deciding to dismiss rather than downgrading or relocating the claimant, discriminated against the claimant within the meaning of s15 Equality Act. Her claim under s15 Equality Act in relation to that unfavourable treatment, as set out at paragraph 2h of the Agreed List of Issues, is well-founded.

3. The claim of discrimination under s15 Equality Act 2010 in relation to the alleged unfavourable treatment as set out at paragraphs 2 a – g of the Agreed List of Issues is not well-founded and is hereby dismissed.

4. The claim of failure to make reasonable adjustments under s20 Equality Act 2010 is not well-founded and is hereby dismissed.

5. The claims of harassment under s26 Equality Act 2010 in relation to the unwanted conduct set out at paragraphs 10 a, g and k of the Agreed List of Issues are well-founded.

6. The claims of harassment under s26 Equality Act 2010 in relation to the unwanted conduct set out at paragraphs 10 b, c, d, e, f, h, i, j, and l of the Agreed List of Issues are not well-founded and are hereby dismissed.

7. The claimant was unfairly dismissed.

8. A remedy hearing will take place on 15 July 2019 commencing at 9.45 am for 10.00am.

REASONS

Issues to be determined

1. At the preliminary hearing on 1 May 2018 the respondent conceded that at the relevant time the claimant was a disabled person within the meaning of the Equality Act 2010 in relation to the impairments of Post Traumatic Stress Disorder (PTSD) and rheumatoid arthritis.

2. At the outset it was confirmed that the parties had agreed a List of Issues, as set out in Appendix 1. The agreed list contains reference to the original list of numbered allegations made by the claimant, some of which are no longer pursued. The tribunal has not included reference to the numbered allegations at Appendix 1. The tribunal has considered each of the issues as set out in paragraphs 1 – 16 of the Agreed List. It has not considered the original list of numbered allegations.

Orders

3. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders the tribunal considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following.

4. The claimant sought to rely on 3 additional documents. Counsel for the respondent confirmed that two of the documents were already included in the bundle at pages 874 and 875. The claimant agreed. The respondent agreed to the inclusion of the third document at page 1464 of the Bundle.

5. It was agreed and ordered that the claimant give evidence first, starting on the afternoon of the first day. At the commencement of the second day the claimant asked for an order that the respondent's witnesses leave the tribunal room during the course of the continuing cross-examination of her by counsel for the respondent.

6. The claimant asserted that:

   6.1. she found the presence of the respondent's witnesses in the room to be intimidating;

   6.2. she had found the afternoon session the previous day very difficult; and

   6.3. she believed that excluding the respondent's witnesses from the tribunal room would help her to manage her anxiety.

7. The respondent opposed the application on the grounds that:

   7.1. it was important for the witnesses to hear the evidence and to provide instructions when necessary;

   7.2. t was anticipated that cross-examination of the claimant would continue for a further 1 ½ hours only;

   7.3. there was no reason for the witnesses to be excluded;

   7.4. this request should have been made in advance of the hearing, when appropriate adjustments could have been made, for example, with the erection of screens.

8. The tribunal retired to consider the application. Having considered representations from both parties the tribunal found that it was in the interest of justice to exclude the respondent's witnesses from the tribunal room while the claimant gave evidence under cross-examination. In reaching this decision it was noted that:

   8.1. the medical evidence showed that the claimant did suffer from anxiety and the OH reported that the claimant had experienced interpersonal difficulties with her manager;

   8.2. the claimant was representing herself as a litigant in person. She had nobody in attendance with her as support or to give evidence on her behalf;

   8.3. the respondent was represented by counsel and a solicitor. In addition, there were five respondent's witnesses sitting in the room;

   8.4. the claimant has displayed distress when making the application. The tribunal accepts that the claimant is truthful when she says that she finds the presence of the respondent's witnesses to be intimidating and is adversely affecting her ability to conduct the hearing;

   8.5. the respondent's solicitor can make a careful note of the claimant's evidence and if necessary take a short break to obtain instructions before completion of cross-examination.

On balance the tribunal is satisfied that there is a significant risk to the claimant's right to a fair hearing by the anxiety she is experiencing by the presence of the respondent's witnesses in the room. The respondent is legally represented and its right to a fair hearing is not prejudiced by the exclusion of the witnesses. The tribunal is under a duty to make reasonable adjustments to its procedure to avoid any substantial disadvantage to either party. The application was successful and the respondent's witnesses were asked to leave the room.

9. Counsel for the respondent objected to the order on the grounds that the respondent could not be excluded from the tribunal. He asked that one of the witnesses, Mr Turner, be allowed to remain in the tribunal room. The claimant agreed to this proposal on the basis that she had had no prior relationship with Mr Turner.

10. It was therefore ordered that each of the respondent's witnesses, other than Mr Turner, leave the tribunal room during the course of the claimant's cross-examination.

11. Having heard the evidence and submissions it was noted that there was insufficient time for the tribunal to consider and reach a decision. It was ordered that the tribunal would make a reserved decision in chambers.

12. At the conclusion of the hearing the claimant made application for an Anonymisation order to avoid sensitive medical information being disclosed by reason of the on-line publication of the reserved judgment with reasons. The application was unopposed. The application was granted as the tribunal was satisfied that it was in the interest of justice to avoid the claimant's sensitive medical information being disclosed online. It was also agreed and ordered that the respondent's witnesses be named by reference to their initials only.

Submissions

13. The claimant relied upon written submissions which the tribunal has considered with care but does not repeat here. In addition, the claimant made a number of further submissions which the tribunal has considered with care but does not rehearse in full here. In essence, it was additionally asserted that:-

13.1. There was documentary evidence to support the claimant's allegations of bullying and harassment;

13.2. The respondent was fully aware of the claimant's medical condition and the effect it had on her;

13.3. The respondent ignored the OH recommendations and medical advice;

13.4. The bullying and harassment related directly to her absence from work;

13.5. The respondent could have placed the claimant on special unpaid leave while the claimant sought an alternate role in Andover

14. Counsel for the respondent relied upon written submissions which the tribunal has considered with care but does not repeat here. In addition, counsel for the respondent made a number of supplemental oral submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was additionally asserted that:-

14.1. as shown in the written submissions there was very limited time in which the claimant was actually at work in the last two years prior to her dismissal;

14.2. the respondent provided the claimant with considerable support throughout this period. That is not challenged by the claimant;

14.3. support included the transfer of claimant to a different Department – Resourcing. The tribunal is invited to accept the respondent's evidence that although the claimant was allocated a task next to MW, as soon as it was realised it was stopped and the claimant went back to the resourcing room, away from MW. It was therefore resolved on the day;

14.4. the only allegation of discriminatory or unfavourable treatment against MW relates to the meeting on 21 April 2017. The claimant's evidence lacks credibility. She was extremely upset during that meeting; her recollection of events is likely to be less clear. She is attributing to MW what she thought herself – that was consistent with the effect of PTSD on the claimant. She felt she was a failure, not right for the job. MW did not express those views, did not say that the claimant was not right in the head. The respondent's witnesses' evidence was credible;

14.5. the claimant's evidence as to the allegation on 24 April 2017 has been inconsistent and lacks credibility. The claimant did not dispute with JW her record of the meeting on 15 May 2017, when the claimant told JW that she had just touched her elbow when going in to a meeting. The claimant's evidence that JW grabbed her arm is false;

14.6. the claimant argues that the respondent adopted a stereotypical view of mental health but this is clearly not the case. The respondent was specifically seeking advice from Occupational Health ("OH"). It was important to the respondent to get the medical advice. The managers were striving to make the decision not on stereotypical assumptions put on the basis of medical evidence;

14.7. The decision of JB to place the claimant on special paid leave for two weeks whilst expert OH advice was sought cannot amount to less favourable treatment. In any event, it is clear that JB would have treated any comparator in exactly the same way. JB knew the two trusted managers involved, knew that they had been upset and shocked by what had happened, and JB made the decision to remove the claimant and seek medical advice as part of the duty of care. She would have treated a non-disabled person in exactly the same way;

14.8. The respondent had extended the normal trigger point, 8 days, for the claimant. The respondent was entitled to come to a decision. It could not wait any longer. The medical evidence had indicated that the claimant was fit to return to work as from 15 March 2017, the OH report of 2 May stated that the claimant was fit to work. However, the claimant had been unable to return to work as of end of August. The fact that the respondent did not obtain a further OH report before reaching the decision to dismiss is irrelevant. If any new report said that the claimant was fit to return the respondent could not rely on that – it had been said before but the claimant did not return;

14.9. There is no real dispute that the claimant could not do the job. She described the environment at Cheadle Hulme as “toxic”. She wanted a move to Andover, she did not want to remain in Cheadle Hulme;

14.10. Since December 2016 the claimant had been unable to work with a satisfactory attendance level – when TT was her interim manager, when JW came back to work, when the temporary move to Resourcing was arranged. A mistake was made in relation to that temporary move but it was corrected immediately and the claimant was told it would never happen again;

14.11. The respondent had no assurance that the claimant’s attendance would improve if she was moved to Andover. There was no medical evidence to suggest that a transfer would make a difference;

14.12. JB worked in the same office, knew the individuals involved, knew what MW, JW and the claimant were saying. JB had sufficient information to make an informed decision. The respondent could not be expected to delay the decision pending the outcome of the grievance;

14.13. Dismissal was a proportionate means of achieving a legitimate aim and fell within the band of reasonable responses.

Evidence

15. The claimant gave evidence.

16. The respondent relied upon the evidence of:-

    16.1. JW, Operations Manager;

    16.2. MW, Senior Operations Manager;

    16.3. JB, Assistant Head of Civilian HR;

    16.4. AS, Head of Civilian Personnel for Defence Business Services;

    16.5. ST, Head of Civil Service Human Resources (CSHR) Casework.

17. The witnesses gave their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

18. Agreed bundles of documents were presented. Additional documents were presented during the course of the Hearing, either in accordance with the Orders outlined above or with consent. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Facts

19. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

20. The claimant commenced employment with the respondent on 1 October 2007. She lived at home with her parents at that time and worked in Andover. The claimant has suffered from depression and anxiety for many years and has been prescribed anti-depressant medication from her teenage years. She was diagnosed with rheumatoid arthritis in 2015.

21. In 2011 the claimant applied for a transfer to the department known as DBS (Defence Business Services), based in Cheadle Hulme, near Manchester. On her arrival, she felt overwhelmed by the new office environment, found living away from her family very hard and her anxiety and depression became significantly worse. She had a long term sickness absence. On her return she was assigned to Leave and Working Patterns Team, with TT as her new line manager.

22. The claimant was successful in this new role and was rewarded by end of year bonuses. She was selected for temporary promotion at Grade D in 2014 with JW as her line manager. The claimant was given a specific task and was required to manage a team. She found this difficult. She suffered further sickness absence by reason of anxiety and depression. However, she successfully completed the project ahead of schedule and was rewarded via an in-year bonus.

23. On completion of the project the claimant returned to the Leave and Working patterns team. She created the bespoke United Service Visiting Forces (USVF) Performance Appraisal Reporting (PAR) process. She had sole responsibility for this and received in year and end of year bonuses in reward of her performance.

24. In March 2016 the claimant was informally loaned to JW's team to assist on the administration of the USVF end of PARs.

25. In or around 2015 JW touched the claimant's arm. The claimant explained she had an aversion to physical contact, that it made her panic, and asked JW to try not to touch the claimant.

[On this the tribunal accepts the evidence of the claimant, noting that she was unsure of the date of this incident, which she describes in her witness statement as occurring in March 2014. However, the tribunal notes that JW accepts that she was aware, prior to the incident in April 2017, that the claimant had an aversion to physical contact.]

26. At the end of March 2016 JW grabbed the claimant's left forearm to prevent her from leaving a meeting. The claimant told JW that she did not like to be touched and that it upset her to a debilitating degree. The claimant was in tears, experiencing what she describes as a severe fear response. TT took the claimant out of the office to calm down. On her return the claimant told Mike White that she was not receptive to physical contact in the workplace and she would be grateful if the behaviour stopped.

[On this the tribunal accepts the evidence of the claimant, taking in to account some inconsistency in her evidence as to the dates of these incidents.]

27. The claimant continued to work in the Leave and working patterns team from April 2016. The claimant's anxiety worsened in this time, she felt isolated in her team, she dreaded attending the office.

28. In 2016 the claimant was absent from work (p920):

28.1. 4 January to 5 February (33 days) with anxiety, depression and stress;
28.2. 8 -9 March (2 days) with cough cold, asthma;
28.3. 8-13 September (6 days) with Viruses and infections;
28.4. 19-27 September (7 days) with Viruses and infections;

29. On 14 November 2016 the claimant took up, by way of promotion, a new role as team leader for the Performance and Recognition team. She was successful in her application for promotion because it was recognised that the claimant had done an excellent job.

[That is the evidence of JW.]

30. JW was the claimant's new line manager. JW was absent from work at this time and the claimant informally reported to TT. The claimant was not allocated a team at this point.

31. In her new position the claimant was responsible for five service lines – Learning and Development, Performance and Recognition, Occupational Health Assistance, Injury Benefit and Accessing Personal Information.

32. The claimant was provided with training on Performance and Recognition. She performed this task. She was then allocated management of the other 4 service lines. The claimant was not provided with training on these other service lines. The individuals who were already working on those service lines were scattered about the office, some working in a room which the claimant describes as toxic. She remained in one room with one other team member. The claimant was from the beginning unhappy with the new job. She felt that she had a very unhappy team, and that she was uninformed, unsupported and overwhelmed. At the same time the claimant's father fell ill and the claimant was extremely upset that she could not see or support him. The claimant's relationship with her boyfriend was also deteriorating. She dreaded going in to work.

33. The claimant was absent from work:

    33.1. 7 – 14 December (8 days) with coughs, cold, flu, asthma;
    33.2. 16 December (1day) with 'muscle and bone';
    33.3. 30 December 2018 to 6 January 2017 (8 days) with Viruses and infections;

34. On 10 January 2017 the claimant returned to work. JW returned to work on the same day and held a meeting with the claimant's team. The claimant was not invited to that meeting and felt that she had been deliberately excluded from that meeting.

35. The claimant was absent from work from 11 January 2017 to 24 March 2017 (73 days) with anxiety depression and stress.

36. By letter dated 30 January 2017 (p181) the claimant wrote to JW, advising JW that she, the claimant, felt that she had been deliberately excluded from the meeting on 10 January 2017 and continued:

> I felt this was inappropriate and you should have advised me that you wished to speak to the team and explained why it was so important that I not be there. This would not only have been a professional courtesy, but it would also have prevented my current absence. The anxiety and subsequent depression that followed this deliberate exclusion from a team meeting, ultimately led to my absence commencing 11 January 2017. This is not about 'my feelings being hurt', your action undermined my authority and set the expectation with the team that they can simply bypass me and go directly to you with their concerns. It is important that I understand the team's concerns so that I can take the required actions to address them. This is important for my continued development.

37. By letter dated 8 February 2017 (p236) JW replied to the claimant's letter, saying that she had not deliberately excluded the claimant from the meeting and that there was never any intention to undermine the claimant. JW addressed some of the other issues raised by the claimant in her letter concluding

> Having worked with you before I am confident that we can resolve these issues and move forward

38. On 27 January 2017 JW made a referral to OH Assist. Extracts read as follows:

> Workplace matters: recently promoted into supervisory role and even though had previous experience there are performance and man management issues. We are concerned whether she is suited to the role as there has been reluctance to undertake current manager duties

39. OH Assist (page 238) provided an interim report on 10 February 2017 reporting that:

> Miss N is under the care of her GP and been referred to a specialist and changes to her medication took place recently and she said she was starting to improve and had a good level of functionality and was hoping to resume work next week when her fit note expired. Today however she says she has had a setback having received a letter from her manager in the post this morning. I have assessed her mood and anxiety levels today and these are moderate to severe level. She is therefore not fit for work currently. I have arranged to review her in approx four weeks to see how she is progressing

40. On 11 March 2017 OH Assist sent to JW a report (page 374) extracts from which read as follows:

> As you are aware the claimant is currently on sick leave with stress which she perceives to be work related
> Outlook
> The rheumatoid arthritis is long-term and can cause recurring symptoms. Her current symptoms are expected to be resolved with the benefit from a review by her consultant when her medication will be reviewed. The mental health condition is long-term and she is having therapy and medication to manage the symptoms. It is expected that she will improve on completion of therapy. She informs me she has 20 more sessions to go..
>
> The reason for her current absence is due to stress which she perceives to be work related
>
> She is fit to return to her contracted role as from 15 March
>
> She started treatment for the mental health symptoms and significant improvement is expected over the next few months, therefore ill health retirement is not applicable.

41. On 17 March 2017 the claimant attended a Managing Unsatisfactory Attendance Interview with JW and CM, a Senior Case Worker. The claimant was supported by TT. During that meeting the claimant explained that:

    41.1. she had recently been diagnosed as having Complex Post Traumatic Stress Disorder (CPTSD), that this was a result of traumatic events from the past that caused her to experience emotional flashback symptoms and that these caused her on occasion to become tearful and feel startled if she felt under threat;

    41.2. She had advised her psychologist that her top priority was for her to be able to return to work;

    41.3. the psychologist had said that her periods of long-term absence could be down to the constant adrenaline rushes she was experiencing and that her body was telling her to rest as these could not be sustained;

    41.4. having received the diagnosis she could now see light at the end of the tunnel;

    41.5. she was receiving treatment from the Priory, who had prepared an action plan. The programme lasted 24 weeks and she had attended four sessions so far. The claimant explained that she would continue to have weekly appointments, that she would be able to attend work prior to her appointment, but would not be able to return to work after her appointments because she would have to relive some traumatic events during the session.

42. It was agreed that the claimant would commence a phased return to work commencing on 24 March 2017. As part of that phased return it was agreed that the claimant would be able to continue to attend her once weekly appointment with her psychologist to complete the course of therapy. It was acknowledged that the claimant may not be fit to attend work the day after the therapy. It was agreed that this be treated as sickness absence. In addition, on her return the claimant worked only on the USVF lines – she was not required to work any other of the service lines which formed part of her allocated duties.

43. By the time of the meeting on 17 March 2017 JW was aware that the claimant would be upset by physical contact.

    [That was the evidence of JW under cross-examination.]

44. On 27 March 2017 the claimant returned to work on a phased return. She was off sick on 29 March, 5 April, 7 April ,10 April and 19 April 2017.

45. The claimant worked on agreed reduced hours as part of her phased return. She believed that she was being allocated too many tasks to

complete during her reduced hours and asked JW for this to be addressed on a number of occasions.

46. On 20 April 2017 the claimant texted JW to advise her that the claimant would be in the office slightly later than normal on the following day because she was beginning a migraine and knew that this would last approximately 24 hours

47. At 7:54 on Friday 21 April 2017 the claimant sent a text to JW to advise that she had a migraine and that she would be in the office but it would be much later, to allow the migraine to pass. The claimant offered to come in on Saturday, 22 April 2017 to get the work done, if she was unable to finalise it. There follows an exchange of texts which read as follows (p1250):

JW:

HRMS is unavailable from 5 and down all weekend. I stated yesterday really need to know exactly where u r up to with USVF urgently PLS. Can u ring me please?

The claimant:

I did as much as I could in six hours yesterday. I just need another six hours to get it finished. This is exactly what I meant when I said DBS can't support a phased return to work. I will be in Saturday to finish updating the spreadsheet and then I can pass this work onto the team. I don't need HMRS to do that. Like I said, I am doing everything I can to get rid of this migraine

JW:

I am sorry A.. I am unable to allow you to work on Saturday on your own. This was not part of the phased return to work agreement. I will look at the USVF spreadsheet today. Hope you feel better soon.

The claimant

I can't tell you exactly where I'm up to until the spreadsheet has been corrected. Had the desk instruction been followed in my absence, I would not need to do what I'm currently doing. Just saying, I'm fixing a lot of mistakes and as the only person familiar with USVF it makes sense that I make the corrections before distributing to the team. If you try and work with the spreadsheet in its current state more mistakes will be made. I am aware that working Saturday was not part of the phased return, but I am willing and able, and I have worked alone as an E1, so don't believe lone working applies here. If it gets the work done and I'm happy to do it, I don't understand why working Saturday is a problem? I'm not claiming overtime

JW:

A.. unable to discuss this matter further by text. I will discuss on your return.

The claimant:

> Very well. Seeing as how I am now going to spend my entire weekend worrying, I see no option but to come in today regardless of whether I am well or not. I am on my way, I will be wearing sunglasses to keep the lights low to help with the pain
>
> **JW:**
>
> I'd rather you didn't if you're not well A..

48. The claimant did attend work later that day on 21 April 2017. JW called the claimant into a meeting. JW sent an email to MW (p426) in the following terms:

> I am going to speak to Ana now and advise the inappropriate tone of her texts etc so may need you on standby please

49. JW prepared a note of the meeting on 21 April 2017 (p427) indicating that the purpose of the meeting was to catch up with the claimant regarding team and work allocations. JW did not at the outset of the meeting inform the claimant that she would be taking notes. However, during the course of the meeting the claimant noted that JW was taking notes and raised no objection. The claimant was not provided with a copy of the notes, was not invited to agree the notes. MW also subsequently prepared a note of the meeting. Again it was an inaccurate note. He did not inform the claimant that he would be preparing a note, did not provide her with a copy at the time, did not give her the opportunity to agree the note. The tribunal is satisfied and finds that both JW and MW created notes of this kind as a matter of record. This was an informal meeting between the claimant and line manager. There was no requirement, no expectation, either that any member of staff would be given advance notice of such meetings, or that in such informal meetings the member of staff in attendance should be given the opportunity to agree the note or be provided with a copy at the time, or be given the opportunity for representation.

50. During the course of that meeting on 21 April 2017 JW asked for information about USVF work. The claimant explained that in order to provide that information she needed to complete approximately six hours more work. The claimant complained about being asked to attend meetings because it took her away from that work. The claimant was very upset and was in tears. JW asked MW to attend the meeting while she ran over the service lines and updated the claimant on the current state of play on the team. When MW attended the meeting there was a discussion about the importance of current deadlines. MW said:

> JW and the team have been working towards them in your absence ….and we really cannot spend time discussing why you do not want to attend meetings or sit with your team… We really have to concentrate on working towards achieving the PAR deadlines and supporting the team. I can't have the team distracted by people who don't want be here..
>
> *[These are the words recorded by JW in her note at page 427]*

MW continued to criticise the claimant and shouted over her when she tried to respond. MW said that:

- the claimant was disrupting the office and preventing people completing their work;
- the position the claimant was in was not meant for her, she was not wanted, and that she was a failure;
- the claimant refused to engage with her team, and had refused a reasonable request issued by her line manager;
- repeatedly stated that the claimant was unwanted and a failure and that the respondent had received nothing back from their investment in the claimant;
- the claimant's partner, Tom, had been verbally aggressive to JW when he phoned.

The claimant tried to defend and clarify what had been said but she was again shouted over by MW, who then lent back in his chair and stated that the claimant was "not right in the head". MW also commented on a recent request the claimant had made for special paid leave due to her partner being rushed to hospital on 11 April 2017, saying "it's one story then the next with you". The claimant asked whether DBS could support a phased return and MW confirmed that they could not. The claimant stated that she felt bullied. By the end of the meeting the claimant was sobbing uncontrollably, she felt trapped in a haze, disorientated and discarded. MW told the claimant to go home and JW escorted the claimant to her car.

51. On this the tribunal, on balance, accepts the evidence of the claimant. The tribunal, in reaching this finding, bears in mind in particular that:

51.1. shortly after the meeting, the claimant wrote to the WCA team (435) detailing what had happened at the meeting on 21 April 2017, asking for help;

51.2. in the email the claimant admits that she was so traumatised by the verbal abuse that she could not remember what was said. However, the claimant is clear in the email about what she did recollect, including that MW repeatedly stated that she was unwanted and a failure, that they had received nothing back from their investment in her, and that MW had lent back in his chair stating that the claimant was "not right in the head";

51.3. the claimant was very upset during the meeting and was suffering from PTSD at the time;

51.4. the managers JW and MW were under considerable pressure to achieve a fast approaching important deadline and this affected their conduct at this meeting;

51.5. it is the respondent's own evidence that they did spend some of the meeting discussing work and criticising the claimant's

performance. That is inconsistent with the managers' assertion that they were primarily concerned for the claimant's welfare;

51.6. It is clear that, in spite of JW knowing that the claimant was at home suffering from a migraine, JW sent her a message asking for urgent information about work. That is inconsistent with JW's assertion that she was primarily concerned for the claimant's welfare;

51.7. calling the claimant to a meeting to discuss conduct performance issues relating to what JW clearly regarded as inappropriate texts (from her email to MW), and to obtain information about work, is inconsistent with the JW's assertion that she was concerned for the claimant's welfare and did not think that the claimant should attend work;

51.8. it is hardly credible that if JW and MW had genuine concerns about the claimant's ill health that they should call her into a meeting to discuss work, and raise criticisms of her performance.

The tribunal finds that the claimant was a credible witness and, on balance, her evidence is to be preferred to that of JW and MW. The tribunal accepts and finds that the undated email to the WCA team (p435) is, for the large part, an accurate record by the claimant of what was said at the meeting on 21 April 2017.

52. Following this meeting MW informed his line manager JB about the meeting with the claimant saying that both he and JW were concerned about the claimant's state of mind, that she had referred to suicide and that they did not feel equipped to deal with this.

53. On Monday 24 April 2017 the claimant attended work. JW approach the claimant and asked her to attend a meeting with herself and MW. This was an unscheduled meeting. JW did not explain the purpose of the meeting. The claimant said she would attend provided she could be accompanied by a supporting third-party. JW confirmed that this was acceptable but that the meeting was immediate and the claimant would need to seek the support directly. The claimant attempted to seek this support. However, JW returned to the claimant's desk and said that the meeting was starting and she was needed in the room straightaway. The claimant was crying and told JW that due to the trauma she had experienced on 21 April she would not be able to enter the same room without prior notice. The claimant commented that she did not feel safe. JW grabbed the claimant by her left fore arm. The claimant flinched away from the unwanted physical contact. She was upset and crying in the open plan office. She did not swear at JW. JW left the claimant's desk.

54. On this the tribunal, on balance, accepts the evidence of the claimant, noting that there is some inconsistency in the sequence/timing of the events between the claimant's evidence to the tribunal, her grievance, statements given during the investigation of the grievance and the

reporting of the matter to OH. It is noted that a work colleague, Seb, confirmed in a statement on 26 April 2017 (p1257) that the claimant had said that she did not want to attend a meeting without a third party present. He makes no reference to any shouting or swearing by the claimant. In reaching this finding the tribunal notes that the claimant, a litigant in person, did not dispute in cross-examination with JW her record of the meeting on 15 May 2017, when it was recorded in the notes of the meeting that the claimant told JW that her complaint was that JW had just touched her elbow when going in to a meeting. However, the claimant was clear in her evidence before the tribunal that she did not agree those notes, and consistently stated that JW had grabbed her forearm.

55. JW sought the advice of JB in relation to the claimant's comment that she felt unsafe in the workplace. JB decided that it was inappropriate for the claimant to remain in the workplace. JB therefore approached the claimant, and, in an open plan office in front of work colleagues, told the claimant "you must leave". JB did not give an explanation for her actions. JB accompanied the claimant to her car. On the way out JB explained to the claimant that a refusal to attend a meeting with her line manager could be considered a failure to follow a reasonable request. JB did not, before the claimant left the premises, assure the claimant that no disciplinary action would be taken in relation to the claimant's refusal to attend a meeting with her line manager. The claimant was emotionally upset by the actions of JW and JB on 24 April 2017.

[On this the tribunal prefers the evidence of the claimant to JB. The evidence of the claimant is in part supported by the letter dated 26 April 2017 from the claimant's psychotherapist (p473)]

56. During this exchange JB did not ask the claimant why she felt unsafe in the workplace, did not seek any explanation from the claimant as to why she did not wish to attend a meeting with JW.

57. By email dated 24th April at 7:25 PM (p440) the claimant sought clarification as to what was happening and whether she was expected in the office. By email dated 25 April 2017 (p442) JB informed the claimant that she did not wish the claimant to return to the office for the time being stating

> You are clearly unwell and the statements you made to [*JW]* are both worrying and unacceptable. *[JW*] spoke to the caseworker yesterday to seek advice and I believe a further referral to OH will be made. [*JW*] will be in touch shortly to explain next steps

58. By email dated 25 April 2017 JW wrote to the claimant as follows:

> Following the incidents on Monday where you refused to meet with me and [*MW]* and where you stated that you felt unsafe at work I want you to refrain from coming to work for the next two weeks while I seek occupational advice. To facilitate this, on an exceptional basis, I will arrange for you to have 2 weeks special paid leave – disability related…..

59. By email dated 25 April 2017 (p454) the claimant replied to JW stating:

> In addition to the advice from 0H assist, my therapist has offered to provide a comprehensive letter explaining my illness and treatment in much more depth than I am able…. I hope this information will prove helpful
> I assume I will be given the opportunity to provide clarification re the events of Monday 24/04/2016 at a later date, and I understand that you may not be in a position to enter into a dialogue about the way forward at this time. However, if I may, can I just clarify that I did not refuse to attend the meeting. I simply asked that I be allowed to seek an independent party to accompany me, which I felt was necessary following the events of Friday 21/04/2016. You confirmed that this was acceptable, however before I was allowed to complete this action I was escorted off site.

60. By letter dated 26 April 2017 (p473) the claimant's Psychotherapist wrote to the respondent in the following terms:

> [The claimant] is currently experiencing severe depression and anxiety symptoms. I have met with her today for her treatment session and she was visibly distraught. Following further probing she reported experiencing some interpersonal conflict at work. Unfortunately the onset of the depression and anxiety symptoms seems to coincide with an increase of work related interpersonal conflicts.
> ..
> I am requesting that [the claimant] be treated with more compassion unfortunately the ongoing stress and distress at work is worsening her symptoms and impacting on her treatment. It seems all the work that she is doing in her treatment is being undoing with the ongoing interpersonal conflicts at work.

61. On 2 May 2017 OH assist provided JW with a report (p497) extracts from which read as follows:

> **Current Health situation**
>
> As you are aware [the claimant] is absent from work on disability leave however [the claimant] stated that she didn't request this
> [The claimant] remains under the care of her GP who reviews her as required and the psychiatrist who is undertaking therapy on a weekly basis
> [the claimant] stated that she is currently fit and well, she is able to undertake all her activities of daily living and her mood is good.
> [The claimant] stated that she is undergoing therapy at this present time due to past personal issues, however she did state that there are work-related issues which are due to the breakdown of the interpersonal working relationship with her line manager.
> Following the information provided in my opinion there are no other underlying medical conditions relating to this
>
> **Capability for work**
>
> In my opinion [the claimant] is currently fit for work on her normal hours and duties with the recommendation in place below

I would recommend in this case, so she can continue her therapy

1. She has the ability to attend therapy session every Tuesday and she may also require the following day off work due to trauma experienced at therapy
I recommend that another line manager meet with [the claimant] using the framework below, to highlight any specific issues that she may face at work, and to identify any required control measures:

Demands..
Control..
Support…
Relationships..
Role…
Change

Outlook

In my opinion the outlook is unknown due to the nature of PTSD and individual variables. Future absence from work may be likely not predictable. However, with ongoing support, therapy, healthy lifestyle approaches and sympathetic management at work I am optimistic that this to be minimal

Response to specific questions

…….
Question: concern over mental health and state of mind. Recently, [the claimant] declared she felt unsafe in the workplace. What adjustments we can put in place?
Answer: [The claimant] stated that the reason she felt unsafe in the workplace was due to being assaulted by her line manager therefore I would recommend the below

I recommend that another line manager meet with [the claimant] using the framework below, to highlight any specific issues that she may face at work, and to identify any required control measures:

Demands..
Control..
Support…
Relationships..
Role…
Change

I have discussed the content of this report with [the claimant] and have verbal consent to release this information to you.

62. When an employee makes an allegation of assault against a line manager it is normal practice for the employee and manager to be separated in the workplace pending an investigation.

[On this the tribunal accepts the evidence of ST]

63. Following receipt of that OH report JB, MW and JW had a meeting with a HR representative, CM, to consider the OH recommendation that a

meeting be held between the claimant and a different line manager to discuss the way forward following the claimant's return to work. It was noted that the recommendation was not mandatory or compulsory and that this was a sensitive situation which the people involved were trying to keep within the management chain. There was a discussion of the allegation of assault but MW took the view that knowing JW, and the fact that the allegation was made through OH after the event, he never really believed that the alleged assault took place and that therefore it was acceptable for JW to conduct the return to work meeting with the claimant. They decided, having received advice from the HR representative CM, not to follow the OH recommendation on the basis that JW was still the claimant's line manager, it was appropriate to keep this within the management chain, it was not appropriate to appoint a different line manager.

64. On this the tribunal accepts the evidence of MW. The respondent's evidence on this has been inconsistent and unsatisfactory. It is clear that the managers understood this as a recommendation that a different line manager should be appointed to deal with any specific issues that the claimant may face at work due to an assault allegation. That is JW's evidence at paragraph 18 of her witness statement. However, it is clear that JW did conduct the return to work meeting on 15 May 2017 and that RD was there merely to support the claimant, not to conduct the meeting on the part of management. During the meeting itself JW made it crystal clear that she was and would remain the claimant's line manager. That reflected the truth of what had happened at the meeting between MW JW and JB to consider the OH recommendation; they decided to ignore the recommendation.

65. On 15 May 2017 the claimant attended a meeting with JW to consider the OH report. RD attended as the claimant's companion. During that meeting:

65.1. the claimant objected to the meeting going ahead as she had had a previous return to work meeting with MW;

65.2. JW led the meeting, discussing the contents of the OH report, stating that although the recommendations were another line manager should go through the report and that RD was in attendance to facilitate this JW wanted to make it clear that it would not be possible for any future change in her current line management chain and that JW would remain the claimant's line manager;

65.3. the claimant's confirmed that she was fit to return to work and did not require any further phased return;

65.4. the claimant made her complaints about the conduct of MW at the meeting on 21 April. JW denied that anything had been said as asserted by the claimant and the claimant told JW that she did not trust her;

65.5. there was a discussion about the Demands, Control, Support Relationships, Role and Change items as recommended in the OH report;

65.6. the claimant did not say that JW had not assaulted her, did not say that the only complaint was that JW had touched her elbow as they went into the meeting room and she felt physically uncomfortable;

65.7. RD stated that it was obvious that there was currently friction between the claimant and JW

[The tribunal accepts for the large part the evidence of the claimant. The tribunal does not accept the respondent's evidence that the document at page 548 is an accurate record of the meeting. Those notes were not given to the claimant for agreement.]

66. By email dated 1 June 2017 at 17.09 JW sent to the claimant at her work email address and home email address a letter inviting the claimant to a loss of capability meeting on 8 June 2017. The email states:

> Apologies I missed you before you left but please see letter and guidance regarding my proposed meeting to discuss your work performance. I have also sent this to your work email also in order that you can access the Policy, Rules and Guidance if you do not get this at home. I know this is your preferred method of communication. If you want to discuss this further please just let me know when I am in in the morning

67. It was the normal practice for correspondence by email to be sent to an employee's work email address. An agreement existed between JW and the claimant that in the event the claimant was on sick leave, should JW need to contact her, JW could contact the claimant at her home email address. Express agreement had not been provided for JW to email the claimant at her personal email address if the claimant was on annual leave or if she was in the office. The claimant had not, prior to this date, expressly told JW not to contact her by her home email address.

68. Prior to the loss of capability meeting the claimant had a meeting with TT and one of TT's direct reports. At that meeting the claimant advised TT that being managed by JW was a nightmare, that the claimant felt under attack all the time, and that JW's actions had made it quite clear to the claimant that JW wanted to get rid of her. The claimant asked TT whether the respondent would consider letting the claimant voluntarily downgrade to E1 and return to the Leave and Working patterns team. Both confirmed that they would love to have the claimant back on the team, but there would be opposition from MW. TT advised that they would consider the possibility of a voluntary downgrade after the Loss of Capability meeting.

69. On 7 June 2017 the claimant's psychotherapist wrote to the respondent (p874), as follows:

> I am writing following my letter dated 26 April 2017. As you may be aware from my previous letter [the claimant] is currently experiencing severe depression and anxiety symptoms. Following my earlier letter the claimant had a phase of stability in her work environment and this facilitated some progress in her treatment. Unfortunately, it seems the work environment has become hostile once again. I have met with her today for her treatment session and she was visibly distraught. She described the hostility as being due to the actions of her superiors. She narrated how she was called into an unplanned meeting in which she was told she is not fit for the job and that she is no longer wanted. Unfortunately due to the latest events within her workplace she has taken a few steps back from her recovery and it now seems recovery may not be possible as long as her work environment remains hostile
>
> Once again I am requesting that the claimant to be treated with more empathy and consideration. Unfortunately it seems all the work that she is doing in her treatment is being undone with the ongoing interpersonal conflicts at work

70. A managing poor performance meeting was held on 8 June 2017 (p806), led by JW, supported by CM, HR representative. During that meeting:

    70.1. the claimant's medical condition and the treatment she was receiving was discussed;

    70.2. JW raised with the claimant concerns about the claimant's performance;

    70.3. there was a discussion about outstanding stress assessments. CM advice on the correct way to complete the stress assessment and there was agreement that the claimant would complete it again over the weekend and provide a copy to JW on 12 June 2017;

    70.4. the claimant stated that she did not understand why the OH recommendation that she be assigned a different line manager could not be acted upon. CM explained that this was a recommendation, not a right or entitlement;

    70.5. the claimant described how her disability was being used against her, referring to a meeting in which she alleged management had said she was 'not right in the head', 'worthless', 'unreliable' and 'not wanted'. JW denied that any of those comments had been made;

    70.6. the claimant asked that any future invitations could be sent to her work email address as she was unable to view attachments and open links from her home email address, which caused her anxiety. JW confirmed that any future invites would be issued to her work email address unless she was absent from work

71. Following the meeting JW attempted to seek the claimant's agreement to a formal improvement plan. Correspondence took place between the claimant and JW. No further formal action was taken under the loss of

capability procedure. The claimant provided a copy of the completed stress assessment to JW as agreed.

72. The claimant was off sick for the rest of the day on 8 June 2017

73. The claimant was off sick between 9 June 2017 and 18 July 2017; a fit note indicated the reason for absence was anxiety depression stress.

74. On 6 July 2017 the claimant received an invitation to a formal Managing Unsatisfactory attendance (MUA) meeting.

75. On 14 July 2017 the claimant attended the MUA meeting led by JW. Notes were prepared (p830). During that meeting:

    75.1. the claimant expressed her concerns about returning to work acknowledging that she had an illness which made it difficult;

    75.2. JW promised to provide the claimant with support;

    75.3. it was acknowledged that there would be regular meetings between JW and the claimant on her return;

    75.4. JW expressed her view that as the claimant had done an excellent job as team leader for over a year when they had previously worked together JW was sure that this could be resolved;

    75.5. the claimant expressed her appreciation for the support she had received particularly for Wednesdays after her therapy session indicated that she did not expect that continue and she anticipated that she would be returning to work for a full five-day week working on a full-time basis;

    75.6. JW explained that if the claimant was off work the next week JW would consider whether the business could continue to support her absence.

76. In the period 17 – 27 July 2017 the claimant took a further 6 days absence due to sickness.

77. In August 2017 JW prepared an impact assessment of the current absence of the claimant in her position as Civilian Personnel Support Team leader (p843). In that document JW recorded the detrimental impact the absence was having on the running of the team. JW made the decision that the business could no longer tolerate the claimant's absence.

78. By letter dated 3 August 2017 (p856) JW wrote to the claimant summarising the meeting on 14 July 2017 and informing the claimant:

    Unfortunately, since our meeting you have been unable to return to work as discussed and since 17 July 2017 to 27 July you have taken a further six days

absence due to sickness. As you have been unable to make a sustained return to work, I can confirm that the Department can no longer tolerate your level of sick absence. Therefore I am referring your case to the decision manager, MW,… who will arrange a formal meeting with you to discuss this further and decide whether dismissal or downgrading is appropriate.

79. On 7 August 2017 the claimant submitted a complaint of bullying and harassment (p867) against JW and MW. Her complaints included the following:

79.1. since her promotion in November 2016 she had experienced bullying and discrimination and had had a significant amount of sick absence as a result;

79.2. the behaviour of her line manager (JW) and CSO (MW) continues to negatively affect her health and well-being, as well as her performance in her role;

79.3. the grievance was submitted to Mrs Barnes because the claimant's B2 (JB) played a part in the events;

79.4. as JB was the direct report to AS she felt that in order to obtain a fair and impartial investigation and assessment of her grievance the deciding officer needed to be far enough removed from the situation;

79.5. she was fit for work and prepared to undertake meaningful work suitable for her grade during the investigation of her grievance but believed it was unreasonable to expect her to attend work in her usual capacity while grievance was being investigated;

79.6. JW had deliberately excluded the claimant from a meeting on 10 January 2017;

79.7. the claimant was being asked to complete too much work during her phased return;

79.8. at a meeting on the 21 April 2017 MW had made hurtful and unconstructive comments for example 'you are not wanted' 'you are a failure' 'you are not right in the head';

79.9. on 24 April 2017 the claimant was invited to a meeting but required a supporting party to accompany her. The claimant advised that due to the trauma she had experienced on the 21st April she would not be able to enter the room without prior notice. Her line manager reacted by grabbing her left forearm, which caused the claimant to flinch away from the unwanted contact. The claimant stated that she did not feel safe in the workplace;

79.10. JB removed the claimant from the workplace and on 25 April 2017 the claimant was placed on two weeks enforced disability leave even though the claimant was fit;

79.11. on 2 June 2017 the claimant received an email at her home address inviting her to a managing loss of capability or qualification meeting;

79.12. her therapist had written to her line manager twice requesting that she be treated with more compassion. In these letters her therapist describes a negative impact the workplace tension was having on her recovery;

80. In her grievance the claimant requested the outcome that she be assigned to a different line manager and CSO at the appropriate grade and sought disciplinary action against her line manager and CSO.

81. By letter dated 9 August 2017 (p878) AS acknowledge the complaint and indicated that as this was a complaint of bullying and discrimination it should be investigated under the MOD bullying and harassment complaints procedure. The letter continued:

> In your letter you have said that you are fit and willing to attend work in an alternative post while this issue is resolved. I am aware that a temporary post has been found that would be suitable for you in Resourcing working for HB. I would be grateful if you would contact H tomorrow with a view to returning to work on Thursday and to make the necessary arrangements

82. By email dated 10 August 2017 the claimant replied to AS stating:

> My motivation for submitting my grievance is to obtain permission to seek civil service jobs in my home area of Andover. The department has prevented me from relocating via implementation of the MUA policy, which I believe has been implemented incorrectly
>
> I have no desire to drag the department through the grievance or complaints procedure if there is a mechanism for granting me priority movers status on compassionate grounds. I believe this would serve the DBS in that it would allow PRL to recruit into my current position as they see fit (it has been made quite clear to me that I'm not wanted in this position) and it would serve me in that it would allow me to move home and obtain some stability with my mental health while still contributing to the MoD's efforts.
>
> My question is, in lieu of completing the grievance or complaints procedures, is it possible for me to obtain priority movers status on compassionate grounds?

83. By letter dated 11 August 2017 (p918) JB invited the claimant to a final decision meeting under the MUA procedure on 22 August 2017, when the Department would consider whether the claimant should be dismissed or downgraded. The claimant was advised that due to the other ongoing issues a decision had been taken to remove MW from the process and to substitute JB as the decision manager. The claimant was advised of her right to be accompanied by a work colleague trade union representative or official employed by a trade union

.

84. By email dated 11 August 2017 (p933) the claimant advised AS that she did wish her grievance to be processed under the MOD bullying and harassment complaints procedure and asked whether the MUA meeting scheduled for 22 August 2017 would be suspended pending the completion of the investigation of her complaints .

85. By email dated 13 August 2017 (p947) JW provided JB and MW with what was described as "sensitive information private and confidential" relating to the management of the claimant's unsatisfactory performance. The email includes the following:

> Although you only asked for specifics around the MUA process, looking at the evidence held it is clear that previous events are relevant e.g. first OH report, events of 21st April and discussions around managing incapability. Whilst not MUA process, the information/behaviours leading to further absences may be relevant in order for you to reach your decision…

86. By email dated 15 August 2017 (p945) AS informed the claimant that the grounds for a compassionate move are very limited and each case is considered on its merits. However, as the MUA process was ongoing this needed to reach its conclusion before AS could consider whether a compassionate move could be granted. The claimant was asked to confirm if she was attending the MUA final decision meeting scheduled for 22 August 2017.

87. On 15 August 2017 the claimant returned to work in the new position in Resourcing on a temporary basis, in a different location within the Cheadle Hulme office, pending the outcome of her bullying and harassment complaint.

88. On 15 August 2017 the claimant's first task within Resourcing placed her back in her old department, PRL, sitting directly next to MW. The claimant was very upset by this. The respondent was aware of the upset, and the reason for it.

89. By email dated 16 August 2017 (p949) the claimant wrote to AS advising him:

> As you know, yesterday my first task within Resourcing placed me back in PRL directly next to MW. As I am not sure what information has been passed to HB or what I am allowed to say, I did not feel able to question this decision or request an alternative task. This left me feeling extremely vulnerable, trapped and significantly distressed. Mike was also visibly aggravated by my presence in PRL.
>
> In addition, my dad was rushed to Basingstoke hospital with severe septicaemia on Friday 11th August 17. His prognosis is not good and the doctors are considering amputating his lower leg… This has been devastating to me, especially as I live so far away and cannot see him support my mum or sister at this time… I am not sure who I would discuss this with as my current line management is not clear to me. I am aware that I am within HB's area, but I'm not sure whether HB is taking full line manager responsibility of me…

> Therefore today 16th August 17 I'm reporting as unfit for work due to stress anxiety and depression

90. AS did not reply to that email. The claimant was not told that the incident on 15 August 2017 had been investigated and that it had been resolved, that she would not be requested to work within PRL or next to MW again.

91. The tribunal does not accept the respondent's evidence that this issue was resolved. The evidence of the respondent shows that they were aware that placing the claimant at work in the presence of MW was not appropriate. The evidence as to how this problem was addressed is contradictory and unsatisfactory bearing in mind that:

    91.1. MW does not address this issue in his witness statement or evidence;

    91.2. JB refers to this temporary move but does not in her witness statement address the reason why the transfer only lasted one day. Neither does she refer to the problem being resolved in her witness statement. In evidence before tribunal JB said that:

    - The claimant was placed in Resourcing, a separate office, and it was not anticipated that she would need to work with her old team;
    - However, her new temporary manager was not informed of the claimant's grievance and instructed the claimant to work in PRL and was required to sit with MW;
    - it was resolved on the day as MW told the manager that he had to re-arrange the claimant's responsibilities.
    - The claimant was absent but she did not agree that the claimant was vulnerable because of the requirement to work with MW. She says she did not know how the claimant felt. That is inconsistent with the evidence of AS

    91.3. AS did not address this issue in his witness statement, in which he merely comments that the supportive measures, for example a temporary move, had not led to improved attendance. He states in evidence that "we quickly recovered the situation" and says that he spoke to JB and she resolved it on the day. No witness says that the claimant was told that it was resolved.

92. The respondent did not obtain any medical or OH advice as to the reason for the claimant's failure to return to the Resourcing department. The respondent did not ask the claimant for an explanation as to why she had not returned to the Resourcing department during the course of the MUA procedure final decision meeting and/or appeal.

93. By email dated 16 August 2017 (p951) MW responded to an email from HB, line manager in Resourcing, which indicated that the claimant had not

attended work that day. Extracts from MW's email, which was copied to JB, read as follows:

> As I was typing a reply to you to say we'd would contact [the claimant] a bit later, AS approached me to say he's received a lengthy email from her this morning, including information that her father is not very well and as a result she doesn't feel fit for work today – so we'll the record as sick leave for today
>
> JB – AS. says the email contains a lot more by way of "emotional response" and he'll discuss it with you later

94. On 22 August 2017 the claimant attended the unsatisfactory attendance final decision meeting. She was unaccompanied. JB attended as a deciding officer, accompanied by CM. Notes were taken and agreed (p983 – 986). During that meeting:

94.1. JB advised that it was her role to determine the business view of the attendance/absence pattern and determine whether the business can continue to tolerate the level of sickness;

94.2. it was noted that since December 2016 the claimant had been unable to establish a full return to work and sustain a period of acceptable attendance;

94.3. the claimant asserted that she had been absent since 10 January as a result of perceived discrimination, bullying and harassment. She had returned in March on a phased return which was not workable given the demands of the job, and that at the meeting on 21 April MW had told her that the Department could not support a phased return;

94.4. there was a discussion about the failure to have a workplace assessment for the claimant because appointments had been made but the claimant had been absent and unable to attend;

94.5. the claimant noted that the notes produced regarding the meeting that took place on 21 April 2017 had been included in the MUA document pack and this was upsetting to the claimant because this was the account of the management team but her account of the meeting was different. She referred to a note that she had submitted to the WCA team which gave her account of the meeting and stated that she wished this to be included in the case for consideration. The claimant also referred to 2 letters that had been provided from her therapist regarding her disability and inability to maintain attendance because of the upset it had caused. JB agreed that this would be considered;

94.6. the claimant acknowledged and accepted her unsatisfactory attendance from January to date but asserted that this had all been related to PTSD and one underlying stress was caused by the perception of the workplace and the environment contributed to this;

94.7. when asked about how the claimant felt about a return to work the claimant indicated that she did not want to cause trouble, she had submitted a letter of complaint to AS, her goal was to move back home down south and she was currently applying for external jobs; she explained that her father was in hospital and her goal was to get back home on a level transfer or downgrading to E1 grade;

94.8. the claimant said she would like to echo the words of the OH reports in that:

94.8.1. if she has the right treatment, her attendance will improve;

94.8.2. her health and ability to maintain attendance consistency will improve if she returns back home;

94.8.3. she feels isolated in her current location because of no support;

94.9. JB did not discuss with the claimant the reason for her attendance in Resourcing for only one day, did not ask whether the claimant would be able to work in Resourcing again, did not ask the claimant to identify any other Department in which she could work;

94.10. the claimant was advised that a decision whether or not to downgrade or dismiss would be made within five working days

95. Prior to the meeting on 22 August 2017 JB had spent some time reviewing the claimant's sickness record. She noted that during the past two years the claimant had 149 working days recorded as sickness absence, representing 33.8% sickness. By comparison the standard trigger period of eight days was 3.2% and in the claimant's case she had been given an extended trigger period of 16 days which amounted to 6.4%. The claimant's last full week of attendance was 28 November 2016 and this was the only full week the claimant had worked in her Band D role from November 2016 to August 2017. Since 23 September 2015 the claimant also had a further 13 days absence on special paid leave and it had been noted that there had been a higher-than-expected number of days of partial attendance which is not recorded. There had also been a number of emergency leave requests made on the same day the domestic crises. The claimant had attended work on the following number of days:

December 2016 – five
January 2017 – two
February 2017- nil
March 2017 – one;
April 2017 – three;
May 2017 – five;
June 2017 – 4
July 2017 – two

96. In reaching her decision to dismiss JB considered the following:

96.1. The claimant's absence in the last two years, as noted in the paragraph above, including the claimant's absence on disability leave between 25 April and 6 May 2017;

96.2. the claimant's assertion that her absence was triggered by what she perceived to be bullying and harassment. JB was aware that a separate case had been raised and that this would be subject to a full investigation. However, for the purpose of the decision-making JB was not persuaded by the claimant's allegation that the bullying and harassment triggered the absence and attendance pattern. In reaching this decision JB took into account her familiarity with the case and knowledge of events and the fact that the claimant's attendance pattern commenced on 7 December 2016 when the relevant line manager was absent from work. Also, the claimant's unsatisfactory attendance history during the course of the previous year, when she was engaged in a different position and grade;

96.3. the claimant's assertion that she felt isolated in her current location due to a lack of support. JB did not agree that the claimant had not been supported on the grounds that having reviewed the case file JB believed that JW and MW had provided significant support to the claimant and had acted on the advice provided by OH assist. JB held the opinion that JW and MW wanted to assist the claimant to achieve better attendance;

96.4. she was satisfied that the MUA process had been followed correctly and that all appropriate meetings had been held in accordance with policy. She noted that return to work discussions had been held, observing policy and demonstrating good line management practice and that these had not been welcomed by the claimant and had in fact been noted as 'too many meetings';

96.5. the impact of the absence had been clearly articulated in the impact statement produced by JW and the business could not continue to tolerate this level of disruption. JB noted that there were significant backlogs in work, and a lack of direction and support from an experienced team leader, morale and engagement was suffering across the team the team had reported directly to JB a feeling of disruption and lack of clarity, nervousness and anxiety. JB knew that the respondent had a duty to support the claimant, JB was also alive to the fact that the respondent had a duty to support and preserve the health and well-being of the wider team which was suffering as a result of the claimant's continued absences. Given the support that had been put in place for the claimant and the lack of any improvement she decided that the business could no longer sustain the claimant's absence;

96.6. she discounted downgrading on the basis that there was an unsatisfactory level of attendance during the time spent in the year preceding her appointment to the current grade;

96.7. JB decided that the decision regarding the claimant's continued employment could not be deferred until the claimant's complaints of bullying and harassment have been investigated because:

96.7.1. the business could not sustain a significant impact of the claimant's absence was having to both the work and the team;

96.7.2. the claimant's absence had commenced before JW had returned to work herself;

96.7.3. a temporary move to enable the claimant to return to work had been implemented when the claimant was temporarily allocated to a new position in another team on the same site but in a different office. This had enabled separation pending the outcome of the claimant's bullying and harassment complaint. However, the arrangement commenced on the 15 August 2017 but did not return to work on the grounds of sickness after that date. On that basis JB decided that a further move would not be of any benefit;

97. JB advised the claimant of her decision by letter dated 29 August 2017 (p987) which:

97.1. confirmed that the claimant was dismissed with effect on 29 August, with pay for 11 weeks' notice;
97.2. confirmed the claimant's right of appeal to AS

98. JB prepared a note headed "Deliberation" (p969), with advice from CM of HR which set out the reason for the dismissal. The deliberation document includes:

98.1. A reference to the number of short term emergency leave requests made on the same day for domestic crises, stating "I am not persuaded that all of these have been for true emergencies";

98.2. I am of the opinion that the number of events occurring in [the claimant's] life away from work that required either SPL, partial attendance or emergency leave suggests a chaotic and unstable home life which impacts on her ability to get better and attend work rather than her assertion that it is the working environment;

98.3. I note that a phased return to work was implemented and that clear expectations about the claimant's focus of work during the reduced phase was articulated. I note that the claimant took emergency leave during the period and two isolated days of sickness. I am of the opinion that the illness prevented her from completing and committing to the plan rather than the alleged lack of management support in implementation

99. There is no reference in that Deliberation document to:

99.1. the claimant's expressed wish to move to Andover;
99.2. the temporary move to the Resourcing department;
99.3. the OH reports and the claimant's therapist's letters;

100. By letter dated 30 August 2017 (p993) the claimant appealed the decision. In that letter the claimant:

100.1. requested that her grievance submitted on 7 August 2017 was considered as part of her appeal;

100.2. stated that the behaviour of JW and MW caused her absences, that the trauma caused by JW and MW's behaviour had directly affected her ability to obtain mental health stability, and this statement was supported in both 0H reports and her therapist's letters to the Department;

100.3. asserted that she had been treated unfairly since formally disclosing the nature of her disability;

100.4. the claimant was unable to maintain a consistent attendance level in her phased return to work because:
100.4.1. the Department could not support the phased return, the claimant felt immense pressure to complete her full-time hours to keep up with the demand of work;
100.4.2. JW consistently and without notice took her into meetings to dictate what she could say to her team, isolating the claimant and demonstrating that she did not want to work collaboratively with the claimant's
100.4.3. the meeting on 21 April and the subsequent actions taken on 24 April 2017 as previously recounted in the grievance;
100.4.4. the respondent failed to follow the 0H report recommendation for a workplace assessment;

100.5. the loss of capability policy had been incorrectly implemented;

100.6. the Department had withdrawn support for her treatment of complex PTSD;

100.7. as confirmed by 0H reports, with the right treatment and sympathetic support from the respondent a full recovery was likely. The Department had not taken responsibility for the actions within their power, for example, reasonable adjustments, sympathetic and collaborative engagement and action 0H recommendations;

100.8. confirmed her request to return to Andover on level transfer or voluntary downgrade.

100.9. asserted that she had been prevented from seeking job opportunities due to the implementation of the MUA policy and asked that she be permitted to apply for vacancies via internal transfer as this would allow her to return home where she had the support necessary to recover, stating “it will allow me to remove myself from what I perceive to be a very toxic environment at Cheadle Hulme”, which again will facilitate an efficient recovery;

100.10. stated that she was happy to agree to a time sensitive arrangement for example 3 months to obtain a post via internal transfer after which dismissal would be actioned or similar.

101. AS, Head of Civilian Personnel for Defence Business Services, was appointed to act as appeal officer. AS was JB’s line manager and had worked with JB, MW and JW. He regarded JB, JW and MW as the most capable and sympathetic line managers he had ever worked with and had absolute trust in their integrity. AS is not medically qualified.

102. By letter dated 11 September 2017 AS invited the claimant to a hearing on 22 September 2017. The claimant was advised of her right to be accompanied at the meeting by a work colleague, trade union representative or official employed by a trade union.

103. The appeal hearing took place on 22 September 2017. The claimant was not accompanied. AS conducted the hearing with the assistance of CM, HR consultant. A note taker was present to take notes. The claimant did not agree the original draft of the notes provided, and provided her amendments. There are no agreed notes of this hearing. During the hearing:

103.1. AS said that the bullying and harassment complaints and the managing unsatisfactory attendance procedure would be dealt with separately, and that the hearing was to decide on the MUA;

103.2. the claimant said that there was a link between the bullying and harassment and the MUA and that her appeal letter had explained why she had been absent from work;

103.3. AS asked for an explanation and the claimant discussed her complaints submitted under the formal grievance;

103.4. AS did not refer to the claimant’s day in Resourcing, did not discuss her e-mail dated 16 August 2017;

103.5. AS did not discuss with the claimant where she was prepared to work within Cheadle Hulme, did not discuss the possible transfer of the claimant to a different department, either by transfer or demotion, within Cheadle Hulme;

103.6. AS did say to the claimant, referring to the claimant's complaint against MW, that he, AS, might also think that the claimant "was not right in the head"

[On this the tribunal, on balance, accepts the evidence of the claimant, noting that there has been some inconsistency in her evidence as to the timing and sequence of the statement, but no inconsistency as to the actual words used. The tribunal notes that neither CM nor the notetaker, who were both present at the appeal hearing, have been called to give evidence.]

104. Prior to reaching his decision AS:

104.1. he noted that the Department policy states that where an internal complaint has been lodged, formal action in response to unsatisfactory attendance can be postponed until such time as the internal complaint had been finalised. A S decided that it would not be appropriate to delay formal action pending the outcome of the claimant's bullying and harassment complaint because

104.1.1. of the significant detrimental impact that the claimant's absence had on her colleagues and the wider business;

104.1.2. the temporary move within Resourcing had not improved the claimant's attendance;

104.1.3. He did not believe that the line management actions had affected the claimant's attendance. He asked what he describes as testing questions of JB as to the circumstances surrounding the claimant's complaints. There is no documentary or other supporting evidence of such questions or the answers.

104.2. did not investigate whether there were any vacancies in Andover;

104.3. he did not obtain any up to date OH advice or any OH or other medical advice relating to the reason for the claimant's latest absence or the claimant's request to move to Andover.

105. In reaching his decision to confirm dismissal AS took into account the following:

105.1. The claimant's absence had not considerably improved over a long period;

105.2. Line management had arranged for reasonable adjustments and a phased return but the claimant had not been in attendance long enough to make these arrangements effective;

105.3. loss of capability procedures could not be pursued for the same reason;

105.4. he did not believe that line management actions had affected her attendance but her subsequent bullying and harassment claim will be correctly investigated by an independent;

105.5. based on his knowledge of line management he believed that:

105.5.1. the line management chain had behaved reasonably and sympathetically throughout;

105.5.2. in what he described as a challenging situation all 3 of them had done their best in the circumstances;

105.6. he did not believe that moving location would resolve the claimant's poor attendance record and there were no opportunities in his organisation for the claimant to work from Andover and it was not viable to retain the claimant in any capacity at Cheadle Hulme while she applied for job opportunities to work from this location;

105.7. he thought moving the claimant to Andover would be quite high risk to the claimant as well as to the respondent

106. AS confirmed the reason for his decision by email dated 26 September 2017 (p1044) to CM of HR. He reported only 105.1 – 105.4 in that email. He did not provide the further information at 105.5 – 105.7, which information was provided in evidence to the tribunal.

107. By letter dated 2 October 2017 (p1054) the claimant was advised of the outcome of her appeal, that it was unsuccessful.

108. The respondent has a Managing Unsatisfactory Attendance Policy. The aim of action under the policy is of improving and ensuring attendance of the workforce and ensuring the respondent could provide a service to its clients to the best of its ability.

109. The Policy appears at p1135. Extracts read as follows:

> 16. Throughout the managing unsatisfactory attendance procedure managers are required to consider the need for reasonable adjustments and occupational health advice
>
> 40. The decision manager is required to determine whether dismissal, or in exceptional circumstances, a move of post, downgrading or a further period of review is appropriate if an employee:
>
> - fails to successfully complete the stage II improvement period or the stage II sustained improvement period
> - is not expected to return to work from a period of continuous absence within a reasonable timeframe
> - is absent for a reason relating to disability and the Department has explored all options to make reasonable adjustments which would enable an employee to return to work
>
> 43. Before a stage 3 meeting managers are required to:

- ensure that occupational health advice has been received within the last three months, unless the employee withheld their consent to an occupational health advice referral

- provide the following information to the decision maker
  - information on any temporary workplace adaptations or reasonable adjustments which have been considered and made. If these have not been implemented manager is required to include an explanation of the reasons

44. Before a stage 3 meeting the decision manager is required to :

consider whether downgrading may be appropriate and work with the caseworker to determine whether there is a suitable post to move the employee into if appropriate

45. During a stage III meeting the decision manager is required to:

- when discussing possible solutions managers are required to explore whether there are any temporary workplace adaptations or reasonable adjustments which might enable the employee to achieve a satisfactory level of attendance or a return to work
- review any reasonable adjustments which are already in place for employees with a disability and check whether they continue to be effective or necessary or whether further adjustments are needed to support the employee

49. Appeals should be heard by an appeal manager who is both impartial and independent of the decision being appealed.

110. There was a considerable delay in the investigation of the claimant's complaint of bullying and harassment. The tribunal accepts the evidence of ST and finds that the reason for the delay in the investigation of the claimant's bullying and harassment complaint was due to a backlog of cases and very limited resources to deal with them.

The Law

111. Section 39 Equality Act 2010 provides:-

(2) An employer (A) must not discriminate against an employee of A's (B)-

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment

112. Previous case law is of assistance in defining the meaning of "detriment". In the case of **Ministry of Defence v. Jeremiah [1998] ICR 13 CA** (a sex discrimination case), the Court of Appeal took a wide view of the words "*any other detriment*" indicating that it meant simply "*putting under a disadvantage*". The House of Lords in **Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** (a race discrimination case) held that in order for there to be a detriment the Tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work. While an unjustified sense of grievance cannot amount to a detriment, it is unnecessary for the claimant to demonstrate some physical or economic consequence.

113. The EHRC Code of Practice on Employment provides:

> *9.8 Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse, or put them at a disadvantage. ... A detriment might also include a threat made to the complainant which they take seriously, and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However an unjustified sense of grievance alone would not be enough to establish detriment."*

114. This detriment test was subsequently confirmed by the House of Lords in **Derbyshire and ors v St Helens Metropolitan Borough Council and ors *2007 ICR*** 841. Lord Neuberger stressed that the test is not satisfied merely by the claimant showing that he or she has suffered mental distress: it would have to be objectively reasonable in all the circumstances.

115. Section 136 Equality Act 2010 provides:

> ***Burden of Proof***
>
> *(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.*

116. Section 13 Equality Act 2010 provides:

> "A person (A) discriminate against another (B) if, because of a protected characteristic A treats B less favourably than A treats or would treat others."

117. Section 23 Equality Act 2010 provides:-

> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case;

118. When considering the appropriate comparator we note that like must be compared with like. Previous case law is of assistance in this exercise. Relevant circumstances to consider include those that the alleged discriminator takes into account when deciding to treat the claimant as he did. **Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) ICR 337.** If no actual comparator can be shown then the tribunal is under a duty to test the claimant's treatment against a hypothetical comparator. **Balamoody v United Kingdom Central Council for Nursing Midwifery and Health Visiting (2002) ICR 646.**

119. We have considered the decision of the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332**, and its observations on the correct approach to the burden of proof in discrimination cases. We note the Court of Appeal's decision in **Igen Ltd v Wong [2005] IRLR 258** where the **Barton** guidelines were amended and clarified and it was confirmed that the correct approach, in applying the burden of proof regulations, is to adopt a two stage approach namely (1) has the claimant proved, on the balance of probabilities) the existence of facts from which the tribunal could, in the absence of an adequate explanation, conclude that the respondent has committed an act of unlawful discrimination? and, if so, (2) has the respondent proved that it did not commit (or is not to be treated as having committed) the unlawful act? We note also the case of **Madarassy v Nomura [2007] IRLR 246**, which confirmed the guidance in **Igen**.

120. In **The Law Society v Bahl 2003 [IRLR] 640** the EAT held that a Tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee unreasonably. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. The tribunal must consider all the relevant circumstances to determine the reason for the unreasonable treatment.

121. We also note the decision in the case of **Hammonds LLP v C Mwitta [2010] UKEAT** in which the EAT (Slade J) reiterated that the possibility that a respondent "could have" committed an act of discrimination is insufficient to establish a prima facie case so as to move the burden of proof to the respondent for the purposes of (now) s136 Equality Act 2010. The tribunal must find facts from which they could conclude that there had been discrimination on the grounds of race. The absence of an explanation for differential treatment may not be relied upon to establish the prima facie case.

122. Section 15 Equality Act 2010 provides:

> 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.

123. The Code of Practice on Employment 2011 provides:

4.9 'Disadvantage' …..could include denial of an opportunity or choice, deterrence, rejection, exclusion. The courts have found that 'detriment', a similar concept, is something that a reasonable person would complain about……. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise);

5.11 Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a proportionate means of achieving a legitimate aim. This objective justification test is explained in detail in paragraphs 4.25 to 4.32.

5.12 It is for the employer to justify the treatment. They must produce evidence to support the assertion that it is justified and not rely on mere generalisations.

4.28 The concept of legitimate aim is taken from European Union law and relevant decisions of the Court of Justice of the European Union… it is not defined by the Act. The aim of the provision criterion or practice should be legal, should not be discriminatory in itself, and must represent a real objective consideration.

4.29 Although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test.

4.30 Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts.

4.31 Although not defined by the Act, the term proportionate is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an appropriate and necessary means of achieving a legitimate aim. But necessary does not mean that the provision criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

4.32 The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision criterion or practice. Cost can only be taken into account as part of the employer's justification for the provision criterion or practice if there are other good reasons for adopting it.

124. In **IPC Media Limited v Millar [2013] IRLR 707** the EAT considered the application of s15 Equality Act and noted that:

> "As with other species of discrimination, an act or omission can occur "because of" a proscribed factor as long as that factor operates on the mind of the putative discriminator (consciously or subconsciously) to a significant extent. The starting-point in a case which depends on the thought processes, conscious or unconscious, of the putative discriminator, is to identify the individual(s) responsible for the act or omission in question."

The EAT commented that the difference between the two claims (s13 and s15) is under s13 the claimant asserts that the alleged discriminator was motivated by the claimant's disability as such whereas under s15 the claimant asserts only that the alleged discriminator was motivated by a consequence of the claimant's disability, such as absence from work.

125. Section 20 Equality Act 2010 provides that the duty to make reasonable adjustments comprises of three requirements, set out in s20(3), (4) and (5): Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments.

126. Section 20(3) states:

> 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.

127. The Code of Practice on Employment 2011 sets out, at chapter 6, principles and application of the duty to make reasonable adjustments for disabled people in employment. It describes the duty to make reasonable adjustments as 'a cornerstone of the Act which requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled'. This can, as HHJ Peter Clark said in **Redcar and Cleveland Primary Care Trust v Lonsdale UKEAT/0090/12, [2013] EqLR 791, [2013] All ER (D) 34**, involve 'treating disabled people more favourably than those who are not disabled'.

128. The Code of Practice includes:

> 6.10 The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions (see also paragraph 4.5).
>
> 6.15 -The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis.

6.16The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's

129. A provision, criterion or practice might include such matters as the rules governing the holding of disciplinary or grievance hearings. Non-payment of allowances such as sick pay may amount to a 'PCP'. However, the application of a flawed disciplinary procedure on a one-off basis may not amount to a 'PCP'. In **Nottingham City Transport Ltd v Harvey [2013] EqLR 4, EAT** it states that 'practice connotes something which occurs more than on a one-off occasion and which has an element of repetition about it.' In **Carphone Warehouse v Martin [2013] All ER (D) 73** Shanks J held that 'the lack of competence in relation to a particular transaction cannot, as a matter of proper construction, in our view, amount to a "practice" applied by an employer any more than it could amount to a "provision" or "criterion" applied by an employer'.

130. Section 26 Equality Act 2010 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 these dignity, or

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

131. The tribunal has considered the EHRC Code of Practice on Employment 2011 in relation to harassment under section 26.

132. There are three essential elements of harassment claim under section 26(1):

a. Unwanted conduct

b. That has the proscribed purpose or effect, and

c. Which relates to a relevant protected characteristic

The EHRC Employment code confirms that "unwanted" is essentially the same as unwelcome or uninvited. In applying the second leg of the statutory definition the tribunal must consider whether the unwanted conduct has the purpose or effect of

- Violating the claimant's dignity, or

- Creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

133. The Tribunal must consider all surrounding circumstances and may draw any appropriate adverse inference in deciding whether the unwanted conduct did have that purpose.

134. In deciding whether conduct has the effect referred to in section 26(1)(b) the Tribunal must take into account:
- The perception of the claimant;
- The circumstances of the case; and
- Whether it is reasonable for the conduct to have that effect

135. The cases relating to harassment claims under the legislation prior to the Equality Act are of some assistance. We note **Richmond Pharmacology v Dhaliwal 2009 ICR 724** in which the EAT noted that the claimant must actually have felt, or perceived, his or her dignity to have been violated or an adverse environment to have been created. If the claimant has experienced those feelings or perceptions the tribunal should then consider whether it was reasonable for him or her to do so. In deciding whether the claimant did experience these feelings or perceptions the tribunal must apply a subjective test. However, we note the decision of the Court of Appeal in **Land Registry v Grant 2011 ICR 1390** in which the court commented that tribunals must not cheapen the significance of the words (violation of dignity or intimidating hostile degrading humiliating or offensive environment) because they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. It follows from this that the fact that a claimant is slightly upset or mildly offended by the conduct in question may not be enough to bring about a violation of dignity or offensive environment.

136. In deciding whether it was reasonable for conduct to have that effect an objective test is applied. Whether it was reasonable for a claimant to have felt her dignity to have been violated is a matter for the factual assessment of the Tribunal taking into account all the relevant circumstances including the context of the conduct in question. The Tribunal must consider whether it was reasonable for the conduct to have that effect on that particular claimant.

137. We have referred to section 98 Employment Rights Act 1996 (ERA 1996). We note that the onus is on the employer to show the actual or principal reason for dismissal. It is sufficient that the employer honestly believes on reasonable grounds that the employee is incapable or incompetent. It is not necessary for the employer to prove that the claimant is in fact incapable or incompetent. In determining whether dismissal fell within the band of reasonable responses it is appropriate to consider whether there has been reasonable consultation with the

employee, a reasonable medical investigation and consideration, where appropriate, of alternative employment.

138. Once the employer has shown a potentially fair reason for dismissing, the Tribunal must decide whether that employer acted reasonably or unreasonably in dismissing for that reason. The burden of proof is neutral. It is for the Tribunal to decide. Section 98(4) ERA 1996 states:-

"The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case".

139. The test of whether or not the employer acted reasonably is an objective one, that is, Tribunals must as industrial juries determine the way in which a reasonable employer in those circumstances in that line of business would have behaved. There is a band of reasonable responses. The Tribunal must determine whether the employer's action fell within a band of reasonable responses. **Iceland Frozen Foods Limited v Jones [1983] ICR 17**. (Approved by the Court of Appeal in **Post Office v Foley**, **HSBC Bank plc (formerly_Midland Bank plc) v Madden [2000] IRLR 827**. The range of reasonable responses test (the need for the tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed**. Sainsbury's Supermarkets Ltd v Hitt.** We bear that in mind and apply that test in considering all questions concerning the fairness of the dismissal.

140. We note the decision of the EAT in **Schenker Rail (UK) Ltd v Doolan** [**2010] UKEAT 0053-09-130** . We note in particular its finding that:

- The **Burchell** analysis is relevant in a capability dismissal where there was an issue as the sufficiency of the reason for dismissal. The tribunal is required to address the three questions, namely whether the respondent's officers genuinely believed in their stated reason, whether it was the reason reached after a reasonable investigation and whether they had reasonable grounds on which to conclude as they did.

- The **East Lindsey District Council** case is not to be read as requiring a higher standard of enquiry for the capability dismissal than is required if the reason for dismissal was misconduct.

- The issue was whether a reasonable management could find from the material before them that the claimant was not capable of returning to his or her post; that it is not for the tribunal to substitute its own view for that of the reasonable employer. The tribunal is required to guard against being carried along by sympathy for a

> long-standing employee whose employer has concluded that he is not fit to return to his job.

The EAT stated at paragraph 35.

> Applying that approach to the present case, the issue for the Tribunal was whether a reasonable management could find, from the material before them that the Claimant was not capable of returning to the post of Production Manager. The Tribunal also required to bear in mind that the decision to dismiss is, properly, a managerial one, not a medical one. Whilst medical or other expert reports may assist an employer to make an informed decision on the issue of capability, the decision to allow someone to return to work or to dismiss for reasons relating to capability is, ultimately, one which the employer has to make. It is not a decision that is to be dictated by the author of a report. Quite apart from considerations of his duty not to dismiss an employee unfairly, an employer owes a common law duty of reasonable care to the employee and, in cases, such as the present, requires to make his own assessment of the risk of a return to work causing a recurrence of the employee's ill health, albeit that any such assessment will normally be informed by the content of an expert report or reports.

141. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues

142. This includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence.

143. The tribunal has considered the Agreed List of Issues.

Direct discrimination

144. In relation to issues at paragraphs 1.a and 1.c, the tribunal refers to its findings on harassment below.

145. In relation to the issue at paragraph 1 b, we note that counsel for the respondent submits that this was not less favourable treatment because the claimant was paid in full during her absence and the claimant raised no complaint about this treatment at the time. However, this was less favourable treatment. The claimant did suffer a detriment within the meaning of s39 Equality Act 2010, because of this action: her absence during that 2 week period was considered as absence when JB considered dismissal. In addition, the tribunal accepts the evidence of the claimant and finds that the claimant was emotionally upset by being told she must leave work in the presence of her colleagues. She was not given any explanation at the time. Emotional upset to the claimant did amount to a detriment within s39 Equality Act 2010. The tribunal is satisfied and finds that this was not an unjustified sense of grievance. Objectively viewed, the tribunal finds that a reasonable worker, being told in front of work colleagues that they had to leave, and then being escorted from the office,

would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

146. The next question is whether the claimant was treated less favourably than an actual or hypothetical comparator. There is no named actual comparator. In constructing a hypothetical comparator the tribunal notes that there must be no material difference between the circumstances of the claimant and the comparator. In creating the hypothetical comparator the tribunal must consider the reason for the treatment. JB placed the claimant on disability leave because it had been reported to her that the claimant, who had been off sick with anxiety and depression for a number of months, had returned to work on a phased return, had attended work when suffering from a migraine, in a meeting on 21 April 2017 had discussed with her line managers suicide, on 24 April 2017 had attended work and refused to attend a meeting with her line manager and had said she felt unsafe a work. The tribunal finds that JB would have treated a non-disabled comparator, in the same circumstances in the same way. There was no difference in treatment. Further and in any event the tribunal finds that JB did not place the claimant on disability leave because of the claimant's disability. JB took this action because she wanted to obtain further OH advice about the claimant's health. That was less favourable treatment related to the claimant's disability but does not fall within s13 Equality Act.

Discrimination arising from disability

147. We refer to paragraphs 2 a - c, of the Agreed List of Issues - not informing the claimant that a record of the meeting of 21 April 2017 would be made, not agreeing the record of the meeting of 21 April 2017 with her; not providing the claimant with a copy of the said record of meeting. The tribunal notes that neither JW nor MW informed the claimant that a record would be made of the meeting, there was no attempt to agree the note, the claimant was not provided with a copy. This was an informal meeting. Notes were made after the event. This was not because of something that arose in consequence of the claimant's disability. The notes were created simply as a record of the meeting. They were an inaccurate record. However, the tribunal is satisfied and finds that the notes were made simply to put a record of the meeting on file, albeit an inaccurate record. The tribunal is satisfied and finds that both JW and MW created notes of this kind as a matter of record. As this was an informal meeting there was no requirement, no expectation, that the member of staff in attendance should be given the opportunity to agree the note or be provided with a copy. The actions of JW and MW did not arise as a consequence of the claimant's disability.

148. We refer to paragraph 2d of the Agreed List of Issues: not informing the claimant in advance of the nature of the meeting she was called to on 24 April 2017. This was an informal meeting. There was no requirement, no expectation that any member of staff should be given advance notice of

the nature of every meeting with a line manager. The action of JW did not arise as a consequence of the claimant's disability.

149. We refer to paragraph 2e of the Agreed List of Issues: not providing the claimant with sufficient time for a colleague to attend the meeting on 24 April 2017. The claimant did ask for a colleague to attend that meeting. There was no requirement, no expectation that any member of staff should be given the opportunity to have a colleague in attendance at every meeting with a line manager. The action of JW did not arise as a consequence of the claimant's disability.

150. We refer to paragraph 2f of the Agreed List of Issues: unwanted physical contact from JW on 24 April 2017, the tribunal refers to its findings on harassment below.

151. We refer to paragraph 2g of the Agreed List of Issues: failing to investigate her bullying and harassment complaint dated 7 August 2017 within a reasonable time or at all. The tribunal accepts the evidence of ST and finds that the reason for the delay in the investigation of the claimant's bullying and harassment complaint was due to a backlog of cases and very limited resources to deal with them. The delay did not arise as a consequence of the claimant's disability.

152. We refer to paragraph 2h of the Agreed List of Issues: deciding to dismiss rather than downgrading or relocating the claimant on 28 August 2017.

153. In dismissing the claimant, the respondent treated the claimant unfavourably because of something arising in consequence of her disability, namely, the claimant's sickness absence.

154. The question for the tribunal is whether the respondent has shown that the treatment is a proportionate means of achieving a legitimate aim. The tribunal is satisfied and finds that the respondent did have a legitimate aim, namely, of improving and ensuring attendance of the workforce and ensuring the respondent could provide a service to its clients to the best of its ability. We have considered all the circumstances of the case to determine whether the dismissal of the claimant was a proportionate means of achieving that legitimate aim. We have conducted a balancing exercise weighing the discriminatory effect of the treatment of the claimant against the employer's reasons for the treatment. The tribunal has considered all the circumstances including in particular the following:

154.1. The claimant had a high level of sickness absence, far exceeding the extended trigger points;

154.2. The claimant's absence was having a detrimental impact on the running of the team for which the claimant had been appointed team leader in November 2016. JW had prepared the impact statement

(p843) and reached the decision that the business could no longer tolerate the absence;

154.3. The respondent considered the claimant's level of sickness absence for the period over the last two years. The respondent did not give due consideration to the reason for the claimant's absence. The respondent was advised from an early stage – February 2017 – that the claimant asserted that her health was adversely affected by the actions of her line manager, and that this was affecting her ability to return to work (see paragraph 39). The available medical evidence indicated that the claimant was fit to return to work as from 15 March 2017, the OH report of 2 May 2017 stated that the claimant was fit to work, and supported the claimant's assertion that it was her interpersonal problems with her line manager that was causing the latest absence. The respondent did not carry out a reasonable investigation of the reason for the claimant's continued absence after the latest OH report of 2 May 2017;

154.4. The tribunal does not accept the assertion that the managers were striving to make the decision on the basis of medical evidence. To the contrary, the respondent took little, if any, account of the OH and other medical evidence that there had been a change in the reason for the claimant's recent absences, from January 2017 onwards, that there was a change in circumstances. The OH advice and other available medical evidence at the dismissal and appeal stage showed that:

154.4.1. In January 2017 the claimant had received a new diagnosis and new treatment plan;
154.4.2. The OH report in March 2017 indicated that the reason for absence was stress which the claimant perceived to be work related;
154.4.3. The OH and medical evidence indicated that the claimant had been unable to return to work, from April 2017 because of the interpersonal relationships at work;
154.4.4. The OH report dated 2 May 2017 indicated that, although unpredictable, after the treatment the claimant, with ongoing support and sympathetic management at work her future absences from work could be minimal. (see paragraph 61 above)

Therefore, the available OH advice and other available medical evidence indicated that the reason for the claimant's absence was different to her absences for the period prior to January 2017. In reaching the decision to dismiss the respondent said that it could not rely on the claimant's assertion that the reason for her more recent absence was interpersonal problems at work because she had had considerable absence under a different line manager, TT, and in the absence of JW. This ignores the OH report of 2 May 2017, ignores the fact that both the absences under TT and during the absence of JW predated the claimant's new diagnosis and treatment plan, and

predated the date from which the claimant asserted that her absence was work-related, pre-dated the date upon which the claimant said she had been bullied at work. There was a significant change in the circumstances surrounding the claimant's absences which the respondent failed to consider;

154.5. The OH report of 2 May 2017 recommended that a different line manager hold a meeting with the claimant. The respondent's evidence on their approach to the OH advice is contradictory. MW is clear in his evidence and the tribunal has found that was that there was a three way meeting between himself, JW and JB when they agreed to ignore the OH advice. At the meeting on 15 May 2017 JW gave the clear indication that she would remain the claimant's line manager and that this was not going to change. At that meeting the manager in attendance a support for the claimant, RD, stated that it was obvious that there was currently friction between the claimant and JW. The claimant requested a different line manager at the meeting on 8 June 2017. That request was not considered. A decision had been made to retain JB as the claimant's line manager in spite of the OH and other medical advice, in spite of the claimant's complaints about management. These decisions were made with knowledge of the medical evidence that the claimant was suffering from a mental illness and that the interpersonal relationships at work were adversely affecting the claimant's recovery. Whether or not the respondent agreed that there was an interpersonal difficulty, whether or not they accepted that the allegations of bullying and harassment were true or false, the respondent had medical evidence and OH advice that that was the claimant's perception, and that it was adversely affecting her health and recovery and ability to return to work. The respondent did not follow the OH advice that the meeting be held by a different line manager, even when another manager noted the friction between the claimant and JW. The respondent made the decision in May 2017 that JW would remain under the management of JW and therefore were not in a position to gauge whether following the advice, or transferring the claimant to a different line manager, would have led to the desired improvement in attendance levels;

154.6. The respondent was obliged to consider demotion and/or transfer to a different Department as an alternative to dismissal under the terms of the policy. In reaching the decision to dismiss, rather than demote or transfer, both the dismissing and appeal officers took into account their observation that alternative employment had been tried but had not provided an improvement in attendance. However, they tried this for one day only and knew that the claimant had been distressed that day because the claimant had been required to sit next to MW. They say now that the problem was resolved on the day. However, there is no satisfactory evidence to support that. The respondent did not reply to the claimant's email dated 16 August 2017, did not investigate or ask any questions of the claimant about the reason for her absence after that one day trial, they did not tell the

claimant that the situation had been resolved and that if she returned to the Resourcing department she would not be required to work with MW or indeed JW. The respondent did not give the trial in a different department sufficient time to assess whether it would lead to an improvement in the claimant's attendance;

154.7. The respondent clearly had concerns that the claimant was unable to perform in her newly promoted role from an early stage. JW had expressed her doubts that the claimant was suited to the recently promoted role in January 2017 (see paragraph 38), and steps had been taken under the loss of capability procedure. The claimant had given a clear indication that she was prepared to consider demotion to effect a transfer – both at the meeting with TT prior to the loss of capability meeting (see paragraph 68 above), at the final decision meeting on 22 August 2017 the claimant indicated that she was prepared to take demotion to achieve her desired aim of a transfer to Andover (see paragraph 94 above), the claimant repeated this during the appeal process. The respondent has failed to provide a satisfactory explanation as to why a demotion to a different department under a different line manager was not a realistic alternative to dismissal. The claimant had poor attendance in her previous role, but as stated above, the respondent failed to give due consideration to the change in medical prognosis and the reason for the claimant's absence following the promotion;

154.8. The dismissing officer and the appeal officer made the decision not to postpone their decision-making pending the outcome of the bullying and harassment complaint. However, the issues raised in the grievance were relevant to the decision to dismiss. In reaching the decision to dismiss JW considered the claimant's assertion that her absence was triggered by bullying and harassment, that she had been hampered in her return to work by a lack of management support. JB rejected the claimant's assertions, deciding that the claimant had been given appropriate support and that OH advice had been followed. In reaching their decisions both of the dismissing and appeal officer relied on their personal opinion that the bullying and harassment complaint was without merit. Both of them had knowledge of both MW and JW, acknowledged them as trusted managers and essentially were not prepared to believe that what the claimant was saying was the truth. It is inconsistent of the respondent to say that on the one hand it was not necessary for them to delay the decision-making pending the bullying and harassment grievance because that was a separate and distinct procedure and then on the other hand to base their decision making on their own subjective view of the merits of the bullying and harassment complaint. Both the dismissing and appeal officer took into account, in reaching the decision to dismiss, their view that the line managers had provided the claimant with support and had acted sympathetically towards her. That was their own personal view, without the benefit of investigation of the claimant's bullying and harassment complaint. The reason for the claimant's absence, the

reason for the failure of the phased return to work were relevant factors in the decision to dismiss. It was proportionate to postpone the decision to dismiss to allow an investigation of the bullying and harassment complaint;

154.9. The appeal officer did not give adequate consideration to the claimant's request for a transfer to Andover, asserting that there was no medical evidence to suggest that a transfer to Andover would make a difference. He did not seek such medical evidence. He made no enquires about vacancies in Andover;

154.10. The dismissal letter and the Deliberation document (p969) do not make any reference to the consideration of a transfer to a different department or the trial in the resourcing department. It is clear that the respondent did not give reasonable consideration to the transfer of the claimant to a different Department as an alternative to dismissal;

154.11. although the claimant did describe the work environment at Cheadle Hulme as toxic, although she did give a clear indication that she wanted to return to Andover, at the dismissal stage the claimant was prepared to return to work in Cheadle Hulme, albeit under a different line manager. She showed her willingness to do so by working in Resourcing. After dismissal the claimant made a request to move to Andover but did indicate that she was prepared to work in Cheadle Hulme while she applied for an internal transfer to Andover. She did not ask for a transfer as part of the appeal outcome. The claimant's intent to make an application for an internal transfer to Andover was genuine. She had not applied for any such vacancies previously because she held the mistaken belief that she could not do so because she was subject to MUA procedure. Whether or not that was correct, it was the claimant's genuine understanding that that was the position;

154.12. The respondent chose to dismiss the claimant and pay her in lieu of notice. It is not clear why the respondent chose to do that, rather than give notice, during which time the claimant would have been able to apply for an internal transfer to Andover, as the claimant suggested. That would not have affected the decision of the respondent to dismiss but would have been a less discriminatory step as it would have given the claimant time to make the appropriate application.

In all the circumstances the tribunal finds that dismissal was not a proportionate means of achieving a legitimate aim. Whereas the respondent was entitled to make the reasonable business decision that the business could no longer tolerate the unacceptable level of absence of the claimant in her current department, the respondent failed to give due consideration to alternative, less discriminatory steps, that is:

- a transfer to a different department with a different line manager. The respondent has failed to provide a satisfactory explanation as to why it was not prepared to follow OH advice, transfer the claimant to a different line manager, why it was not prepared to give the alternative role in Resourcing another try, rather than dismiss a long standing employee who was acknowledged to be a valued employee and who, in spite of previous problems with attendance, had been rewarded for good performance and promoted. The problems with the claimant's performance, the OH reports, the allegations of lack of support, and request for a different line manager had been made well before August 2017. Therefore, the respondent had ample time, before the decision to dismiss was made, to act on the advice and information given and arrange a transfer to a different department, to give the claimant the opportunity to improve her attendance;
- a transfer to a different department by way of demotion: it did not have to be at the same grade. A transfer to a different department in Cheadle Hulme, or a transfer to Andover, if there were any suitable vacancies, with a demotion to the previous grade, would have answered the problems within the existing department arising from the claimant's absence and would also have addressed the concerns as to the claimant's performance in her newly promoted role;

- postponing the decision to dismiss pending the outcome of the claimant's bullying and harassment complaint;

- dismissing the claimant with notice, allowing the claimant to apply for internal transfer during the notice period.

Failure to make reasonable adjustments

155. We refer to paragraph 6 of the Agreed List of Issues. There is no satisfactory evidence to support the claimant's assertion that the respondent applied a provision, criterion or practice of:

155.1. not postponing final capability hearings to deal with employees' internal complaint of bullying and harassment first; or

155.2. Not downgrading or relocating employees as an alternative to dismissal at final capability hearings

The respondent did not postpone the final capability hearing in the claimant's case, did not downgrade or relocate the claimant as an alternative to dismissal. However, there is no evidence that the respondent had a practice of doing this: no further examples of such behaviour have been adduced before this tribunal. This claim is therefore unsuccessful.

Harassment

156. We refer to paragraph 10 of the Agreed List of Issues. In relation to the complaints at 10.b.c.d.e.f.i.j and l, the tribunal agrees with counsel for the respondent that these are essentially complaints about procedure and do not amount to harassment within the meaning of the Equality Act. The claimant may have been slightly upset about some of these matters, principally after the event, but the tribunal notes the decision in **Land Registry v Grant** (above) and finds that in each of these cases the breaches of procedure, the conduct, could not be said to be enough to bring about a violation of dignity or offensive environment. Further, and in any event, the tribunal is satisfied and finds that, taking into account the perception of the claimant, and the circumstances, the unwanted conduct did not have the purpose or effect of

- Violating the claimant's dignity, or
- Creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

It is not reasonable for these action/inactions to have such an effect. Further, and in any event, these actions or inactions did not relate to the claimant's disability.

157. In relation to the complaint under 10.h. the decision to put the claimant on enforced disability leave was unwanted conduct which did relate to the claimant's disability. However, bearing in mind all the circumstances, the tribunal is satisfied and finds that the unwanted conduct did not have the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. JB took this decision because she wished to obtain OH advice and there was concern that the claimant was not in a fit state of health to attend work. The tribunal is also satisfied and finds that, taking into account the perception of the claimant, and the circumstances, the unwanted conduct did not have the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The claimant was paid in full for the two weeks and made no complaint about the decision at the time. It is not reasonable for these action/inactions to have such an effect. In reaching this decision the tribunal notes that the complaint relates to the decision to place the claimant on two weeks disability leave, as communicated to the claimant after the event, and does not relate to the manner in which the decision was carried out by JB on 24 April 2019.

158. The complaints under paragraphs 10 b, c, d, e, f, h, i, j and l are not well-founded.

159. In relation to the complaint under paragraph 10.a of the Agreed List of Issues the tribunal notes that MW did make this comment "not right in the head" directly to the claimant at the meeting on 21 April 2017. The

claimant was very upset before this comment was made. MW's evidence on this has been unsatisfactory. MW knew the claimant, knew that she had suffered from anxiety and depression for a considerable time, knew that the claimant was suffering a migraine that day but had come in to work, knew that the claimant was upset. In spite of this he made criticisms of the claimant and her performance. He made this comment which clearly related to the claimant's disability. It is simply not credible that a manager with a number of years' experience would not understand that telling someone with a mental illness that they were "not right in the head" was offensive and extremely upsetting. In all the circumstances the tribunal finds that the comment had the purpose of violating the claimant's dignity, and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Further, and in any event, the tribunal is satisfied and finds that the comment had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, taking into account:

(a) the perception of the claimant, who did regard this comment as violating her dignity and/or creating a hostile and offensive environment for her;

(b) the other circumstances of the case, in particular, the claimant's mental health;

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

160. In relation to the complaint under paragraph 10.g of the Agreed List of Issues, the tribunal notes that JW did grab the claimant's forearm, knowing that the claimant was made upset by physical contact, that it made her panic. This was unwanted conduct which related to the claimant's disability. JW knew the claimant, knew she had suffered from anxiety and depression for a considerable time, knew that one of the features of the claimant's anxiety was that she reacted badly to or was panicked by physical contact. In all the circumstances the tribunal finds that the unwanted conduct had the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Further, and in any event, the tribunal is satisfied and finds that the comment had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, taking into account:

(a) the perception of the claimant, who did regard this conduct as creating a hostile and offensive environment for her;

(b) the other circumstances of the case, in particular, the claimant's mental health. The tribunal accepts the claimant's evidence that unwanted physical contact had an adverse impact on her, that it caused her to panic;

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

161. In relation to the complaint under paragraph 10k of the Agreed List of Issues the tribunal notes that AS did make this comment. AS knew the claimant, knew that she had suffered from anxiety and depression for a considerable time, knew that the claimant had raised a complaint about MW making the “not right in the head comment”, knew that she had been upset by this comment. In spite of this AS made this comment which clearly related to the claimant’s disability. It is simply not credible that a manager with a number of years’ experience would not understand that telling someone with a mental illness that he might also think that she was “not right in the head” was offensive and extremely upsetting. In all the circumstances the tribunal finds that the comment had the purpose of violating the claimant's dignity, and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Further, and in any event, the tribunal is satisfied and finds that the comment had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, taking into account:

(a) the perception of the claimant, who did regard this comment as violating her dignity and/or creating a hostile and offensive environment for her;

(b) the other circumstances of the case, in particular, the claimant’s mental health;

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

Unfair dismissal

162. The claimant was dismissed and the reason for dismissal was her sickness absence. This related to her capability and is a potentially fair reason for dismissal within the meaning of s98(1) ERA 1996.

163. The tribunal has considered all the circumstances to decide whether dismissal fell within the band of reasonable responses. The tribunal reminds itself that it must not substitute its own view. The tribunal notes in particular the following:

163.1. The respondent did not carry out a reasonable investigation of the claimant’s absence, the reason for her absence and the likelihood of her being able to return to work and sustain an acceptable level of attendance. The available medical evidence indicated that the claimant was fit to return to work as from 15 March 2017, the OH report of 2 May 2017 stated that the claimant was fit to work, and supported the claimant’s assertion that it was her interpersonal problems with her line manager that was causing the latest absence. The respondent did not carry out a reasonable investigation of the reason for the claimant’s continued absence after the latest OH report of 2 May 2017;

163.2. As determined at paragraph 152 above, the available OH advice and other available medical evidence indicated that the reason for the claimant's absence was different to her absences for the period prior to January 2017. In reaching the decision to dismiss the respondent acted unreasonably, outside the band of reasonable responses, by rejecting the claimant's assertion that the reason for her more recent absence was interpersonal problems at work. In reaching this decision the respondent ignored the OH report of 2 May 2017, ignored the fact that both the absences under TT and during the absence of JW predated the claimant's new diagnosis and treatment plan, and predated the date from which the claimant asserted that her absence was work-related, pre-dated the date upon which the claimant said she had been bullied at work. There was a significant change in the circumstances surrounding the claimant's absences which the respondent failed to consider;

163.3. As determined at paragraph 152 above the OH recommended that the return to work meeting be conducted by a different line manager. The respondent ignored the OH advice. JW gave the clear indication that she would remain the claimant's line manager and that this was not going to change. The claimant requested a different line manager. That request was ignored. These decisions were made with knowledge of the medical evidence that the claimant was suffering from a mental illness and that the interpersonal relationships at work were adversely affecting the claimant's recovery. Whether or not the respondent agreed that there was an interpersonal difficulty, whether or not they accepted that the allegations of bullying and harassment were true or false, the respondent had medical evidence and OH advice that that was the claimant's perception, and that it was adversely affecting her health and recovery and ability to return to work. The respondent did not follow the OH advice and therefore were not in a position to gauge whether following the advice, whether changing the claimant's line manager, would have led to the desired improvement in attendance levels;

163.4. As determined at paragraph 152 above, the respondent failed to give reasonable consideration to alternatives to dismissal, in particular the transfer of the claimant to a different Department. The respondent was fully aware that the claimant was suffering with interpersonal issues with her line manager, that these were impacting on her health and her attendance. In reaching the decision to dismiss both the dismissing and appeal officers took into account their understanding that alternative employment had been tried, in the Resourcing Department, but both made their decisions on the basis that this alternative employment had not provided an improvement in attendance. However, they tried this for one day only on 15 August 2017, only one week prior to the decision to dismiss. Both were aware that the claimant was distressed because the claimant had been required to sit next to MW. This problem was not resolved. The claimant's email of 16 August 2017 (p949) was ignored. The claimant

clearly raised two matters which had led to her reporting as unfit for work due to anxiety and depression: the incident with MW and the illness of her father. The respondent chose to categorise the claimant's subsequent absence as sickness. AS referred the other matters as "emotional response" which were not addressed. The reason for the claimant's absence after 15 August 2017 was not investigated : no questions were asked of the claimant, she was not told that if she returned to Resourcing she would not be required to sit next to MW again. It fell outside the band of reasonable responses to reject the possibility of a transfer to a different department, based on one day's trial in Resourcing;

163.5. It fell outside the band of reasonable responses for the dismissing officer and the appeal officer to decide not to postpone their decision-making pending the outcome of the bullying and harassment complaint. As determined at paragraph 152 above, the issues raised in the complaint were relevant to the decision to dismiss: the reason for the failure to improve attendance. JW had provided other information to JB, which she acknowledged was not directly relevant to the MUA process (see paragraph 85) , including her note of the meeting on21 April 2017, which JW considered relevant to the decision making process. At the final decision meeting the claimant indicated that she was very unhappy with this, and that she disagreed with the accuracy of the note. The conduct of the meeting on 21 April 2017 was included in the bullying and harassment complaint, and the allegations of discriminatory treatment had been made. In reaching their decisions both of the dismissal and appeal officers relied on their personal opinion that the bullying and harassment complaint was without merit. It is inconsistent of the respondent to say that on the one hand it was not necessary for them to delay the decision-making pending the bullying and harassment grievance because that was a separate and distinct procedure and then on the other hand to base their decision making on their own subjective view of the merits of the bullying and harassment complaint. Both the dismissing and appeal officer took into account, in reaching the decision to dismiss, their view that the line managers had provided the claimant with support and had acted sympathetically towards her. That was their own personal view, without the benefit of investigation of the claimant's bullying and harassment complaint;

163.6. The appeal officer did not give adequate consideration to the claimant's request for a transfer to Andover, asserting that there was no medical evidence to suggest that a transfer to Andover would make a difference. He did not obtain that medical evidence. The respondent's evidence as to the availability of any alternative employment in Andover has been unsatisfactory. It fell outside the band of reasonable responses for the appeal officer to base his decision partly on his own subjective view that the transfer of the claimant to Andover was high risk to the claimant. The respondent acted outside the band of reasonable responses in failing to obtain

what it regarded as relevant medical evidence in relation to the requested move to Andover;

163.7. The tribunal has considered the procedure and notes in particular the following:

163.7.1. the respondent did follow the MUA procedure by holding the requisite number of meetings and advising the claimant of the right to be accompanied;

163.7.2. the respondent acted outside the band of reasonable responses by failing to address the claimant's bullying and harassment complaint prior to dismissal. The reason for the claimant's absence was relevant to the decision. Both the dismissing and appeal officer made their own decisions on the merits of the claimant's complaints before a full investigation had been carried out;

163.7.3. JB made the decision to dismiss. She was included in the claimant's complaint of bullying and harassment;

163.7.4. the appeal officer was not independent. He made his decision on his subjective opinion as to the level of support provided by JW and MW to the claimant;

163.7.5. the appeal officer did not investigate the possibility of opportunities in Andover prior to making his decision;

163.7.6. the respondent did not obtain up to date OH advice as to the reason for the claimant's illness since 2 May 2019, and any steps that could be taken to improve attendance. This was a breach of the respondent's own policy, which required OH advice to be no more than three months old;

163.7.7. in reaching her decision JB questioned the number of requests for special leave made by the claimant. She did not address these concerns with the claimant;

163.7.8. the one day trial in the Resourcing department was not discussed at either the final decision meeting or the appeal hearing, even though both the dismissing officer and appeal officer took into account in reaching their decisions. The dismissal letter and the Deliberation document (p969) do not make any reference to the consideration of a transfer to a different department or the trial in the resourcing department. The claimant was therefore unaware that these matters had been considered and therefore could not address this in her appeal;

In all the circumstances the tribunal finds that the respondent did not follow a fair procedure.

164. Having considered all the circumstances the tribunal finds that dismissal fell outside the band of reasonable responses. Whereas the claimant's level of attendance was unacceptable, whereas the respondent could no longer tolerate the claimant's continued absence in the claimant's department, OH advice was that the more recent absences arose because of problems with her line manager. The respondent failed to give reasonable consideration to the reason for the claimant's absence, to her complaints about management, to her request for a transfer to a different department, before reaching the decision to dismiss.

165. The claimant was unfairly dismissed.

Employment Judge Porter

Date: 11 May 2017

RESERVED JUDGMENT WITH REASONS SENT TO THE PARTIES ON

29 May 2019

FOR THE TRIBUNAL OFFICE

APPENDIX 1

AGREED LIST OF ISSUES

Direct discrimination (section 13 EA 2010)

1. Would the respondent have treated a non-disabled employee in the same position as the claimant in the same way by:

    a. alleged comments made by either MW or JW on 21 April 2017 that the claimant was "*not right in the head*"

    b. putting the claimant on enforced Disability leave for two weeks between 25 April and 6 May 2017

    c. alleged comment on 22 September 2017 from dismissal appeal hearing manager that *"I might also think you are not right in the head"*

Discrimination arising from disability (section 15 EA 2010)

2. Was the claimant treated unfavourably by:

    a. not informing her that a record of the meeting of 21 April 2017 would be made;

    b. not agreeing the record of the meeting of 21 April 2017 with her;

    c. not providing the claimant with a copy of the said record of meeting;

    d. not informing her in advance of the nature of the meeting she was called to on 24 April 2017;

    e. not providing her with sufficient time for a colleague to attend the meeting on 24 April 2017;

    f. unwanted physical contact from JW on 24 April 2017;

    g. failing to investigate her bullying and harassment complaint dated 7 August 2017 within a reasonable time or at all;

    h. deciding to dismiss rather than downgrading or relocating the claimant on 28 August 2017

3. Was any such unfavourable treatment because of something arising in consequence of her disability?

4. The claimant avers that something arising in consequence of the disability is
    a. Symptoms of CPTSD, specifically flashbacks;

    b. sick absence

5. Was any such treatment a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments (section 20 EA 2010)

6. Did the respondent apply a provision, criterion or practice of:

    a. not postponing final capability hearings to deal with employees' internal complaint of bullying and harassment first?

    b. Not downgrading or relocating employees as an alternative to dismissal at final capability hearings?

7. Did any such provision criterion or practice put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

8. Did the respondent have a duty to make a reasonable adjustment by

    a. Postponing the final capability hearing to deal with the claimant's internal complaint of bullying and harassment first?

    b. Downgrading or relocating the claimant as an alternative to dismissal?

9. Did the respondent make reasonable adjustments?

Harassment (section 26 EA 2010)

10. Did the respondent engage in unwanted conduct which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her by:

    a. alleged comments made by either MW or JW on 21 April 2017 that the claimant was "*not right in the head*";

    b. not informing her that record of the meeting of 21 April 2017 would be made;

    c. not agreeing the record of the meeting of 21 April 2017 with her;

    d. not providing the claimant with a copy of the said record of meeting;

e. not informing her in advance of the nature of the meeting she was called to on 24 April 2017;

f. not providing her with sufficient time for a colleague to attend the meeting on 24 April 2017;

g. unwanted physical contact from JW on 24 April 2017;

h. putting the claimant on enforced Disability leave for two weeks between 25 April and 6 May 2017;

i. sending the invite to the loss of capability meeting to the claimant's home email address;

j. failure to investigate claimant's bullying and harassment complaint of 7 August 2017 within a reasonable time or at all;

k. alleged comment on 22 September 2017 from dismissal appeal hearing manager that *"I might also think you are not right in the head"*

l. failure of the appeal manager to consider relevant information as it pertains to claimant's case (internal complaint of bullying and harassment) in considering her appeal against the decision to dismiss

11. Was any such conduct related to the claimant's disability?

Unfair dismissal

12. What is the reason for the dismissal?

13. Is it a potentially fair reason under section 98 ERA 1996?

14. If so was the dismissal fair and reasonable in all the circumstances of the case (section 98(4) ERA 1996)?

15. Did the respondent comply with the ACAS Code of Practice relating to disciplinary hearings?