EMPLOYMENT TRIBUNALS

Claimant: Mrs E Worsley

Respondent: Commissioners for HM Revenue & Customs

Heard at: Manchester **On:** 11 and 12 July 2019
15, 16, 17 and 18 July 2019
(pm in Chambers)
19 July 2019
(in Chambers)

Before: Employment Judge Ross
Ms M T Dowling
Mrs S J Ensell

REPRESENTATION:

Claimant: Mr K Ali, Counsel
Respondent: Mr J Hurd, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed pursuant to section 98 Employment Rights Act 1996.

2. The claimant was unfavourably treated because of something arising in consequence of disability when she was dismissed pursuant to s15 Equality Act 2010

3. The respondent failed to make reasonable adjustments pursuant to s20-21 Equality Act 2010 by failing to transfer the claimant to another team with a different manager.

REASONS

1. The claimant was employed by the respondent as an Administrative Officer from 1970 until her employment was terminated for capability reasons on 13 April 2015. She appealed but her appeal was unsuccessful.

2. The claimant had been absent from work on sick leave since 15 December 2014. She was absent with depression due to stress at work. The claimant considered she had been bullied by her line manager, Linda Marrison, since September 2014 and her illness was connected to that. She presented a nine page letter of complaint to her employer on 1 December 2014. At the time of her dismissal the claimant was not responding to correspondence from her employer although she had sent in fit notes. She did not attend the dismissal hearing. She asked for the appeal to be heard on the papers.

3. In March 2015 the claimant presented a further grievance which was considered by Mr Bradley after her employment ended.

4. The claimant brought claims to this Tribunal for unfair dismissal pursuant to section 98 Employment Rights Act 1996, a complaint that she was unfavourably treated because of something arising in consequence of disability when she was dismissed pursuant to section 15 Equality Act 2010, and a claim for failure to make reasonable adjustments pursuant to sections 20-21 Equality Act 2010.

5. We heard from the claimant's line manager, Linda Marrison; Ms Marrison's manager, Ms Foxly; and her manager, Ms Hiscox. We heard from the dismissing officer, Mr Taylor; the appeal officer, Mr Caren; and the grievance manager, Mr Bradley.

The Issues

6. The issues were agreed with the parties at the outset of the hearing. They are based on the Case Management Order of Employment Judge Horne dated 24 May 2017 and the respondent's List of Issues, as follows:

Unfair dismissal pursuant to the Employment Rights Act 1996

(1) What was the reason for dismissal? The respondent relies on capability within the meaning of section 98(2) Employment Rights Act 1996.

(2) Was the dismissal fair or unfair within the meaning of section 98(4) Employment Rights Act 1996 having regard to:

(a) whether in the circumstances, including its size and administrative resources, the respondent acted unfairly in treating the claimant's incapacity as a sufficient reason for dismissing the claimant; and

(b) equity and the substantial merits of the case.

(3) The Tribunal will take into account whether the respondent followed a fair procedure and in particular whether it consulted with the claimant, whether medical evidence was sought and whether alternative work was considered.

(4) The principle of **Polkey v A E Dayton Services** may be relevant.

(5) The claimant contended there had been a failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures.

Disability Discrimination

(6) Disability was conceded, as was knowledge of disability. The impairment was depression.

Discrimination arising from disability – section 15 Equality Act 2020

(7) Did the respondent treat the claimant unfavourably because of something arising in consequence of the disability, in dismissing her?

(8) It is not disputed that the "something" arising in consequence of disability was the claimant's absence from work, and that the "something" arose from the claimant's disability.

(9) Can the respondent show that dismissing the claimant was a proportionate means of achieving a legitimate aim? It is not disputed that the legitimate aim was the need to maintain an effective workforce and hence to be able to provide an adequate level of service to the public.

(10) The proportionate means of achieving this aim is disputed. The respondent relies on the use of its long-term absence policies and other procedures in hearing bundle 2 (pages 741-906), including:

(i) HR38000 – Keeping in Touch (KIT generic guidance – pages 743-751).

(ii) HR27008 – Managing Continuous Absence (pages 752-758).

(iii) HR20406 – Dismissal and Compensation on the grounds of poor attendance and/or performance: "How to" steps for managers, decision makers and managers' managers (pages 759-768) and the accompanying guidance for decision makers HR20407 (pages 755-780) and HR20208 decision makers' guide (pages 788-791).

(iv) HR27006 – Sickness Absence: Guidance for Decision Makers (pages 711-714).

(v) HR27004 – Sickness Absence: Guidance for Job Holders (pages 810-813).

(vi) HR20408 – Dismissal and Compensation on the Grounds of Port Attendance and/or Performance: Appeal against formal decisions relating to poor attendance or compensation (pages 799-806).

(vii) HR62303 – Recognising and managing mental health or stress (pages 896-901).

(viii) HR83002 – Disability Introduction.

Failure to make reasonable adjustments – sections 20-22 Equality Act 2010

(11) What is the provision, criterion or practice ("PCP")? The claimant relies upon requiring the claimant to work with a manager against whom she had made an allegation of bullying and/or or requiring the claimant to work or continue to work with her manager. Did the respondent apply those PCPs?

(12) If yes, did the PCP place the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

(13) Did the respondent have knowledge of substantial disadvantage?

(14) Did the respondent make such adjustments as was reasonable to make to avoid the substantial disadvantage?

(15) The reasonable adjustment contended for by the claimant was a transfer to another team with a different manager. The claimant relied in particular upon the respondent's refusal in relation to the following requests to transfer her:

(i) Refusal by Linda Marrison on or around 13 October 2014;

(ii) Refusal by Chris Hiscox on or around 17 November 2014;

(iii) Refusal by Kath Foxly following submission of a nine page letter dated 1 December 2014;

(iv) Refusal by Jim Waldron following a doctor's letter of 11 February 2015;

(v) Refusal by Paul Caren during an appeal against dismissal on 20 April 2015, appeal letter dated 21 May 2015 and outcome letter dated 20 June 2015;

(vi) Refusal by Mark Bradley on 21 August 2015 in relation to claimant's grievance.

Time Limits

(16) Does the Tribunal have jurisdiction to hear the reasonable adjustments claim?

Findings of Fact

7. We find the claimant started working for the respondent aged 16 in 1970.

8. We find that in January 2014 the claimant's manager became Linda Marrison. The claimant worked in a team of approximately 11 people at Albert Bridge House in Manchester.

9. Both women agree that initially the relationship was very good. The claimant bought plants for Ms Marrison who in turn gave the claimant chocolates.

10. The claimant said in her statement at paragraph 3 that she considered Ms Marrison's attitude changed towards her in August 2014. When cross examined she said a person who sat behind her had made a formal complaint. The claimant understood that her name and her colleague David Burrows, who sat next to her, had been mentioned in the complaint. Mr Burrows was due to retire on 18 September and did not want to raise the matter. The claimant waited until Mr Burrows retired and then asked Mrs Foxly if their names were involved. Initially Mrs Foxly said not but when the claimant asked if she was sure she said she inferred that they were involved.

11. In her evidence Ms Marrison considered that the relationship with the claimant was good until September 2014.

12. It was agreed that Mrs Worsley sat on the next-but-one desk to Ms Marrison.

13. In September 2014 there was a discussion about annual leave. A meeting was arranged because there was insufficient cover for the Christmas and New Year period after staff had put in their requests for holiday. Ms Marrison had asked the team to meet and agree amongst themselves sufficient cover was in place. We find the claimant attended the meeting. It was agreed that there was a need for 40% cover over the Christmas and New Year period.

14. We accept the claimant's evidence that although she attended the meeting and participated, as usual, she did not say much.

15. Ms Marrison did not attend the meeting. She made a note at page 207: "Elaine didn't involve herself in the team meeting despite being asked to attend".

16. Ms Marrison asked to speak to the claimant on 1 October 2014 to discuss the Christmas leave arrangements with her. She had previously asked another member of staff who had been missing from the team meeting to cover 24 December, and that member of staff had agreed (see paragraph 17 of Ms Marrison's statement). Ms Marrison then asked the claimant to provide cover on 31 December, as that day was not covered.

17. The claimant had requested four days' leave including 31 December.

18. We find that Ms Marrison told the claimant the leave on the planner was simply a "wishes list" and nobody's leave had been approved. We find she told the claimant if her leave was not approved and she did not attend she would be absent without leave, "AWOL".

19. We rely on the claimant's evidence to find that she accepted and knew that if she did not attend work on a day when annual leave had not been authorised, she would be "AWOL".

20. We find that the claimant explained to Ms Marrison that she considered it to be unfair that she as being asked to attend on 31 December because she never took blocks of leave in the summer and indeed was owed a substantial amount of holiday. She also said that she had specifically asked for four days whereas other employees had asked for a much longer period of time and then had been allowed part of that time. In her note at page 207 Ms Marrison recorded that the claimant had stated she was "digging her heels in and not coming in". The claimant categorically denied saying that. The Tribunal prefers the recollection of the claimant.

21. We find that other members of the team had compromised by giving up one day of their annual leave.

22. We rely on the claimant's evidence in paragraph 5 page 3 of her statement that:

> "I never understood why, after being told on 1/10/14 that I could only have three days annual leave not four days at Christmas/New Year, my manager didn't just leave it at that."

23. We find that the leave arrangements were that annual leave had to be approved by a manager and the claimant was well aware of that. She said very clearly in cross examination that she would not fail to attend on a day when annual leave had not been approved because she knew the consequences would be serious and it would be very stressful for her.

24. We find on 9 October 2014 in a team meeting the claimant was informed by Linda Marrison that she should go to a hub meeting. We rely on the claimant's recollection of that conversation in her email the following day of 10 October 2014. This states:

> "During this meeting at 11.00am you said you wanted me to go to the hub meeting. You gave me no warning about this. You just put me on the spot in front of the rest of the group. I felt really embarrassed. You know that I'm suffering with sciatica and sitting for any length of time just aggravates it even with my special chair which doesn't really help much. You also know that I find it more painful sitting in the blue seating area than anywhere else. When I pointed this out in front of everybody else you just said I should stand. I don't want to stand up at the hub when everyone is seated. It draws attention to me and I feel embarrassed and get people asking me why I'm not sitting down and then having to explain. It isn't vital that I go to hub meetings and I can't

> understand why when X offered to go you said no to her. The result was nobody went to the hub meeting."

25. Ms Marrison's account is at her notes at page 207.

26. We accept Ms Marrison's recollection that in fact it was one of the other members of the team who suggested the claimant go to the hub meeting because everyone else had already been to the meeting.

27. We also accept the claimant's evidence in cross examination that the short notice of the meeting disconcerted her. She knew the meeting started at 11.00am and she was worried about attending a meeting she had never been to before, arriving late and without an agenda.

28. We find on 9 October, Linda Marrison sent an email to the claimant (page 196) asking her for a "quick chat about Christmas leave and the general expectations regarding attitudes and behaviours on the team. Nothing to worry about or be concerned".

29. We find that on the morning of 10 October the claimant advised Ms Marrison that she had not had time to reply to the email and would not be able to attend the meeting. We find Ms Marrison rearranged the meeting to Monday 13 October (see page 197).

30. The claimant sent a lengthy email on 10 October (see pages 198-199) explaining her concerns about the Christmas leave and the short notice of the hub meeting.

31. We find there was a conversation between the claimant and Ms Marrison that at rearranged meeting on Monday 13 October Helen Mitchell, a PCS representative, would accompany the claimant. The claimant was no longer a member of PCS but asked Helen Mitchell as a friend to accompany her and Ms Marrison had agreed.

32. The meeting was due to take place at 11.30am. The claimant discovered Helen Mitchell had not arrived at work. We find she asked a colleague, Carol Hurd, to contact Helen Mitchell on her behalf, which she did. She informed the claimant that Helen Mitchell had been sick on the way into work so she thought it was likely she would not be in (page 200).

33. The claimant went to the meeting at 11.30am but we find she informed Ms Marrison that she wanted her friend, Helen, with her and as Helen was not at her desk she was going. We accept Ms Marrison's recollection that the claimant left the room two minutes after she came in. We find this was because Helen Mitchell was not there to support her. We find Ms Marrison rearranged the meeting for the afternoon and liaised with Helen Mitchell, who did attend work (see page 203), to check she was available. Ms Marrison sent an email to the claimant informing her that she had managed to book a room for the afternoon (page 201) and stating:

> "This will be the third attempt to arrange a meeting with you and I would like this matter brought to an end sooner rather than later and having it drag on."

34. The Tribunal finds that from the manager's perspective it was frustrating that a relatively trivial matter was requiring a meeting which had been rearranged twice. However, from the claimant's perspective she had wanted an opportunity to put her point of view in writing and to have a companion with her at the meeting.

35. We find there is an account of the 2.00pm meeting where the claimant, Ms Marrison and Helen Mitchell were present: in Ms Marrison's notes (page 208), in Ms Mitchell's account to the grievance office (pages 604 and 605) and the claimant's version of events is in her grievance at page 368 and in her statement.

36. The Tribunal finds it likely that the recollections of Helen Mitchell, an independent witness, are likely to be accurate.

37. We find Ms Mitchell's account to be sensitive and balanced. At page 605 she quotes from the HMRC Guidance about possible signs of depression and mental health. There is no dispute that the respondent was aware that the claimant was a disabled person by reason of depression.

38. Ms Mitchell also confirms that she considers that the request the claimant attend work on 31 December was a reasonable management request but "with reservations in this case". She notes that Ms Marrison said to the claimant she was "digging her heels in" in a previous meeting. She confirms the claimant twice denied saying this but the manager kept repeating it. She confirms at that point the claimant raised her voice and for the third time denied saying it. Ms Mitchell describes the claimant's objections and the information she provided which she considered to be relevant, for example that she came into work when her mother died and had taken annual leave days off here and there to fit around colleagues with children to enable them to have time off in school holidays. The claimant had come into work on 2 January 2014 to enable a colleague to attend a family party. Ms Mitchell noted that "this is all semantics: different words, same meaning", and she firmly believed that "the breakdown of the relationship between Linda and Elaine stemmed from the annual leave issue of that one day 31/12/2014". However, she also stated that she believed the manager was not willing to meet the claimant halfway and she was "standing her ground, asserting her authority".

39. We find that Helen Mitchell offered a solution to the problem. She offered to come into work on 31 December 2014. She said that she was aware the claimant was hoping to go away to Wales for that week. She stated she had checked with the First Line Manager (FLM) who was in charge of the process of authorising Christmas leave if she could cover the day for the claimant and whether her understanding of the process was correct: that if another colleague offered to cover Christmas leave, whether they be on the same or different team/floor/building in the same business stream, then that was acceptable under the process being followed by the respondent. It was confirmed to Helen Mitchell that that was correct. It was her understanding it was also in line with PCS briefing BB/168/14.

40. Despite this Ms Mitchell's offer to resolve the issue by covering 31 December 2014 was refused by Ms Marrison.

41. According to Ms Marrison's note at page 209 she "advised this wasn't really the issue. It was a fair management request that the claimant attend on New Year's

Eve as the rest of the team had all arranged cover and reduced their leave over the Christmas period".

42. We rely on the evidence of Helen Mitchell that:

> "Elaine said she felt there was a clash of personalities between herself and Linda and that it was affecting her health, sleeping pattern and appetite. She wasn't opening her emails until leaving work as she dreaded what was in them. She felt the only solution was a move off the team. Linda didn't look up but responded 'like that's ever going to happen'. There was no other discussion on the matter."

43. We consider Helen Mitchell to be an independent witness and we note that at the time she made these remarks to the grievance officer on 9 May 2015 the claimant had left the business. There was no incentive for Ms Mitchell to give anything other than her clear recollection.

44. Ms Marrison did not expressly say the claimant did not request a move. She simply says as far as she can recall she did not. We prefer Ms Mitchell and the claimant's recollection.

45. We find that on 16 October 2014 Ms Marrison replied to the claimant in writing. She stated expressly:

> "Annual leave is only granted after management approval. I will not authorise your annual leave for 31 December and if you do not attend work on that day you will be treated as being absent without leave."

She goes on to state:

> "I've tried to negotiate with you to swap for another day but again you haven't cooperated or given any specific reason why you cannot attend."

46. Ms Marrison refers to the hub meeting, stating "again this was a reasonable management request". She concludes:

> "I am concerned about your recent attitudes and behaviours which at best have been unaccommodating. A continuation along recent lines will result in a 'must improve' PMR marking." (See page 204)

47. On 23 October 2014 the claimant attended a meeting with Ms Marrison about feedback from a validation meeting concerning the claimant's mid year marking (see page 210). It was not disputed that the claimant's marking had been changed from "achieved" to "achieved- borderline must improve". This was not her overall marking but just in relation to call handling time only.

48. There is no dispute that on 6 November 2014 the claimant arrived at work at approximately 11.25am. The claimant normally arrived at work earlier than this. It was not disputed that the respondent operated a flexitime arrangement.

49. We find that when the claimant arrived Ms Marrison asked her, before she had taken her coat off, if she was ok as she was late and she should have been at

the 11.00am meeting. We find the claimant asked, “what meeting?”. We find that the claimant had completely forgotten about the team meeting at 11.00am and was frustrated with herself because of this. We find Ms Marrison said she had sent an email about the meeting, and the claimant said, “what email?”. We find the claimant asked Ms Marrison not to hassle her as she had just walked in. Ms Marrison said she was not hassling, she was simply concerned because the claimant had arrived late and missed the meeting, and the claimant had responded “as far as I’m aware we work flexitime”.

50. We find that around 11.50am on the same day there was a bad tempered exchange between the claimant and her manager. We accept the claimant’s evidence that she was suffering from sciatica on that day. We accept her evidence that she was feeling cold and her back condition had been aggravated by that and she was in more pain than usual.

51. The claimant's version of events is that Ms Marrison walked towards her and “started again”. We find it is likely that Ms Marrison asked the claimant if she was ok and did she have a minute. We find it is likely the claimant replied if she could leave her alone or she may as well go home (see page 269). The claimant's recollection is that her manager snapped at her, saying “well go on then go home, go on, go”. Ms Marrison’s recollection is that the claimant said to her she felt like going home so was going home and Ms Marrison responded “ok then”.

52. The Tribunal finds that this is an occasion when each of the individuals had a perception that was different to the other. From the claimant's perspective she was unwell, cold, in pain and felt that her manager was unsympathetic and was “hassling her”. From Ms Marrison’s point of view the claimant had arrived late without explanation and was overreacting to a simple enquiry.

53. We find what happened next was that the claimant had gone to speak to a colleague, Carol Hurd, on the next team down. Ms Marrison’s recollection is at page 217. The recollection of Ms Hurd as given to the grievance officer is at pages 608 and 609. The claimant’s recollection is in her statement at page 270.

54. There appears to be no dispute that within minutes Ms Marrison approached the claimant and said words to the effect of could she return to her desk and do some work. Ms Hurd remembers the words as “can you get back to your desk?”. The claimant did return to her desk. Ms Hurd comments that the request was made in a “sharp manner” and that she “felt LM was confrontational”. She commented that she felt the request to return to her desk was not unreasonable but felt it was delivered in a harsh manner. She further added “the events on 6 November lasted a few minutes and she had found LM brisk”.

55. We find it is likely that Ms Hurd is an independent witness. She explained to the grievance officer that she had found LM very supportive, for example when she had returned to work after the death of her father (page 609). Her recollection was given some time after the events occurred but after the claimant had left the respondent. We rely on her evidence.

56. Ms Marrison noted that she had said to the claimant, “if she was going home then she could go”. She says the claimant said, “you told me to go home” and she

confirmed (page 217). We therefore think it is likely that the claimant's recollection that Ms Marrison told her to go home is correct.

57. The claimant said, “to tell anybody as depressed as I am to go home to an empty house where I have no support is despicable”.

58. We accept the claimant's evidence that she felt distraught.

59. We find the claimant came into work that day despite not feeling well because she was due to attend training and that she attended the training that afternoon (see grievance officer report, page 449).

60. We accept Ms Marrison’s evidence that she spoke to her manager, Ms Foxly, about her concerns regarding the claimant's behaviour. We accept Ms Foxly suggested she invite the claimant to an informal meeting to discuss these with her.

61. We find on 12 November 2014 there was training on the new Digital Mail System (“DMS”). Ms Marrison said she approached the claimant’s desk and asked if everything was ok. The claimant replied “yes” but did not move her head or look at her. Ms Marrison asked “are you not using your second screen” and the claimant replied “no”, again no eye contact. Ms Marrison said she asked her “why not?”, and the claimant ignored her.

62. The claimant's recollection of this event was similar although her explanation and perception was different. The claimant said at the point Ms Marrison made that enquiry the claimant was being trained and speaking to the trainer. She said Ms Marrison butted in. The claimant accepts that she did not make eye contact but the reason for that was because she was talking to someone else. The claimant said there was a reason why she was not using her second screen: she was only using one screen due to her back condition.

63. There is a dispute between the claimant and Ms Marrison as to whether the incident on 12 November occurred on 12 or 14 November, but we find that nothing turns on that.

64. We find that Ms Marrison invited the claimant to an informal meeting on 12 November 2014. The request was sent on 11 November 2014 at 12.35pm (see page 220). The claimant replied the same day asking the meeting be postponed until Friday 14 November and that Helen Mitchell be allowed to attend as her companion, as that was the first day she was free (see page 220). On the same day the claimant attended her GP, Dr Blockley (see page 221).

65. On 12 November Ms Marrison responded saying she was unable to attend on Friday but she had booked a meeting room for Monday 17 November at 11.00am-12noon.

66. We find the claimant realised that Helen Mitchell was not usually in work on Mondays (see page 224). She emailed Helen Mitchell, explaining that she herself is absent on 13 November but will email Linda Marrison when she is back in work on Friday 14 November (page 225). On Saturday 15 November the claimant emailed Linda Marrison to state, “just to let you know that Helen isn’t in work on Monday”. The claimant’s email is abrupt in tone:

> "I'd also like you to tell me who your 'companion' is. I can't understand why you said you weren't available on Friday 14th when you were in work."

67. On Monday 17 November Ms Marrison responded:

> "Elaine, I have booked a room 2.00pm-3.00pm tomorrow. Please note this will be the third attempt to arrange this meeting with you. If you fail to attend I will consider dealing with this under HR23007 (insubordination)." (Page 226)

68. Later that day Carol Hurd, one of the claimant's colleagues, emailed Ms Marrison:

> "Just for info, Elaine not so good today. Thanks, Carol."

69. Ms Marrison responded half an hour later, "Thanks Carol".

70. We find there is no evidence to suggest that Ms Marrison took this information into account when conducting her communications with the claimant.

71. In cross examination Ms Marrison said that she was aware the claimant suffered from depression from reading her file. She also said that she was aware that the claimant's mother had died in April 2014 and that the claimant, an animal lover, had been very distressed by a fire at the Manchester Dogs Home in September 2014, where the claimant had been a volunteer. However the way she communicated with the claimant does not reflect that she was aware of the claimant's poor mental health.

72. We find that Ms Marrison asked the claimant if she could find another companion for the meeting on Monday 17 November 2014. The claimant responded that she could not. Ms Marrison said she needed to have the meeting and if necessary she could find the claimant an independent companion. The claimant said that she was not refusing the meeting but asked if the meeting could wait for Helen Mitchell. The claimant said that she did not understand why the meeting was urgent and that she was feeling ground down.

73. There is no dispute that the claimant was very distressed. She went to look for a senior manager, Alison Lowe, who was absent on sick leave. Ms Hiscox (now retired) was in the senior manager's office. We entirely accept her evidence that she took the claimant into a private room, made her drink and allowed her to speak about what was distressing her.

74. Ms Hiscox accepts that the claimant asked her about a move from the team. The claimant said Mrs Hiscox would not comment on the request because she did not know anything about the case. The claimant perceived that as meaning Ms Hiscox could not take sides.

75. There is no dispute that Ms Marrison was the claimant's manager, Ms Foxly was Ms Marrison's manager and Ms Hiscox was Ms Foxly's manager. We find that Ms Hiscox spoke to Ms Foxly and asked her to speak to the claimant about the serious allegations of bullying the claimant had made about Ms Marrison.

76. The claimant attended a meeting on 18 November 2014 with Ms Foxly (see pages 230-231 for Ms Foxly's notes).

77. The claimant in cross examination said that these notes were inaccurate and that there was a lot missing. The minutes of the meeting taken by Ms Foxly on 18 November were sent to the claimant on 20 November (see page 243).

78. The claimant reiterated her allegations of bullying by Ms Marrison in this meeting. She also told Ms Foxly that she had a letter from her GP saying she was being bullied. Ms Foxly asked her to bring it in. She also asked the claimant to put her allegations in writing.

79. The claimant said she understood Mrs Hiscox had told her she did not need to meet with her manager Ms Marrison. She also said that Mrs Hiscox may have implied that.

80. Ms Foxly said she contacted Chris Hiscox who confirmed she had not said the claimant should not attend the meeting arranged for later on 18 November with Ms Marrison.

81. The claimant said in cross examination that she felt she was being intimidated at this meeting on 18 November. We find that the claimant raised the issue of a transfer for herself in this meeting but it was not responded to by Ms Foxly (see page 230).

82. We find there was a second meeting on 18 November (see pages 238-240). At that meeting were the claimant, Linda Marrison, Chris Hiscox and Jim Eynon.

83. In that meeting the claimant was given a list of incidents by Ms Marrison where it was alleged she was insubordinate (see page 238). The meeting concluded with Ms Marrison informing the claimant she considered "her behaviour to be a refusal to comply with a reasonable management request and therefore insubordination" (page 239). She stated: "if there are any repeats of unacceptable behaviours and/or insubordination, then I will consider taking disciplinary action". She advised: "repetitive minor misconduct can be viewed as serious misconduct".

84. The claimant raised the issue of her depression and her back issues when asked if there were relevant personal issues or health reasons which affected her behaviour. (Page 239)

85. The following day,19 November 2014 Ms Hiscox sent an email to the claimant (page 232). She stated that Ms Marrison confirmed she would send the claimant a copy of the notes of the meeting as the claimant had felt unable to discuss any points without notes. She stated that Ms Marrison would send a copy of the notes from the meeting on 18 November "by close of business 20 November 2014" and she considered "a week, until 27 November," was "a reasonable time to prepare yourself for a meeting with Linda, your manager". She also suggested the claimant contact workplace wellness, the employee assistance programme and her TU representative.

86. We find that the outcome of the meeting held on 18 November between the claimant and Ms Marrison was ambiguous. On the one hand the claimant was told

she could have an opportunity to reply within a week and there would be another meeting. On the other hand she was clearly informed by Ms Marrison that she had been “insubordinate. “ . She considered “overall this to be minor misconduct under HR23007”. She also “advised Elaine that if there are any repeats of unacceptable behaviours and/or insubordination that I will consider taking further disciplinary action. I advised that repetitive minor misconduct can be viewed as serious misconduct as stated in guidance HR23007”.

87. On 20 November 2014 Ms Marrison sent a copy of the notes of the meeting on 18 November to the claimant (see page 237). She stated:

> “As Chris Hiscox mentioned, I would like you to respond and then arrange a further meeting. Please let me know when this meeting will be and who your companion is. Note: I am unavailable for a meeting on Thursday 27 November.”

88. Ms Marrison also suggested informal mediation.

89. We find at page 263 on 27 November Ms Foxly was chasing the claimant for her allegations of bullying in writing so that they could be investigated “as soon as possible”.

90. In cross examination Ms Marrison said she was unaware of any allegations of bullying against her at this stage.

91. The claimant replied to Ms Foxly on the same day saying that she had spoken to Chris Hiscox and explained “the difficulty I am faced with”. She explained that in relation to the allegations of bullying, “having to write this out is an ordeal for me which is why it is taking time” (page 263).

92. We find that on 1 December 2014 the claimant handed in a nine page document of complaint detailing allegations of bullying by Ms Marrison (pages 267-275) together with her GP letter of 11 November, to Ms Foxly. Ms Foxly says she has no recollection of receiving those documents. It is accepted that the respondent did receive them and Ms Foxly agreed that by a meeting of 3 December 2014 she was aware of the complaint letter.

93. We find that on 1 December Linda Marrison contacted the claimant asking for a time and date for the meeting and to be provided with any written response in advance of the meeting, and a copy of the reasonable adjustments passport.

94. On 3 December 2014 there was a meeting arranged at the last minute so that Julie Cawley could attend as the claimant's companion. Julie Cawley was a term time only worker and would shortly be going on leave. In attendance were Ms Foxly, Ms Hiscox, the claimant and Julie Cawley. There appeared to be no formal minutes of the meeting. There are some notes made by Ms Hiscox at page 305.

95. We find that Julie Cawley had been to see Chris Hiscox as was worried about the claimant’s state of mind. (see page 305).

96. The summary of the meeting is contained in an email to the claimant (see page 283). The claimant says she did not agree to these outcomes although they were discussed at the meeting.

97. We find there was also a meeting between the claimant, Julie Cawley and Linda Marrison on 4 December about the reasonable adjustments passport in terms of time off for a medical appointment (see pages 287 and 288).

98. On 5 December 2014 the claimant received an email at page 290 from Ms Marrison informing her that in the meeting of 18 November 2014 she had felt unable to respond to the points raised and so a further meeting was to take place to discuss this once she had received a copy of the notes. Ms Marrison stated :

> "A week was considered a reasonable time limit. This was subsequently extended to two weeks and despite reminders from myself and Chris Hiscox I have still not had any response from you.
>
> Under the circumstances I must assume that you do not intend to reply and therefore I advise you that my decision under HR23007 is as follows. Your behaviours have been unacceptable and your refusal to comply with reasonable management requests represents minor misconduct.
>
> I must remind you at this stage if there is any repeat of unacceptable behaviours and/or insubordination then I will consider taking further disciplinary action. Repetitive minor misconduct can be viewed as serious misconduct."

She also goes on to state:

> "I must also advise you that when anybody's behaviour falls short of the acceptable standard then they will not be permitted to work overtime. I have therefore removed your name from the list of staff working overtime tomorrow as this is with immediate effect.
>
> I also consider that with your recent health issues I believe that by not working overtime this will benefit you and help you maintain a more healthier work/life balance."

99. We turn to paragraph 43 of Ms Hiscox's statement. She confirmed that she had held a meeting with the claimant on 4 December 2014 in which "we had agreed it would be considered as Mrs Worsley's reply to the original meeting on 18 November 2014". There was therefore no need for the claimant to reply to Ms Marrison about the allegations of insubordination.

100. The Tribunal was not taken to any formal notes of the meeting between Mrs Hiscox and Mrs Worsley on 3 December 2014. Mrs Hiscox accepted that as she had not been in the office on 4 December 2014 or 5 December 2014 she had not contacted Ms Marrison to explain that she and Mrs Foxly had told the claimant on 3 December that she did not need to provide a response in writing to the allegations of misconduct.

101. The Tribunal finds the respondent witnesses' account of this puzzling.

102. In her timeline at page 306 Ms Hiscox states:

> "As Chris Hiscox nor Kath Foxly had been the office on Thursday 4th and Friday 5th they had not been available to contact Linda Marrison to confirm that the meeting held on 4th was to be considered Elaine's reply to the original meeting on 18 November, and therefore the email was in effect incorrect and apologies should be put on record."

103. We find that there is a typographical error in Ms Hiscox's timeline and in her statement where she says that the meeting with the claimant herself and Kath Foxly was held on 4 December. We find the correct date of the meeting was Wednesday 3 December. (See claimant's email at page 292). We find the only meeting on 4 December was a meeting between the claimant, her representative (Julie Cawley) and Linda Marrison about the reasonable adjustments passport.

104. The Tribunal finds no apology was ever put on record to the claimant about the failure of Ms Hiscox and Ms Foxly to inform Ms Marrison that they had told the claimant she did not need to respond in writing to Ms Marrison. Ms Marrison never indicated her email of 5 December confirming the claimant was insubordinate and removing her overtime appeared to be based on an inaccurate premise namely "you do not intend to reply". P290

105. We find that the claimant responded to the withdrawal of overtime and the finding of minor misconduct by an email on 5 December 2014 at 18:34 (page 292) identifying her confusion:

> "I was under the impression that the meeting I had with you and Kath Foxly on Wednesday (3rd) superseded the need for any further meetings with anybody before mediation had been arranged."

106. The Tribunal cannot trace a reply to that email.

107. We find there was a further meeting on 9 December 2014 between the claimant and Ms Hiscox with Karen Williamson, an overtime supervisor, also present (see pages 323-324). Perhaps surprisingly Ms Hiscox informed the claimant that a "decision maker would only be involved if Elaine wanted to make a formal complaint and then the decision would be formal". By this stage the claimant had submitted a nine page document detailing her allegations of bullying together with a supportive letter from her GP.

108. Meanwhile we find there had been an issue about the "Building Our Futures" event.

109. The claimant stated she understood the policy to be that if she was formally notified individually that she needed to attend a meeting of this type then she put it in her diary and attended. If she received a later generic email about the same event she should ignore or delete it and go on the first occasion where she had been invited personally.

110. The claimant's evidence is that she was invited to a "Building Our Futures" event on Thursday 20 November 2014. She received an email to confirm her attendance on that date and she attended.

111. Ms Marrison contacted the claimant on 21 November to say that her invitation to the event is "listed below on 4 December" (see page 27), and if the claimant was unable to make the date she should let her know. The claimant responded promptly explaining her invitation was for 20 November 2014 and she was not aware of anything else.

112. We find that the claimant viewed this exchange as a "battleground". She could not understand why there was a "degree of confusion" as was suggested to her in cross examination. She said she thought the manager knew she had to go on the first slot. It is the claimant's evidence that she had copied her manager into the original email and Ms Marrison knew that she was going on the earlier date.

113. There is no dispute that the claimant had replied to the issues of alleged insubordination raised on 18 November by Ms Marrison at the meeting on 3 December 2014 with the more senior managers Ms Hiscox and Ms Foxly. She had also handed in her nine page grievance document on 1 December.

114. It appears from the email at page 290 that the insubordination finding was linked to the claimant's failure to respond to Ms Marrison about those allegations. Our reason for this finding is that having in her email at page 290 narrated the claimant's alleged failure to respond she says:

> "Under the circumstances I must assume that you do not intend to reply and therefore I advise you that my decision under HR23007 is as follows: your behaviours have been unacceptable and your refusal to comply with reasonable management instructions represents minor misconduct."

115. We find that Ms Marrison is taking into account in her finding of "minor misconduct" the claimant's failure to respond to her despite the fact the claimant had been told by two senior managers that she did not need to respond to Ms Marrison.

116. The Tribunal finds it unsurprising that by this stage the claimant was increasingly confused and feeling besieged. In addition the Tribunal finds the matter is confusing because at the original meeting it appears that the respondent (Ms Marrison) had already found minor misconduct.

117. We turn to the withdrawal of overtime. The Tribunal finds that Ms Marrison issued a further sanction linked to the same behaviour. She stated:

> "I must also advise you that when anybody's behaviour falls short of the acceptable standard then they will not be permitted to work overtime. I have therefore removed your name from the list of staff working overtime tomorrow as this is with immediate effect."

118. We refer to the guidance on overtime at page 233. It states that a person working overtime must have behaviours which are "acceptable".

119. At the hearing the respondent's witnesses sought to argue that the other reason why the claimant was not being permitted to work overtime was that she had a "must improve/borderline" PMR and the guidance states:

> "Anyone who is 'must improve' or 'borderline must improve' under PMR will not be able to work overtime."

120. We find firstly this was not the reason given to the claimant at the time. Secondly, she did not have an overall "must improve" or "borderline must improve" under PMR: it was in relation to one area of her work only.

121. The Tribunal was concerned about the sentence in the email removing overtime which stated:

> "I also consider that with your recent health issues I believe that by not working overtime this will benefit you and help you to maintain a more healthy work/life balance."

122. In evidence Ms Marrison said she did not know about the claimant's health issues apart from the reference to depression in her file. She said she was not aware of receiving the claimant's GP letter handed in on 1 December until after the claimant had gone absent from work on sick leave later that month.

123. The evidence from the claimant was that work was "her rock" and she enjoyed working overtime and relied on it financially. She also said that it gave her stability. We find removing the claimant's overtime was distressing for her.

124. We find that there was due to be phone training on 9 and/or 10 December 2014.

125. Ms Foxly informed the claimant as she had missed her first phone overview she should attend a session the following day at 11.00am (page 309). The claimant explained to Ms Foxly she had missed the training as she was in another meeting (with Ms Hiscox) at 11.00am and that she had explained that to her manager Ms Marrison that morning. She also explained that she had spoken to Sharon, the phone trainer who had informed her she could either do the 2.00pm session (if there was room) or she was doing a "sweep up session" the following week.

126. We find the claimant tried to attend the 2.00pm session the following day. We find she attended in good time and realised it was full and agreed with the trainer she would attend the "sweep up session" the following week.

127. We find that the claimant's manager, Ms Marrison, had noted that the claimant was sitting at her desk at 2.00pm. She reminded the claimant she should be at the training. The claimant informed her that she was on her lunch break and explained that she had already spoken to Sharon (the trainer). Ms Marrison reiterated that the claimant needed to go to the training. The claimant did not participate in the training that day. We find the reason the claimant did not do so was because the seesion was full and she had agreed with the trainer to go the "sweep up" session.

128. We find that by this stage it is clear that the relationship between the two women had broken down.

129. We find on 11 December Chris Hiscox sent an email to the claimant confirming the present position and suggesting she complete a stress reduction plan.

She emailed a copy to Ms Marrison and Ms Foxly and also suggested they read the new mental health guidance (see page 325).

130. On 11 December 2014 Ms Foxly sent guidance on mediation to the claimant and Ms Marrison (page 312).

131. We find that one of the suggested outcomes of the meeting with Ms Hiscox was that Ms Foxly would review the claimant's leave request for 31 Dec 2014. We find she did so and refused it (see page 329).

132. We find Ms Foxly tried to arrange mediation. She wrote on 15 December (page 338) and asked the claimant for a response that day.

133. On 16 December Ms Foxly chased up the claimant's flexisheet. She stated, "you have been asked by your manager on several occasions to provide your flexisheet". She suggests that "any further refusal to comply with a reasonable request from a manager could result in this being escalated to serious misconduct" (see page 352).

134. The claimant provided her flexisheets on 17 December (see page 357).

135. On 17 December 2014 the claimant said that she was unable to take part in mediation:

> "I now feel too ill to deal with this so it will have to be postponed, sorry."

136. The claimant was absent from work on sick leave on 18 December 2014. She never returned to work.

137. The claimant's fit notes are found at page 364,19/12/14 to 2/1/15 – stress at work, page 369 ,2/1/15 to 16/1/15 – depression due to stress at work, page 390 16/1/15 to 30/1/15 – depression due to stress at work, page 393 ,30/1/15 to 13/2/15 – depression due to stress at work and page 405, four weeks from 13/2/15 – depression due to stress at work.

138. We find that the claimant obtained a fit note from her GP on 19 December 2014 valid until 2 January 2015 (page 364). She had rung in on 18 December 2014 saying she would not be attending work.

139. We find the claimant attended her GP again on Friday 2 January 2015 and obtained a further fit note to 16 January 2015. However, the claimant did not send that fit note in until 7 January 2015. The claimant explained that she arranged to meet a work colleague on each occasions she obtained a fit note and the work colleague took the fit note into the office. Ms Marrison accepts she received the first fit note on 23 December 2014 and the second fit note on 7 January 2015.

140. However, when Ms Marrison had not heard from the claimant after the first fit note expired she contacted the claimant's son (page 370) by text on 6 Jan 15.

141. The claimant does not have a landline or mobile telephone. Her son is listed as the emergency contact. Her son responded to Ms Marrison text by ringing Ms Marrison (see page 371).

142. The claimant was very distressed that her manager had contacted her son. Her son does not live with her. She considered the emergency number was only to be used in circumstances if she had died at work or some similar serious emergency.

143. On the same day that Ms Marrison received the claimant's original fit note, 23 December 2014, she sent a letter to the claimant reminding her of keeping in touch arrangements. She specifically asked the claimant to ring her on Friday 2 January 2015 and gave an alternative number for Kath Foxly or Andy Foot if the claimant felt she was unable to speak to her. She reminded the claimant that if the absence extended to ten days they had a policy of an informal meeting.

144. We find that the claimant was very distressed when she received this letter. We find at this stage the claimant was very unwell. She said she had retreated to her home which she considered a "sanctuary". She also explained she had a serious phobia about opening post.

145. We find the claimant was a very vulnerable individual. Her GP letter of November 2015 expressly stated this. We rely on the claimant's description of her illness to find it was serious and intractable. See page 31 paragraph 52 of claimant's statement.

146. From Ms Marrison's point of view she considered was behaving as an efficient manager would, following the respondent's sickness absence policies.

147. Ms Marrison sent the claimant another letter after she had received the second fit note (see page 382). Again she asked the claimant to telephone her. She referred to independent mediation. She also asked the claimant to complete a form ACC1. The respondent said that this was a "accident at work form" which enabled a person who was suffering from a work related illness to identify the nature of the illness and why it was work related.

148. We find it surprising that such a request was made because the claimant had handed in a nine page document with a GP letter on 1 December 2014 to the respondent which clearly identified the issues which were making her ill and medical evidence to confirm that her stress was related to those factors. However, Ms Marrison explained that at this point she did not think she had seen either the GP letter from November or the nine page grievance statement.

149. The Tribunal finds the claimant had handed that information to another manager. The Tribunal finds Ms Foxly agrees she had received that information by the meeting of 3 December. The Tribunal finds Ms Hiscox was also aware of both the GP letter and the nine page grievance by that date.

150. Ms Marrison also suggested it might be helpful to have an Occupational Health referral and asked the claimant to complete an enclosed consent form.

151. The Tribunal notes that the respondent's witnesses informed us that their policy was:

> "An individual could not be referred to Occupational Health without completing a consent form."

152. We entirely accept the claimant's evidence that at this time she was feeling very ill indeed. She does not know when she opened the letters from the respondent.

153. We accept Ms Marrison's evidence that the letters she was sending the claimant were standard letters for a manager to follow during sickness absence.

154. The respondent used a mail delivery company for the letters to be delivered to the claimant. There is evidence in the bundle that they were delivered and the claimant agreed, save for one letter which we will refer to later, that they were all delivered.

155. We find that the claimant made a further appointment with her GP on 8 January 2015. She obtained a letter which is dated 9 January 2015 which states that the claimant is becoming increasingly depressed due to her situation at work. She is feeling desperate. The letter states that the claimant is clear in her opinion that "if this matter were to be resolved her mood would improve and she would be able to return to work".

156. The doctor explains that approximately seven years ago the claimant had a similar episode of severe depression triggered by work related stress, and once that matter was resolved she returned to work. It explains her depression had been in remission since the recent episode. It asks the employer to look into the matter in order to reach a resolution as soon as possible (see page 385). This is accompanied by an undated letter from the claimant (see page 384) asking the employer to read the doctor's letter, the previous letter of 11 November 2014 from the doctor, the claimant's nine page statement and this letter (undated). The claimant repeats that it is unreasonable for her to continue working with her current manager and reminds the employer she requests a move to another team.

157. We find the claimant arranged for a colleague to take pages 384 and 385 into the workplace. It was addressed to Alison Lowe, senior manager. The claimant did not know but Alison Lowe was absent on long-term sick leave and subsequently took ill health retirement.

158. Ms Marrison said she did not receive pages 384 or 385 and was not aware of them.

159. We accept the evidence of Mr Waldron that when he started work in January 2015 at Albert Bridge House in Manchester he was passed pages 384 and 385 on or around 12 January 2015.

160. The claimant received a response to that letter on 11 February 2015 (pages 399-400 – see below).

161. On 15 January 2015 the claimant's manager, Ms Marrison, contacted HR for a advice (page 408). She provided a summary of the matter as she perceived it. She stated, "the jobholder has been insubordinate and difficult in work and has subsequently been issued with informal minor misconduct on 28 November 2014". She referred to a previous Employment Tribunal.

162. Ms Marrison also stated:

> "Prior to her absence the jobholder has separately claimed in a letter to my manager that I am the stressor."

163. We find this suggests that Ms Marrison was by this stage aware of the claimant's allegations of bullying claimed in the nine page letter given to her manager, Ms Foxly, on 1 December 2014.

164. Following that referral there was a face-to-face meeting with Catherine Lomas, Occupational Health, Linda Marrison, Bill Fearnley from Human Resources and other managers (see page 406).

165. We find the summary of information presented to HR to be slightly puzzling. It states:

> "You have a jobholder on long-term sickness who has complained they cannot return to their post unless their manager is moved."

166. The Tribunal finds that this is factually incorrect. The Tribunal finds the claimant never requested for Ms Marrison to be moved. We find the claimant always requested a move for herself.

167. The advice from HR was that the "keeping in touch" duties should be passed from Ms Marrison to another manager. HR also advised that the claimant's detailed nine page document should be "managed as a formal grievance complaint". It identified the request to be moved as the jobholder stating that the manager should be moved (rather than them moving). As stated above, the Tribunal finds that this is based on incorrect information. HR suggested this was likely to be picked up as a possible resolution to the complaint and rolled up as part of the grievance. It noted that the claimant was depressed, that she qualified under the Equality Act 2010 and the managers should "look to the facts and make adjustments that are reasonable".

168. The advice from HR is dated 18 February 2015 (page 406).

169. The Tribunal finds that the face-to-face meeting described above took place on 5 February 2015. Ms Foxly and Mr Taylor were also in attendance.

170. The Tribunal finds that Ms Marrison had a meeting in mid January with Ms Foxly and Ms Hiscox as set out at paragraph 63 of her statement which led to the referral to HR. The referral is at page 388.

171. We turn to Mr Waldron's consideration of the claimant's request for a move contained in her letter to Alison Lowe supported by her GP letters.

172. We find that Mr Waldron's letter is an unequivocal refusal of the claimant's request to move to another team. He specifically states:

> "With regard to your request for a move to another team I do not think this would be a realistic solution to the current problem. You may find my decision to be disappointing but in all honesty, I do not think that moving you would result in a long-term solution."

He then goes on to state:

> "Whilst you might regard this news to be disappointing, there is another option that you may wish to consider if you feel that a move out of the Manchester office would be beneficial. This is to register on the Civil Service job site and apply for a priority mover status."

173. When giving evidence Mr Waldron appeared to suggest that his letter was not as final as it appeared and that there was an option to review if the claimant had met with respondent. The Tribunal is not convinced by that explanation. The Tribunal finds that the letter is very clear that the claimant's request for a move to another team within the Manchester office was rejected.

174. Although in this letter Mr Waldron offers to meet the claimant, we find that is in the context of an outcome where he has refused her request for a move.

175. We find that Mr Waldron did not offer to meet the claimant before making his decision. We find that he did speak to the claimant's manager, Ms Marrison, and Ms Hiscox.

176. Mr Waldron explained he was new to the office and had no other knowledge of the matter save what he was told and the claimant's personnel file.

177. We find that Mr Waldron did not explicitly acknowledge in the letter dated 11 February that the claimant was a disabled employee, although at page 399 he refers to reasonable adjustments.

178. We find that Mr Waldron said in cross examination he did not view the claimant as disabled. He said thought that matter was in the past.

179. The Tribunal finds this is surprising. The claimant's letter requesting a move (page 384) which was accompanied by a GP letter of 9 January 2015 refers back to her earlier GP letter of 11 November 2014. That expressly states:

> "As we know, she has had a long history of depression and sciatica and as such is covered under the Disability Act. With this in mind obviously an employer should view to help her in the workplace…"

180. Surprisingly he also said he could not remember seeing the nine page letter of grievance despite the fact that is also referred to in the claimant's letter at page 384: "my nine page statement".

181. He also said he had not read the policy on mental health and stress.

182. In his letter Mr Waldron refers to a history of team moves because of ongoing issues between the claimant and her manager:

> "I note from your file that previous team moves have taken place principally because of ongoing issues between you and a number of managers and no real effort on either part has been made to discuss and resolve issues face to face."

183. When cross examined Mr Waldron accepted that in 2005 (see page 113) there was a team move of the claimant to a new manager following an incident. There was no suggestion that the request had been made by the claimant. Mr Waldron accepted that the claimant had not requested such a move.

184. The Tribunal finds that there is no evidence in 2007 that the claimant requested a move. At pages 117 and 133 we find the evidence is that the claimant was not happy about the suggestion of a move.

185. Mr Waldron accepted that there was no evidence that the claimant had ever previously suggested a move to a new manager.

186. We find on 13 February the claimant obtained a further fit note (page 405) and arranged for it to be taken into work by a colleague.

187. We find by this stage Ms Marrison had received the detailed advice from Mr Fearnley advising that a different manager should take over the "keeping in touch". Ms Marrison did not act on that advice. Instead she sent a further "keeping in touch" letter dated 26 February 2015 asking to meet the claimant on Friday 6 March 2015.

188. We find that the claimant finally received the letter dated 26 February 2015 on 4 March 2015 (see page 412).

189. However, Ms Marrison had re-dated the letter and re-sent it on 2 March 2015 when she had been informed that the claimant had not received delivery on 27 February 2015. The duplicate is at pages 413-414.

190. We find the 2 March 2015 version of the letter had been hand delivered by Paul Taylor (see page 422).

191. The claimant did not attend the meeting on 6 March 2015.

192. Ms Marrison spoke to a colleague, Debbie Williams who explained that the claimant only rang her on her work phone and Debbie did not have a contact number for the claimant. Debbie Williams was the employee whom the claimant contacted to bring in her fit notes.

193. Debbie Williams explained to Ms Marrison that she was concerned because the claimant was "in a bit of a state". She also informed Ms Marrison that she did not think the claimant was opening any mail either.

194. We find during this period of time the claimant was extremely unwell. We entirely accept her evidence that she felt suicidal. We accept the claimant's evidence at page 32 of her statement that she was chronically depressed. She was not in a fit state, she said, to be dealing with the letters she had received from work. She was going out of her mind with worry and was isolated and separated from her colleagues who were a help and support to her. She felt she had reached breaking point.

195. We find Ms Marrison contacted the claimant's son on 6 March 2015 but received no reply from him (page 421). We find that is unsurprising because the

claimant had expressly told him not to contact the respondent and to delete any texts.

196. Ms Marrison was aware that the claimant was a disabled employee. She was aware from her fit notes that she was suffering from depression due to stress at work. She was aware that the claimant had said that her depression was caused by her poor relationship with Ms Marrison. She was aware that HR had recommended that “keeping in touch” be handed to a different manager. She was aware from her conversation with Debbie Williams that the claimant was “in a bit of a state” and not opening mail.

197. We find Ms Marrison made an enquiry about the claimant's entitlement to pension (page 423). Then on 5 March she wrote recommending that the claimant's employment be ended on the grounds of continuous absence, when the claimant had been absent from work since 18 December 2014, a period of 2½ months. p425

198. The file was referred to the decision maker, Mr Woods (see page 424) with a recommendation of dismissal.

199. Ms Marrison travelled by car with Mr Taylor to hand deliver the letter at page 425.

200. At the point when Mr Taylor arrived at the claimant's home, the claimant was about to take her dog for a walk. We find she was very upset and distressed to see Ms Marrison sitting in a car outside her home.

201. When Mr Taylor approached the claimant, she asked him to leave her alone and stated he had no right to invade her privacy by coming to her home without her permission. He said that he had every right to do so. He alleged that the claimant tried to hit him (see page 428). Ms Marrison said the claimant lunged towards him and screamed violently “go away, go away” (page 427). The claimant denied that she had attacked Mr Taylor.

202. The respondent reported the incident to the police. The claimant stated that she never received any contact from the police. Ms Marrison also texted the claimant's son (page 429).

203. The respondent then arranged for the letter to be delivered by TNT (see pages 443-444).

204. We find that on 15 March 2015 the claimant completed a letter which says, “please accept this as a formal grievance letter”. She refers to her nine page statement handed in on 1 December 2014 together with letters from her doctor and confirmed that she is disabled under the Equality Act 2010. She referred once again to the request for a move from her manager. (See pages 445 and 446)

205. There is no dispute that no action had been taken in relation to the claimant's original grievance handed in on 1 December 2014.

206. The claimant arranged for the further grievance to be taken into work with her medical certificate on 17 March 2015. Reference to this grievance is found at page 447.

207. The grievance was acknowledged by Mr Bradley on 27 March 2015 (page 462).

208. We find that the decision maker in relation to the claimant's employment situation, Mr Woods, wrote to her on 26 March 2015 inviting her to a meeting on 2 April 2015 (pages 460-461).

209. The claimant responded promptly to that letter. She sent in a letter dated 1 April 2015 which Mr Woods said he received just before the meeting on 2 April 2015. The letter states:

> "As you know, I am currently on sick leave due to depression as certified by my GP. I am therefore unable to attend any meetings."

210. We find Mr Woods proceeded with the dismissal meeting in the claimant's absence on 2 April 2015. Mr Woods told us in cross examination that he did have the claimant's nine page statement of grievance handed in on 1 December and the claimant's GP letters dated 9 January 2015 and 11 November 2014. He also had the letter of 1 April 2015 from the claimant. He said he had seen the claimant's personnel file because he stated, "I was aware from case notes that there had been other instances of conflicts with previous managers". He said that he had not seen the claimant's most recent grievance of 16 March 2015 (page 445) and that he should have done. He said he knew that the claimant was suffering from a disability of anxiety, depression and sciatica.

211. We find that Mr Woods proceeded to deal with the disciplinary hearing before him.

212. We find that Mr Woods ruled out a team move for the claimant. We rely on paragraph 24 of his statement where he makes that clear. We also rely on his answers in cross examination in the early part of his evidence where he appeared to concede that the matter had been considered already by Mr Waldron, a more senior manager, and was outside his remit.

213. Later in cross examination he appeared to suggest that a team move was still an option if the claimant had engaged with the respondent.

214. We find his evidence on this point was inconsistent. We find that at the time he dismissed the claimant he simply ruled out the team move because, as he stated in his statement, he considered it had already been dealt with Mr Waldron.

215. In his evidence at Tribunal Mr Waldron appeared to suggest that his letter had a "gloss" on it, suggesting that there was an implicit suggestion that the team move was still open. We find that Mr Woods, having heard this evidence, then sought to qualify their own evidence.

216. Mr Woods agreed he did not take the claimant's length of service into account. He said it was not in the respondent's policy so he did not consider it.

217. He also confirmed he spoke to Linda Marrison before he received the file.

218. Mr Woods took into account the claimant's failure to respond to letters.

219. He issued a letter on 13 April 2015 dismissing the claimant. He said that he found there was "no prospect of you returning to work within a reasonable time".

220. The Tribunal finds Mr Woods did not have evidence to support this finding. Mr Woods said he reached this finding because he considered as the claimant had not completed the form for a referral to Occupational Health and was not attending meetings then that lack of engagement suggested that there was no reasonable prospect of a return to work. He also took into account that the claimant had failed to complete the ACC1(accident at work/injury at work) form and that the claimant had not taken up the offer of mediation. He also stated the claimant had failed to keep regularly in touch.

221. The letter of dismissal was hand delivered.

222. On 20 March 2015 the claimant wrote to the grievance officer, Mr Bradley. She stated clearly:

> "I'm currently off sick. I can confirm that I want to come back to work. To do that I need to be separated from my current frontline manager, Linda Marrison. If I sit in a different part of the office away from Ms Marrison and have a different FLM I believe I will be able to return to work initially part-time gradually increasing to full-time. I believe I would then be able to continue working full-time for HMRC efficiently and effectively until my retirement. This is what I want. It can only happen if Mrs Marrison is not in a position to make my life a misery as she has done."

223. She goes on to state that he may not be aware she has received her notice of dismissal. (Page 497)

224. The same day the claimant writes to the appeal officer appealing against her dismissal. She states clearly:

> "I am a disabled person under the Equality Act therefore HMRC is under an obligation to make reasonable adjustments for me. The adjustment I want you to make is to move me away from my current FLM, Linda Marrison. If I sit in a different part of the office away from Ms Marrison and have a different FLM I believe I will be able to return to work initially part-time increasing gradually to full-time."

225. The letter then explains:

> "Please note that my depression makes it very difficult for me to attend any meetings with HMRC. I will take advice from my GP about whether I should attend an appeal meeting." (Page 498)

226. Mr Bradley commenced his grievance investigation. He interviewed Ms Marrison, Helen Mitchell, Carol Hurd and the claimant wrote to him with her comments (page 593).

227. Mr Caren wrote to the claimant on 1 May 2015 inviting her to an appeal meeting on 15 May 2015 (page 506). In evidence he stated it was a review and not a re-hearing.

228. The claimant continued to send in fit notes (page 509).

229. The claimant wrote to Mr Caren on 13 May 2015 explaining she would not be attending the meeting on 15 May but she was writing grounds of appeal and would send them to him. She also sent in a letter from her GP stating:

> "I have full access to her records and feel it would be reasonable and helpful to her mental health if the meeting scheduled for Friday 15 May could be cancelled. In its place a letter sent to her detailing the information you require and the opportunity for her to respond in writing which she could do in a calm, non threatening environment would be beneficial and allow her to put her case forward in a fair manner."

230. Mr Caren granted this request (page 519) and the claimant sent in her detailed grounds at pages 520-522.

231. Mr Caren rejected the claimant's appeal. His letter is at pages 561-562.

232. We find that Mr Caren said he was aware of the nine page letter of grievance but not aware of the later grievance lodged on 16 March 2015. Mr Caren was unsure whether he had seen the later GP letter dated 9 January 2015 and stated he could not recall seeing the earlier GP letter from November 2014. He confirmed he had read the claimant's personnel file. He stated he accepted the claimant was a disabled person.

233. We find that Mr Caren stated at paragraph 24 of his statement that the claimant's request for a move had already been considered by Mr Waldron. He said that:

> "This suggested course of action was one with which, after careful consideration of Mrs Worsley's file, I fully agreed with and endorsed."

234. Mr Caren repeatedly stated that he wanted "honest dialogue". When asked by one of the panel members how that could have made a difference he could not say, except that he would have tried to be persuasive.

235. The claimant received an outcome from Mr Bradley, the grievance officer, on 21 August 2015 which rejected her grievance ([page 615).

236. The Tribunal finds that Mr Bradley was conducting his first grievance investigation and therefore had a lack of experience. He also candidly admitted he had had a discussion with a friend, prior to commencing the grievance, who was one of the managers who had previously been involved in conflict with the claimant and was relevant to the previous Employment Tribunal case. Mr Bradley did not consider that this amounted to a conflict of interest for him as the grievance officer.

The Law

237. For the disability discrimination claims, the relevant law is found in Sections 20-21 Equality Act 2010 (Duty to make reasonable adjustments) and Section 15 Equality Act 2010 (Discrimination arising from disability). The burden of proof provision is relevant, Section 136 Equality Act 2010.

238. We reminded ourselves of the principles in Igen Limited & others v Wong [2005] ICR 931 CA; Anya v The University of Oxford [2001] IRLR 377; Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL; Barton v Investec Securities [2003] ICR 1205; Madarassy v Nomura International PLC [2007] ICR 867; Laing v Manchester City Council [2006] ICR 1519; and Nagarajan v London Regional Transport [1999] ICR 877 HL

239. In the reasonable adjustments claim the Tribunal had regard to the principles in Environment Agency –v- Rowan 2008 ICR 218 EAT, Project Management –v- Latif 2007 IRLR 579 and Smith –v- Churchills Stair Lifts Plc 2006 524 CA. The Tribunal also had regard to the EHRC Code of Practice at 6.23 ad 6.28.

240. In the Section 15 claim the Tribunal had regard to Pnaiser –v- NHS England and Another 2016 IRLR 170 EAT. The Tribunal also had regard to paras 4.31 and 5.9 EHRC.

241. In the unfair dismissal claim the relevant law is found at Sections 95 and 98 ERA 1996. We had regard to BS v Dundee City Council 2014 IRLR 131.

Applying the Law to the Facts

Unfair Dismissal pursuant to the Employment Rights Act 1996

242. We turn to the first question: what was the reason for dismissal? There is no dispute that the respondent relied on capability, which is a potentially fair reason within the meaning of section 98(2) Employment Rights Act 1996.

243. We turn to the next question, which is whether the dismissal was fair or unfair within the meaning of section 98(4) Employment Rights Act 1996, having regard to the size and administrative resources of the respondent, equity and the substantial merits of the case.

244. In a capability dismissal the Tribunal has regard to consultation with the claimant, medical investigation and whether the respondent has considered alternative work. We were referred specifically to the case of **BS v Dundee City Council** which identifies that the Tribunal should consider how long an employer might be expected to wait.

245. We turn to the first issue of consultation.

246. The Tribunal finds that the respondent did communicate with the claimant and the claimant struggled to respond. The Tribunal relies on the letters sent by Ms Marrison to the claimant in accordance with the policy.

247. However, the Tribunal reminds itself of the guidance in the ACAS Code at appendix 4 which states:

> "Where absence is due to medically certified illness the issue becomes one of capability rather than conduct. Employers need to take a more sympathetic and considerate approach, particularly if the employee is disabled, and where reasonable adjustments at the workplace might enable them to return to work."

It goes on to state that:

> "There are certain steps an employer should take when considering a problem of long-term absence. These include:
>
> - Employer and employee should keep in regular contact with each other;
> - The employee must be kept fully informed if there is any risk to employment;
> - If the employer wishes to contact the employee's doctor he must notify the employee in writing and secure consent."

248. Ms Marrison was aware that the claimant suffered from depression. She was aware she was very distressed in the workplace before she went on sick leave. She was informed by Debbie Williams on 6 March 2014 that the claimant was in "a bit of a state" and she did not think she was opening mail. (Page 422)

249. Despite this and despite the fact that the claimant had presented a grievance on 1 December 2014 which named Ms Marrison as the person causing her distress, Ms Marrison continued to communicate with the claimant even though she had been expressly advised by HR that communication should be transferred to a different manager.

250. The respondent relied on the fact that the claimant did not respond to an invitation to complete a referral to Occupational Health, did not complete an ACC1 form and did not attend a proposed meeting with Ms Marrison or attend the dismissal hearing.

251. However, the Tribunal finds that to describe the claimant as not engaging is not accurate.

252. The Tribunal relies on its findings that the claimant ensured that her fit notes were taken into the respondent by a colleague. The claimant gave evidence about how very distressing she found it to contact someone and ensure that her fit notes were taken into the employer. This was a considerable effort on the part of the claimant.

253. In addition, the claimant had supplied medical evidence to the respondent, both accompanying the original grievance letter before she went sick on 1 December 2014 (GP letter 11 November 2014) and then again when she wrote her further letter in January 2015 which was accompanied by a GP letter of 9 January 2015. She also communicated with the dismissing officer by explaining she would not be well enough to attend, and she communicated with the appeal officer making a request for dispensation to provide written submissions.

254. The Tribunal turns to the issue of medical investigation. It was the respondent's case that because the claimant did not complete an Occupational Health form, they could not obtain up-to-date Occupational Health evidence which they needed.

255. The respondent stated through the dismissing officer that they did not consider contacting the claimant's GP. The respondent had the benefit of the claimant's fit notes which clearly identified that she was suffering from depression and that the depression was related to stress at work. They knew the stress at work was related to the claimant's manager, Linda Marrison because that is made clear in the nine page grievance statement and the two GP letters and the claimant's letter accompanying the January GP letter.

256. The dismissing officer stated he did not consider contacting the claimant's GP for advice about the claimant's prognosis and stated that he considered that a GP would not offer a balanced report on the basis they were "not qualified to represent the business".

257. The claimant gave evidence that if the respondent had contacted her for permission to contact her GP she would have given consent for this course of action because she had faith in her GP Practice who had supported her.

258. It was also suggested to the respondent that they might make a general Occupational Health referral for advice before dismissal as had been done during the claimant's absence (see page 408). There was no clear explanation as to why that was not done.

Alternative Work

259. As far as alternative work was concerned, the claimant put very clearly, both to the dismissing officer and to the appeal officer, supported by her GP, that if she could be moved to a different manager she would be able to return to work. We rely on Mr Woods' evidence in his statement and his early cross examination that he simply ruled that out because the decision had already been taken and refused by a senior manager. Neither Mr Waldron nor Mr Woods seemed to have regard to the fact that the claimant was a disabled employee and as per the ACAS guidance a reasonable adjustment of a transfer to another team was a way of ensuring a return to work.

260. The Tribunal relies on its findings of fact that the respondent is a huge employer. We heard evidence that 1,000 employees work in Albert Bridge House where the claimant was based. The Tribunal finds that there are at least 15 or 16 teams of approximately ten or 11 employees each on the second floor west wing (see page 721) of Albert Bridge House. The claimant thought there may be additional teams in another part of the building (east wing). There is no dispute that all members of those teams were engaged in the same type of work as the claimant.

261. There was no cogent explanation by the dismissing officer or the appeal officer why it was not possible to move the claimant to another team in the same building with another manager.

262. The Tribunal heard evidence that a request for a move to a different team was rare. However, the Tribunal also heard evidence that restructuring, re-organisation and changes between teams were frequent.

263. Mr Waldron suggested that if the claimant had moved into a different team someone would have to move into her place but did not address any further why that would have presented a difficulty.

264. The real reason for not moving the claimant appeared to be the reiteration that the claimant had had problems with managers in the past which had resulted in team moves.

265. The respondent's witnesses conceded in cross examination that the claimant had never previously requested a team move.

266. We heard evidence that the only information on file about a team move because of difficulties in relationships was many years earlier, in 2005.

267. So far as the alleged history of conflict in terms of the claimant and her managers, the claimant had been employed by the respondent for over 40 years. The most recent work related incident on the file appeared to be an issue in relation to the claimant and Mrs Smith, a manager between 2009 and 2012. There was no dispute that the team was disbanded due to a reorganisation. (See Ms Marrison statement paragraph 11).

268. **In BS v Dundee City Council** the Tribunal is reminded to consider whether the employer be expected to wait any longer. In this case no assessment was undertaken of how the claimant's absences could be supported and tolerated despite the respondent's policy expressly requiring that this should be done (page 755). Both Mr Woods and Mr Caren admitted this had not been done and there were no notes in the Tribunal of those steps being taken.

269. The point in time at which the respondent dismissed the claimant was relatively early: at the time she was recommended for dismissal she had been absent only for 2½ months, particularly in the context of an organisation where there is an extensive entitlement to sick pay. The claimant was entitled to six months' full pay/six months' half pay (see page 507). The respondent's policy appears to suggest implicitly that absence up to a year may be tolerated. See page 756 – "HMRC does not normally expect anyone to be absent for a year".

270. We remind ourselves it is not for us to substitute our own view. It is whether a reasonable employer of this size and undertaking could have reached this decision to dismiss the claimant for capability in these circumstances.

271. We rely on the fact that the claimant, a disabled employee suffering from depression, had expressly requested a team move. The claimant said her illness was being aggravated by her manager. Her request was supported by her GP. We find the dismissing officer gave no consideration to that request. The appeal officer did not seriously consider it either.

272. The claimant had an extraordinary length of service, of over 40 years. She was absent from work for a relatively short period of time on sick leave of less than 3 months when the decision to dismiss was taken. She was continuing to engage with the respondent on a limited basis. There was no dispute that save for the minor incident of insubordination recorded by Ms Marrison as an informal matter, she had a

clean disciplinary record. The dismissing officer dismissed on the basis there was "no prospect of returning to work within a reasonable time" The Tribunal finds this finding was not based on evidence. The evidence before the respondent from the claimant's GP was that if the work related matter was resolved she would be able to return to work. p385.The claimant's grievance letter of Dec 2014 and the letter accompanying her GP letter of 2015 (page 384) make it clear the claimant considered her work related stress was caused by the behaviour of her manager and if the claimant was transferred she would be able to work. Her appeal letter was even clearer in explaining she would be able to return to work if she was transferred to another team.

273. We find a reasonable employer of this size and undertaking in the above particular circumstances would not have dismissed the claimant.

274. We therefore find the dismissal was unfair.

S15 Equality Act 2010 claim

275. We turn to consider the claimant's claim for unfavourable treatment arising from disability pursuant to section 15 Equality Act 2010.

276. There was no dispute the claimant was a disabled person by reason of depression and that the respondent had knowledge of that disability.

277. We turn to the first question: did the respondent treat the claimant unfavourably because of something arising in consequence of disability in dismissing her?

278. It is not disputed by the respondent that the "something" arising in consequence of disability was the claimant's absence from work on sick leave. There was no dispute that the absence from work on sick leave arise directly as a result of the claimant's disability.

279. We turn to the next question: can the respondent show that dismissing the claimant was a proportionate means of achieving a legitimate aim? It was not disputed that the legitimate aim was the need to maintain an effective workforce and hence to be able to provide an adequate level of service to the public. The Tribunal turned to consider whether the respondent can show dismissing the claimant was a proportionate means of achieving that aim. The Tribunal finds that it cannot.

280. The Tribunal is satisfied that there was another way in which the legitimate aim could be achieved. The legitimate aim was to maintain an effective workforce and hence to be able to provide an adequate level of service to the public. The claimant stated clearly, and was supported by her GP, that she would be able to return to work if she was moved to a different team. There was no cogent explanation from the respondent as to why this could not be done. The respondent is a large organisation. We rely on our fact finding above that there were in the region of 15 or 16 teams on the same floor on which the claimant worked. There was no clear explanation why the claimant could not have been moved to one of those teams. Although there were some instances in the past where she had had conflict

with other managers, they were in the past and there was no evidence that the claimant had requested a move before.

281. In addition the claimant suggested that at the time she requested the move there was substantial reorganisation in terms of new employees being taken on. The evidence was also that although it was rare for moves to be requested, in fact due to reorganisation moves between teams were common.

282. The Tribunal has also taken into account the fact that the claimant in the past, approximately 7 years earlier, had a much longer period of sickness absence and was able to return to work. This was clearly identified to the respondent by her GP in the letter of 9 January 2015 which explained that when the claimant had a previous episode of severe depression triggered by work related stress she had been able to return to work. The evidence was also that the claimant's depression had been in remission from that time until 2014.

283. The Tribunal finds the respondent's policy of managing absence anticipates when the absence reaches two months the manager should hold a case conference identifying whether the business can continue to support the absence, taking into account the individual circumstances and the impact of the absence on the business.

284. The Tribunal had no clear evidence of the impact of the claimant's absence on the business. There was no suggestion that the team could not cope with the claimant's absence. The evidence was there was no clear identification of any real issue in terms of the problem of the claimant's absence. The Tribunal has had regard to paragraph 752: Sickness Absence – managing continuous absence:

> "There will be people with chronic conditions and serious of terminal illnesses which may require lengthy periods of absence. As a manager you will have a crucial role to play by actively managing absence from day one, responding to individual circumstances to achieve the best outcome for the jobholder and the business in each case."

285. There was no cost implication to the respondent if the claimant was moved to another team.

286. Taking all the above into account the Tribunal is not satisfied that dismissing the claimant on 9 March 2015 and failing to uphold her appeal against dismissal was a proportionate means of achieving their legitimate aim.

Failure to make reasonable adjustments

287. We turn to the claim for failure to make reasonable adjustments. The first issue is: what is the provision, criterion or practice ("PCP")? The claimant relies upon requiring her to work or continue to work with a manager against whom she had made an allegation of bullying, or requiring the claimant to work or continue to work with her manager, Linda Marrison. There is no dispute the respondent applied those PCPs.

288. The second question is: did those PCPs place the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? It was the claimant's case that her depression was substantially

aggravated by her manager Linda Marrison because of the way she behaved towards her, and therefore she was at a substantial disadvantage in relation to a relevant matter.

289. For the respondent it was argued that as there was no bullying of the claimant by Ms Marrison then the claimant was not placed at a substantial disadvantage in relation to a relevant matter. In the alternative it was argued that even if the claimant was bullied by Ms Marrison anyone in that situation would have suffered a substantial disadvantage whether disabled or not.

290. The Tribunal was satisfied that the PCP of working with her manager, Linda Marrison, against whom she had made an allegation of bullying and/or working with Linda Marrison placed the claimant at a substantial disadvantage in relation to a relevant matter. The Tribunal does not consider it is necessary to make a finding of whether or not Ms Marrison bullied the claimant.

291. The Tribunal relies on its findings of fact that the claimant was a disabled person suffering from the impairment of depression. She was a vulnerable individual. In 2014 her mother had died and she had become very distressed after the fire at the Manchester Dogs Home where she was a volunteer. The claimant's own witness statement makes it very clear how entrenched her depression, a lifelong condition, was and how vulnerable she was.

292. Linda Marrison was a robust manager. We rely on the evidence of the claimant's colleagues, Carol Hurd and Helen Mitchell, to the grievance officer. Carol Hurd had described Ms Marrison acting in a “sharp manner” and “confrontational” and in a “harsh manner”. Helen Mitchell described that Linda Marrison was “not willing to meet Elaine halfway, and that she was standing her ground/asserting her authority”.

293. We rely on our findings, particularly in relation to the withdrawal of the claimant's overtime, as being a wholly confusing for the claimant. We also rely on our finding that once Ms Marrison became aware that her conclusion in that email withdrawing the claimant’s overtime was unsafe because she appeared to be penalising the claimant for not responding to her in a situation where she later knew the claimant had been told by Ms Hiscox and Ms Foxly that the claimant did not need to reply to her, she did not apologise or send a further email correcting the position to the claimant. We find that Ms Marrison lacked sensitivity. She did not seem to be aware of the guidance in HR62303 about possible signs of depression and mental health, including “being withdrawn from colleagues, mood swings, getting into disagreements with colleagues or manager, difficulty dealing with change”. (See page 605)

294. The Tribunal finds that the claimant was not an easy person to manage. We find once she became ill the claimant’s tone could be direct and abrupt.

295. Once she became unwell the claimant became extremely worried about matters which a more resilient individual would have brushed off.

296. We find that working with Linda Marrison did place the claimant at a substantial disadvantage in relation to a relevant matter after September 2014. We find the claimant became increasingly unwell and eventually went absent from work with depression which was related to stress at work, which in turn was caused by working with Ms Marrison. We find that that substantial disadvantage in relation to a relevant matter, namely the claimant becoming unwell, was in comparison with persons who are not disabled. We find that persons who are not disabled would have been able to shrug off Ms Morrison's "brisk and sharp manner". The claimant was a vulnerable individual with a pre-existing history of depression and the way she related to her manager was different to a person who was not disabled.

297. We turn to the third issue: did the respondent make such adjustments as was reasonable to make to avoid the substantial disadvantage? We must consider whether the respondent had knowledge of substantial disadvantage.

298. We find that from September 2014 the claimant was becoming increasingly distressed in the office. Ms Hiscox was well aware of that when the claimant sought help from her. She gave evidence about how distressed the claimant was. Ms Marrison was aware that the claimant was becoming increasingly upset. In particular we refer to our finding of fact that one of the claimant's colleagues, Carol, had identified on 17 November that the claimant was not well (see page 227).

299. The respondent was aware from 1 December 2014 when the claimant handed in her nine page grievance letter detailing allegations of bullying by Ms Marrison with the letter from her GP dated 11 November 2014 that "the above named patient is very concerned about her state which appears to have been made worse by bullying within the workplace". It went on to state she had "a long history of depression and sciatica and is covered under the Disability Act".

> "This lady…is feeling increasingly isolated and at home she is not even able to enjoy her home life as she is crying continually and has to take herself straight to bed due to the stress she has been suffering throughout the day.

It asks the employer to look into the matter and states:

> "She is a very vulnerable adult at this time."

300. We therefore find that the respondent had knowledge of the substantial disadvantage to the claimant.

301. We turn to consider whether the respondent made such adjustments as it was reasonable to make to avoid the substantial disadvantage. We find it did not.

302. We find the claimant asked to move teams on numerous occasions. She asked Linda Marrison on 13 October 2014, Chris Hiscox on 17 November 2014, Kath Foxly via a nine page grievance document dated 1 December 2014 supported by her GP letter of 11 November 2014, a further request by a letter sent to the employer on 16 January 2015 at page 384 accompanied by a further GP letter dated 9 January 2015 and considered by Mr Waldron on 11 February 2015, her request to Mr Caren during the appeal against dismissal in May 2015 and a request to the grievance officer, Mark Bradley, the outcome of which was given on 21 August 2015.

303. We rely on our findings above that the adjustment was reasonable. The respondent is a large organisation. There are approximately 15 teams to which the claimant could have been transferred on the same floor of the same building. No evidence was adduced as to why the respondent could not move the claimant save for reliance on an alleged history of falling out with managers and requests for move.

304. The evidence did not support this. The evidence was that the claimant had never previously requested a move and that the last occasion when there had been a reorganisation when the claimant had been moved was many years previously.

305. The Tribunal finds the fact there were other adjustments which could have been made is not a reason to refuse an adjustment which had been specifically requested by the claimant and which her medical evidence supported. The respondent repeatedly stated that they wanted to "get to the bottom of the matter" and for the claimant to engage in mediation. The respondent did not appear to consider that firstly mediation is voluntary, and secondly a person with a mental impairment who behaves in the way the respondent's mental health guidance at page 896 suggests may have difficulty having insight into how their behaviour affects others and thus have difficulty in engaging in mediation.

306. Accordingly the Tribunal finds the claimant's claim for failure to make reasonable adjustments to be well-founded and succeeds.

Time Limits

307. There was potentially an issue in relation to time limits in connection with the reasonable adjustments claim. The Tribunal is satisfied that the claimant's claim for failure to make reasonable adjustments was presented within time. The claimant made repeated requests to be moved so that she was not managed by Linda Marrison. The final request was made to Mr Bradley, the grievance officer, in April 2015 and refused by him in August 2015.

308. There was confusion about the date of presentation of the claim because there was an administrative error by the Employment Tribunal when the claimant's claim form was not directed to the local office from Leicester.

309. The Tribunal is not satisfied that the claimant's claims for failure to make reasonable adjustments was presented out of time. However, if the Tribunal is wrong about this, the Tribunal is satisfied that it is just and equitable to extend time given the intractable nature of the claimant's illness of depression.

Polkey v A E Dayton Services

310. The Tribunal reminds itself of the principle in **Software 2000 Limited v Andrews [2007] ICR 825 EAT** where it was stated:

- In assessing compensation for unfair dismissal the Employment Tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal.

- If the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the Tribunal must have regard to all relevant evidence, including any evidence from the employee (for example to the effect that he or she intended to retire in the near future).

- There will be circumstances where the nature of the evidence for this purpose is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no reasonable prediction based on the evidence can be properly made. Whether that is the position is a matter of impression and judgment for the Tribunal.

- However the Tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

- A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that the employment might have been terminated earlier) is so scant that it can effectively be ignored.

311. The Tribunal reminds itself that a degree of speculation is expected of Tribunals in such an exercise.

312. The Tribunal finds that if the claimant had been offered a team move to a different team doing the same work in Albert Bridge House, she would have returned to work.

313. The Tribunal relies on the claimant's response to a question at Tribunal that if Mr Waldron had offered the opportunity to come in to discuss a team move she would have been “round there like a shot”. She explained that work was her “rock” in an otherwise difficult life and that she enjoyed working overtime and needed her wages.

314. The Tribunal also relies on the evidence from the claimant and from her GP that after a previous incident of work related stress seven years earlier, the claimant had returned to work and had been able to continue working ever since until the issues arose with Ms Marrison. The Tribunal takes into account although the respondent repeatedly spoke of the claimant's difficulties with managers, in fact she had a clean formal disciplinary record and she spoke highly of a number of managers.

315. The Tribunal has regard to the claimant's very lengthy service of over 40 years and the fact that the claimant was within four years of retirement when her employment was ended. The Tribunal accepts the claimant's evidence that she simply wanted to return to work and complete her final years of service with the respondent.

316. Therefore, the Tribunal finds that a **Polkey** deduction is not appropriate. The Tribunal finds that if the respondent had acted in a non-discriminatory manner and offered the claimant a reasonable adjustment of a transfer to another team in the same office instead of dismissing her, she would have returned to work until her retirement.

ACAS Uplift

317. The claimant submitted a request for a 25% uplift to any damages awarded on the grounds of the respondent's failure to follow the ACAS Code of Practice in relation to the claimant's grievance submitted on 1 December 2014, in particular paragraphs 33, 34 and 46.

318. The Tribunal notes that the claimant's claims in this case are for unfair dismissal pursuant to the Employment Rights Act 1996 and that her dismissal was discriminatory pursuant to section 15 Equality Act 2010. She also brought a claim for failure to make reasonable adjustments pursuant to sections 20-21 of the Equality Act 2010. There is no specific complaint in relation to the claimant's grievance, although it is clearly relevant as background.

319. In these circumstances the Tribunal is not satisfied it is relevant to consider a breach of the ACAS Code.

320. However, in case it is wrong about that the Tribunal has gone on to consider the matter further. Section 207A(2) TULR(C)A provides that:

> "If in any proceedings to which this section applies, it appears to the Employment Tribunal that:
>
> (a) the claim to which proceedings relate concerns a matter to which a relevant Code of Practice applies;
>
> (b) the employer has failed to comply with that Code in relation to that matter; and
>
> (c) the failure was unreasonable,
>
> the Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

321. The claimant relies on breach of the following:

Paragraph 33: "Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received";

Paragraph 34: "Employers, employees and their companions should make every effort to attend the meeting. Employees should be allowed to explain their grievance and how they think it should have been resolved. Consideration should be given to adjourning the meeting for any investigation that may be necessary";

Paragraph 46: "Where an employee raises a grievance during a disciplinary process, the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently".

322. The Tribunal finds there was a breach of paragraph 33 because there was a considerable delay before the formal meeting was held. The claimant originally presented a grievance in December 2014 and Mr Bradley did not start to investigate until the summer of 2015.

323. The Tribunal is not satisfied there was any breach of paragraph 34. It is unfortunate that the employer gave no consideration to pausing the disciplinary process whilst the grievance was ongoing, but the ACAS Code does not say that that should occur, only that it may be temporarily suspended. The Tribunal is not satisfied there is any breach.

324. The Tribunal must then consider whether the failure to comply with the Code is "unreasonable". The Tribunal finds the failure to arrange a formal meeting without unreasonable delay was unreasonable.

325. However, the Tribunal then turns to exercise its discretion as to whether or not it was just and equitable to uplift the compensation.

326. The Tribunal notes that in relation to the grievance although there was a considerable delay in the respondent investigating the matter, and in fact it only did so once the claimant specifically identified that she wanted her grievance investigated as a formal grievance on 16 March 2015 (despite the advice from HR to Ms Marrison and the other managers that her December 2014 grievance should be treated as a formal grievance), once Mr Bradley became involved he did investigate the matter and provide an outcome to the claimant. In these circumstances we are not satisfied it is just and equitable to uplift the compensation.

Employment Judge Ross

Date 8 August 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

16 August 2019

FOR THE TRIBUNAL OFFICE

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