Case number: 2600063/2018 Reserved

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
	And	
Mrs M Hargreaves		The Grimsby Institute of Further and Higher Education

AT A FINAL HEARING

Held at: Lincoln **On**: 6, 8, 9, 13, 15, 16, and 22 May 2019

Before: Employment Judge R Clark
Ms F French
Ms H Andrews

REPRESENTATION
For the Claimant: In Person
For the Respondent: Miss Barry of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows: -

1. The claims of disability discrimination **fail and are dismissed**.
2. The claims of direct sex discrimination **fail and are dismissed**.
3. The claims of harassment **succeed in part**. Remedy to be determined if not agreed.

REASONS

1. Introduction

1.1 Mrs Hargreaves' claims relate to treatment by her managers and colleagues which is alleged to amount to harassment and/or discrimination and which entitled her to resign. She did resign with effect from 31 August 2017 and thereafter she alleges further acts of harassment post-employment. Mrs Hargreaves relies on the protected characteristics of sex and disability.

1.2 These events unfold in a relatively short spell of employment of around 16 months or so, during which the Claimant was employed as the Head of Career 6. That is, a brand new 6 form provision of The Academy Group, or "TAG", a division of the Respondent's organisation.

1.3 We say at the outset that the events in question all took place within a culture of particularly dysfunctional team dynamics and, at times, expose examples of poor and ineffective management. Although we have dismissed a number of her claims when applying the relevant law, we understand the sense of grievance that led her to leave and bring these claims.

2. Jurisdiction

2.1 The incidents are alleged to take place from June 2016 until the Claimant's resignation on 31 August 2017 following which there are then two allegations of post-employment harassment occurring in October and November 2017. They are in respect of a grievance outcome letter dated 25 October 2017, the harassment which it is said to contain is said to have been maintained in the appeal outcome letter dated 29 November 2017.

2.2 At the effective date of termination, the Mrs Hargreaves did not have sufficient qualifying service for unfair dismissal and the claim is not framed by reference to any of the exceptions. Nevertheless, should her resignation amount to a dismissal in law, it remains relevant to the claims of discrimination.

2.3 The claim was presented on 11 November 2018. Early conciliation took place between 30 October 2017 and 30 November 2017. We calculate the earliest date in time to be 12 September 2017, nearly two weeks after the employment ended. It follows that the events during employment are out of time. The allegations relating to the handling of the grievance are in time.

2.4 In order for the earlier claims to engage jurisdiction they must either form part of a continuing act ending with one or other of the events that are themselves in time, or alternatively we must be persuaded that it is otherwise just and equitable to extend time.

3. The Issues

3.1 The issues in the claim were identified at a Preliminary Hearing conducted by Employment Judge Dyal on 26 April 2018 and they are set out in his case management summary [39/40]. That list of issues was adopted by both parties who have conducted their disclosure in preparation of evidence for this hearing based on those being the issues in the case. We consequently adopt them as the issues for us to determine save only in respect of the following three matters.

3.2 Firstly, insofar as Section 4 of the list of issues is concerned, that is the allegations of either direct discrimination or harassment, it was confirmed that the Claimant does not advance a case against Mr Thundercliffe.

3.3 Secondly, it is agreed that the reference to "disability" is an error and it should say "sex", such that the acts of harassment alleged are said to relate to the protected characteristic of sex only. For the avoidance of doubt, it is agreed that there are no claims of harassment or direct discrimination in respect of disability.

3.4 Finally, at the time of the Preliminary Hearing it was anticipated that further disclosure of medical records and an impact statement may lead to the question of disability being conceded. It was not conceded and the question of whether the Claimant was disabled at the material time remains a live issue for us to determine.

4. Evidence

4.1 For the Claimant we heard from the Mrs Hargreaves herself, Mr Dean Hand, Lauren Webster and Vicky Dryden (Whittaker in the contemporaneous records).

4.2 Sonia Winter attended in response to a witness attendance order applied for by the Claimant.

4.3 For the Respondent we heard from Mrs Deborah Gray, the Principal of the Respondent and Deputy Chief Executive of the TEC Partnership, Mr Chris Read, Deputy Principal, Mr Donald Everitt who convened the grievance hearing and Mr Adrian Clarke, who convened the grievance appeal hearing.

4.4 All witnesses adopted written statements on oath or affirmation and were questioned. We received a bundle running to 550 pages and considered those documents we were taken to. Both parties made oral closing submissions.

5. Disability Status

5.1 We deal with this first as a discrete issue and need to say something about the evidence before us on this point.

5.2 The Claimant prepared an impact statement as long ago as 19 April 2018. She was also ordered to disclose her medical records. Ultimately she did not, beyond that which follows. On 4 June 2018, she sought an extension of two weeks to provide the medical records, the reason at that time being that they were in paper form and not digital. She said

she had been to her GP and she was *"working on the relevant parts of my medical records to submit".* She needed further time to do so. The further time still did not generate any disclosure. What it did generate was a single printout of a digital record relating to a single consultation with her GP on 15 June 2018 which, on the face of it, is the only relevant record in the Claimant's entire medical record. It contains an account given by the Claimant, as opposed to a more objective medial assessment or contemporaneous account of matters from her past history. That generated a short report from the GP which does little more than repeat the account given by the Claimant. In the course of the hearing we were told by Mrs Hargreaves that the reason why the records were not disclosed was because "they did not support the Claimant's case".

5.3 That non-disclosure for that reason could have given rise to a sanction if standard disclosure had been ordered. As it happens, Employment Judge Dyal had not made such an order. Instead his order was expressed to be that *"the Claimant must by 11 June 2018 serve on the Respondent copies of any relevant medical records and/or medical reports that she relies upon to prove disability."* It follows, therefore, that the Claimant's decision not to disclose records because they did not support her case was not a breach of the order.

5.4 Nevertheless, such evidence as there is exists in something close to vacuum so far as any contemporaneous record. What we do have are GP reports, the Claimant's impact statement and some reference points in the chronology of the case which are potentially relevant to disability status.

5.5 The Claimant advances two impairments. They are a mental impairment leading to depression and seasonal adjustment disorder ("SAD"). In fact, the way the case is principally put by the Claimant is that she suffers with SAD, and that SAD is a subset of depression. We understand the reason the Claimant puts matters in this way is because there does not appear to have been any reference to depression at any time during the relevant period of employment whereas SAD does have some presence in the facts as they unfolded.

5.6 We then consider how Mrs Hargreaves has described her disability in the contemporary employment documents. We note first her ET1, at box 12, answers the question "do you have a disability" in the negative. That is a small point and certainly isn't determinative, but it is a fact to note. Of greater relevance is the way similar questions were answered in the course of the various pre-employment monitoring questionnaires and post appointment health questionnaires. On 12 January 2016, the Claimant completed the Respondent's pre employment health questionnaire prior to appointment. It is a typical format which asks a series of questions of general nature relating to health. Question 2 asks "do you have any health problems such as illness, impairment or disability that you think may affect your performance or safety at work". The answer given is no. Question 3 asks "have you ever had any mental health problems including anxiety, depression or stress related illness?". Again, the answer is no. Question 7 asks "if the applicant suffers from any long term or recurring medical conditions requiring regular medication, treatment or therapy? Again, the answer is no save to the extent that she qualifies it with unrelated matters by saying gallstones could reoccur and that she outlines an allergy to nickel and had been off sick with a broken ankle. None of those positive answers appear relevant to the disabilities now

alleged. Beyond that, there is nothing on the post appointment health questionnaire to indicate either a disability in the abstract or, more particularly, mental health issues of any type.

5.7 We also have before us the equal opportunities monitoring form relevant to what became her new employment, after her resignation, in September 2017. It asks the question whether the Claimant considered herself to be disabled as defined by the Equality Act 2010. That question is unusual in setting out the main aspects of the statutory definition of disability. The Claimant answered no. Consequently, there is nothing further ticked in the more specific enquiries as to disability, notably the question relating to a mental health condition such as depression is not ticked to indicate an affirmative answer.

5.8 Those forms were completed at either end of her employment with the Respondent. We have before us the manner and circumstances in which the alleged disability played out in the workplace and we make two observations. The first is that in the claim before us, what existed by way of stress is expressed in the claim in terms of a resulting *consequence* of the employment, as if a claim for personal injury in negligence, as opposed to a requirement for adjustments in the face of an existing disability. Secondly, a mental health issue was never asserted as having any relevance at all to the very pressured state of affairs encountered in respect of the work or workload. We found it significant that that was so even during the exchanges where the Claimant was raising the issue of meeting deadlines and dealing with the workload. We remind ourselves that there may well be reasons why any individual may be reluctant to volunteer ill health, particularly mental ill health. There may be even greater reluctance to do so at the time of obtaining employment and such reluctance may well explain why pre-employment questionnaires do not contain such disclosure. However, the force of that diminishes once employment has been obtained. It diminishes further once difficulties begin to arise and support is being sought by the individual. The obvious and logical way to generate a positive response to that support would be to draw the link, if that is indeed believed to be relevant to the difficulty encountered. That did not happen in this case. Nevertheless, we need to accept that it may be that a degree of reticence remains through fear of how disclosure will be received by the employer, but that must disappear entirely once the employment ends. In this case, the issues over workload and support continued for some months after Mrs Hargreaves' resignation and were expressed in her grievance without reference to any difficulties encountered by the Claimant arising from the convergence of her disability and any factors in the workplace.

5.9 The absence of any reference being made to disability is relevant in respect of two issues before us. One is whether or not the Claimant was disabled at the material time. The second is whether or not the Respondent had knowledge of disability and/or disadvantage.

5.10 Against that, we do have two reference points in the evidence that relate to SAD. The first is that the Claimant and others viewed a number of possible new offices at TAG when setting up the new management team. One possibility was an area referred to as "the care flat" which was a room without any windows. On entering that room, we accept the Claimant said words to the effect of "I couldn't work in this environment; I have SAD". Mr Thundercliffe seemed to have immediately and instinctively accepted the room was an unsuitable room and

the search for alternative rooms continued. The second reference point is that the Claimant made use of a lightbox in her room. That is a device designed to omit a form of light close to natural daylight. She had this in her workplace for all to see. We cannot say whether any effects of SAD as there may have been were disclosed or observable during the time that the Claimant was at work. Whatever the effect on the Claimant, we find there was no variation in it. The evidence shows there was no variation in effect throughout the various seasons, although we recognise the Claimant classes this in itself as a detriment. She attributed that to the stress she was under working for the Respondent. We have no means of measuring the relative ups and downs, all we can find is that such aspects of her daily routine as SAD may have affected, remained consistent throughout the time that she was there and it would not have given rise to any observable issues that may have put an employer on notice of difficulties. In part, that may have been because all staff were working under a particularly heavy workload in this first year of Career 6 and the new TAG management team and just about all staff were describing being under stress. In short, it is impossible to distinguish between a non-disabled employee expressing concern about workload and being able to get things done, and an employee disabled as Mrs Hargreaves alleges, expressing concern about workload and getting things done.

5.11 We find that the Claimant took two days sick leave during her employment with the Respondent on 6 and 7 February 2017. The reason given to Mr Thundercliffe for that absence was said to be “I am not well and pretty foggy”. Mr Thundercliffe recorded this absence in the digital sickness absence record, containing a limited drop-down menu of reasons, as being “respiratory/cold/flu/asthma/allergies” which we find was reasonable as the best fit of the options. We cannot accept that that two-day absence supports the presence of the alleged disability.

5.12 We have already referred to the equalities monitoring form Mrs Hargreaves completed for her subsequent employment at Haverlock Academy in August 2017. After the post was offered, the Claimant did then complete a post appointment health questionnaire in which it is right to say she did identify matters she had previously not disclosed to either employer. They disclose anxiety, anorexia, mental illness and also stress. That was dated 24 August 2017. There is nothing in that form which indicates the duration and, save for the reference to anorexia, it is consistent with generally how the Claimant described her state of wellbeing at the time of her resignation.

5.13 In her impact statement, the Claimant split her disability into the two aspects of depression and SAD, although she says there is a substantial overlap between the two. For our part, we approach disability as a single issue focussing on the person, rather than the two or more impairments that may be at the root of a disability. In summary she describes depression as being a chronic condition she has suffered with for over 10 years leading to progressively debilitating symptoms. Those symptoms are described in terms of depression, a change in eating behaviour, continuous fatigue, difficulty concentrating, sleep problems, avoidance of social situations and feelings of isolation. She describes taking little or no pleasure in all aspects of life which affects relationships, finding it difficult or impossible to switch off, affecting an ability to focus, she took less care of her appearance, struggled to get

dressed and ready for work, gains weight which concerns her which affects her physically in respect of a knee joint and concerns her that she risks of aggravating her gestational diabetes and putting her at risk of type 2 diabetes diagnosis. She goes on to describe stress as a further psychiatric illness resulting in heightened symptoms of SAD as well as non-seasonal depression and anxiety. Her impact statement of April 2018 does not contain the detail that was then given to the Claimant's GP in the one and only consultation that is before us in June 2018. When we turn to that, the records and the reports show the Claimant has reported seasonal affective disorder and has for several years had low mood in the winter months, she had depression whilst in university and since having her children she has suffered but declined antidepressant. She has self-medicated and used a lightbox, at the time of the consultation in June 2018 she described being low in mood and anxious for the last several weeks (albeit that is some time after her employment with the Respondent ended). The doctor makes a diagnosis of seasonal affective disorder with a plan for self-referral to open mind and to start Sertraline. Mrs Hargreaves completed a patient health questionnaire which records a score of 11 although the report gives no meaning of that scale. Similarly, she completed generalised anxiety disorder questionnaire with a score of 14, again without any context being given of the meaning of that score. The questions themselves however indicate negative response more often than not to each of the areas examined.

5.14 In the medical report from the GP of April 2019, he reports how the Claimant had reported concerns of her mental health throughout her adult life and expressly deals with intense periods of low mood, including a period of up to 2 years suffering with bulimia nervosa and suicidal intentions. Thereafter he describes a significant improvement in her symptoms during her early twenties where both bulimia purges reduced to zero and general mood improved. He referred to the Claimant becoming aware of seasonal affective disorder and searching out self-help remedies such as a lightbox and on-line discussion group. He refers to the effect on her mental health following the birth of her children, particularly in respect of intense and often intrusive thoughts about their safety. He records how she was now taking medication which has enabled her to become more aware of the intensity of her symptoms. He does not say as much, but we deduce from the limited other evidence that we have that Mrs Hargreaves did not seek medical assistance during her employment with the Respondent and the medication referred to commenced in 2018. He post-employment health questionnaire for Havelock Academy records her not being under any form of medical treatment and not taking any medication.

5.15 In the context of this case we find the reference from the Assistant Principal of Haverlock in July 2018 as relevant. He describes how he has worked with Mrs Hargreaves on two separate occasions. He describes how he has continued to be impressed by her work ethic and her dedication, always giving support to the senior leadership team and other staff. This commitment often extends beyond the normal working hours. He describes always being able to rely on the Claimant to meet deadlines and to exceed expectations. He commends her for her performance in the classroom, the running of her department and completing her impact initiative as an Associate Assistant Principal. This is a general employment reference and, to that extent, we would ordinarily apply some caution to the content. Nonetheless, it is a document that's has been produced by the Claimant and, even

allowing for the varnish that can sometimes be applied to references, we would simply observe that the sentiments expressed were consistent with what we saw in the evidence during much of the employment with the Respondent.

5.16 The meaning of disability for the purpose of the Equality Act 2010 is defined in section 6 and schedule 1. There is further guidance to be taken into account both in previous relevant decisions, such as **Goodwin v Patent Office [1999] ICR 302**, and the 2011 Guidance on the Definition of Disability. In simple terms, the Claimant must establish a mental or physical impairment which has a long term and substantial adverse effect on her ability to carry our normal day to day activities.

5.17 In this context substantial means simply more than minor or trivial. The adverse effects must be considered in terms not only of activities of which she is incapable, but which are prevented or hindered, in becoming more difficult or taking longer or causing their own secondary issues. The ability must also be considered as it would be without the benefit of clinical intervention such as medication. A cumulative view of a number of effects may pass a threshold where each individual effect, viewed in isolation, might not. In long term conditions, we may also be concerned with the likelihood of recurrence of effects which fluctuate. In some case, particularly those involving a mental impairment such as here, the constituent elements of the test as identified in Goodwin may be better considered out of order, addressing the question of impairment only after the other elements have been considered **J v DLA Piper [2010] UKEAT/0263/09.**

5.18 The evidence before us, therefore, identifies a mental impairment and gives some sense of the of the gravity of symptoms in a medical context. The definition of disability of course is not a medical definition but a social one. We have to weigh the evidence against the statutory test. There are, within the evidence before us, also some employment references which give an insight into the nature and extent of any effects on the Claimant. We have to keep in mind that we are concerned with the relevant period, that is during the employment with the Respondent.

5.19 So far as the Claimant relies on SAD as a discrete disability, and we remind ourselves it is not necessary for the purpose of being disabled that she identifies two separate disabilities, we are not satisfied this is made out as a discrete disability although it may be part and parcel of another. Mrs Hargreaves describes SAD as a subset of depression. We can accept that the Claimant has researched this herself and self-managed what she finds of assistance. We do not, however, accept the evidence shows this in isolation causes a substantial adverse effect on the ability to carry our normal day to day activities.

5.20 We do not accept that it has been established that SAD is a subset of depression and certainly that a lay person would be expected to recognise that someone who defined themselves as suffering with SAD necessarily also had a mental impairment of depression. When we look at the evidence of Mrs Hargreaves' ability to carry out normal day to day activities during the relevant time, and how she has herself described this, we do not accept that there is sufficient to established a substantial adverse effect at the outset of her employment with the Respondent. During her employment there were pressured and stressful

times which all staff at a similar level were exposed to and all seemed to find difficult to a similar degree. We cannot differentiate Mrs Hargreaves' response to that from the response by others not disabled.

5.21 However, when we take a step back from the 17 months of employment, we see a slightly different picture. Although we have not been presented with the contemporaneous medical records and the Respondent understandably urges caution upon us, the description of the Claimant's ill health during her early twenties and particularly the suicidal ideations and bulimia nervosa over an extended period of time of at least two years in her early adulthood are facts we do accept. We are satisfied at that time, there was an impairment that was long term, and which undoubtedly had substantial adverse effects on Mrs Hargreaves's ability to carry out normal day to day activities; eating, self-care and socialising being just three at a very basic level. We are satisfied that although the contemporaneous evidence is thin, we have no reason to disbelieve it. The seriousness of the Claimant's impairment and the nature of the effects were such as to meet the definition of disability within the meaning of the Equality Act 2010.

5.22 We are satisfied that by the time of this employment, the impairment had long since improved to such an extent that Mrs Hargreaves was no longer under any treatment or therapy or medication and the circumstances of the effects of any underlying conditions ceased to be a disability, but only so far as the adverse effects themselves had ceased. The medical report confirms the improvement in the Claimant's twenties, for example by reference to purges reducing to zero. The question is then only whether Mrs Hargreaves was someone with a past disability, which she will satisfy in any event, or whether the disability itself continued or resumed. We are satisfied that the nature of Mrs Hargreaves' underlying impairment was such that she remained vulnerable to a recurrence of the adverse effects and the likelihood of that happening has remained with her and, in all likelihood, that risk will always be present. It seems to us likely that the stress associated with the poor Career 6 final results and the potential that she might have been placed under some sort of performance improvement process at the end of the summer term may well have contributed to exposing that vulnerability which then manifested again as a disability (that is manifesting in the necessary substantial adverse effect on her ability to carry out normal day to day activities) as was seen in the content of the Haverlock Academy medical questionnaire and subsequent return to medication. Consequently, we are satisfied that the mental impairments described by Dr Ray first manifesting during the Claimant's early twenties satisfy the definition and she continued to be at risk of recurrence. The Claimant has established that she was someone with a past disability and, once again, met the definition of disabled for the purposes of Section 6 of the Equality Act 2010 from around July 2018.

6. Facts

6.1 It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. Our purpose is to make such findings of fact as are necessary to answer the issues in the claim before us and to put them in their proper context. On that basis, and on the balance of probabilities, we make the following findings of fact.

6.2 The Respondent is a further education establishment. It operates principally at sites in Grimsby but has a wide network of colleges across the country, particularly in the field of direct entry to vocational based studies for those under the age of 16. Its range of courses are the typical range of vocational and skills-based post sixteen education. For those under the age of 16 the opportunity to engage in this learning route was previously by way of release from secondary school. In recent years, the law in that area has been relaxed and a scheme of what is called “direct entry” was created for those aged 14 and older. This meant those opting for a vocationally based education could do so from that age directly through an institution such as the Respondent, rather than release from secondary school.

6.3 To facilitate this change in the law the Respondent set up “TAG” to provide its fourteen to sixteen education. In doing so, it drew on staff from both further education backgrounds to teach the technical and vocational areas and also those from a more traditional secondary school background to teach the associated academic areas. At sixteen, on completion of their secondary education, those students would then transfer to further education, sixth form college or the workplace. The strategic aim of the Respondent was to create a seamless transition into sixth form within its own group so that students could opt either to go into further education and then university or employment. That aim was put into effect by the creation of “Career 6”. That is, effectively, the sixth form. This sixth form was established within TAG but from the outset the intention was that Career 6 would, within a year or so, separate from TAG and become a standalone department of the Respondent, not only as a discrete entity but occupying its own sperate site.

6.4 In early 2016, a post of Head of Career 6 was created. The Claimant was appointed. She started in the spring term to give her time to get established in the role ahead of the academic year starting the following September. The decision to allow that time was based on the experience of the original start-up of TAG, the inference being that it had had something of a difficult start.

6.5 Although the aim was for Career 6 to become a department in its own right, the Respondent’s plan was that it would spend its first year or two as part of TAG. We can readily understand the logic of that although, with the benefit of hindsight and particularly the circumstances of this case, it seems that may have hindered rather than helped the Head of Career 6 to develop the independent sixth form provision that was planned and may well have been a factor which contributed, within the broad matrix of other factors, to the first year of Career 6 being substantially well short of a success for all those involved. The interim arrangement was that Career 6, and the Claimant in particular, would fall within the management structure of TAG. The head of TAG was Paul Thundercliffe. The management was expanded early in the 2016/17 academic year to include Sonia Winter, previously head of humanities at TAG, and Chris Read, previously head of English at TAG. Whilst they had their own areas of responsibility, a decision was taken to share the additional roles and responsibilities amongst the four of them and to apply it across the 14 to 16 courses as well as the Career 6 courses. Consequently, the Claimant found herself not only responsible for Career 6 but some GCSE courses and taking on some responsibility across TAG in its entirety. Similarly, Mr Read and Ms Winter held responsibilities beyond their own in TAG and

into Career 6 also. As we have said, there was an obvious practical logic to this decision at the time and it is only with the benefit of hindsight that we see how the development and success of Career 6 was placed in a setting where, frankly, the TAG managers had no investment in the Career 6 project. Whether it failed or succeeded had no direct consequence to them although its subsequent failure would potentially reflect on how TAG was seen in the annual league tables at the end of each year.

6.6 We did not hear from Mr Thundercliffe. What we did hear in evidence suggests there were a number of deficiencies in Mr Thundercliffe's management of TAG and how he operated as a line manager and senior leader. One significant event during the relevant period was that he and Ms Winter began an extra marital affair. Indeed, this relationship had commenced before he appointed her to the senior management team. Both were married, indeed, Mr Thundercliffe's wife was also a teacher in TAG. The inevitable fallout of this affair had implications for all in the senior management team and beyond, not least when both parties ended up taking a period of time out from work and leaving Mr Read and the Claimant to effectively run the entire TAG school. In due course, Mr Thundercliffe would himself receive a disciplinary warning in respect of his involvement in the appointment of Ms Winter which was expressed in terms that he only avoided dismissal because, on an objective analysis of the candidates for the post, Ms Winter did seem to be the best candidate in any event.

6.7 The nature of the damaging effect this had on the management of TAG and the new Career 6 was obvious but the extent of it only really became clear to us during cross examination of Mrs Grey when she and the Claimant shared, with feeling, how: -

> ***"those not living through that episode would never really appreciate the gravity of the situation all found themselves in and the effect it had on all of us".***

6.8 This clearly was a dysfunctional period in which Mr Read and the Claimant bore the lion's share of the work to keep the ship afloat. Despite the pressures, it seems both the Claimant and Mr Read worked reasonably well together in that aim.

6.9 The Respondent is a large organisation with dedicated in-house HR advisers and a developed employment policy framework. In fact, it is a surprisingly large employer with something in the region of 900 staff across 13 trading brands and catering for approximately 25,000 students each year. As a proportion of that, TAG and Career 6 is a very small part. We find TAG accounted for about 1.5% of total student numbers and Career 6 only 0.6%. TAG had around 450 students in total and around 50 staff.

6.10 The Claimant commenced her employment on 1 April 2016. The first year's plan included some teaching at a slightly more intense than would ultimately be expected but, we find, at a level that ought to have been well within that expected of someone at the Claimant's level. The plan was also to attract an intake of around 80 students during the first year of Career 6. In fact, we find only 40 or so enrolled and, moreover, the academic calibre of those students was not conducive to obtaining consistently good results at the higher levels. We find the view was that many simply did not have the necessary GCSE results in English and

Maths to obtain satisfactory grades and the first year's AS results would turn out to be very poor indeed. The word "abysmal" as was used to describe it.

6.11 The Claimant's background is teaching in further education, particularly in the area of psychology with a focus on criminology. We found there to be something of a fluid labour market between the various institutions providing similar educational services in or around the Grimsby area and even in the relatively short period of time with which we are concerned, we can see evidence of staff movement between the Respondent and another establishment called the Haverlock Academy. In fact, the Claimant has been employed in both organisations on two occasions.

6.12 The Claimant's initial focus was setting up the academic programme for the Career 6 for the following September and, more particularly, to engage with the potential feeder institutions and students who might form the intake for that academic year. She was responsible for the applications and vetting of potential students' suitability for entry onto the various courses and pathways that were being offered. As part of the marketing of the new Career 6 she set up an induction trip. In other words, a day out where those potential students could meet with staff and each other in an informal and social environment as a means to demonstrate the culture and ethos of Career 6. She chose a venue at Elsham Hall. It is an outdoor activity centre well suited for this sort of team building event. The trip was planned for 30 June 2016. As with all school trips, it was strictly governed by a process of consents and risk assessments. Like any school, the Respondent had a policy and procedure for running trips which was subject to review. That policy defined various key roles and requirements for assessments, permissions and consents. It was a paper based system, although it has subsequently become an on line process. The Claimant was designated as the trip leader which we find meant she carried the ultimate responsibility for the safe organisation of the trip and, importantly, to obtain the necessary consents in advance. The policy coordinator was Chris Read. At the time of this trip, he had not yet been appointed to the post of Assistant Principal and remained in his previous post of Head of English at TAG. We find his role in respect of this particular trip was limited. As policy owner, his role focused on its review and development. His only executive role in respect of any trips was that he was required to undertake the necessary safety risk assessment process.

6.13 We find the Claimant was familiar with the principles of running student trips and acting as a trip leader. She had done it in the past on numerous occasions. We find the Respondent's policy as it applied at the time was not followed by the Claimant.

6.14 On 12 May the Claimant began a series of intermittent e-mail exchanges with Mr Read about the Elsham Hall trip in the context of its initial approval. He replied promptly within a quarter of an hour saying:

> ***"I can't see any reason why this can't go to marketing. I was hoping to speak to you again about the activities involved in the team building as it is likely to make it a category C trip rather than a category A trip if they are doing any of the activities in Section 2.4 of the document I have attached to this e-mail (I saw that you had put itinerary to be confirmed on the form, hence my needing to speak to you). It shouldn't make a difference to whether the trip can go ahead but I will need to know the individual activities for the risk assessment***

> ***form. As long as the risks are identified and action is taken to avoid risk then we are okay. At this stage I would suggest sending the info out and we can sort the risk assessment form out as soon as you have the details."***

6.15 From that we are satisfied there was no obstacle to the trip going ahead. We find Mr Read was supporting the Claimant by attaching documents and policies to explain to her what *she* needed to do and also to help her inform him of information relevant to his area of responsibility in respect of the risk assessment. He gave clear indication as to the type of trip that this was with the various activities, such as archery sand the like, that gave rise to it being a category C, that is, a higher risk trip than might first have been thought.

6.16 It was then almost a month later before the Claimant e-mailed him again to say:

> ***"Just coming back to this visit. What paperwork etc do I need to do next etc."***

6.17 We find nothing of any significance had happened with the paperwork during the intervening period. By 22 June, we find the Claimant had still not settled the actual activities to be included and she sent an e-mail to Mr Read to say that the contact at Elsham Hall will send them. On 28 June the Claimant sent Mr Read details of the those attending from each pathway. He replied, again immediately, to say that he had done what he could but there were still parent contact details to add for the students which he said he assumed the Claimant had. The Claimant confirmed that she had them and towards the end of the same day Mr Read responded saying:

> ***"Here's the updated list with contact details for parents. Unfortunately, there are 6 forms missing plus the extra one which you mentioned earlier.***
>
> ***This is the document which needs to be signed off ahead of the trip on Thursday so you will have to add the missing bits if you have them."***

6.18 This email exchange is now only 2 days before the trip was due to go ahead. We have seen trip authorisation forms as they stood at that time. It is clear there remained missing information. We find there were no discernible tensions arising between Mr Read and the Claimant at this stage. They had only worked together for a matter of 2 or 3 months. Both understood the organisation of the trip was her responsibility and we find Mr Read was taking reasonable steps to support her in discharging that responsibility.

6.19 On the day of the trip the Claimant happened to meet Mr Read. We find he had not heard anything further from her and find that he assumed that all necessary matters had been signed off. He asked Mrs Hargreaves and was told that they had not. He told her she needed to quickly chase things up with those that could authorise the trip. As a result, the Claimant had to make contact with Mr Thundercliffe and Deborah Grey urgently and was eventually able to get the trip signed off. During this hour and a half or so of pressure, the Claimant seemed to accept it was her failings that had led to this state of affairs. In fact, she expressed in her own statement how she told other staff including Mr Read that she was going to get the sack or reprimanded for the farce that had occurred.

6.20 Despite that, in her evidence to the tribunal she stated how later that day she heard from a third party, a Mr Atkinson who also worked at TAG, that Chris Read had done this on

purpose as he knew the paperwork wasn't signed. We are doubtful of the provenance of this comment, it's accuracy and the extent to which we can have any regard to it. We are not at all satisfied in the circumstances that the suggestion that Mr Read deliberately sabotaged this trip is a finding we can reach. The two had known each other for a matter of months. The responsibility for the trip was the Claimant's. No motivation for such a malicious act at this time has been established. Mr Read, who we are certain had his own work to be dealing with at the time, denied deliberately failing to point out the omission. In fact, on that point we are satisfied the limited contemporaneous exchanges we have between the two only shows Mr Read was willing and content to help the Claimant ensure this student trip got off the ground. Consequently, we do not find that there was any sabotage.

6.21 We are reinforced in that conclusion by our finding that this incident was not raised as a complaint, not only during the Claimant's employment but nor even in her grievance after employment had ended. It was referred to for the first time only during the course of the Claimant's ultimate appeal against the grievance outcome which was heard by Mr Adrian Clarke.

6.22 In August 2016 the Claimant, Ms Winter and Paul Thundercliffe toured the site at TAG to view potential office space. They viewed what was then known as the care flat which was a room without natural lighting. On entering that room there was a brief conversation in the course of which we accept the Claimant said words to the effect of "I couldn't work in this environment; I have SAD". Mr Thundercliffe seems to have immediately and instinctively accepted it was an unsuitable room and the search for alternative rooms continued. It was, however, a room that was simply inappropriate irrespective of whether the intended occupant suffered with SAD or not. Other suitable office accommodation was found. The relevance of this exchange is that it is the only point in the chronology that we can identify any explicit reference to any of the alleged disabilities.

6.23 Over the summer, Mr Thundercliffe made a number of adjustments to the timetabling reflecting the final mix of subjects, students and teachers and one consequence of this was that the Claimant, who believed she would be teaching A level psychology only, was given a GCSE group to teach. We find this sort of change as the timetable settles is normal.

6.24 In September 2016, the new senior leadership team was in post. We do not accept Mrs Hargreaves' suggestion that she struggled to find her place in the management team. When appointed, each was given lead roles across TAG, each had their own specialisms and whilst she may have genuinely felt there was ambiguity in roles, we do not accept that is supported in the evidence before us.

6.25 As one would expect, September marks the start the academic year and the first students arrived at Career 6. Other timetable adjustments were soon made, and Mrs Hargreaves was required to teach "PSHE" and an extended programme qualification for engineering. We found aspects of the Claimant's complaints about workload to be advanced in hindsight and there was little in the early months to indicate to those around her that there was any difficulty with these changes which we find to be part of the normal process of a new course settling. We accepted the evidence of Mrs Gray that the teaching commitment was

not onerous and that in any new academic year some timetabling turbulence is to be expected. We find the Claimant's engagement in some of these additional tasks was better described as being closer to volunteering for work and additional responsibility than having it unfairly forced upon her. Indeed, even in the midst of exchanges with Mr Thundercliffe about workload, Mrs Hargreaves made representations to Mrs Gray to become involved in some additional group board level work which we find to be completely at odds with the contention that she was struggling with workload.

6.26 Similarly, we do not accept that Mrs Hargreaves was excluded from senior leadership team meetings. We have no doubt that there will have been occasions when Paul Thundercliffe met with Sonia Winter and not her, or with Chris Read and not her, or with both of them and not her. We expect there were also times when he met with the Claimant alone or with another and not either or both of the other members. Each had their own areas of responsibilities and we are satisfied on any day there would have been reason for Paul Thundercliffe to meet with his team on an issue by issue basis, particularly in the context of a working environment governed by individual timetables. This may have felt to the Claimant like matters were decided before senior management team meetings which became a rubber stamp, but we do not find that to be the case.

6.27 We find Deborah Gray's role was one of a strategic oversight of TAG and as line manager for the head. It was not intended that she would have any direct management involvement but we find it was not long before a series of issues began to arise which forced her to become involved.

6.28 Early in the academic year, a concern began to emerge across a number of senior managers that the student intake for career 6 was academically deficient and the students were not suited for A level study. This arose from a basic deficiency in the GCSE grades for English and Maths which were necessary for the courses provided. At the end of the year, what would be regarded as the "post-mortem" analysis would show as much as 72% of the intake had insufficient grades. The claimant explained the apparent deficiencies in GSCE by reference to the particular pathways being taken. Mrs Gray was also included in concerns by the timetabling support staff concerning students changing pathways which was a further warning sign of problems. Mrs Gray suggested the Claimant engage with the timetabling clinics to assist her understanding of the effect of changes. We do not accept Mrs Gray was dismissive of the Claimant.

6.29 Whether it was this sense that the first year intake of Career 6 looked likely to be a failure, or whether it was the experience over the summer induction day at Elsham Hall, we find Chris Read formed a negative opinion of Mrs Hargreaves' competencies as head of Career 6 early on. After only a few months into the academic year we find the pressure of the new look of TAG was being felt by all in the senior leadership team. In November we find a colleague, Vicky Dryden (then Whittaker) relayed a comment made by Chris Read to her to the effect that "he thought Mrs Hargreaves would lose her job by Christmas" and that this had come direct from Paul Thundercliffe after discussing the matter with Debra Gray. Mr Read denies saying those words although accepted that there was a conversation with Ms Dryden in which he did express a view that he did not think that Career 6 would last.

6.30 We accept Ms Dryden had a conversation with Mr Read in which something along these lines was said or, at least, it was reasonable for Ms Dryden to interpret the surrounding context of the conversation in that manner. As is always the case, it is rare the extract that we are presented with was the only thing said and we have to try and view it in its context. That context included the fact that Mr Read and Ms Dryden worked closely together at that time and spoke about a range of matters within TAG in the context of a sense of trust and confidentiality. The context also included the fact that, by then, Mr Thundercliffe was already contemplating some form of formalised performance management of the Claimant in her role as head of Career 6 which we find Mr Read must have been aware of and it is also the case that Mr Read held a view that Career 6 was already showing signs of failing. We find Ms Dryden regarded their discussions at the time as confidential, that he trusted her although she had her own issues with Mr Read's professionalism. Indeed, the notion of the Career 6 project not being continued seems to have been a factor in Ms Dryden's own mind as she would late speak with Mr Thundercliffe about her own issues with Mr Read in the context of whether her own position in the school was secure. On balance, we find something close to what Ms Dryden reported was in fact said. We note in due course the investigation into the Claimant's grievance would find those words had been said.

6.31 It was in November 2016 that Mr Thundercliffe began exploring the process for instigating a formal performance improvement plan for Mrs Hargreaves. We find he had received internal advice and was about to hold a meeting with the Claimant about his concerns when the affair became public. He was absent from work almost immediately, for some months, and nothing further happened in respect of this. Upon his return to work in 2017, we find he did not feel he was in a position to implement a performance improvement plan because of both his own behaviour and also the intervening work done by the Claimant with Mr Read to keep things going, the burden falling to them as the remaining members of the senior leadership team under the direction of Debra Gray.

6.32 We find Mrs Hargreaves did express concerns about her workload to Mr Thundercliffe from as early as October 2016. We have seen emails in which workload is raised, some describe working flat out, or are headed "drowning", others describe the causes of this workload in terms of staffing problems and other systems issues. None makes any reference to the particular impact on the Claimant with regard to any disability. Many are in terms similar to the concerns other members of staff were expressing about their ability to cope with the workload. We have seen responses from Mr Thundercliffe to these sorts of concerns. In November he recognised the teaching workload of all of the senior management team needed reviewing for the following year and invited discussion with the Claimant. Whilst we cannot see that Mr Thundercliffe made immediate changes to resolve the problems the Claimant and others were experiencing, he was equally not dismissive of the situation.

6.33 We find the relationship between Mrs Hargreaves and Paul Thundercliffe was, in the main, a positive one. We find she went out of her way to organise a surprise event, in part to bring Paul Thundercliffe together with his wife, and that Mr Thundercliffe was particularly appreciative of her efforts.

6.34 After both colleagues were back at work, there were extra demands placed on the time of the Claimant and others to, effectively, chaperone meetings between Paul Thundercliffe and Sonia Winter. Sonia Winter would resign from TAG the following April 2017.

6.35 The Claimant raised concerns with Debra Gray when she was forced to take over the senior leadership team meetings following the affair. The claimant describes her involvement as professional, that meetings ran smoothly and that *"she had some difficult messages for all of us.*" The claimant expressed concerns about the workload being such that it could not be completed without working into the evening and at weekends. Mrs Gray was firm in stating that no member of staff, whatever grade, was expected to work into the evenings and weekends and should not do it. We find the sentiment was wholly supportive, but the practical reality of such an edict which is very often quite hard to put into practice. What we do not have is evidence of is what the attitude of the employer would have been had work had not been completed in time as a consequence of adhering to Mrs Gray's laudable instruction.

6.36 In January 2017, we find Chris Read did express his opinion of Mrs Hargreaves as a "stupid fucking woman". This was reported to Paul Thundercliffe by another colleague, Lauren Webster, on 11 January 2017. She reported to Mrs Hargreaves which we find would be relevant to her offence at being undermined by him not only by the terms used, but by it being said in front of a subordinate. The context was him opening an email and, whatever the content of that email, then expressing openly his view of her in those terms. The claimant subsequently learned of this and was understandably upset. She raised it with Mr Thundercliffe. He dealt with it informally. It is common ground the issue was raised with Mr Read who accepted he was in the wrong and apologised to Mrs Hargreaves. The claimant, believing this was a single incident, accepted the apology and the two seemed to rebuild a working relationship. We find that had she known this had been regularly repeated, she may well have taken things further.

6.37 In fact, Mrs Hargreaves did not know until her employment had ended that this was not a one-off event. In the period between October 2016 and January 2017, Mr Read had referred to her in front of colleagues as either a stupid fucking woman or a stupid fucking bitch on at least half a dozen, and up to 20, occasions. Mr Read denied further occasions. We find it more likely that his view of the Claimant was expressed on more than one occasion and if it can be expressed once in terms of stupid fucking woman, it is likely similar words were used on those other occasions. However, we find these further examples were not brought to the Claimant's knowledge until after her employment had ended, and when they were, the information conveyed to her was of the same nature and expressed in the same circumstances as the information she was already aware of, albeit the frequency and recipients of the communication had increased. Ms Dryden was the colleague who was present when these further comments were made although if the conduct was freely displayed in front of both Ms Dryden and Ms Webster, we find it more likely than not that others may have heard similar comments but who have not made it known. Ms Dryden would have her own dispute with Mr Read and had a meeting with Mr Thundercliffe in February 2017. Although her complaints were different, we find she shared with Mr Thundercliffe his

comments about the Claimant. Nothing was done by Mr Thundercliffe as, we suspect, the conduct had by then already been stopped and an apology given.

6.38 The claimant was absent from work due to sickness on 6 and 7 February 2017. We have referred already to the reason for the absence expressed in an email sent to the TAG senior management team. She also sent a text message stating how she was "feeling rubbish". We find Paul Thundercliffe replied to her texts offering supportive good wishes. We find they met on her return to work. As Mrs Hargreaves asserts, we find this meeting was not a formal meeting or scheduled as a "return to work" meeting and the discussion did not contemplate a referral to occupational health. That said, we are not surprised about the informality and do not see it as raising any concern at the time. In the context of two members of the senior leadership team meeting to consider an absence for what was described in vague terms as feeling "rubbish" and/or "a bit foggy", there is little more the discuss than that which was discussed. That was Mr Thundercliffe enquiring how she was, and the Claimant answering OK. It effectively continued the exchanges that had already occurred by text. The claimant would accept in her subsequent grievance appeal that she did not refer to stress as the reason for her absence and that it was Mr Thundercliffe who drew the link between the recent difficult times for all following the affair to which the Claimant accepted "yes it has been, it was all quite stressful".

6.39 Mr Thundercliffe's attention to administrative matters seems to have operated at a similar level to his management. The claimant's 2 days' absence appears to have stayed open on the Respondent's HR system until all senior managers undertook training in March 2017. We find it likely that the realisation of the significance of his obligations to maintain the central HR records is what then led Mr Thundercliffe to rectify the entry on the system. He entered the details as he understood them. This would later be categorised by the Claimant in her grievance as being fraudulently completed. We do not accept that and, in any event, the limited nature of the options on the system's drop-down menus means what was recorded was not inaccurate. Moreover, the process and system were known to the Claimant. Not only did she not raise any issues with Mr Thundercliffe, but she was monitoring the online system for a period of time, having noted it had not been updated and said nothing about that. He should have entered the detailed sooner, but his delay in doing so was not fraudulent.

6.40 If Mrs Hargreaves' criticism of Mr Thundercliffe's handling of her absence is because she wanted the matter dealt with more formally, or by reference to occupational health. We find there was nothing in her own participation in the process which would have brought this to anyone's attention.

6.41 In April 2017, we find a decision was made by Debra Gray to put Career 6 into the Respondent's internal "support to improve" process ("SIP"). The reason was the concern that a number of Career 6 students were seeking to change pathway's late in the year and this seemed to be yet a further warning sign that the fit between course and student was not suitable and something had gone wrong with the Career 6 intake process. Part of the issue stemmed from Mrs Gray's concern about the likely out turn from the first Career 6 exam results and the calibre of students and wider system concerns about data accuracy. We find

this led to even more scrutiny of the Claimant's work which we find would in turn become a source of pressure but would have been a source of pressure for anyone.

6.42 We find that SIP is an established internal quality process to support a team or department meet its aims. It is different to an individual performance improvement process although there are obviously overlaps and we suspect the impact on those involved could be similar in that, in both, there is an implicit, if not explicit, recognition that they are not delivering to the standard expected. We find that Mrs Hargreaves felt that acutely. We find that Mrs Gray did not view this situation as an individual failing so much as a system failing. She was supportive of the Claimant when corresponding on the process of SIP. In response to the Claimant, she wrote: -

> ***Please don't feel upset, managing anything with his low level of transparency will come with significant challenges – you can't manage what you can't see clearly…….***
>
> ***Do you want me to come over? I want you to feel comfortable and trusted – I equally want you to know why we are so uneasy. Effective communication is always the best way to ensure a good outcome – I feel I've let you down today in this regard, forgive me?***

6.43 Part of the data accuracy issue related to student attendance records. There was a dispute as to whether, as Mrs Hargreaves asserted, the system was not recording correctly or, as Mrs Gray asserted, the data was simply showing a poor level of attendance. Attendance was a factor, together with exam results, which would feature in whether the students were entitled to participate in any "reward" events organised by the TAG at the year end. We return to that but for present purposes we find it was enough of a concern that the data was wrong and this in itself reflected poorly on TAG and Career 6.

6.44 We find Mrs Hargreaves put in additional work to remedy the records. To support her, her lunch time duties were removed although she was still working weekends and evenings. The SIP programme was intense and we detect some frustration in Mrs Gray where some aspects of the problems, such as register changes, were still occurring after weeks of senior management input to the problem. Minimum levels of attainment were set for students as a condition of them being able to continue their studies with Career 6.

6.45 TAG routinely organised an end of year trip for successful TAG students as a reward for their effort and exam results. On a day in June 2017, shortly before the planned trip, Mr Read and Mr Thundercliffe were standing together on the field at a break time with a colleague, Dean Hand. The discussion between Mr Thundercliffe and Mr Read turned to the arrangements for the trip and the available limited funds. The numbers going appeared to Mr Hand to be low. He enquired along the lines of whether the Career 6 students were going on the trip. One or the other men replied along the line of "you didn't just ask that". We find Mr Thundercliffe asked him not to say anything to Mrs Hargreaves as it was a job he had to do which triggered a joke about having to have a difficult conversation with the Claimant. The "joke" was arising from nothing more than the fact that the senior team had, the day before, been on a workshop about having difficult conversations. We don't find anything in that comment which could be said to have been a joke at anyone's expense. Rather, the timing of

the fact that it did, indeed, look like the situation with career 6 meant there was a difficult conversation to be had.

6.46 Despite what had been asked of him, Mr Hand did then relay this conversation back to Mrs Hargreaves before Mr Thundercliffe had chance to speak with her. She sent an email to Paul Thundercliffe explaining how devastating it would be for the Career 6 students not to go on the trip and the marketing fall out that would follow. Mr Thundercliffe denied any recollection of the conversation but in response to being told it was Dean Hand who had relayed the conversation expressed disappointment that he could not trust him. We find it was said. The claimant contacted Mrs Gray and she intervened, speaking with Mr Thundercliffe. We find those eligible from Career 6 did attend the reward trip. We also find Mrs Hargreaves' anger at this arose from the fact that her students were being denied the chance to go on the rewards trip and she was concerned about the marketing damage that would be done. In short, it was professional anger aimed at the decision, not the terms or comments. We do not accept the comments were viewed by Mrs Hargreaves as creating any form of proscribed environment or being related to her sex.

6.47 Towards the end of the summer term Mrs Hargreaves had a conversation with HR about her concerns about her relationship with Mr Thundercliffe and Mr Read. We have not been given the detail of that conversation and find it sits more naturally with how the Claimant was feeling at the time and her wish for an occupational health referral. The claimant did nothing further about that at the time.

6.48 The claimant ended the school year initiating friendly exchanges with colleagues including Mr Read as she went on holiday. The well-wishing was reciprocated.

6.49 We find Mrs Hargreaves was well aware of the likely Career 6 results, that they would be poor and that that she would be professionally associated with it. We find she was contemplating leaving the Respondent for some time for that reason. Around the time of her holiday in July, she made contact with Havelock Academy. Tentative and anonymous at first, by August the discussion was explicitly in respect of her looking for a new role and she was able to arrange an interview for a position with them. The interview went well and the arrangements were planned with a view to an immediate start. That is, by not giving the contractual term of notice to the Respondent.

6.50 Her view of her colleagues remained receptive to input from others who had views to share, Mrs Thundercliffe being one who relayed her views that her ex Husband and Ms Winter had both been undermining of her in the past.

6.51 In August Mrs Hargreaves contacted Vicky Hubbard in HR to arrange a referral to occupational health. She set out the purpose for this as being to discuss; -

> ***…stress in the workplace and non work related but might be worth chatting with her is my seasonal affective disorder and an easy one, an adjusted chair in my office due to osteoarthritis in my right knee.***

6.52 Our understanding of this comment is that SAD was being distinguished from the workplace problems of stress. She was offered the opportunity to refer to occupational health but did not do so.

6.53 On 21 August 2017, a meeting was arranged to discuss the anticipated Career 6 results. The claimant did not attend and sent her apologies instead. The AS level results were published and were not good. In fact, they were so poor many of the students would not have been able to progress to the second year. The adjective used by Mrs Gray was "abysmal" and she expressed concern how so many of them should not have been on A level courses in the first place.

6.54 We find Mrs Hargreaves was aware that Mrs Gray was planning to engage in active intervention to ensure improvements were made which included performance management plans. The claimant attended a meeting with HR on 21 August 2017 at which she indicated her intention to resign and to do so with immediate effect in order to find alternative employment. In fact, that alternative employment was already in place. She said she could not work her notice as she felt unable to continue in the role. She described how she had not been supported by Mr Thundercliffe to do her role. She explained the absence of any grievance as being that she knew Mr Thundercliffe was on a final written warning and she was trying to steady the ship at TAG. She was invited to consider raising a formal grievance and reviewing the situation at Christmas. She stated how: -

> ***…she knew she was about to be put on a formal performance management and she could not have that on her record.***

6.55 She was advised her notice was an issue to discuss with Mrs Gray. The next day, 22 August 2017 Claimant attended a meeting with Mrs Gray. During the meeting she confirmed her wish to resign with immediate effect. Mrs Gray's attempt at a compromise of one month was met with an intention to go off sick. In both meetings, Mrs Hargreaves made reference to her concerns being noted and in both she was told that abstract concerns would not be noted, and that if there were concerns that Mrs Hargreaves wanted on record they should be expressed in a grievance.

6.56 Her resignation was accepted and she was permitted to leave on 31 August 2018 subject to cover being arranged. She commenced her new employment on 4 September 2017.

6.57 On 23 August, she raised a grievance spelling out how she had already resigned and was lodging the grievance as part of her preparations for an employment tribunal claim.

6.58 The grievance set out a number of complaints, mainly identifying Mr Thundercliffe, under the headings of bullying and harassment and not supporting her to do the job. Mr Don Everitt, the Respondent's then finance director, was appointed to investigate the grievance. An investigation meeting was arranged for 13 September 2017. The meeting took place and the Claimant expanded on her grievance. At the outset she set out her desired resolution was an apology and acknowledgement together with a settlement agreement.

6.59 Mr Everitt met with Debra Gray on 25 August 2017 and on 29 September he met with Paul Thundercliffe, Steven Butler director of HR, Chris Read, Vicky Hubbard from HR, Dean Hand, Kyllie Booker who had been involved in the timetabling and resourcing issues and Vicky Dryden. Debbie Chalkley of HR also made contact with Sonia Winter who replied to specific questions by email. This further line of enquiry caused some delay, as did the relevant witnesses approving the notes of their interviews. The claimant was chasing an outcome in late October. Mr Everitt set out the results of his investigation in a letter dated 25 October 2017. The grievance was rejected in all respects. It did, however, conclude there had been a period of inadequate leadership and that Mr Thundercliffe's management had fallen below the standard the Respondent expected. The claimant was told that Mr Thundercliffe was now being made subject to a performance management plan which we find was managed informally within his supervision sessions with Mrs Gray. Within his analysis of each complaint, he accepted that Mr Read had said words to the effect of "stupid fucking woman" which he then described as an isolated but unfortunate incident and one which was properly dealt with at the time by the line manager.

6.60 In respect of that complaint, the evidence of Vicky Dryden given to the investigation was that this had been heard by her on a number of occasions, more than 6 but less than 20. We found Mr Everitt to have conducted a reasonably thorough investigation and his final outcome was supportive of Mrs Hargreaves in certain respects. On the use of the phrase "isolated but unfortunate incident", he was under the impression that the other incidents were being referred to HR to investigate. Indeed, we find this investigation did lead to further investigations and one consequence was that in February 2018 Chris Read received a formal written waring under the disciplinary procedure for his unprofessional comments about staff. On balance, we find it likely that he was limiting his choice of words to *the* single allegation made by the Claimant who he believed to be ignorant of the other occasions alleged by Ms Dryden. Either way, we now know that it was not accurate to describe the facts of her allegation as isolated. He recognised in evidence his choice of words could have been better. Mr Everitt concluded by rejecting the allegation of bullying and harassment but accepting on behalf of the Respondent that Mrs Hargreaves, and indeed all of those reporting to Mr Thundercliffe, had suffered the effect of his management shortcomings and that she had not been in any way targeted. Otherwise, he found there was reasonable support for her in her senior role as head of Career 6.

6.61 Although Mr Everitt was unaware, by the time of his outcome letter Mrs Hargreaves was in fact aware of the other incidents of similar language being used as she and Ms Dryden had spoken to each other in early October, shortly after Ms Dryden's interview. This was in contravention of the instruction to Ms Dryden not to talk about the matters in the investigation.

6.62 At the time of the outcome letter from Mr Everitt, the Respondent had not yet sent copies of the associated interview notes. The claimant lodged an appeal on 28 October 2017 which included the challenged to the use of the word isolated, on the basis it had come to her attention that it was far from isolated. The appeal letter is an extremely long document which challenged numerous aspects of her past working relationship with Mr Thundercliffe and Mr Read. The appeal letter included reference to sexual discrimination. There was no allegation

of disability discrimination, but there was reference to causing harm and failing to recognise risk. The appeal takes each point of conclusion expressed by Mr Everitt and sets out why Mrs Hargreaves argues he was wrong. It concludes with a single statement: -

"It is all of these grounds I claim I have been unfairly dismissed"

6.63 Mr Adrian Clarke, Director of Corporate Services, was appointed to hear the appeal.

6.64 In the meantime, the notes of the investigation, in particular those of Ms Dryden had been provided. Mr Clarke met with Mrs Hargreaves on 20 November 2017.

6.65 The claimant reduced her grounds of appeal to four main points which formed the structure of the appeal hearing. Omitted from the initial grievance, the appeal now included the allegation that Mr Read had deliberately allowed her to fail in organising the induction trip the previous year. The claimant made reference to a colleague called Shaun in the context of health and safety. We refer to it only because there was challenge that Mr Clarke had failed to investigate this point after giving the impression he would. He did not speak further because, we find the two were at crossed purposes, the Claimant referring simply to Shaun as opposed to Shaun Atkinson. Unfortunately Shaun was also the name of the person in Health and Safety within the Respondent's organisation and Mr Clarke decided against speaking further with him, not for any other reason than he concluded this Shaun would in any event have known that the forms were not completed in advance and thus did not need any further investigation. Mr Clarke's decision not to explore that further was therefore a reasonable one in the context of the knowledge and belief he had about the situation, albeit labouring under that mistake.

6.66 The notes of the meeting on 20 November 2017 are full and close to verbatim. We are satisfied that Mr Clarke understood the points in the Claimant's appeal and set about his role with an open mind, despite the fact that this process was now not about resolving any issues but the Claimant launching a claim against the Respondent.

6.67 After the appeal meeting Mr Clarke decided he needed to speak for himself with Ms Dryden and Mr Read. He met with Ms Dryden on 22 November 2017. She was not able to provide any further information but in view of the fact Mrs Hargreaves knew of the substance of her investigation meeting at the time she lodged her appeal, he asked her if she had spoken with anyone. She said she had not. That was not true, she had spoken with the Claimant and told her the further matters from the previous year that she had stated at the investigation and which she had previously not told the Claimant about. Mr Read was spoken to on 24 November and he denied any further comments. Similarly, we reject his response and we prefer the recollection of Ms Dryden albeit that she had clearly lied in part of her account to Mr Clarke and had not shared this information during the preceding 12 months. Nevertheless, our findings of fact are reached on what we have before us. We have to accept it was open to Mr Clarke to conclude as he did. He rejected there being any evidence of gender bias, harassment or failure to support. He found Ms Dryden to lack credibility due to her not mentioning what she had heard at the time. In respect of the additional occasions on which offensive comments had been made about Mrs Hargreaves, he concluded that there was evidence both ways and was unable to confirm or deny it.

6.68 The decision was set out in an outcome letter dated 29 November 2017. We find Mr Clarke set out a genuine position he felt he had arrived at following his further investigation on appeal. He had concerns about Ms Dryden's reliability. That is a reasoning he was entitled to apply. Our conclusions on Ms Dryden's evidence before us arrived at a different conclusion but we understand how and why he came to his conclusions. Although he was acting as an appeal, he recognised the new matters and conducted his own further investigation of the relevant witnesses. He had concerns about Ms Dryden's credibility after she had clearly not been truthful when asked about talking to others about her interview and not disclosing her evidence sooner. He then had Mr Read denying any further occasions to the one that had been dealt with. There were no other witnesses to the allegations. We do not accept there was an intention, conscious or sub-conscious, to supress allegations of sex discrimination. His conclusions on the further allegations of further occasions of harassment by Mr Read was to recognise the evidence but he felt unable to determine it one way or the other. In short, whilst that left the possibility open, he concluded that as the appeals manager the evidence did not entitle him to concur with the Claimant's allegation that it was not an isolated incident.

7. Direct Discrimination/Harassment Related to the Protected Characteristic of Sex

7.1 The list of issues sets out 7 events during the Claimant's employment which are said to be either harassment related to sex, or direct sex discrimination. All of the allegations prior to 12 September 2017 are out of time and, to engage jurisdiction, must form part of some discriminatory act extending over a period of time which itself is in time or otherwise it must be just and equitable to extend time. In this case, and having heard the evidence, we first reach a conclusion on the merits and it is only if the allegation would succeed on the merits that we go on to consider jurisdiction.

7.2 The definition of detriment within section 212(1) of the Equality Act 2010 means that we must first consider those allegations through the prism of a claim of harassment under s.26 of the 2010 Act. So far as is relevant, s.26 provides: -

> ***(1)A person (A) harasses another (B) if-***
>
> ***(a)A engages in unwanted conduct related to a relevant protected characteristic, and***
>
> ***(b)The conduct has the purpose of effect of-***
>
> > ***(i)violating B's dignity, or***
> >
> > ***(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.***
>
> ***(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-***
>
> ***(a)The perception of B;***
>
> ***(b)The other circumstances of the case;***
>
> ***(c)Whether it is reasonable for the conduct to have that effect.***

7.3 We are required to consider separately the discrete elements of this provision, namely whether any conduct found to have taken place was unwanted, had the proscribed purpose

or effect and was related to the relevant protected characteristic (**Richmond Pharmacology v Dhaliwal [2009] IRLR 336**). This case is also relevant to the threshold of when conduct amounts to harassment, Underhill P said at para 22: -

> ***"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."***

7.4 Whilst that passage focused on dignity as a prohibited purpose or effect within s.26(1)(b)(i), we take the view the essence of a threshold applies similarly to the other prohibited purposes or effects in s.26(1)(b)(ii) and that threshold is regulated by the concept of the reasonableness or not of the conduct having the prohibited effect as set out in in s.26(4)(c). Similarly, the meaning of the statutory words is itself a measure of the threshold and, as the Court of Appeal stated in **Grant v HM Land Registry & Another [2011] IRLR 748**, the significance of the words must not be cheapened. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

7.5 The alternative case of direct discrimination is brought under s.13 of the 2010 Act which provides: -

> ***(1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.***

7.6 By that provision, we are required to identify the reason why the treatment complained of occurred. That is the crucial question in cases of direct discrimination (**Nagarajan v London Regional Transport [1999] IRLR 572 HL**) and if we are able to, we will seek to make an explicit finding of the reason why it occurred. (**Amnesty International v Ahmed [2009] IRLR 884 EAT**). In this regard, the "because of" and "less favourable" questions are not always apt for separate consideration, particularly where the comparator is hypothetical.

7.7 Where the reason why is not readily apparent, we will turn to s.136 of the Equality Act 2010 which provides: -

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

7.8 We were referred to **Madarassy v Nomura International PLC [2007] IRLR 246** as authority for the proposition that the burden does not shift by proving a difference in treatment and difference in characteristic alone, something more is required; and **Bahl v The Law Society and others [2004] IRLR 799** for the proposition that unreasonable treatment in itself is not a basis for inferring discrimination.

7.9 Against those directions, we turn to consider each of the alleged acts of harassment.

7.10 The first is set out at paragraph 4.1.1 of the list of issues [39] and alleges that Mr Read attempted to sabotage the induction trip in July 2016. We are entirely satisfied there is nothing in the allegation that can be said to be related to sex. We found Mr Read was assisting Mrs Hargreaves, whose responsibility it was to organise the trip. We did not accept as a fact any sense that Mr Read spotted the deficiencies in the Claimant's preparation for that trip and simply sat back waiting for the inevitable failure to occur. The alleged unwanted conduct is therefore not made out. Moreover, the evidence does not support that any of the statutory prohibited effects were present as a result of any conduct at all of Mr Read. This allegation would fail even if jurisdiction were engaged.

7.11 Similarly, the alternative claim is premised on lass favourable treatment than a hypothetical comparator. That person must be a recently appointed male head of Career 6 whom Mr Read was signposting to the policy of trip management and explaining the need for risk assessments, consents and records. We cannot see anything in the surrounding circumstances that would lead us to conclude that the hypothetical comparator would have received any more favourable support that the favourable support we concluded Mrs Hargreaves received. There is therefore no less favourable treatment established and the alternative claim also fails.

7.12 The second allegation, at paragraph 4.1.2, alleges Mr Read told Ms Dryden that Mrs Hargreaves would lose her job by Christmas. We have found as a fact that there was some discussion in the context of the concerns about the career 6 project as a whole in which words to this effect were said. We are unable to detect any aspect of this comment being related to the protected characteristic of sex. We have concluded the discussion was about the broader state of affairs in Career 6 and the growing sense of the poor numbers and quality of students and sense it may not succeed. Even if it was possible to discern any aspect of this which was related to sex, which we cannot, we would conclude that it was not said for any of the prohibited purposes as it was conveyed in a private discussion in circumstances of trust and was not intended for the Claimant to learn of the comment. The underlying facts seem to reflect a state of affairs that anyone with knowledge of the education sector and this establishment may have considered and many of the senior managers did. For the same reasons, we would also conclude that it would not be reasonable, having regard to s.26(4) for it to have the proscribed effect. This claim fails irrespective of jurisdiction.

7.13 As with the first allegations, the alternative claim is premised on less favourable treatment than a hypothetical comparator. That comparator is a newly appointed male head of Career 6. The other relevant and material facts would be that the same quantity and quality of intake for that first year of Career 6 being to such an extent that there was widespread concern about it surviving, and that the head was contemplating implementing some form of performance management on the comparator. Once again, we have concluded that the hypothetical comparator would have been spoken of in the same terms as the Claimant. It follows that we are not satisfied the necessary less favourable treatment has been established. If we are wrong, we have considered if there are factors which provide the something more and which shift the burden and, in that regard, we recognise our other findings in respect of Mr Read making derogatory comments about Mrs Hargreaves in similar

private discussions. We are satisfied that would have been enough to have shifted the burden had there been less favourable treatment. However, had it shifted we are satisfied that the Respondent has established an explanation for the treatment which is in no way whatsoever related to sex. That is, that early in the academic year there were already concerns amongst the senior team, including significantly the Principal of the Respondent, that Career 6 may not succeed. One potential consequence of that state of opinion was, whether by inference of express statement, that Mrs Hargreaves might lose her job by Christmas. The focus of the comment and the underlying sentiment was related to the apparent failings of the Career 6 project, and not directed at the Claimant's gender. The alternative claim fails also.

7.14 The third allegation, at paragraph 4.1.3, alleges that Mr Read had sworn about Mrs Hargreaves in front of Lauren Webster in January 2017. We found that did occur. The claimant was told what had happened and took offence. We are satisfied that words used and relayed to her of *"stupid fucking woman"* are, in its terms, related to the protected characteristic of sex. The phrase conveys a dismissive and derogatory attitude to her, which he may feel he had legitimate grounds to hold, but which he expressed impermissibly by reference to her protected characteristic. It was not said in any sense of irony or jest. It was not said with the purpose of creating a proscribed environment as it was not intended to be relayed to the Claimant, but it must have been reasonably foreseeable that it could be repeated, especially as we found it was being said repeatedly between October and January and overheard by colleagues, sometimes directly subordinate to Mrs Hargreaves. We accept as a fact that Mrs Hargreaves did find this created an intimidating, hostile, degrading, humiliating or offensive environment for her as she complained to the principal and action was taken resulting in Mr Read's behaviour stopping and him apologising to Mrs Hargreaves. We have given careful consideration of the threshold considerations in claims of harassment and are satisfied that it was reasonable that the conduct had that effect. This allegation would succeed if jurisdiction is engaged. Subject to jurisdiction, the detriment amounts to harassment and s.212 precludes it being considered as a claim of less favourable treatment.

7.15 The fourth allegation is split into three related matters. Paragraph 4.1.4.1 alleges Mr Thundercliffe and Mr Read decided that Career 6 Students would not go on the reward trip. Paragraph 4.1.4.2 alleges that Mr Hand was told not to tell Mrs Hargreaves. Paragraph 4.1.4.3 alleges there was a joke between Mr Read and Mr Thundercliffe that they would need to have a difficult conversation. We dismiss all three of these allegations. The reason Mrs Hargreaves was the subject of this discussion in the first place was simply the fact she was head of Career 6. All other relevant factors being equal, whoever occupied that post would have been the subject of this discussion, the need for a difficult discussion to take place and Mr Thundercliffe wishing to be the one to raise the subject. The difficult discussion joke, to the extent it was a joke, was not at the Claimant's expense and arose simply due to the timing of the recent training. There is nothing in the evidence before us from which we are able to discern anything that could be said to be relevant to the Claimant's protected characteristic. Our findings conclude the prohibited effect was not made out in fact. Again, if we are wrong, even if it is possible to identify aspects of the comments which could be related to sex, which we cannot, and the prohibited environment or effect was created, which we have not found,

we would conclude that nothing was said with that purpose as the comments were explicitly not expected to be heard by the Claimant. Similarly, when it was relayed, we would conclude that it was not reasonable for it to have the prohibited effect. This allegation fails.

7.16 The alternative claim of less favourable treatment is premised again on a hypothetical comparator. That male comparator would have the same record on Career 6 as the Claimant had, would have been party to the training the day before on having difficult conversations and would have been told of the discussion by Mr Hand. There is nothing which establishes less favourable treatment, still less that can be said to be because of gender. We note the key player in this discussion was Mr Thundercliffe who was not alleged by the Claimant to have been guilty of any discriminatory conduct. If we are wrong, and there are factors which provide the something more and which shift the burden, we are satisfied that the Respondent has established an explanation for the treatment which is in no way whatsoever related to sex. In this case that the organisation of the reward trip was, by definition, a reward for student's success, that the budget was for the trip was limited and that it was known if the Career 6 students were not to go, Mrs Hargreaves' reaction would understandably be anger and disappointment and there would be a difficult conversation to convey the decision. Those reasons explain why what happened, happened. The alternative claim would fail also if jurisdiction was engaged.

7.17 The final allegation, at paragraph 4.2, is related to that at paragraph 4.1.3 but in terms of the Claimant's discovery in late October 2017 that the comments by Mr Read had, unknown to her, been repeated a number of times between October 2016 and January 2017 and appeared to vary slightly to include *"stupid fucking bitch"*. We have found they were said. We have found they arose in like circumstances to the allegation the Claimant was aware of and carry the same connotation of being related to her protected characteristic. The word "Bitch" is a derogatory term typically applied only to females. If anything, we conclude that the term bitch, as opposed to woman, carries with it something more derogatory than the mere expression of exasperation arising from a view of incompetence. We are satisfied this allegation is made out subject to jurisdiction. As before, we do not therefore consider the alternative basis.

7.18 There are then two further allegations of harassment related to the grievance and the appeal outcome letters. At paragraph 5.2.3 it is alleged that the grievance outcome letter of Mr Everitt dated 25 October 2017 was an act of harassment insofar as it styled the allegation of Mr Read speaking in offensive terms about Mrs Hargreaves as an "isolated but unfortunate incident". It is said to be related to the protected characteristic either due to its underlying subject matter or as an act of covering up Mr Read's sexually discriminatory remarks. At paragraph 5.2.4 the appeal outcome of Mr Clarke is said to be an act of harassment insofar as it fails to uphold the belatedly discovered allegations against Mr Read. It is said to be related to the protected characteristic in essentially the same way as the grievance outcome.

7.19 Both of these allegations are framed as harassment only. Unlike the others, it is not suggested in the alternative that they amount to less favourable treatment. They differ also in that both come to the Claimant's knowledge after the employment relationship had ended and to that extent, there cannot be a claim based on an extant relationship of employment under

s.40 of the 2010 Act. However, we potentially retain jurisdiction by virtue of section 108(2) of the 2010 Act which provides: -

> ***(2) A person (A) must not harass another (B) if-***
>
> ***(a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and***
>
> ***(b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act***

7.20 We are satisfied the nature of the allegation is closely linked to what was the employment relationship. Whether subsection (2)(b) is satisfied depends on our assessment of the merits a conclusion that the conduct does not amount to harassment would therefore dispose of the allegation both on the merits and our jurisdiction.

7.21 We turn to the allegation at 5.2.3. The focus is the use of the word isolated, when there was evidence before Mr Everitt from Ms Dryden of multiple occasions. We are satisfied this was unwanted conduct but we are not able to say his conduct in itself is related to the protected characteristic beyond the fact that the subject of what he is talking about is an act of harassment. We dismiss the contention that there was an intention to cover up sexually discriminatory remarks. In any event, to the extent that the subject of the comment is related to sex, the question arises whether the proscribed consequences followed. The claimant had left the employment at this time although dignity may still be violated. We are entirely satisfied that Mr Everitt did not use this phrase with the intended purpose of violating Mrs Hargreaves' dignity or otherwise creating the proscribed environment, if the environment can be said to continue. The question is whether it is reasonable that it does and we are not satisfied this passes the threshold necessary to attract the definition of harassment, having regard to the statutory words and the guidance from the cases we have cited. This claim fails.

7.22 The final allegation is 5.2.4, that Mr Clarke's appeal outcome in total was harassment because he did not uphold her grievance. The rationale being it was harassment because the subject matter related to harassment or alternatively was a cover up of sex discrimination. This was unwanted conduct insofar as it was an outcome that Mrs Hargreaves did not want and believed was a wrong outcome. We have come to the conclusion the conclusions Mr Clarke reached were conclusions he was entitled to come to in his capacity as appeals manager, even though we have made a different finding of fact on the question of Mr Read's conduct. It is important to recognise the distinction. We have interpreted Mr Clarke's approach in the appeal was that he was not positively finding the further incidents did ***not*** happen, he made clear the evidence left him unable to confirm or deny but, because of that, he was unable to uphold the appeal. For reasons we have set out in relation to Mr Everitt's outcome letter, we are straining to understand how this outcome is related to sex, save in respect of the underlying substance of her parts of her grievance, and we are satisfied on our findings that Mr Clarke was genuinely considering the appeal before him and there was no intention to cover up any misconduct. We also have regard to the fact that, although we differed to Mr Clarke in being able to come to a positive conclusion on the further acts of harassment, our own findings of the other surrounding circumstances are largely in line. Where Mr Clarke rejects the institutionalised bullying by Mr Thundercliffe, we recognise there

were a number of legitimate factors going to the set up of Career 6 and the intervention of Mrs Gray when things quickly appeared to be going wrong. We are satisfied he had grasped the issues within TAG. In any event, we are satisfied there was no intention to create the proscribed environment or that it is reasonable in these circumstances that any aspect of the outcome letter should have any of the proscribed effects. This claim also fails.

8. Reasonable Adjustment

8.1 So far as is relevant to the circumstances of this case, the duty to make adjustments arises under section 20(3) of the 2010 Act where: –

> ***a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.***

8.2 In determining whether the duty has arisen, the Tribunal must identify each element of the section in turn, that is to identify the provision, criterion or practice ("PCP"); the identity of a non-disabled comparator (where appropriate) and the nature and extent of the substantial disadvantage suffered by the Claimant. Only by breaking down those elements can a proper assessment be made of whether the adjustment contended for was reasonable or not. (**Environment Agency v Rowan [2008] IRLR 20 EAT**)

8.3 Paragraph 20 of part 3 of schedule 8 imports a requirement of knowledge on the employer in respect of both the employee's disability and that he is likely to be placed at the disadvantage created by the PCP. Unless there is or ought to have been the required level of knowledge of both elements, the duty to make a reasonable adjustment does not arise.

8.4 Whether an adjustment is reasonable or not is a question of fact for the Tribunal taking into account all the relevant circumstances and applying the test of reasonableness in its widest sense. Guidance similar to that which used to exist under s.18B of the repealed Disability Discrimination Act is now found in the code of practice.

8.5 The claimant advances the claim on three bases. The first relies on the PCP of "performing the job role and duties". There can be no argument that the Respondent, as with any employer, expects its employees to perform the role and duties of their post. The second PCP contended for is "completing the workload assigned". We are less satisfied this is in the same category of truism as the first PCP but on balance we are satisfied that there is a similar expectation that work that needs to be done will be done. The third PCP contended for is in two parts and is stated as "not holding return to work meetings following absences" and falsely purporting that such a meeting had happened. We reject that either properly amounts to a PCP. In the first instance, we do not accept that the Respondent applied a PCP of not holding return to work interviews. There is a policy expectation that they will happen and in the case of Mrs Hargreaves there was a dispute if fact as to whether there was a return to work meeting or not. It is rare for a single decision, especially where it is contrary to an established process, to be able to amount to a PCP. Similarly, the resolution of that dispute of fact answers whether Mr Thundercliffe falsely purported that such a meeting had been

held. In any event, we do not see how one party's account of a meeting can in itself be amount to a PCP. In this case we are satisfied that neither alleged PCP was applied.

8.6 The first disadvantage said to arise from either or both of the first two PCP's is that Mrs Hargreaves could not work as quickly as employees who are not disabled and had to work longer hours to get through her duties/workload. We accept that Mrs Hargreaves was at times working long hours and there were various points in the chronology where reference was made to working in evenings or at weekends. The necessary fact that that was down to the convergence of a disability and the PCP is simply not made out on the evidence. Firstly, the occasions on which this was said to have been happening was such that we would have expected reference to disability at some point in the correspondence or, if not disability, at least ill-health or impairment. That does not feature in the evidence. What does feature is a sense of having too much work, as a number of other members of staff were complaining about, as opposed to not being able to cope with the appropriate volume of work. Secondly, the context of the this particular year was such many of the staff appeared to be under a great deal of pressure and although this was the only academic year Mrs Hargreaves worked for the Respondent, it was clearly an extraordinary year in a number of respects from the new Career 6, the new senior leadership team, the absence of the head following his affair and the scrutiny Career 6 was under by higher management from early on in the year. We note also how when working at Havelock Academy previously her employment reference referred to her going above and beyond and often working beyond normal working hours and that , in the midst of this pressure Mrs Hargreaves was seeking to engage in other board level activities on top of her role at Career 6.

8.7 The second is that Mrs Hargreaves' depression and anxiety symptoms were aggravated. We accept that by the time the Claimant was at the end of her employment with the Respondent she was beginning to experience symptoms related to her underlying mental health fragility. We do not accept there were any substantial symptoms at the start of her employment to be aggravated although we do accept, by our findings in respect of disability, that the Claimant remained vulnerable to recurrences of her previous mental ill health. That being said, there is no evidence the work or workload was the cause of this. Whilst it is not necessary at all for the workplace (PCP) to cause the disability to engage the requirement to make reasonable adjustments, the way this claim is put is that the PCP causes that as a disadvantage. By the time Mrs Hargreaves completed her post employment health declaration for Havelock Academy it is clear she was suffering with symptoms of a recurrence that was not the case a year or so earlier. There are a number of factors that appear likely to have contributed to that and we cannot find evidence which attributes the workload with any particular impact when compared to the support to improve programme instigated towards the end of the academic year in the face of the failing career 6 intake or the consequential stress of her professional reputation being tarnished by the poor outturn of results and performance management procedure. We are not satisfied the Claimant has made out that the workload itself, or the role and duties of the post of head of Career 6 were what put the Claimant at this disadvantage.

8.8 The third relates to the third alleged PCP and is said to be that Mrs Hargreaves' needs for assistance were not identified and they were more substantial than the needs of non-disabled people returning to work. We doubt that, as formulated, this is expressing a disadvantage. Nevertheless, if, contrary to our conclusion, the associated PCP was applied by the Respondent, we are still not satisfied that either formulation of it caused this disadvantage, particularly when the Claimant appeared to be taking time to monitor the online absence records to track Mr Thundercliffe's failure to update the system. We have no doubt if Mrs Hargreaves felt there was benefit in some support, she knew how to progress that and if she had, it would have been offered. We have seen the ease with which she had access to HR and was invited to self-refer to occupational health later in the year but chose not to. We have seen the typical health questionnaires which we are aware often act as filters for early occupational health referrals and which, in this case, were completed disclosing no health issues at all. If the essence of the disadvantage argued for here is that the Claimant was deprived of the support that might have come from occupational health, we do not accept it was the alleged PCP put her at that disadvantage.

8.9 Before turning to the adjustments contended for, an essential necessary element before the duty to make an adjustment is engaged is the necessary state of knowledge. That is the existence of the disability and the disadvantage and, in both cases, the standard of knowledge is either knowing, or that the employer ought reasonably to have known. We have given careful consideration to this element as the facts surrounding Mrs Hargreaves' appointment and work throughout the time she was employed does not appear to satisfy either. As to disability there is nothing before the employer to establish either the depression or SAD. In fact, there are positive statements to the contrary and a stark absence of reference to any disadvantages related to any disability when there were email exchanges about workload and keeping up. None of those refer to being slower than others, the essence of complaint is that she has too much to do. The high point is the comment made in the presence of Mr Thundercliffe in the course of viewing office space that the Claimant could not work in it as she had SAD. That comment, in the context it was said and particularly in the context of the surrounding circumstances of the case does not create a basis to say the Respondent ought reasonably have the necessary knowledge.

8.10 It follows that the conclusions we have reached do not establish the duty to make reasonable adjustments. For completeness, however, we have considered the adjustments contended for. Clearly, reducing workload or redistributing duties are both capable of amounting to adjustments which may be reasonable depending on the nature of the disadvantage which engages the duty. However, by being expressed in general terms as they are here, the question of reasonableness cannot be determined in the abstract without a conclusion of the extent of the disadvantage and adjustment being contended for. We do not accept that holding a return to work meeting is an adjustment that would remove or substantially mitigate the alleged disadvantage of needing to be referred to occupational health. Our findings were that there was a meeting and although the Claimant's case was that this was not a formal return to work meeting there would have been nothing to prevent the point about occupational health being raised in the most informal of ways. The issue in this allegation is not the absence of formality, but the absence of any hint form the Claimant

that a referral to occupational health might be needed or beneficial or, more fundamentally, that there were any underlying issues that might reasonably prompt an employer to think for itself that an occupational health referral might be beneficial.

8.11 The claim of reasonable adjustments therefore fails on its merits irrespective of jurisdiction. We observe only that the time when the alleged adjustments ought to have been made appears to be in the early months of 2017 and the return to work more specifically on 7 February 2017 such that they are prima facie out of time.

9. Jurisdiction

9.1 Of the claims, two allegations of harassment have succeeded but they are out of time. Although the knowledge of the repeated use of the phrase stupid fucking woman/bitch comes to the Claimant's attention after the employment had ended, the acts themselves were carried out in the period between October 2016 and January 2017, well before it ended and the issue is one of time limits. There is no doubt the alleged act of discrimination occurred long before the period of three months immediately before the presentation of the claim, allowing for early conciliation. We therefore have to consider whether it is just and equitable to extend the time for the presentation. Section 123 of the 2010 provides that: -

> ***(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—***
>
> ***(a)the period of 3 months starting with the date of the act to which the complaint relates, or***
>
> ***(b)such other period as the employment tribunal thinks just and equitable.***

9.2 We have had regard to the relevant principals on the application of this test, which have relatively recently been summarised in **Miller v Ministry of Justice UKEAT/003/15** at paragraph 10, as: -

a) The discretion to extend time is a wide one.

b) Time limits are to be observed strictly in employment tribunal. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule.

c) What factors are relevant to the exercise of discretion, and how they should be balanced, are for the employment tribunal. The prejudice which a Respondent will suffer from facing a claim which would otherwise be time-barred is customarily relevant in such cases.

d) The Employment Tribunal may find the checklist of factors in section 33 Limitation Act 1980 helpful. This is not a requirement, however, and any employment tribunal will only err in law if it omits something significant.

9.3 With that guidance in mind for the following reasons we have concluded it is just and equitable to extend time for the presentation of the allegation at 4.2 (repeated derogatory comments). Firstly, when Mrs Hargreaves accepted the apology from Mr Read, she was under the impression his comment was a one off, both in terms of not being aware of the

extended number of occasions on which he had said similar comments nor that it had been said in front of different people. Secondly, Mrs Hargreaves learned of the repeat of the comments only in the course of the grievance investigation, thirdly, she acted on the information promptly by raising it in her appeal and lodging these proceedings. Finally, the issue of the further occasions that Mr Read is said to have said these things is investigated by the employer only in October and November 2017 when it comes to its attention in the course of the grievance process. The investigation is therefore neither hindered nor is its quality diminished by the passage of time. We find no prejudice to the employer if the extension of time is granted.

9.4 We then turn to the allegation at 4.1.2. We first consider how that allegation and the allegation at 4.2 relate to each other. Although we have found the earlier (4.2) acts of harassment to engage jurisdiction on the basis that it is just and equitable to do so, the last act of harassment in January (4.1.2) doesn't benefit from the same reasons to extend time. Nor can it engage the continuing act principles so as to engage jurisdiction, but there can be no doubt that they are all part of the same conduct extending over a period of time and coming to an end in January 2017. We anticipate there will be little effect on remedy whether this single allegation is included or not included so our conclusion may not have any material consequence either way but we have concluded that it is just and equitable to extend time for the presentation of this discrete allegation. We arrive at that principally because of its inherent connection with the other allegations for which we have accepted jurisdiction, the fact that there is some extent to which the other incidents of harassment was in fact known to the Respondent, when Mr Thundercliffe was told by Ms Dryden in the context of other purposes, but not disclosed to Mrs Hargreaves and also because there is no basis of evidential prejudice to the Respondent. Those factors outweigh the prejudice of losing the limitation defence.

9.5 In respect of both successful allegations of harassment therefore, we accept jurisdiction on that basis.

10. Whether there was a Dismissal or a Resignation

10.1 The claim of unfair dismissal was dismissed but (constructive) dismissal was, potentially, still a live issue to the extent it was engaged under s.39(2)(c) and(7)(b) of the 2010 Act. It is arguable that the structure of the statutory regime creates some legal difficulty in claiming constructive dismissal where the underlying breach is said to arise from harassment, as opposed to discrimination. Harassment and detriment are separate concepts. Similarly, harassment is not conduct of "discrimination", but "other prohibited conduct". Consequently, so far as dismissal creates a cause of action within s.39(2)(c) that is a claim of discrimination, not harassment. S.39 includes victimisation but not harassment. The cause of action of harassment, under s.40, has no equivalent provision relating to termination. All that said, we would readily accept that a resignation flowing from acts of harassment, and the losses that flow from no longer being employed, is a readily foreseeable consequence of the harassment and therefore there is a route to a remedy of financial loss in a claim under s.40 without need for a discrete and separate cause of action.

10.2 In this case, however, we can be brief on our discussions and conclusions on this part of the claim. There are only two claims that are made out and on which a dismissal, to the extent the employee accepts the employer's repudiatory breach and resigns, could be founded to give rise to consequential financial losses.

10.3 The first was the single incident of harassment in January in respect of which Mrs Hargreaves accepted Mr Read's apology and continued in employment for a further 8 months. We see no basis on which that can be relevant to the resignation in August. There may not have been a repudiatory breach in any event as the employer's response was not inappropriate. In any event, any repudiatory breach was clearly waived and the contract positively affirmed. The second claim was not discovered until after the resignation and as a matter of hard logic, cannot have informed the decision to resign.

10.4 It follows that the resignation is not the Claimant's act of acceptance of a repudiatory breach by the employer, or by someone for whom the employer is vicariously liable. It would not amount to a constructive dismissal nor does it open up financial losses flowing from the two matters that are made out. The resignation was clearly arising from the circumstances of Career 6 and the risk the Claimant perceived that her reputation would be tarnished by the potential of being made subject to a performance management plan.

11. Remedy

11.1 The matter will be listed for a remedy hearing unless the parties are able to reach agreement as to compensation. We have obviously not heard submissions on remedy and what we say here in no way binds our final determination, but within the findings we have made and the conclusions reached a number of provisional observations can be made that may assist the parties in reaching an agreement on remedy.

a) The principal head of loss appears to be injury to feelings. We have to separate the injury said to be caused by all acts of discrimination/harassment alleged, and award on the basis of the acts of harassment made out. We will have to have regard to the effect of how the Claimant indirectly learns of the comments, the acceptance of the apology and her response at the time generally to the third hand discovery of a single incident of harassment in January 2017. As to the effect of learning in October that this was not a one off, this was a second single discovery (albeit discovering a number of previous occasions) at a time when the Claimant had a range of issues with Mr Read and others within the Respondent. Our preliminary view is that injury to feelings will fall within the lower *Vento* band.

b) There is no financial loss flowing from the claims succeeding.

c) We do not see a basis for aggravated damages.

d) We do not see a basis for an award of damages for personal injury. If that head of claim is to be maintained, it can only be awarded in respect of the harassment claims made out. It is not a claim in negligence. The claimant will have to obtain an appropriate medical report dealing with causation generally, any pre-existing injury and the extent to

which any injury as there is flows from the two allegations made out as opposed to any other factors.

EMPLOYMENT JUDGE R Clark

DATE 30 August 2019

JUDGMENT SENT TO THE PARTIES ON

AND ENTERED IN THE REGISTER
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FOR SECRETARY OF THE TRIBUNALS