EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs Anna Ketlinska		(1) Holland Mountain Group Limited (2) Mr Barnaby Piggott

Heard at: London Central Employment Tribunal

On: 11, 12, 13, 14, 15 November 2019;
(2 & 3 January 2020 decision making in chambers)

Before: Employment Judge Adkin
Ms S Campbell
Dr V Weerasinghe

Representations

For the Claimant: Mr J Wallace, Counsel
For the Respondent: Mr J Gilbert, Litigation Consultant

JUDGMENT

The judgment of the Tribunal is that the Respondent did:

(a) Treat the Claimant unfavourably because of something arising in consequence of her disability pursuant to section 15 of the Equality Act 2010.
(b) Fail to make reasonable adjustments pursuant to sections 20-21 of EqA.

The following claims were withdrawn by the claimant and are dismissed:

(a) Protected disclosure detriment claim under the Employment Rights Act 1996.
(b) Claim for wages under the Employment Rights Act 1996.

The following claims do not succeed:

(a) Direct disability discrimination pursuant to section 13 of EqA.
(b) Harassment claim pursuant to section 13 of EqA.

REASONS

1. By three claims presented on 26 May 2017, 8 December 2017 and 3 April 2018 the Claimant Mrs Ketlinska ("the Claimant") brought claims of disability discrimination under the Equality Act 2010 ("EqA 2010"), specifically claims under sections 13 (direct), 15 (something arising), 20, 21 (reasonable adjustments) and section 26 (harassment). Claims of protected disclosure detriment and for unpaid wages were withdrawn.

The Issues

2. The issues agreed by the parties were as follows:

1. Equality Act Claims Time Limit: Equality Act 2010 ("EqA 2010"), s 123(1), (3) and (4).

(a) When is the act or omission treated as having happened?

(b) Is there a continuing act or omission over a period?

(c) Are any of the claims out of time?

(d) If so, is it just and equitable to extend time in the circumstances?

2. Whistleblowing Claims Time Limit: the Employment Rights Act 1996 ("ERA 1996"), ss 48(3) and (4).

(a) This claim was not pursued.

3. Wage Claims Time Limits: ERA 1996, s 23(2), (3) and (4), and Extension of Jurisdiction (England and Wales) Order 1994 ("EJO 1994"), art 7.

(a) This claim was not pursued.

A. <u>EQUALITY ACT CLAIMS</u>

4. Disability: EqA 2010, s 6 and sch 1.

(a) Between 11th July and 30th November 2017, did the Claimant have a mental impairment of depression, anxiety, and panic attacks?

(b) If so, did the Claimant's mental impairment have a substantial adverse effect on her ability to carry out normal day-to-day activities between 11th July and 30th November 2017?

(c) Were the substantial adverse effects of the Claimant's mental impairment long-term in that the impairment lasted or could well have lasted for at least 12 months?

5. Discrimination Arising from Disability: The Equality Act 2010 ("EqA 2010"), s 15.

(a) Did the following arise as a consequence of the Claimant's disability (1/52/55):

i. The Claimant was unable to sustain her participation in the 19th July 2017 meeting with the Second Respondent (1/52/55);

ii. The Claimant left the 19th July 2017 meeting with the Second Respondent (1/52/55); and

iii. The Claimant was absent from work from 19th July 2017 until her dismissal on 30th November 2017 (1/52/56 and 57)?

(b) Do the following acts amount to unfavourable treatment (per EqA 2010, s 15(1)(a)), where proven if not admitted:

i. From 19th or 20th July 2019, the Respondents commenced and sustained disciplinary proceedings against the Claimant (1/52/55b);

ii. On 30th November 2017, the Respondents dismissed the Claimant (1/52/55c);

iii. On 19th July 2017, the Second Respondent accused the Claimant of lying about her illness (1/52/55d);

iv. The Respondents abandoned settlement discussions with the Claimant (1/52/55a);

v. On 19th July 2017, the Second Respondent told the Claimant's colleagues not to contact her (1/52/55f);

vi. On 21 August, 31 October and 21 November 2017, The Claimant was unable to find a colleague who was willing to accompany her to her grievance hearings and grievance appeal hearing (1/52/55f);

vii. On 26th August and in November 2017, the Respondents failed to pay the Claimant her bonus (1/52/57);

viii. From 26th June to 30th November 2017, the Respondents failed to pay the Claimant wages due to her (1/52/57); and

ix. On 24th November 2017, the Respondents decided to conduct the disciplinary hearing, which resulted in dismissal, in C's absence and without providing C with an opportunity to make representations (1/52/58).

(c) Did the following alleged facts have a more than trivial influence on the acts listed at paragraph 5(b)i-vi (1/52/55):

i. The Claimant was unable to sustain her participation in the 19th July 2017 meeting with the Second Respondent; and/or

ii. The Claimant left the 19th July 2017 meeting with the Second Respondent?

(d) Did the alleged fact that the Claimant was absent from work from 19th July 2017 until her dismissal on 30th November 2017 have a more than trivial influence on the acts listed at paragraph 5(b)vii-x (1/52/56-58)?

(e) Have the Respondents shown that the acts listed in paragraph 5(b) above are a proportionate means of achieving a legitimate aim where the aim relied on is achieving consistency throughout the consultancy team (1/80/73)?

(f) Have the Respondents shown that they did not know and could not reasonably have been expected to know that the Claimant had the disability alleged at paragraph 4 above **(Respondents do not specifically plead this but imply at 1/79/64 and 71)**?

6. Failure to Make Reasonable Adjustments: EqA 2010, ss 20 and 21.

(a) The Respondents accept (1/79-80/71-73) that between 19th July and 30th November 2017 they operated on the following provisions or conducted the following practices:

i. Requiring employees to comply with management instructions (1/48/51e);

ii. Requiring employees to remain at meetings unless expressly permitted to leave (1/48/51g);

iii. Not sending or preparing meeting agendas in advance of workplace meetings (1/48/51d);

iv. Commencing disciplinary proceedings against those who do not comply with management instructions (1/48/51f);

v. Holding disciplinary hearings on predetermined dates (1/48/51f);

vi. Requiring employees to work solely from the First Respondent's office or on client sites (1/48/51a);

vii. Requiring employees to work from at least 9 am to 6 pm (1/48/51b); and

viii. Linking bonus payments to hours worked on client sites (known as utilisation) (1/48/51c).

(b) Did the above provisions or practices subject the Claimant to a substantial disadvantage in that,

i. Regarding the provision or practice at paragraph 6(a)i, ii, iii and iv above, the Claimant experienced increased anxiety, stress and a panic attack at the 19th July 2017 meeting which made it difficult for her to comply with the Second Respondent's instructions, remain at the meeting, and which exposed her to disciplinary proceedings and ultimately dismissal (1/49-50/52d-h);

ii. Regarding the provision or practice at paragraph 6(a)iii above, the Claimant experienced increased anxiety, stress and the likelihood of experiencing a panic attack at meetings where she was unaware of the purpose, as exemplified by the 19th July 2017 meeting with the Second Respondent (1/49/52d);

iii. Regarding the provision or practice at paragraph 6(a)v, the Claimant experienced increased anxiety, stress, and fainted prior to the 24th November 2017 disciplinary hearing. As a consequence, the Claimant did not attend and was unable to make representations at the hearing (1/50/52g);

iv. Regarding the provision or practice at paragraph 6(a)vi and viii above, the Claimant experienced increased anxiety, stress, and likelihood of experiencing a panic attack by solely working at the First Respondent's office or on client sites (1/48/52a);

v. Regarding the provision or practice at paragraph 6(a)vii and viii above, the Claimant experienced increased anxiety, stress and likelihood of experiencing a panic attack by working from at least 9 am to 6 pm (1/49/52b); and

vi. Regarding the provision or practice at paragraph 6(a)vi, vii and viii above, the Claimant will have a lower utilisation rate than those without her disability (1/49/52c).

(c) Did the Respondents take such steps as were reasonable to avoid the disadvantage? Although unnecessary, the Claimant highlights the following suggested adjustments:

i. Regarding the provision or practice at paragraph 6(a)i, ii, and iv, and disadvantage at paragraph 6(b)i above, allowing the Claimant to leave 19th July 2017 meeting, disobey instruction (if any) to remain, and provide the Claimant with an opportunity to explain her reasons for leaving the meeting or disobeying instruction prior to instituting disciplinary proceedings against her (1/51/53e-g).

ii. Regarding the provision or practice at paragraph 6(a)iii, and disadvantage at paragraph 6(b)i and ii above, providing the Claimant with an agenda and notice of the reasons for meetings in advance of the meeting (1/51/53d);

iii. Regarding the provision or practice at paragraph 6(a)iv, and disadvantage at paragraph 6(b)i above, not instituting disciplinary proceedings against the Claimant at all or, at least, where dismissal was a possibility (1/51/53f, h and i);

iv. Regarding the provision or practice at paragraph 6(a)vi and viii, and disadvantage at paragraph 6(b)iv and vi above, allowing the Claimant to work from home or at a location other than the First Respondent's offices or client sites (1/50/53a);

v. Regarding the provision or practice at paragraph 6(a)vii and viii, and disadvantage at paragraph 6(b)v and vi above, allowing the Claimant to work at reduced hours (1/51/53b); and

vi. Regarding the provision or practice at paragraph 6(a)vi, vii and viii and disadvantage at paragraph 6(b)vi above, not linking the Claimant's bonus to utilisation or adjusting the rate of utilisation to include home working, or fewer hours on client site (1/51/53c).

(d) Have the Respondents shown that **(Respondents do not specifically plead this but imply at 1/79/64 and 71)**,

i. They did not know and could not reasonably have been expected to know that the Claimant had the disability alleged at paragraph 4 above; or

ii. They did not know and could not reasonably have been expected to know that the Claimant was likely to be placed at the substantial disadvantages in paragraph 6(b) above?

7. Direct Discrimination: EqA 2010, s 13

(a) Did the Respondents treat the Claimant less favourably than they would treat a person in materially the same position as the Claimant save that the person does not have the Claimant's disability? The alleged acts of less favourable treatment are as follows:

i. On 11th July 2017, Mr Jeremy Hocter questioned whether the Claimant should be on the client site (1/47/50b);

ii. On 19th July 2017, the Second Respondent accused the Claimant of lying about her disability (1/47/50c);

iii. On 24th November 2017, Ms Sharlene Hernandez's disbelieved the Claimant's account of the 19th July 2017 meeting with the Second Respondent, particularly as regards the effects of the Claimant's disability (1/47/50d).

iv. The Second Respondent's adoption of Ms Hernandez's report, dated 24th November 2017 (1/47/50e);

v. On 21 August, 31 October, 21 November (grievance and grievance appeal hearings) and 24th November 2017 (disciplinary hearing) The Respondents' treatment of the Claimant as a less reliable witness (1/47/50f); and

vi. On 30th November 2017, the Respondents dismissed the Claimant (1/47/50a).

(b) Did the Respondents treat the Claimant less favourably because of her disability?

8. Harassment: EqA 2010, s 26.

(a) Do the following acts amount to unwanted conduct:

i. On 19th or 20th July 2017, the Respondents decided to take disciplinary action against the Claimant (1/53/59a);

ii. On 19th July 2017, the Second Respondent accused the Claimant of lying about her disability (1/53/59a);

iii. On 24th November 2017, Ms Sharlene Hernandez's disbelief of the Claimant's account of the 19th July 2017 meeting with the Second Respondent, particularly as regards the Claimant's disability (1/53/59b); and

iv. On 8th September, 7th November, and 21 November (grievance and grievance appeal decisions), the Respondents dismissed the Claimant's grievances and grievance appeals (1/53/59d)?

(b) Is the unwanted conduct related to the Claimant's disability?

(c) Did the unwanted conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

The Evidence

3. The Tribunal heard oral evidence from the Claimant herself, supported by

3.1. An Impact Statement dealing with disability dated 31 July 2018.

3.2. A short three page witness statement dated 29 January 2019 dealing specifically with the Claimant's relationship with Blackrock and alleged income received.

3.3. The Claimant's substantive witness statement of 56 pages dated 28 February 2019.

4. For the Respondents the Tribunal heard evidence from:

4.1. The Second Respondent Mr Barnaby Piggott, CEO and founder of the First Respondent.

4.2. Mr Jeremy Hocter, Director and the Claimant's line manager.

4.3. Mr Kushil Lakhani.

5. We were presented with witness statement, but no live evidence from:

5.1. Ms Liz Hocter;

5.2. Mr Jonas Bastholt.

Procedural matters

6. Protected disclosure claims and wage claims were withdrawn on the first and second day of the hearing respectively.

7. At the outset of the hearing, the Claimant made an oral application to amend the description of disability at paragraph 5 of the Grounds of Complaint in the third Claim which was pleaded as "anxiety, depression and panic disorder causing her to have panic attacks, find and experience anaphylaxis". The application was to include the word "stress" in the description of disability. Submissions were heard from both parties. The Respondents opposed this application. An oral judgment was given dismissing this application. No written reasons were requested.

8. Also considered at the outset of hearing was the Claimant's written application to amend dated 7 November 2019. The application was to incorporate the narrative from the second and third claim forms into the first claim form. This was to avoid a "legal bear-trap" caused by non-compliance with the ACAS certificate regime. This application was granted in the Claimant's favour. Again an oral judgment was given. Again no written reasons were requested.

9. It was explained that the Claimant was under high levels of anti-anxiety medication during the hearing. As the medication wore off during the afternoon she struggled, particularly during her oral evidence. Her husband, who was present during the hearing indicated that he was concerned about her taking even more medication in order to keep going with her evidence. As a result the Tribunal had a relatively short sitting day during the Claimant's evidence which went over three days. Much of the Claimant's evidence was unfocussed and progress was very slow, even on matters which the Tribunal anticipated would be uncontentious. It was difficult to gauge whether the Claimant was being deliberately evasive in her responses to questions or struggling with the effect of medication.

10. In view of the very slow progress the Tribunal canvassed with the representatives whether interposing some of the witnesses might "speed up" the evidence. Having reflected on this Mr Wallace's preference was that we should complete the Claimant's evidence in one continuous block, even if it took longer. The Tribunal respected this preference.

11. On the morning of the third day of the Claimant's evidence, by agreement between the representatives, the Claimant was given an 'agenda' by the Respondent's representative which set out the remaining questions. This 'adjustment' was reasonably effective at speeding up the remainder of the Claimant's evidence and helping her to focus. While it is not a criticism of the Claimant, the effect of the protracted nature of the Claimant's evidence was to cause the hearing to go part-heard.

12. Given shortness of time, submissions were sent in writing by both representatives after the conclusion of the hearing. The representatives

were given the opportunity to respond in writing to the primary submissions of the other side.

The Law

Disability

13. The Equality Act 2010 ("EqA") contains the following provisions:

> 6 Disability
>
> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities
>
> Schedule 1 Part 1
>
> Long-term effects
>
> 2(1) The effect of an impairment is long-term if—
>
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months, or
>
> (c) it is likely to last for the rest of the life of the person affected.
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

'Likely to last for at least 12 months'

14. The issue of how long an impairment was likely to last should be determined at the date of the discriminatory act and not the date of the tribunal hearing — *McDougall v Richmond Adult Community College* [2008] ICR 431, CA and *Singapore Airlines Ltd v Casado-Guijarro* EAT 0386/13.

15. In *Casado*, an Employment Judge erred in having regard to subsequent events when reaching her decision that the Claimant was already a disabled person by December 2011. In that case C did not have a significant medical history of anxiety or depression and was signed off in 20 December 2011 with an acute stress reaction. It was common ground that the stress/depression persisted and amounted to a disability by August 2012. HHJ Richardson followed *McDougall* and found that the

Employment Judge had erred by having regard to subsequent events in determining that C was disabled in December 2011.

16. The *Guidance on Matters to Be Taken into Account in Determining Questions Relating to the Definition of Disability (2011)* issued under section 6(5) EqA also stresses that anything that occurs after the date of the discriminatory act will not be relevant (see para C4).

17. In *SCA Packaging Ltd v Boyle* [2009] UKHL 37, [2009] IRLR 746 [52] and [70], the House of Lords held that "likely" in disability discrimination legislation means "could well happen", which is a much lower threshold than "more likely than not". IDS Brief offers the following commentary on this decision:

> "According to Baroness Hale, the word 'likely' in each of the relevant provisions of the DDA (now EqA) simply meant something that is a real possibility, in the sense that it 'could well happen', rather than something that is probable or 'more likely than not'. This decision clearly makes it much easier for individuals with certain conditions to satisfy the statutory test for disability, in that their Lordships' construction of the word 'likely' represents a significantly lower hurdle than the probability test that was formerly thought to apply."

18. "Could well happen" is not a mere possibility test. In *Thyagarajan v Cap Gemini UK plc* EAT 0264/14 the EAT did not disturb the finding of a Tribunal that a 2% chance of recurrence of retinal detachment within 12 months was not enough to satisfy the "could well happen" test.

19. In the case of *Martin v University of Exeter* (UKEAT/0092/18/LA), the EAT upheld the decision of the Tribunal in applying *Boyle* and finding that an impairment which began in June 2015 (PTSD initially characterised as anxiety) only became a disability in April 2016, i.e. after nine months on the basis that in the circumstances of that case it was by then likely to last 12 months. In that case, in absence of expert opinion on the question of the appropriate date, the Judge was obliged to use all the information with which he was presented.

Mental health cases

20. Guidance on determining disability in mental health cases was given in *J v DLA Piper UK* [2010] IRLR 936, in which Underhill J held that depression, anxiety and stress might describe two states (at [42]):

> "The first state of affairs is a mental illness - or, if you prefer, a mental condition - which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances

(such as problems at work) or -if the jargon may be forgiven – 'adverse life events'.

We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians - it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case - and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived."

21. Underhill J stated, at paragraph 40, that the tribunal may need to consider the adverse effects on C's day-to-day life and whether the impairment has a long-term effect before it considers the question of impairment.

Harassment

22. Section 26 of the Equality Act 2010 provides:

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

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

…

> (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.

23. There is a minimum threshold for what might amount to harassment. In *Richmond Pharmacology v Dhaliwal* [2009] ICR 724, EAT, Mr Justice Underhill, then President of the EAT, said: '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'

Reasonable adjustments claims

24. In considering reasonable adjustments claims, tribunals are required to have an analytical approach (*Environment Agency v Rowan* [2008] ICR 218). The correct approach is to identify (i) the PCP; (ii) non-disabled comparators, where appropriate, (iii) the nature & extent of substantial disadvantage. This is in order to consider the extent to which taking the step would prevent the effect in relation to which a duty was imposed.

The Facts

25. On 1 July 2016 the Claimant commenced employment at the First Respondent as 'Consultant'. The First Respondent provides consultancy services focusing on operational efficiency for clients in the financial sector.

26. On 28 October 2016 the Claimant was diagnosed with 'systemic anaphylaxis' and was prescribed an Epipen Auto-Injector.

27. On 10 May 2017 the Claimant had a discussion with her manager Jeremy Hocter. There was a discussion about her draft Personal Development Plan ("PDP") and a discussion about her career development and salary expectations. The Claimant was clearly focused on progressing to a Senior Consultant role. She raised concerns with Mr Hocter about comments made a couple of months earlier by Mr Piggott that had left her feeling demotivated. The Claimant had understood Mr Piggott to say that there was no point about talking about salary [i.e. a pay rise] and that he was looking to replace her with another colleague.

28. Mr Hocter wrote about his discussion with the Claimant in email sent on 10 May to his wife Liz Hocter. Mrs Hocter was Head of People and Performance at the First Respondent. Mr Hocter wrote that he felt that the

part about replacing the Claimant was almost certainly a misunderstanding. He did see potential for the Claimant to take on more senior responsibilities in 18 months' time. In the short term however he did not see that the Claimant was yet ready for this. He raised a concern that whatever he told the Claimant about a pay rise would be unlikely to meet her expectations. He also raised a question about the Claimant's commitment to her employment with the First Respondent.

29. In an email on 11 May 2017 the Claimant wrote directly to Mr Piggott Mr Barnaby Piggott, CEO of the First Respondent. She wrote that the PDP talks with the Hocters were

> "going off in a direction I am not comfortable with…
>
> … Generally the outlook they have in mind is, both in terms of role, package and timelines, far from what I had understood to be the case, hence I would very much appreciate to discuss with you before making up my mind about whether that is something I can sign up to."

30. It is clear from an email sent by Mr Piggott to Mr and Mrs Hocter on 14 May that he felt that there was a risk of the Claimant leaving. He had a wider concern about low morale causing risk of losing other members of the client team at Bridgepoint, the client for which the Claimant was working. In her reply Mrs Hocter made a comment about the Claimant wearing sunglasses during a recent management meeting being "career limiting". It is not necessary for us to make a finding on this point, but the evidence suggests that this was likely to have been as a result of the Claimant suffering a migraine.

31. On 15 May 2017 there was a meeting between the Claimant and Second Respondent. There was a discrepancy between the Claimant's assessment of her own performance and how her managers perceived it. The Tribunal has not seen evidence that suggests that performance concerns *per se* had been raised with the Claimant prior to this point. The discrepancy in expectations was in regard to how quickly the Claimant might reasonably progress to the Senior Consultant role. The Claimant used this opportunity to raise some broader concerns in this meeting about the way the First Respondent operated, the precise detail of which is not relevant to this claim. She had concerns that the First Respondent failed to enrol its employees into a pension scheme, about the morale of the team, contradictory messages regarding pay and recruitment practice and a lack of training.

32. On 25 May 2017 the Claimant was signed off work by her GP until 9 June 2017 with "stress". This certificate was provided to the First Respondent on 26 June. The GP record on this day reads:

> "History: Having major pressures off work and has reached the point at which she is having trouble dealing with the workload and then has been having reduced productivity.

Diagnosis: Stress at work"

33. The Claimant was prescribed Sertraline 50mg and Zolpidem 10mg. By this time the Claimant had been suffering from insomnia relating to work stress.

34. There was a meeting on 26 May 2017, in which Mr Piggott and Jeremy Hocter met with the Claimant. There was again a mismatch in expectations. Mr Hoctor told the Claimant that she was disengaged and not ready yet to be a Senior Consultant.

35. On 30 May 2017 the Claimant wrote to Mr Piggott and Mr Hocter. Her email contained the following:

> "I have quite full on medical schedule this week and my test results are still not amazing.
>
> I got signed off work until the end of next week and whilst I was hoping to ignore it and juggle both work and health it transpires that I have to focus on the diagnosis and recovery."

36. Mr Piggott responded, appropriately, a few minutes later:

> "No problem – get yourself better, sorry to hear situation.
>
> I'll speak to Jeremy [Hocter] about this and how we are going to handle. We'll get in touch with Kushil too."

37. On 8 June 2017, the day before she was to return to work the Claimant was signed off for a further period of 14 days to 23 June with "work stress". The certificate was provided to the First Respondent on 26 June. The diagnosis recorded in the GP record was low mood. The dosage of Sertraline was doubled and a referral to a psychiatrist was recommended.

38. On 9 June 2017 Mr Hocter spoke to the Claimant by telephone. She updated him that she'd been referred to a neurologist and that she was sleeping a fair bit. To date the doctors had not found an obvious trigger for her symptoms and had suggested that it was down to the body being under stress.

39. On 22 June 2017 the Claimant was certified by her GP as having "stress" but fit to return to work "up to and not beyond 6 hours a day" for one month. This certificate was not received by the Respondent however until 28 July 2017. The sertraline dosage was further increased to 150mg.

40. On 26 Jun 2017 the Claimant returned to work. On this day she supplied the First Respondent by email to Lynsey Choules with three medical documents. First, was a GP fitness certificate dated 25 May 2017, signing her off as not fit for work with "Stress" until 9 June 2017. Second was a further fit note citing "Work Stress" dated 8 June 2017 which certified that she was not fit for work until 23 June 2017. Third was a certificate dated 17 October 2016 relating to a 'respiratory infection'. The Tribunal

considers that the most likely explanation is that this third document, which was by now quite old, was attached by the Claimant in error rather than the 22 June 2017 certificate.

41. At her return to work meeting with her line manager Mr Hocter it was discussed that the Claimant would no longer carry on working on the project for the Bridgepoint client.

42. On 4 July 2017 the Claimant had a meeting with the Second Respondent. Various matters were discussed. Mr Piggott encouraged the Claimant to speak to her line manager Mr Hocter if she was not able to be in the office 9am-6pm. He also discussed a potential new project with her at a financial client in Paris. In the event this new opportunity did not materialise for the Claimant.

43. On 10 July 2017 the Claimant met with Ms Liz Hocter. In an email sent the same day to Mr Piggott and Mr Hocter, Mrs Hocter characterised this as an uncomfortable conversation. She stated that the Claimant was evasive and responded to most questions with a question. She felt that the Claimant was twisting her words. Mrs Hocter also felt that the Claimant didn't want to deal with her and would prefer to deal either with Mr Piggott or Mr Hocter her line manager.

44. The Claimant followed up this meeting with an email to Mr Piggott and Mr Hocter, but not copying Mrs Hocter. She complained that she felt that Mrs Hocter was questioning her commitment offering to help transition her out of the business. She said that she was pretty upset to say the least. She felt that her enthusiasm was completely quashed. She said it was not easy for her as she had to manage her levels of stress not to relapse.

45. Mrs Hocter also summarised the meeting in an email. Her version differed very significantly from the Claimant's. At 18:00 that day Mr Piggott had a conference call with Mr and Mrs Hocter at which they discussed the two emails and difference in recollection and what they considered was a pattern of the Claimant being antagonistic towards Mrs Hocter. Based on this conversation at this point Mr Piggott decided that they needed to exit the Claimant from the business. His subsequent involvement in the case was directed to trying to achieve this objective.

46. On 11 July 2017 the Claimant met with Mr Hocter and Ms Douglas in Tom's Kitchen, a bar and restaurant at London Bridge. The Claimant in her Impact Statement states that she was sent home having had a "nervous breakdown" in front of Mr Hocter and Ms Douglas. The Tribunal finds that the Claimant was distressed in this meeting. . Based on our findings, we find that "nervous breakdown" overstates what actually occurred in this meeting.

47. The Claimant told Mr Hocter in this meeting that she did not feel comfortable discussing her email of 10 July due to the public setting. She said that she felt stressed as it was not confidential. It was agreed that the next meeting would take place in a meeting room and the Claimant

reiterated that she did not want to have a discussion in a bar. The Tribunal finds that the Claimant did tell Mr Hocter that she had experienced an "unexplained allergic reaction" and that she did not know what had caused this. She told Mr Hocter in this meeting that she did not have any critical health issue.

48. A detailed conversation also took place in this meeting on a variety of different topics including the Claimant's health, her workload, the team, learning and development and ways that the First Respondent could support the Claimant. These are detailed in a little over three pages of close type in a small font in the notes taken by Ms Douglas.

49. In an email sent on 11 July 2017 in response to Ms Douglas' minutes, Mr Hocter wrote:

> "The point made in the day's meeting was also concerning. I haven't review[ed] the doctor's notes but it was implied sickness was caused by work. The explanation from the employee was that sickness was an unexplained allergic reaction, further tests have not found any specific allergens to avoid. In a return to work interview and in conversations prior to the return work I asked each time if any changes to ways of working would be required to support her to avoid further illness – each time I was assured that she is recovered and fine. Today's meeting contradicted this suggesting a discussion in the office caused her to need to see her GP. I appreciate this might be a one off and no problem if it is, but it sounds like we need a mitigation plan should it happen again, particularly on a client site. I would have expected guidance from the GP if this was an ongoing concern and now I'm not comfortable we're in a position to deal with the future risk."

50. On 12 July 2017 the Claimant wrote to Mr Hocter, reiterating that she wished for future meetings to take place in a more professional environment, and complained that she felt extremely uncomfortable discussing Mrs Hocter with him given that the two were married. She wrote:

> "Thank you for your time yesterday. I have had an excruciating migraine for the last 20h following on this humiliating experience that brought me to tears in front of all the people that bar."

19 July 2017 meeting

51. On 19 July 2017 the Claimant attended a meeting with Mr Piggott following an invitation by Ms Douglas. The Claimant plainly believed that this would be some sort of continuation of the discussions she had been having with Mr Hocter. Indeed on the morning of 19 July she was chasing up the minutes for that meeting as she considered they were relevant. At

09:12 on the morning of the meeting Mr Piggott notified the Claimant that the notes of the earlier meeting would not be relevant.

52. When the Claimant arrived at the meeting at approximately noon, she was surprised to see that Ms Debbie Ramsden, an HR consultant for Face2Face was also in attendance. Mr Piggott explained that the previous meetings with Mr and Mrs Hocter were merely "background" and that this meeting would not be about performance, capability or PDP. The Claimant wanted and tried to talk about these matters.

53. Mr Piggott tried to position the meeting as a "without prejudice" discussion and in fact had a one page letter [165B] to be delivered by hand to this effect. The Claimant would not accept this. She felt that this was an ambush, since Mr Piggott had not told her that this was to be the purpose of the meeting and this was not what she had prepared to deal with.

54. The Claimant's Impact Statement says that she had a "severe panic attack" at this meeting. The Tribunal accepts that the Claimant was distressed and did not feel able to continue to participate in this meeting. Ultimately she walked out of the meeting. Mr Piggott tried to get her to come back to the room, but she refused. She told him "I can't speak to you". As she left she told Mr Piggott "I am sick, I have a note, I have told Jeremy [Hocter]". She then left the building altogether.

55. The GP notes on 19 July 2017 indicate that the Claimant visited her GP twice on that date. The first note record that at 11:31 "Had 2 Panic Attacks at work last week. Feeling shaky and stressed. Plan: Will see this pm at 6:15". Later on at 18.28 is recorded "the sertraline is working well. Being pressured at work and had a Panic Attack in the meeting today, however. Diagnosis: work stress." The Claimant was again signed off work by her GP, this time with "work stress" for 6 weeks until 30 August 2017. This certificate was received by the Respondent on 28 July 2017.

Communication following the 19 July 2017 meeting

56. The Claimant followed up the meeting on 19 July with an email sent a few minutes later at 12:30:

> "Hi Barney,
>
> There must have been some confusion indeed. I wasn't notified of the meeting attendees, agenda and purpose in due course and although I try to accommodate it as you insisted, despite being sick, I am am [*sic*] not able to go ahead with meeting you until I am formally allowed to be back at work.
>
> As I am sick, I will notify you of the person representing me further to liaise with and let you know when I am back in due course.
>
> I do not appreciate that you pressurize and ambush me with a meeting in that manner in a situation where I am signed off

specifically for work stress with specific working conditions that are repetitively ignored.

I am looking forward to speaking to you at the earliest opportunity.

Kind regards, Anna"

57. In an undated email sent around this time, Mr Piggott emailed staff to say that the Claimant would be absent from work for the foreseeable future and would not be contactable by email or phone.

58. Following the meeting, Mr Piggott informed the Claimant in a letter to her personal email address that her email had been suspended. Mr Piggott wrote a letter informing the Claimant that the purpose of the meeting was to hold a without prejudice discussion. Mr Piggott stated in the letter that he attempted to give the Claimant a letter at the meeting which mentions the application of the Employment Rights Act 1996, s 111A to the letter and subsequent settlement discussions. Mr Piggott informed the Claimant that he no longer wished to pursue settlement talks due to the Claimant's unprofessional behaviour and explained that a combined capability and disciplinary hearing would be convened shortly.

59. In a letter on 20 July 2017 Mr Piggott wrote to the Claimant about the upcoming conduct and capability disciplinary, stating that his relationship with Michael Bastholt, the Claimant's husband and a friend of his, was very important and for this reason he would be handing over the future handling of the case to Peninsula. He asked for information on the status of various hours in July. He then wrote:

"From the 24/7/17-31/7/17 – we don't really know what is going on. Please can you inform us whether you are back at work or on sick leave.

Aside from your disciplinary process, it is really important to me that we help you handle your illness correctly - can I ask you going forward for transparency & full disclosure around your doctor's appointment/notes and whether or not you are available for work or on sick leave".

60. On 21 July 2017 the Claimant was invited to a disciplinary and capability hearing.

61. On 24 July 2017 the Claimant's solicitors wrote to Ms Douglas to explain that the Claimant needed rest owing to her illness. Sick notes dated 19 July, 22 June, 8 June and 25 May were enclosed. The sick notes for 25 May and 8 June had already been provided.

Disciplinary allegations

62. On 27 July 2017 Ms Douglas invited the Claimant to a disciplinary hearing, scheduled for 2 August 2017. In the letter, the First Respondent alleged that:

62.1. First, the Claimant had failed to follow reasonable management request on 19 July 2017;

62.2. Secondly, that the Claimant had demonstrated insubordination to Mr Piggott in that she had stormed passed him and said "I can't speak to you"; and

62.3. Thirdly, the Claimant had taken part in activities that caused the First Respondent to lose faith in the Claimant in that the second demonstrates unacceptable behaviour in the workplace in front of colleagues and tenants of the building.

Grievance

63. On 2 August 2017 the Claimant provided the First Respondent with a statement in preparation for the disciplinary hearing due to take place on 2 August 2017, which was treated as a grievance ("the First Grievance"). Ms Douglas informed the Claimant that disciplinary process will be suspended to investigate concerns raised in the Claimant's statement under the First Respondent's grievance.

64. On 4 August 2017 the Claimant's GP, Dr Bassey, wrote to the First Respondent citing "severe work-related stress" to request that the Claimant be given complete rest for two weeks and that she should not be addressed with work-related issues.

65. The Claimant's solicitor then wrote to the First Respondent suggesting that, given Dr Bassey's advice, the parties correspond to discuss the grievance.

First grievance meeting

66. There was a hearing of the First Grievance on 21 August 2017. The hearing was chaired by Mr Paul Beevers, an HR consultant provided by Face2Face, which appears to be a service operated by or at least connected to the Respondents' representative Peninsula. The Claimant attended this hearing alone. She says in her Impact Statement that she suffered "a severe Panic Attack in the presence of my husband and staff at the Oriental Club due to the 1:30h lateness of the Peninsular Consultant for the disciplinary hearing".

67. At the outset of the hearing with Mr Beevers the Claimant said:

> "I'm not very happy, as I'm taking the medication, I can't focus, I get panic attacks, I can't breathe, my blood pressure is through the roof, but the company says that if I don't proceed, you will

reach a conclusion without my input, it doesn't feel like I have any choice or possibility to recover".

68. The Tribunal notes first, that she did not tell Mr Beevers that she had just had a panic attack. This might have been expected had it just happened. Secondly, the Claimant suggested that she had very high blood pressure. This is not corroborated by the contemporaneous medical records. The only references to blood pressure in the medical records suggest blood pressure in a normal range.

69. During the course of the meetings there were some peculiarly long silences. It took the Claimant 9 minutes to confirm her job title. There was a further 14 minute delay in questioning, after which the Claimant confirmed that she was really not well. Later on in the meeting the Claimant asked "what is 19 July?". She seemed not to understand the significance of this date which was crucial since this was the date on which she had conducted herself in a way which led Mr Piggott to initiate a disciplinary.

70. This is more extreme but had similarities to our observation of the Claimant giving evidence in Tribunal.

71. On 24 August 2017 the Claimant says that she received notes from the 11 July 2017 meeting for the first time.

72. By a certificate dated 24 August 2017 the Claimant was signed off work by her GP with "Work Stress and Depression" for 3 months until 24 November 2017. This was sent by the Claimant's solicitor and received by the First Respondent on the same date it was issued.

1 September 2017 further grievance information

73. On 1 September 2017 the Claimant submitted a 31 page document headed 'further information related to the grievance procedure' containing detailed representations about her treatment, including screen shots of a number of emails as evidence in support.

74. This document contains a very large number of miscellaneous different complaints to do with pension contributions, of an alleged unlawful deduction from wages, a failure to provide a breakdown of SSP payments, an alleged failure to follow GP recommendations, workplace pressures, a variety of different alleged health and safety regulation breaches at a client site, timesheets that had been overridden, that job titles have been reclassified without proper process, that clients were made unrealistic promises regarding project timelines, that inexperienced graduates were being deployed without any proper training, that work social events prioritised "male" pursuits such as drinking alcohol, that coaching was not professional and included trying to pressure the Claimant to leave the organisation, that immigration rights to work status was not being checked properly, that there were accounting errors leading to the wrong wage payments and the wrong tax codes, that management treated employees

in an inconsistent way, that Liz Hocter's role was not sufficiently well defined, that clients were being misled over the quality of staff qualifications, that she had not received her bonus in August 2017 (which discriminated against her on health grounds as it related to utilisation levels), that payslips were not being sent to the Claimant in the mail in the usual way, that the Claimant was being sidelined/discriminated against, that she was not been provided with expenses envelopes, nor access to the online forms. She also complained about the events of 11 July and 19 July 2017.

Grievance outcome

75. Mr Beevers produced a 45 page report dated 6 September 2017 which recommended dismissing the grievance. This decision contained little analysis and was essentially an uncritical acceptance of Mr Piggott's answers to the points raised by the Claimant.

76. On 8 September 2017 Mr Piggott informed the Claimant of his finding that her First Grievance had not been upheld. Mr Piggott informed the Claimant that her 'further information' document dated 1 September 2017 will be addressed through a further formal grievance procedure ("the Second Grievance").

77. By a letter dated 15 September 2017 the Claimant appealed the First Grievance outcome.

78. On 19 September 2017 Ms Douglas invited the Claimant to a hearing of the Second Grievance, scheduled for 22 September 2017.

79. On 21 September 2017 the Claimant's solicitors wrote to Ms Douglas to request an adjournment of the Second Grievance hearing because the Claimant had collapsed in the shower and was in hospital receiving treatment.

80. On 25 September 2017 Ms Douglas invited the Claimant to a postponed hearing of the Second Grievance and hearing of the First Grievance appeal, scheduled for 5th October 2017.

81. On 3 October 2017 the Claimant's solicitor wrote to Ms Douglas asking that the hearing of the First Grievance appeal take place on a different day to the hearing of the Second Grievance, and that the Claimant be allowed to attend the hearing of Second Grievance by telephone. The following day Ms Douglas wrote to the Claimant to inform her that the hearing of the Second Grievance and the First Grievance appeal would be postponed.

82. On 10 October 2017 the Claimant's solicitor contacted Ms Douglas the day before the postponed hearing stating the Claimant would be unable to attend in person but could attend via telephone.

83. On 13 October 2017 the Claimant's solicitor advised the First Respondent that the Claimant would be unable to attend the rescheduled grievance

meeting due to a cardiologist follow-up appointment and further medical tests.

84. By an email on 18 October 2017 to the Claimant's solicitor, Mr Piggott's personal assistant Ms Amy Scott invited her to attend the postponed Second Grievance hearing via telephone, scheduled for 23 October 2017. This was followed up by Ms Scott on 20 October 2017.

85. On 23 October 2017 the Claimant's solicitor advised that the Claimant had medical appointments so could not attend by telephone on 23 October 2017.

Second Grievance

86. On 31 October 2017 the Second Grievance hearing was chaired by Mr John Carter and held via telephone conference. The Claimant attended this call unaccompanied. Also on this date the Claimant signed a consent form for an Occupational Health Referral ("OHR") requesting that a copy of any report be sent to her before it is sent to the First Respondent.

87. On 2 November 2017 the Claimant presented the first claim to the Employment Tribunal (case no 2207588/2017).

88. On 3 November 2017 the Claimant was certified as fit to work with adjustments. The certificate cited "stress" and was for two months and said:

> "Please avoid loading with too much work initially for the first few weeks, to enable smooth return to work and please consider enabling her to work from home".

89. The Claimant's solicitor emailed Ms Scott with the statement of fitness to work and suggested reasonable adjustments, including:

89.1. the Claimant works from home on a temporary basis;

89.2. the Claimant is given manageable workload for a temporary period;

89.3. Disciplinary proceedings against the Claimant are dropped; and

89.4. Consideration is given to changing the Claimant's line management structure.

90. On 7 November 2017 the Claimant's solicitor wrote for confirmation that the Claimant would be awarded full pay until the outcome of any OHR assessment is known. In a reply emailed on the same day Ms Scott responded:

> "Your client is fit to work subject to reasonable adjustments being implemented. We tried to contact your client with a view of arranging a meeting to discuss these proposed adjustments yet she stated we should communicate with you and hung up.

> Given it is your client who refused to engage in the process to discuss the reasonable adjustments she will not be receiving full pay. Further, this seems to go against the notice that she is permitted, or willing, to return to work. If, however, she is agreeable to have a meeting to discuss the proposed reasonable adjustments, then please let us know."

91. The Claimant's Second Grievance was not upheld. This was communicated to her on 7 November 2017.

92. By an invitation of 9 November 2017 the First Respondent invited the Claimant to a disciplinary hearing scheduled for 17 November 2017.

Occupational Health Assessment

93. On 15 November 2017 the Claimant met Dr Schilling, a Consultant Occupational Health Physician for an Occupational Health Assessment. He informed her that the examination could not be completed due to the complexity of her case. Dr Schilling asked the Claimant to return for a second meeting.

94. On 16 November Dr Schilling sent a draft Occupational Health Report to the Claimant for her approval. This report was never finalised, nor was it supplied to the Respondents prior to the Claimant's dismissal. Of relevance in this report are the following:

> "In addition to symptoms of anxiety she felt general [un]well and had problems with breathing and stomach pains.
>
> **Capacity for Work**: At present Ms Ketlinska is unfit for work
>
> **Adjustments and Rehabilitation:** Ms Ketlinska says that it would be very difficult for her to return to work taking account of everything that has happened over the last few months
>
> **Future Outlook**: It appears that it will be difficult for Ms Ketlinska to return to work in all of the circumstances and that she would like a settlement rather than to proceed to the protracted process of tribunal hearings
>
> **When will they be able to return to work/return to normal hours/duties?** It is not possible at present to say when she would be able to return to work and undertake her normal duties.
>
> **Is there an underlying medical condition affecting their ability to work?** The underlying medical condition from which she is suffering is severe anxiety associated with work-related stress.
>
> **Is this employee likely to be able to provide regular and effective service in the future?** The likelihood of her being

> able to provide regular and effective service in the future is not something that can be addressed at this stage.
>
> **In your view is the employee likely to be covered on the disability provision of the Equality Act 2010? (OH can provide guidance and advice only this question)** In my view, Ms Ketlinska is unlikely to be covered under the disability provision of the Equality Act 2010.

95. On 16 November 2017 the Claimant met Ms Scott to discuss reasonable adjustments and return to work. At this point the Claimant was placed on medical suspension.

96. On 20 November 2017 the Claimant's solicitor contacted the First Respondent to request that the disciplinary hearing arranged for 21 November be postponed until the OHA report had been received back.

Grievance Appeal Hearing – 21 November 2017

97. Before the grievance appeal hearing due to take place on 21 November 2017 could take place, the Claimant fainted.

98. Ms Scott of the First Respondent wrote to the Claimant care of her solicitor in a letter later that day inviting her to provide written submissions for the grievance appeal by 7pm on 23 November and written submissions in relation to the disciplinary 5pm on 24 November. This was said to be to avoid the "stress" of face to face meetings.

99. On 22 November 2017 the Claimant's solicitors wrote to the First Respondent a very detailed 7 page letter, with various criticisms, specifically requesting that a disciplinary hearing take place in person and that no decision should be made until the grievance appeals were determined, the OHR outcome was known and the Claimant had obtained medical evidence from her GP. The Claimant's solicitor wrote:

> "the Company [i.e. the First Respondent] had, in the terms of occupational health referral specifically requested that the assessing Doctor comment upon our client's ability to attend grievance meetings and, if appropriate, suggest any reasonable adjustments necessary to facilitate our client's attendance at such meetings. We noted that the Company was ignoring our client's request for a reasonable adjustment in circumstances where it was aware that some adjustments may be necessary for our client. We suggested, in our correspondence, for the first time that both appeal meetings should be postponed until the outcome of the occupational health assessment was known. Once again, our client's request was refused."

Determination of the disciplinary

100. Ms Sharlene Hernandez, HR Face2Face HR consultant was due to chair the disciplinary hearing on Friday 24 November. On that day she received the Claimant's solicitor's letter dated 22 November requesting a postponement.

101. Ms Hernandez nevertheless determined the disciplinary without any substantive submissions on behalf of the Claimant in a report confusingly dated Monday 25 November 2017. She concluded that it was a serious matter when the Claimant refused to obey the instruction of Mr Piggott to return to the meeting on 19 July 2017. She goes on under the heading "finding":

> "In the alternative, if AK [the Claimant] did feel ambushed which caused the onset of panic attack and caused her difficulty to breathe, the actions of 'storming out of the office' and leaving [the First Respondent's] premises in anger are inconsistent with those symptoms, and a more reasonable response would have been to ask BP [the Second Respondent] for a few moments alone to calm down and to properly consider her position, present this position to BP either privately or in the presence of DR, listen to what BP and or, DR had to say in response, and then make an informed decision as to the most appropriate next steps."

102. She concluded that the Claimant's education as a lawyer and 10 years of professional experience at top tier financial institutions should have enabled her to conduct herself in a more positive and productive way than leaving the meeting on 19 July.

103. Ultimately Ms Hernandez recommended that the Claimant's employment be terminated with immediate effect.

Last medical report before dismissal

104. In a letter dated 29 November 2017 the Claimant's GP Dr Brassey wrote as follows:

> "This patient has been registered with us since 17.10.2016 for Primary Medical Care.
>
> She has a diagnosis of Panic Attacks, anxiety and depression for which she first presented on 25th May this year, complaining of extreme pressures at work and scored very high on measures of anxiety and depression.
>
> These symptoms are ongoing at a lesser level than at first presentation due to Medical and social support from her own family and network.

> I saw her on 19th July when she presented having had a meeting that morning with exacerbated stress and when I offered her acute treatment for anxiety and Panic disorder in addition. She had been given a "fit note" to return to work earlier, on 22nd June, which was apparently not respected by her employer (see attached).
>
> The root cause of the conditions seems to be her working conditions as she had never previous [sic] presented with these symptoms and has been continuously and entirely preoccupied with her conditions at work, plausibly.
>
> She is having Psychology follow-up, medical treatment and follow-up with the GP, and is reliant on support from immediate and extended family and friends.
>
> As far as I am concerned, she is fit to go back to work, under the conditions specified earlier ie with reduced hours of work, agreed with the employer, and a realistic workload, and any other adjustments that may be necessary.
>
> …
>
> She is unlikely to fully recover until such time as her working conditions are resolved but in the interim, she might well benefit from a phased return to work in the absence of any hostility from her employer. She may well need medication for the next few months."

105. This letter was not received by the Respondents until 7 December 2017.

Dismissal & Grievance Appeal Outcome

106. On 30 November 2017 Mr Piggott accepted the recommendation of Ms Hernandez. His assistant Amy Scott informed the Claimant by letter of her dismissal with immediate effect and payment of six weeks' in lieu of notice.

107. In a separate letter also on 30 November Mr Piggott informed the Claimant that her First Grievance appeal had been dismissed, save for ground 5, relating to the fairly trivial matter of a letter not being dated, which was upheld.

108. In a letter dated 7 December 2017 the Claimant appealed against her dismissal. She included the GP letter dated 29 November 2017. This was the first time that the Respondents saw this letter.

109. On 8 December 2017 the Claimant presented the second claim to the Employment Tribunal (case no 2208025/2017).

Appeal against dismissal

110. Ms Rebecca Dennis Face2Face HR consultant heard the appeal against dismissal. On 15 and 22 January 2018 the hearing of the appeal took place with the Claimant in attendance.

111. On 31 January 2018 Mr Piggott informed the Claimant of his decision to dismiss the Claimant's appeal against dismissal.

112. On 3 April 2018 the Claimant presented her third claim form (case no 2201883/2018).

Medical evidence post-dating material events

113. In a letter dated 24 September 2018 the Claimant's GP Dr Louis Brassey wrote in a letter headed 'Dear to Whom this Concerns':

> "This patient of ours has been registered with us since 2007. She was an extremely infrequent attender at the surgery until early 2017 when she started presenting with increasing stress, anxiety and depression from job-related pressures, to the point at which in May 2017 she was no longer able to work due to the resultant anxiety, trouble with concentration, poor short-memory, difficulty making decisions, insomnia and enormous loss of confidence and had several Panic Attacks and anxiety-related collapses.
>
> …
>
> This patient is still under medication as the situation is unresolved and is still accessing psychotherapy for her symptoms."

Blackrock/post-dismissal income

114. In her witness statement dated 29 January 2019, the Claimant stated as follows:

> "5. … Blackrock is one of the biggest asset managers in the world. During the spring/summer of 2018 I made a speculative approach to Blackrock with a view to securing employment with them.
>
> 6. Following the approach referred to above, I was contacted by Blackrock. It was explained that I could become what is known within Blackrock as a contingent worker whereby my details were available on the Blackrock Intranet and I would be contacted if there was any work available which matched my skill set. My recollection is that the opportunities available to contingent workers were short term assignments – for example, maternity cover etc and were for relatively junior, administrative roles.

> 8. The opportunities to work at Blackrock were not on the basis of an employment contract and, as stated before, I have not derived income whatsoever from any form of relationship with Blackrock."

115. The background to this witness statement was a concern raised in correspondence by the Respondents' advisers that the Claimant had failed to comply with her disclosure obligations with regard to employment postdating her employment with the First Respondent.

116. The First Respondent obtained a screenshot (barely legible) of the Claimant's profile on the Blackrock Intranet system. A LinkedIn profile showed that in 2018 for a period of less than a year the Claimant worked in the Blackrock Real Assets (Infrastructure Debt and Real Estate Funds Investor Relations). The narrative on LinkedIn states "Responsible for 40+ SMAs and 4 funds. Full spectrum of Investors Services for Global Infrastructure Debt Platform. Working alongside 3 Investment Teams in New York, London and Hong Kong and financial PR and crisis management".

117. The Claimant was asked directly by the Respondents' representative whether she had derived income as a direct result of her relationship with Blackrock. She denied it in evidence.

118. It was only when she was pressed with questions from the Tribunal it became clear that, notwithstanding the content of the witness statement set out above, Ms Ketlinska admitted that she had in fact worked in Blackrock offices as a contingency worker through an agency in the Summer of 2018 and that payment for this work was made to Thornhill Financial Limited, a limited company which she exercised control over. The Claimant confirmed she had control over Thornhill Financial Limited's ("Thornhill") bank account. Thornhill was set up by her in connection with ownership of a residential property.

Conclusions

Protected disclosure claims

119. This claim was withdrawn on the first day of the hearing.

Wage claim

120. This claim was withdrawn on the second day of the hearing.

EQUALITY ACT CLAIMS

Disability discrimination

121. [**Issue 4a**] Between 11 July and 30 November 2017, did the Claimant have a mental impairment of depression, anxiety, and panic attacks?

122. Paragraph 5 of the Grounds of Claim states:

> "On 25 May 2017 the Claimant was diagnosed with anxiety, depression and a panic disorder causing her to have panic attacks, faint and experience anaphylaxis".

123. This is not a factually accurate description of what the Claimant's GP diagnosed at the time. On 25 May the Claimant's symptoms were simply characterised as stress at work.

124. Summarising the medical evidence in concise form:

124.1. 25.5.17 GP signed off sick with "stress" on the fit note, described as "stress at work" in the medical record; medication prescribed sertraline 50mg and sleeping tablets. GP note recorded "History: Having major pressures off work and has reached the point at which she is having trouble dealing with the workload and then has been having reduced productivity". A Patient Health Questionnaire 9 ("PHQ9"), relating to depression scored 24/27, indicating a high level of depressive symptoms. A GAD-7, a screening test for anxiety, scored 18/21.

124.2. 8.6.17 GP signed off for further 14 days with "work stress", described in the medical record as both "Low mood" and "Work Stress". GP doubled the dose of sertraline to 100mg. There is reference to contact being made with a psychiatrist to arrange therapy. PHQ9 score reduced to 21/27. GAD-7 score reduced 16/21.

124.3. 22.6.17 GP certificate "stress: fit to return not longer than 6 hours"; C reports feeling much better on higher dosage of sertraline; medical notes contain two separate diagnoses of "low mood" and "stress". There was discussion about a private psychotherapist and the possibility of increasing dosage to 150mg Sertraline. PHQ9 score reduced to 15/27. GAD-7 score increased to 18/21.

124.4. 26.6.17 Return to work.

124.5. 19.7.17 C attended GP twice on this day, at 11:31 and 18:28. C reports to GP "2 panic attacks at work last week", including on that day 19.7.17. Continued at sertraline 150mg. Claimant couldn't speak to R2. GP signed off work with "work stress" for 6 weeks.

124.6. 4.8.17 GP "severe work-related stress" advises complete rest. Reports to GP "Had a panic attack and vomited and shaking" and also "Still seeing her counsellor. Review next week. Letter to ask her firm to correspond with her lawyer exclusively for a couple of weeks". At this stage Zaluron XL, an antidepressant was added to the medication prescribed. PHQ9 score increased to 25/27. GAD-7 score increased to 21/21.

124.7. 24.8.17 GP "work stress and depression" signed off 3 months. The record notes "History: Ongoing standoff at work. Having a disciplinary. Feeling somewhat better. Examination: Looks well, dysthymia [persistent mild depression] with mild emotional blunting. PHQ9 score of 20/27.

124.8. 21.9.17 C collapsed in shower and went to hospital in Moscow according to her UK GP record. The GP's diagnosis on 28.9.17 was 'vaso-vagal'. A referral was made to a cardiologist for arrythmia.

124.9. 13.10.17 C's solicitor notified R2 re: cardiologist & further medical tests.

124.10. 3.11.17 GP certificate cites "stress" but may be fit to work with adjustments (avoiding too much loading, work from home). Medical note records "Feeling better after a 3 weeks [sic] holiday. Still going through a work process. Awaiting an OT assessment. Examination: Seems much brighter." Diagnosis: "Low Mood" and "Stress". PHQ9 score 4/27.

124.11. 15.11.17 Occupational Health Dr Schilling: case complex cannot complete examination.

124.12. 21.11.17 C fainted at grievance appeal hearing.

124.13. 29.11.17 detailed letter from C's GP with a diagnosis Panic Attacks, anxiety & depression from May 2017, now ongoing at a lesser level.

125. The Respondents' position is that there was no diagnosis of anything other than stress until 24 August 2017. On that date the diagnosis of depression was given. By 3 November 2017 the GP's diagnosis reverted to "stress". The Respondents accept that C was depressed in the period 24 August 2017 to 3 November 2017.

126. There is something of a mismatch between the language being used by the Claimant to describe her own condition to her GP, the language used in her Impact Statement and the language which was being used by the GP in the contemporaneous fit certificates.

127. The Tribunal finds that the Claimant suffered from anxiety and some periods of depression both amounting to impairments within the period 11 July and 30 November 2017.

128. The Tribunal has formed the impression, based on the contrast between the Claimant's Impact Statement and the contemporaneous evidence (in particular on 11 & 19 July 2017) that there is an element of overstatement in the language she has used (e.g. 'severe panic attack' and 'nervous breakdown') compared to what objectively occurred based on the accounts of others who were present at the time.

129. [**Issue 4b**] If so, did the Claimant's mental impairment have a substantial adverse effect on her ability to carry out normal day-to-day activities between 11 July and 30 November 2017?

130. We consider that the mental impairment did have a substantial adverse effect on the ability to carry out normal day-to-day activities. The Claimant was plainly struggling with normal day-to-day activities. She was having to sleep a great deal, having previously struggled to sleep. She was taking

increasing levels of medication. She was suffering from anxiety and feelings of stress such that she was unable to return work

131. [**Issue 4c**] Were the substantial adverse effects of the Claimant's mental impairment long-term in that the impairment lasted or could well have lasted for at least 12 months?

Majority decision on long-term (Employment Judge Adkin, Ms S Campbell)

132. In respect of Issue 4c, this is the majority decision of Employment Judge Adkin and Ms S Campbell ("the Majority"). The minority reasoning of Dr V Weerasinghe follows below in italics.

133. The question of whether an impairment is likely to last for at least 12 months must be assessed based on the medical position at the time. Following the *SCA* decision, likely in this context means "could well happen". As is set out in our direction on the law above, the test for "could well happen" reflects a lower probability than more likely than not, but a higher probability than mere possibility.

134. The Claimant's mental impairment in this case did not pre-date May 2017. She first reported stress to her GP on 25 May 2017. At that stage initially her condition would certainly fall within the second state of affairs described in *DLA Piper*, i.e. reaction to adverse circumstances (such as problems at work). We do not conclude that the Claimant symptoms met the definition of disability on the first day she reported stress to her GP.

135. The Majority has considered this question carefully. We are not bound to follow Dr Schilling's opinion on 16 November in his draft report that the Claimant was unlikely to be covered under the disability provision in the Equality Act.

136. We have taken account of the fact that in May and June 2017 the Claimant was being signed off work for comparatively short periods. She returned to work on 26 June 2017 and remained there until 19 July. While the meeting on 19 July 2017 was plainly an exacerbation of symptoms, this was connected with the "stressful" event of an unexpected without prejudice discussion. Still, in our judgment the Claimant's symptoms at that stage are best characterised as reaction to stressful workplace events rather than something that will be better characterised as a long-term mental health condition.

137. We consider that **24 August 2017** is the date at which in our assessment it 'could well happen' that the Claimant's impairment would be long-term, lasting for at least 12 months. This was the point at which the GP clearly indicated a diagnosis of "depression" in addition to "stress". This was also the first time a fit note was issued saying this. This change in terminology suggests an ongoing illness rather than merely a persisting reaction to workplace problems. In our assessment at this stage the Claimant's condition tips into the first state of affairs in *DLA Piper*.

138. There was also at this point a significant increase in the length of time that the Claimant was being signed off for. The fit note was for a period of three months, a substantial period of time, in contrast to earlier fit notes of much shorter duration. It meant that the Claimant would now be off work until the end of November 2017, approximately six months from the GP's initial sick note for stress in May. While this is still some way from 12 months, in our assessment, by 24 August it 'could well happen' within the meaning of *Boyle* and as discussed under 'The Law' above that this impairment might persist for at least 12 months.

Minority decision on long-term (Dr V Weersinghe)

139. This is the dissenting decision of Dr Weerasinghe on 'long-term'*.*

140. I have read and understood the following cited authorities:

140.1. J v DLA Piper UK [2010] IRLR 936

140.2. Baldeh v Churches Housing Association of Dudley & District Ltd (EAT, 11th March 2019) [17 UKEAT/0290/18/JOJ

140.3. Kapadia v London Borough of Lambeth [2000] IRLR 699.

140.4. McDougall v Richmond Adult Community College [2008] ICR 431, CA

140.5. Singapore Airlines Ltd v Casado-Guijarro EAT 0386/13

140.6. Donelien v Liberata UK Ltd [2018] EWCA Civ.129 (08 February 2018)

140.7. EHRC Equality Act 2010 Statutory Code of Practice

141. I have also read and understood the NICE Guidelines on Depression referred to in Piper by Underhill LJ as background.

142. I will follow the step by step process outlined by Underhill LJ.

143. I first refer to the Claimant's impact statement in which she describes the adverse effects on her day to day activities. It seems to me that these effects are substantial and clearly indicate a mental impairment

144. *I will now look at the 'state of affairs' (language used by Underhill LJ) on the 25th May when the Claimant presented herself to her GP. In my view, the 'state of affairs' on the 25th of May is not the 'adverse life events' phase referred to by Underhill because the medical records show that the GP did prescribe a powerful anti-depressant (Sertraline). Furthermore, the two indicators for depression (PHQ-9) and anxiety (GAD-7) both showed high scores. It might help to refer to NICE guidelines to understand as to when a GP would make a medication intervention. It is clearly not plausible for the Claimant to develop such a serious 'state of affairs' on the 25th May itself. In my view, the so called 'adverse life*

events' phase or the formative phase happened earlier as described in her impact statement: P659, para 2, she says; "In the lead up to the diagnosis ……." and on P660, first para, she says "I first presented to Dr.Brassey …..". She further elucidates these issues that troubled her in her grievance no.2 as recorded in para (78).

145. *It is to be noted, at the start of her employment, she raised issues about her salary, bonus, pension contributions and private health insurance (para 5, claimant's statement). By way of an example, at page 11 of her statement, the claimant says that in May 2017 she wrote an email to Lindsey (P704) stating: "….this is frustrating as I can see that you are retaining money from my salary but there have been no contributions to the pension provider ….". Therefore it is clear that the 'adverse life events' phase happened much earlier than 25th May. By 25th May, all of the work issues she had raised remained unresolved which in my view, worsened her mental health condition to a serious level which necessitated the medication intervention by the GP.*

146. *Furthermore, it seems to me, the GP was adopting a 'wait and see' approach before affixing a label to the mental impairment. However, in a letter dated 29th November 2017, Dr Brassey, the GP, reflects back to 25th May and confirms the label 'anxiety and depression'. It is clear that the doctor was merely re-labelling the same impairment and its effects with a different label, Jennings v Barts and the London NHS Trust. Based on this, I too shall affix the label 'anxiety and depression to the claimant's mental impairment as at 25th May. The only remaining question is whether considering only the facts known as at 25th May, could it be inferred that the impairment was likely to last more than 12 months. It is clear that the causal factors driving her mental health condition are the many unresolved work issues referred to above that the claimant had raised. On the 25th May, the GP notes: "Having major work pressures at work ……" The claimant states that she raised some of these issues at the outset of her employment, para5. After nearly ten months since joining the Respondents company, these and other additional issues had remained unresolved as at 25th May with no evidence of a likelihood that they would be resolved in the months ahead. On this basis, I find that the claimant's mental impairment as at 25th May could well have lasted for at least 12months. I will now consider the 'state of affairs' during the ensuing weeks up to 11th July. The facts found in para 34 to 49 indicate a continuation of both her mental impairment and work issues. As regards her mental impairment, it is to be noted that the dosage of Sertraline was doubled to 100mg on 8th June and further increased to 150mg on the 22nd June. As regards the work issues, new issues had arisen with the previous issues still remaining unresolved. By way of an example, sometime in late June, she was taken off the Bridgeport project without warning or explanation, para 30 of the Claimant's statement.*

147. *In consideration, I find that the claimant's mental impairment could well have lasted for a further 12 months and as such I find the claimant remained disabled as at 11th July. The above analysis also applies to the*

period between 11th July to 30th November. Her work situation had worsened with no likelihood of a resolution and as regards her mental health condition, apart from a brief remission after a 3-week holiday on the 3rd November, the general prognosis remained the same with new medications added in July and August.

148. *Therefore, I conclude that the claimant was disabled throughout the period 25th May to 30th November 2017*.

Majority decision on knowledge of disability (Employment Judge Adkin, Ms S Campbell)

149. This is the majority decision of Employment Judge Adkin and Ms S Campbell ("the Majority") on knowledge. The minority reasoning of Dr V Weerasinghe on knowledge follows below in italics.

150. The GP certificate dated 24 August 2017 was sent to the First Respondent by the Claimant's solicitor on that day.

151. We note that on 20 July 2017 the Respondents were seeking "transparency and full disclosure" with regard to the Claimant's medical position. While on the one hand this suggests that they did not have the complete picture, on the other hand it suggests that they knew that there were some significant health problems and that they did not have the complete picture.

152. We have taken account of this. We have taken account of the history of the Claimant's prior behaviour, her communications with her manager Mr Hocter, her absences, the communications from her solicitor and the succession of GP certificates. We consider that by the time of the receipt of the GP certificate dated 24 August 2017, which signalled a shift in diagnosis and increased length of time for recovery, read in the context of the earlier matters the Respondents had knowledge of disability **on that date**.

Minority decision on knowledge (Dr V Weersinghe)

153. This is the dissenting decision of Dr Weerasinghe on knowledge of disability.

154. By 26th June 2017, the Respondents were aware of the following factual events:

154.1. The sudden deterioration of the claimant's sickness absence viz. a period of four weeks since May.

154.2. Claimant's referral to a neurologist

154.3. GP's diagnosis of 'stress/ work related stress'

154.4. Mr Piggott's knowledge of the claimant's issues at work

154.5. Claimant's behaviour issues as follows:

154.5.1. "…..her behaviour was not at the standard we would typically expect" - para 10, Liz Hoctor

154.5.2. "….. the claimant confronted me in the main office and objected loudly to having Derek report to her" - para 19, Liz Hoctor

154.5.3. "….. raised red flags as did her behaviour wearing sunglasses through a NLP session …….. Her behaviours and body language at the time wasn't one of a committed employee" - para 7 Jeremy Hoctor

154.5.4. "….. but the claimant was not as positive as she had been on Monday" – para 18, Jeremy Hoctor

154.5.5. "Her behaviour towards the more junior members of the team was also of concern" – para 9, Barnaby Piggott

154.6. The fact that there were no issues raised with claimant's behaviour prior to May 2017.

155. My view is that the knowledge of all of the above factual matters should have alerted the Respondents to the possibility of a connection to a disability and hence ought to have made reasonable efforts to investigate. It is to be noted that the EHRC Equality Act 2010 Statutory Code of Practice states: "The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that that these were connected to a disability".

156. In my view, the reasonable process of investigation could have been: Referral to an OHP, consultation with her GP and obtaining consent from the claimant for the said referral and consultation. The resulting knowledge of such an investigation would have been:

156.1. The GP would have informed the OHP of the claimant's medication history from the 25th May up to 26th June.

156.2. He would have informed the OHP of the claimant's high PHQ-9 and GAD-7 scores at the time.

156.3. He would also have informed that on the 8th June, he had asked the claimant to contact a psychiatrist and arrange therapy.

156.4. Having trebled the dosage of Sertraline on the 22nd June and having regard to all of the above, the GP would have expressed the same opinion as in his letter of 29th November in which he reflected back to the 'state of affairs' in May and concluded that the claimant was suffering from anxiety and depression. He also said: "The root cause of the

conditions seems to be her working conditions ……" and "She is unlikely to fully recover until such time as her working conditions are resolved…..".

157. The OHP would have consulted the claimant and understood the substantial adverse effects of her mental impairment on her day to day activities. He too would have concluded the root cause being the claimant's on going issues at work with no resolution in sight. In consideration, he would have advised the Respondents that the claimant was disabled as per the Equality Act.

158. It is likely that the investigation process would have been completed by 11th July. The Respondents would by then have understood the full extent of the claimant's mental impairment and its effects and would have also understood that the said impairment was likely to be 'long term'. The reason for this is that the Respondents had full knowledge of the claimant's work issues and had no intention to resolve these because by the 11th July, foremost in Mr Piggott's mind was exiting the claimant by way of a without prejudice agreement. Moreover, by way of their own research, the Respondents would have understood any causal link between the claimant's behaviour issues and her disability. Therefore, my conclusion is that the Respondents did have constructive knowledge of the claimant's disability by 11th July 2017.

Discrimination Arising from Disability: The Equality Act 2010 ("EqA 2010"), s 15.

159. [**Issue 5a**] Did the following arise as a consequence of the Claimant's disability (1/52/55):

160. The following allegations fall before 24 August 2017, the date on which the Majority finds the Claimant became a disabled person, and accordingly cannot succeed:

160.1. The Claimant was unable to sustain her participation in the 19 July 2017 meeting with Mr Piggott;

160.2. The Claimant left the 19 July 2017 meeting with Mr Piggott (1/52/55).

160.3. The Claimant was absent from work from 19th July 2017 until her dismissal on 30 November 2017 (1/52/56 and 57)? She was absent for part of this period related to disability from 24 August 2017 to 30 November 2017. This is something arising in consequence of her disability.

161. [**Issue 5b**] Do the following acts amount to unfavourable treatment (per EqA 2010, s 15(1)(a))

162. We have considered this issue together with [**Issue 5c**] Did the following alleged facts have a more than trivial influence on the acts listed at paragraph 5(b)i-vi (1/52/55):

163. The following allegations fall before 24 August 2017, the date on which the Majority finds the Claimant became a disabled person, and accordingly cannot succeed:

163.1. From 19 or 20th July 2017, the Respondents commenced and sustained disciplinary proceedings against the Claimant.

163.2. On 19 July 2017, Mr Piggott accused the Claimant of lying about her illness.

163.3. The Respondents abandoned settlement discussions on 19 July 2017 with the Claimant (1/52/55a).

163.4. On 19 July 2017, Mr Piggott told the Claimant's colleagues not to contact her (1/52/55f).

164. *On 30 November 2017, the Respondents dismissed the Claimant* - we consider that this was clear unfavourable treatment. No comparison is required.

165. As to causation, the finding of the Tribunal is that Mr Piggott took the decision to dismiss the Claimant on the evening of 10 July 2017, based on his view at that stage of the Claimant's conduct, the differences in recollection of meetings between her and Mrs Hocter and the breakdown of the relationship between the Claimant and Mrs Hocter. We find that it was his settled intention to dismiss the Claimant from that point onward. This was before she was, on the Majority's finding, a disabled person. This is before absences relating to her disability. We do not find that her subsequent absences influenced the decision to dismiss in more than a trivial way.

166. On 21 August, 31 October and 21 November 2017, the Claimant was unable to find a colleague who was willing to accompany her to her grievance hearings and grievance appeal hearing - we consider that this is a consequence of earlier matters, predating disability, but not unfavourable treatment.

167. *On 26 August and in November 2017, the Respondents failed to pay the Claimant her bonus* – the Claimant was not paid a full bonus in her last months due to her not having completed any significant billable hours. The bonus was discretionary based on performance and "utilisation". The bonus paid in August 2017 related to the period May – July 2017, before the point at which the Claimant was disabled based on the Majority finding. The November bonus however related to August – October 2017 by which time the claimant was disabled. Non-payment of bonus is plainly unfavourable treatment.

168. R's pleaded case is that C's bonus was based on "utilisation" (billable work) (1/81-82/82-86). It follows that C's absence meant that she was unable to work, unable to bill and unable to be awarded a bonus. The non-

payment of a bonus and the reduced wage were directly caused by C's absence.

169. Regarding causation, we find that the non-payment and lower payment of bonus were caused by the Claimant's absences. Based on the Majority finding, from 24 August onwards these absences were something arising from disability. We consider that the reduction in bonuses relating to the period from 24 August onward was because of these absences.

170. *From 26 June to 30 November 2017, the Respondents failed to pay the Claimant wages due to her* – non-payment of wages is unfavourable treatment.

171. We find that non-payment of wages insofar as these related to the period 24 August 2017 onward were because of the absences which were something arising from the Claimant's disability

172. *On 24 November 2017, the Respondents decided to conduct the disciplinary hearing, which resulted in dismissal, in the Claimant's absence and without providing the Claimant with an opportunity to make representations* – we consider that the decision to conduct the disciplinary hearing in the Claimant's absence without the opportunity to make representations in person was unfavourable treatment. The First Respondent did give the Claimant the opportunity to provide written submissions. This situation was compounded by the decision not to wait for the Occupational Health which had been commissioned but not yet received.

173. Regarding causation, we consider that the decision to hold the disciplinary hearing in the Claimant's absence was in a more than trivial way because of her absences from work.

Justification

174. *Have the Respondents shown that the acts listed in paragraph 5(b) above are a proportionate means of achieving a legitimate aim where the aim relied on is achieving consistency throughout the consultancy team*?

175. *Wages & bonuses* - the Tribunal accept that consistency of treatment with regard to wages and bonuses is a legitimate aim. With regard to proportionate means however, the First Respondent has failed to lead evidence or develop submissions which convince the tribunal that the justification defence is made out in respect of non-payment of wages and bonuses.

176. *Conclusion of disciplinary process in claimant's absence* - it is unclear what the First Respondent's case on justification is in respect of this allegation at all. This is not pleaded, nor is evidence led on it nor have we heard submissions on it. It cannot succeed therefore.

177. *Have the Respondents shown that they did not know and could not reasonably have been expected to know that the Claimant had the disability alleged at paragraph 4 above (Respondents do not specifically plead this but imply at 1/79/64 and 71)*?

178. The question of knowledge has been dealt with above.

[**Issue 6**] Failure to Make Reasonable Adjustments: EqA 2010, ss 20 and 21.

179. [**Issue 6a**] The Respondents accept (1/79-80/71-73) that between 19 July and 30 November 2017 they operated on the following provisions or conducted the following practices:

179.1. Requiring employees to comply with management instructions (1/48/51e);

179.2. Requiring employees to remain at meetings unless expressly permitted to leave (1/48/51g);

179.3. Not sending or preparing meeting agendas in advance of workplace meetings (1/48/51d);

179.4. Commencing disciplinary proceedings against those who do not comply with management instructions (1/48/51f);

179.5. Holding disciplinary hearings on predetermined dates (1/48/51f);

179.6. Requiring employees to work solely from the First Respondent's office or on client sites (1/48/51a);

179.7. Requiring employees to work from at least 9 am to 6 pm (1/48/51b); and

179.8. Linking bonus payments to hours worked on client sites (known as utilisation) (1/48/51c).

[**Issue 6b**] Did the above provisions or practices subject the Claimant to a **substantial disadvantage**?

180. These elements of the claim relate to the period before the Claimant became disabled on 24 August 2017, and therefore cannot succeed:

180.1. *Regarding the provision or practice at paragraph 6(a)i, ii, iii and iv above, the Claimant experienced increased anxiety, stress and a panic attack at the 19 July 2017 meeting which made it difficult for her to comply with the Second Respondent's instructions, remain at the meeting, and which exposed her to disciplinary proceedings and ultimately dismissal*.

180.2. *Regarding the provision or practice at paragraph 6(a)iii above, the Claimant experienced increased anxiety, stress and the likelihood of experiencing a panic attack at meetings where she was unaware of the*

purpose, as exemplified by the 19 July 2017 meeting with the Second Respondent.

181. *Regarding the provision or practice at paragraph 6(a)v, the Claimant experienced increased anxiety, stress, and fainted prior to the 24 November 2017 disciplinary hearing. As a consequence, the Claimant did not attend and was unable to make representations at the hearing* - we have interpreted the PCP 6(a)v reference to 'predetermined' to mean inflexible. We find that the First Respondent's decision to press ahead with the disciplinary hearing in the Claimant's absence did place her at a disadvantage because of her disability. She lost the opportunity to put her case in person, which would have enabled her to challenge any misunderstandings, convey greater nuance of meaning and potentially make more of a personal connection with the disciplinary investigator.

181.1. *Regarding the provision or practice at paragraph 6(a)vi and viii above, the Claimant experienced increased anxiety, stress, and likelihood of experiencing a panic attack by solely working at the First Respondent's office or on client sites* – we are not satisfied based on the evidence that we have heard that the Claimant did actually suffer a substantial disadvantage as a result of being required to work on from the First Respondent's office or from client's sites.

181.2. As to the bonuses linked to utilisation we find that this did amount to a substantial disadvantage. The Claimant was placed at a financial disadvantage as a result of her absences which were a direct result of disability.

181.3. *Regarding the provision or practice at paragraph 6(a)vii and viii above, the Claimant experienced increased anxiety, stress and likelihood of experiencing a panic attack by working from at least 9 am to 6 pm* (1/49/52b) - we are not satisfied based on the evidence that we have heard that the Claimant did actually suffer a substantial disadvantage as a result of working hours. While we note that the Claimant's GP recommended that she work reduced hours, our assessment is that this was a part of a phased return to work designed to reintegrate the Claimant into employment by the First Respondent rather than because the hours *per se* were causing a difficulty.

181.4. *Regarding the provision or practice at paragraph 6(a)vi, vii and viii above, the Claimant will have a lower utilisation rate than those without her disability* – this appears to be a different combination of points already considered.

182. [**Issue 6b**] Did the Respondents take such steps as were reasonable to avoid the disadvantage? The Claimant highlights the following suggested adjustments:

183. These proposed reasonable adjustments pre-date the point at which the Claimant was disabled:

183.1. *regarding the provision or practice at paragraph 6(a)i, ii, and iv, and disadvantage at paragraph 6(b)i above, allowing the Claimant to leave 19 July 2017 meeting, disobey instruction (if any) to remain, and provide the Claimant with an opportunity to explain her reasons for leaving the meeting or disobeying instruction prior to instituting disciplinary proceedings against her*.

183.2. *Regarding the provision or practice at paragraph 6(a)iii, and disadvantage at paragraph 6(b)i and ii above, providing the Claimant with an agenda and notice of the reasons for meetings in advance of the meeting*.

183.3. *Regarding the provision or practice at paragraph 6(a)iv, and disadvantage at paragraph 6(b)i above, not instituting disciplinary proceedings against the Claimant at all or, at least, where dismissal was a possibility*.

184. We have not found that the relevant substantial disadvantage is made out in respect of the following contended for adjustments:

184.1. *Regarding the provision or practice at paragraph 6(a)vi and viii, and disadvantage at paragraph 6(b)iv and vi above, allowing the Claimant to work from home or at a location other than the First Respondent's offices or client sites*.

184.2. *Regarding the provision or practice at paragraph 6(a)vii and viii, and disadvantage at paragraph 6(b)v and vi above, allowing the Claimant to work at reduced hours*.

185. *Regarding the provision or practice at paragraph 6(a)vi, vii and viii and disadvantage at paragraph 6(b)vi above, not linking the Claimant's bonus to utilisation or adjusting the rate of utilisation to include home working, or fewer hours on client site* – we consider that in the circumstances of this case and the lengthy absence that the First Respondent should have considered a different basis for the assessment of bonus. We do not consider that this necessarily would have required to pay a full bonus, and will consider submissions further on this point as part of remedy.

186. [**Issue 6d**] *Knowledge* - have the Respondents shown that:

187. They did not know and could not reasonably have been expected to know that the Claimant had the disability alleged at paragraph 4 above; or

188. They did not know and could not reasonably have been expected to know that the Claimant was likely to be placed at the substantial disadvantages in paragraph 6(b) above?

189. We have dealt with knowledge above.

[**Issue 7**] Direct Discrimination: EqA 2010, s 13

190. [**Issue 7a**] Did the Respondents treat the Claimant less favourably than they would treat a person in materially the same position as the Claimant save that the person does not have the Claimant's disability? The alleged acts of less favourable treatment are as follows:

191. These allegations pre-date disability:

191.1. On 11 July 2017, Mr Jeremy Hocter questioned whether the Claimant should be on the client site (1/47/50b).

191.2. On 19 July 2017, the Second Respondent accused the Claimant of lying about her disability (1/47/50c).

192. *On 24 November 2017, Ms Sharlene Hernandez's disbelieved the Claimant's account of the 19 July 2017 meeting with the Second Respondent, particularly as regards the effects of the Claimant's disability* (1/47/50d) – Ms Hernandez's suggests (albeit in an "alternative" to her principal finding) that the Claimant should have been sufficiently professional not to have a panic attack. This is a hopelessly simplistic view of the matter. If the Claimant actually was having a panic attack which was causing her to have difficulty in breathing, the Tribunal do not consider it realistic that she should be able to calmly request time to calm down and consider her position. We find that Ms Hernandez's comments on this point are surprising for an HR specialist and suggest a lack of awareness or understanding as to what a panic attack would be like.

193. The basis of the claim however is that Ms Hernandez disbelieved the Claimant's account of 19 July 2017 and that this was less favourable treatment. Was it less favourable treatment to doubt the extent of the Claimant symptoms, or to doubt that she was having a panic attack? We do not consider that this is *less favourable treatment*. In any investigation in which there are competing versions of events, it must be open to the investigator to prefer one version of events over another. Mr Piggott's version of this conversation might be read to be more consistent with the Claimant storming out and refusing to participate rather than a medical reason. There is nothing about the preference of one version of events over another which is inherently discriminatory. Even if this could be characterised as 'less favourable treatment' we do not consider that it was because the Claimant was a disabled person.

194. The Tribunal has also wrestled with the credibility of some of the evidence given by the Claimant during the course of the Tribunal hearing. She struggled to give straightforward answers to straightforward questions throughout her oral evidence. We find that she has been misleading in a signed witness statement about deriving income about her relationship with Blackrock. This is relevant to these proceedings since the Claimant's income during that period is relevant to the question of loss. We recognise that this is a matter which is different in nature to the question of

her disability and that lack of candour on one topic does not necessarily mean lack of candour on a different topic.

195. We have concluded nevertheless that the Claimant's characterisation of her symptoms in her 'Impact Statement' was in places exaggerated or at least described in dramatic language. Our conclusion is based on the contemporaneous evidence of other employees and agents of the First Respondent who observed the Claimant. We have considered particular events described in her Impact Statement, such as events on 11 July, 19 July and 21 August and compared this to the other available evidence. We do not consider that the fact of Ms Hernandez expressing disbelief in itself amounts to less favourable treatment, nor do we infer that it was because of the Claimant's disability. If anything, Ms Hernandez appears to be doubting that there was a 'medical' reason underlying the Claimant's behaviour at all.

196. *The Second Respondent's adoption of Ms Hernandez's report, dated 24 November 2017* - we have found that the Second Respondent had a settled intention from 10 July 2017 onward to dismiss the Claimant. It is unsurprising that he has accepted this report. The report concluded that this was a serious disciplinary matter and that conduct on the part of the Claimant had served to irrevocably destroy the trust and confidence necessary to continue the employment relationship. This is a basis to justify termination of the employment relationship, which is what Mr Piggott wanted throughout.

197. *On 21 August, 31 October, 21 November (grievance and grievance appeal hearings) and 24 November 2017 (disciplinary hearing) The Respondents' treatment of the Claimant as a less reliable witness* - we do not consider that the Claimant has shown evidence which points to a discriminatory reason for the Respondents doubting her evidence. We reiterate here points above about preferring evidence not being inherently discriminatory. Given the Tribunal's own doubts about the Claimant's credibility on various matters, we have concluded that there are objective reasons to doubt her reliability. We do not conclude therefore that there has been less favourable treatment because of the Claimant's disability.

198. *On 30 November 2017, the Respondents dismissed the Claimant* – as is set out in the section 15 claim above we find that the Second Respondent had a settled intention of dismissing the Claimant from July 2017 onward, at which point the Claimant was not a disabled person.

199. [**Issue 7(b)**] Did the Respondents treat the Claimant less favourably because of her disability?

200. Each of these are addressed above.

Harassment: EqA 2010, s 26.

201. These allegations pre-date disability and therefore cannot succeed:

201.1. On 19 or 20 July 2017, the Respondents decided to take disciplinary action against the Claimant.

201.2. On 19 July 2017, the Second Respondent accused the Claimant of lying about her disability.

202. Do the following acts amount to unwanted conduct?

203. *On 24 November 2017, Ms Sharlene Hernandez's disbelief of the Claimant's account of the 19 July 2017 meeting with the Second Respondent, particularly as regards the Claimant's disability* – we consider that this was unwanted conduct and that it did relate to the Claimant's disability. We have made our own criticism of Ms Hernandez's comments in our discussion on direct discrimination above.

204. We do not consider however that this objectively amounts to harassment, considering the objective limb of section 26(4)(c) and the minimum threshold identified by Underhill P in *Dhaliwal*. The comments may have been misguided or unsympathetic, but we do not find amounted to harassment, considering "all of the circumstances".

205. *On 8 September, 7 November, and 21 November (grievance and grievance appeal decisions), the Respondents dismissed the Claimant's grievances and grievance appeals*?

206. We do consider that many of the conclusions leading to the outcomes of the grievance and grievance appeal were uncritical acceptance of the views of the Second Respondent. We do not consider however, that these objectively approached the threshold posed by *Dhaliwal* i.e. violating the Claimant's dignity or satisfying section 26(1)(b)(ii) EqA.

Employment Judge Adkin

Date 05/02/2020

WRITTEN REASONS SENT TO THE PARTIES ON

05/02/2020.....
.....

.....

FOR THE TRIBUNAL OFFICE

Notes

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