RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms M Gomes Resende**

Respondent: **Aecom Limited**

Heard at: **East London Hearing Centre**

On: **27, 28 and 29 November 2019 and (in chambers) 16 January 2020**

Before: **Employment Judge Gardiner**

Members: **Ms M Long**
Mrs S Jeary

Representation

Claimant: In person

Respondent: Mr C Parkin, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

All of the Claimant's claims fail and are therefore dismissed.

REASONS

Introduction

1. Until her dismissal with effect from 27 July 2018, the Claimant, Maria Resende, was employed by the Respondent, Aecom Limited, as a Senior Project Manager. The Respondent provides project management services on large construction projects, including projects commissioned by public sector organisations. The Claimant had started as an employee on 5 February 2018, following a period of around three weeks when she

had worked on an agency basis. The Claimant has a condition known as Multiple Chemical Sensitivity (MCS). The Respondent accepts this amounts to a disability under Section 6 of the Equality Act 2010. The Claimant's claim in the Employment Tribunal is that the way she was treated during her employment and in her dismissal amounts to disability discrimination. The Respondent denies disability discrimination. Its defence is that the Claimant was fairly dismissed for poor performance and misconduct in circumstances where she had failed her probationary period.

The issues

2. Before the start of the Final Hearing, various drafts had been prepared by the Respondent of a document headed "Respondent's list of factual and legal issues". That document was the subject of extensive discussion and revision on the first morning of the hearing. Following this discussion, the Respondent produced a final list of issues, which the Claimant accepted accurately reflected her complaints. The issues for decision were as follows:

1. Did the Claimant disclose to the Respondent that she considered her condition to be a disability? *The Claimant accepts that she did not describe her condition as a disability.*

2. When was the Respondent aware of the disability? *The Claimant contends that the Respondent was aware in mid to late February.*

3. Comparator: the Claimant relies on a hypothetical comparator with a nut allergy, or someone with a common cold that affects their ability to work.

4. Did the Respondent treat the Claimant less favourably than it would have treated a person without a disability in the same or materially similar circumstances? *The Claimant relies on the following allegations as less favourable treatment*:

    a. *From mid to late February, by various colleagues, reacting in a hostile way when the Claimant asked a colleague if she had reapplied or sprayed perfume;

    b. *By the Claimant's manager, Laila Caton, being dismissive in a conversation in February 2018 about the Claimant's medical condition;

    c. *By the Claimant's line manager, Laila Caton, denying on 17 April 2018 that the Claimant had previously raised this with her and alleging that the Claimant ought to have raised this with her rather than going to HR;

    d. *Carrying out the Claimant's mid-term probation meeting and medical risk assessment meeting back to back on 17 April 2018 and thereby linking the two;

    e. *By Ms Caton, telling the Claimant "*You need to be more like us*" at her mid-term probation meeting on 17 April 2018;

f. *By the Claimant's manager Laila Caton, stating at the meeting to discuss the medical risk assessment on 17 April 2018 "*We can no longer send you to work in the client's office*" because of the Claimant's medical condition;

g. *By Ms Caton, requiring the Claimant to work in an isolated area from 3 July 2018;

h. *By Ms Caton, in a telephone call held around 27 June 2018, criticising the Claimant for choosing to sit on the 10th Floor rather than the 16th Floor during a telephone call and by Ms Caton, requiring the Claimant to inform her if the Claimant was working on another floor;

i. *On 26 June 2018, by Ms Caton accusing the Claimant of being absent without leave and copying three directors into that email;

j. *On 26 June 2018, by email from Ms Caton, requiring the Claimant to attend Aldgate Tower to work there;

k. *By Mr Michael Lickfold, failing to take the Claimant's request for a new line manager made to Mr Lickfold on 26 June 2018 seriously;

l. *By Mr Lickfold, telling the Claimant on or about 26 June 2018 that she should not contact Brookfield to establish what chemical was used at Aldgate Tower;

m. *By Ms Caton, in a meeting on 3 July 2018, accusing the Claimant of misconduct concerning the Claimant's communication with colleagues;

n. *By Ms Caton, making working from home a contentious issue. The Claimant alleges that this was an ongoing situation from 17 April 2018, but particularly in a conversation on 2 July 2018;

o. *By Ms Caton, not giving the Claimant further work to do from mid April or May onwards despite the Claimant stating that she had potentially two days per week available to do more work;

p. *By Ms Caton, during the 17 April 2018 meeting to discuss the risk assessment, being angry that the Claimant had not disclosed her medical condition in her job interview and asking the Claimant "*why did you not tell me about this medical condition at the interview?*";

q. *By Ms Caton, during the 17 April 2018 meeting, asking how often the Claimant would be sick and absent;

r. *By Ms Caton, during the 17 April 2018 meeting, asking the Claimant *"why do you work if you have this condition?"*

s. On 24 July 2018, by Ms Caton, telling the Claimant at the end of her six month probation that she may be dismissed;

t. On 27 July 2018, by Ms Caton, dismissing the Claimant.

5. If the Respondent did any of these things, was any part of the reason for such action or omission the Claimant's disability?

6. If the Respondent did any of these things, is the Claimant's claim in respect of this allegation or these allegations in time? *Claims marked with an asterisk (*) are claims that the Respondent contends are out of time (ie on or prior to 22 July 2018)*

7. Did the Respondent have a provision, criterion or practice ("PCP") that put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? *The Claimant claims that the Respondent had the following PCPs:*

    a. Permitting members of staff to spray perfumes and deodorants in the open plan office (PCP A);

    b. Permitting members of staff to wear perfumes and deodorants in the open plan office (PCP B);

    c. Permitting members of staff to spray perfumes and deodorants in the accessible bathrooms (PCP C).

    d. A requirement that employees work in the open plan office.

8. If so, what adjustments does the Claimant contend would have been reasonable to avoid the disadvantage? *The Claimant claims that the following adjustments were reasonable and would have avoided or reduced the disadvantage:*

    a. With respect to PCP A, introducing a rule that staff members cannot spray perfumes or deodorants in the office;

    b. With respect to PCPs A, B and D, allowing the Claimant to work in an enclosed office;

    c. With respect to PCPs A, B and D, allowing the Claimant to work from home as her health required;

    d. With respect to PCPs A, B and D, introducing awareness training for members of staff that spraying chemicals may adversely affect someone else's health;

    e. With respect to PCPs A, B and D warning the Claimant before spraying and applying chemicals so she could remove herself from the area before getting sick;

    f. With respect to PCP C, introducing a rule that staff members cannot spray perfumes or deodorants in the accessible bathrooms.

9. Did the Claimant carry out a "protected act" for the purposes of Equality Act 2010 section 27(2)? *The Claimant relies on the following actions as protected acts:*

    a. In the risk assessment meeting of 17 April 2018, in response to Laila Caton's alleged question "why do you work if you have this condition?" with a shocked facial expression, responding "If I can't work who is going to support me? Do I not have the right to work?"

    b. By email on 25 June 2018, stating that she could not work at her normal place of work while chemicals were injected into the building's ventilation system;

    c. Filing a grievance on 3 July 2018.

10. To what, if any detriments, was the Claimant subject to? *The Claimant relies on the following treatment as detriments:*

    a. The circumstances set out at 4 f, l, l, m, n, o, r and s above *(the Respondent contends that those circumstances marked with an asterisk above are also out of time for this claim);*

    b. *Asking the Claimant to justify her working hours from 8 May 2018;

    c. *By Laila Caton on 17 April 2018 meeting and reiterated in the 3 July 2018 meeting, relaying to the Claimant that colleagues had complained about her discussing that she was getting sick.

11. Was the Claimant subjected to those detriments because she had done a protected act?

12. If the Claimant was subjected to one or more detriments because she did a protected act, is the Claimant's claim in time in respect of this allegation or these allegations in time? *Claims marked with an asterisk (*) are claims that the Respondent contends are out of time (ie on or prior to 22 July 2018).*

The Final Hearing

3. Having finalised the issues, the Tribunal took time to read the witness statements submitted by the parties and the documents to which they cross referred. Witness statements had been submitted on behalf of the following individuals:

    a. Maria Gomes Resende (the Claimant);

    b. Anna Abramowicz, who wrote the Claimant's reference for the role;

    c. Laila Caton, Associate Director and the Claimant's line manager – a lengthy original statement and a brief supplementary statement;

d. Michael Lickfold, Employee Relations Specialist – again a lengthy original statement and a brief supplementary statement;

e. Andrew Wain, who heard the Claimant's grievance

4. Neither Mr Wain nor Ms Abramowicz were called to give oral evidence. Whilst the Tribunal read their witness statements, their absence affects the weight we can give those parts of their statements that are disputed.

5. The Tribunal has read those documents in the agreed bundle to which we have been directed in the course of submissions. At the conclusion of the evidence, Mr Parkin produced detailed written submissions. The Claimant gave her submissions orally. Mr Parkin confined his oral submissions to responding to certain limited points made by the Claimant. There was insufficient time to deliberate during the three days allocated for the Final Hearing. As a result, the Tribunal Panel reconvened without the parties on a later date to discuss the evidence and decide the issues.

Findings of fact

6. As recorded in her CV, before she joined the Respondent, the Claimant had over twenty years' experience working in the construction sector. By professional qualification, she is an architect, having qualified in the US in 1993. Her career has involved working for several organisations of varying sizes, in the US, Hong Kong, Austria and the UK. Most recently, she had worked in a management role for a London based organisation called CallisonRTKL where her role was that of Project Control Manager.

7. The Claimant started working at the Respondent on 11 January 2018 on a temporary basis. She had previously been interviewed for a permanent position. She was offered the position of Project Manager (later renamed Senior Project Manager) by email and letter on 12 January 2018. The proposed role was based at Aldgate Tower, where she would be in the Buildings & Places Business Line, reporting to Ms Laila Caton. The letter said that she would be working from the London site office, details of which would be advised under separate cover. This was in recognition of the expectation that she would be based at the client's site office. As explained in interview, it was anticipated that she would be working for a particular client based in Shepherds Bush, with a need for daily site inspections. In the event, she was not deployed to that particular client, as a result of a change in business requirements. Her annual salary was £65,000 gross.

8. In subsequent emails prompted by the draft employment contract, the Claimant raised issues about flexible working and about a standard clause requiring her to allow herself to be examined by a registered medical practitioner employed by the company. She was told that flexible working was something that needed to be agreed locally with her line manager and it was not something that could be written into her employment contract. In the event, she signed the draft contract, without amendment, on 19 January 2018.

9. The contract provided that there would be a six-month probation period, during which time the notice period would be two weeks on either side. The contract stated that the Respondent reserved the right to extend the probationary period if necessary. It provided:

> "During the probationary period, you will be required to demonstrate your suitability for the position in which you are employed and your progress will be reviewed by your Line Manager on a regular basis."

10. The Claimant completed a Candidate Information Form. In answer to the question "Are you registered or consider yourself to have a disability?" she answered "No". This led to an identical record being made on her New Starter Checklist. As was her right, she had chosen not to refer to her Multiple Chemical Sensitivity (MCS) during her interview. She did not mention it to Ms Caton when she started working for her.

11. In a reference provided by Anni Abramowicz on 20 February 2018, Ms Abramowicz stated that one of only two drawbacks to the Claimant was that she was often disappointed by persons who did not meet her standards and that she might appear confrontational in such events.

12. Shortly after she started, the Claimant was allocated responsibility for two projects. The first was a project entitled the Attleborough Academy, in Norfolk (which also involved work on Downham Market Academy); the second was a project entitled the Turner Free Schools. In both cases, the client was the Education and Skills Funding Agency (ESFA), although the point of contact was different for each project. In relation to each site, the Claimant was expected to liaise on day to day matters with that person at the ESFA. Given her seniority, she was expected to work on feasibility reports and prepare other documents without much direct supervision from Ms Caton or others at the Respondent. Before submitting major reports to the clients, she was expected to submit them to the Respondent's Directors for their review and approval. Although her title was Senior Project Manager, the Claimant did not have any line management responsibility for more junior employees. Her role was essentially managing the delivery of particular projects in order to meet the Respondent's contractual responsibilities to its clients. Other Senior Project Managers were generally engaged on three or four projects at the same time.

13. Ms Caton was the Claimant's line manager throughout her employment. Until about mid-February 2018, she was based at Aldgate Tower working with the Claimant. From then onwards, she was allocated particular responsibility for a project on the Parliamentary Estate in Westminster. As a result, at that point she became based at Westminster for an average of four days per week. The majority of her contact with the Claimant would be by email or occasionally by phone. She would visit Aldgate Tower on an infrequent basis. She would aim to meet with the Claimant and others during one of her visits to Aldgate Tower. The first structured meeting was a four-week probationary review meeting, held on an informal basis. No notes were taken.

14. The Respondent's offices at Aldgate Tower were located on the tenth and sixteenth floors. All staff, including the most senior staff, known as the Executive Team, worked in large open plan areas. The Respondent employed around 1000 staff based at Aldgate Tower, with over 300 people on each floor on any given day. The Respondent had previously decided that this fostered the most collaborative working environment, and was appropriate given that not all staff worked in the office each working day. The Respondent had what it described as an "Agile Working Policy", albeit it was not set out in writing. This Policy entitled all staff to choose the desk location at which they worked. There was a limited number of quiet rooms, which could be booked for particular

purposes, usually for up to two hours. In addition, there were approximately 10 meeting rooms per floor, accommodating between four and eight people.

15. Other floors at Aldgate Tower were occupied by other companies. Communal areas in the building were managed by a facilities management company called Brookfield. This included the lobby and vestibule areas and the toilets. An automatic deodoriser was used in the women's toilets on each floor, to neutralise unpleasant smells. There was also an accessible toilet on each floor. This did not have an automatic deodoriser. The Claimant did not raise any problems with Ms Caton about her use of the accessible toilets.

16. Employees would use deodorants and perfumes in the toilet areas and, on occasions, also when sitting at their workstations. When the Claimant started, and during the period until her dismissal, the Respondent did not have a specific policy limiting the circumstances in which staff could apply fragrances whilst at work. So far as the Respondent was aware, no other employees had the same degree of apparent sensitivity as the Claimant.

17. The Respondent's Attendance Management Policy and Procedure has a section entitled "Occasional Working from Home". It states that the Respondent does not operate a Home Working policy whereby the individual's contractual place of work is their home. It then sets out various circumstances in which it could be more effective for individuals to work from home from time to time. It stated that home working must be agreed by the line manager and no employee has an automatic right to work from home. Even where occasional home working had been previously agreed, the Policy said that the Respondent reserved the right to withdraw those arrangements at any time. Ms Caton said in her first statement (para 10), which we accept, that employees in their probationary period would be expected to work for at least four days a week in the office, to ensure that they are given the necessary guidance and support, and to build relationships.

18. The Claimant's evidence was that she had experienced particular sensitivity and reactions to the chemicals in everyday perfumes and products since the age of 18. The range of products potentially prompting a reaction was very extensive, including perfumes, after shaves, deodorants, lotions, scented personal products, hairsprays, soaps and shampoos. She has a particular difficulty when the chemicals become airborne, such as when sprays or deodorants are applied by those in close proximity to her. In an email dated 15 April 2019, she graphically illustrated the extent of her problems in a lengthy section starting "Imagine your day as I experience it". In that email she stated that she had never really understood how challenging living with a disability really was until her experience as an employee of the Respondent.

19. On the Claimant's account, she first experienced difficulties with exposure to chemicals whilst employed by the Respondent in February 2018. However, she did not raise any difficulties until 13 March 2018. On that date she emailed Adam Rawlings Smith, HR Director, asking him to tell her what the company policy was on spraying and applying personal products in the workplace. She said that she was very sensitive to many products, although it had been a rare occurrence that this had caused her a problem and so far it had only been at the end of the day. By that stage, as she told Mr Rawlings Smith, she had started to use the accessible bathroom. She sent him a second email raising similar concerns on 22 March 2018. Mr Rawlings Smith responded, apologising for his oversight in not responding to the first email, and asking her to discuss it with her

manager. He also said that a member of the employee relations team would be contacting her to discuss it further. That led to an email from Michael Lickfold on the same date, which was the start of Mr Lickfold's involvement in addressing the Claimant's working environment.

20. On 14 March 2018, the Claimant had received client feedback on the Turner Free School Feasibility Study. The feedback was extensive, running to twenty numbered points. It was more extensive than would normally be expected. Criticisms included picking up on typing errors, significant concerns about the technical aspects, as well as concerns that the Claimant's projected timeline was longer than was usual. The Tribunal considers that the extent and nature of this feedback indicated that Mr Bourner was very concerned about the standard of the Respondent's performance on this project, and that significant responsibility for this rested with the Claimant.

21. On 20 March 2018, the Claimant asked Ms Caton if she could work from home on the next two days. No reason was given for the request, nor any indication as to the particular work she was intending to carry out from home. Ms Caton responded that if the Claimant was planning on working on the Attleborough feasibility report, she suggested the Claimant needed to be in Aldgate Tower where she would be able to get assistance with any queries. Around this time, the Claimant started forwarding work email chains to her home email address. When this was later noted by Mr Lickfold and he raised it with her, the Claimant did not provide him with any reason why she was doing this.

22. On 22 March 2018, the Claimant emailed Ms Caton asking her if she could work from home a couple of days a week to alleviate her allergy symptoms. This was the first time in her dealings with Ms Caton that she had referred to an allergy or otherwise alluded to the issue of her chemical sensitivity. She asked if she could discuss her sensitivity with Ms Caton after Easter, which would have been after the Easter Monday Bank Holiday. In 2018, the Bank Holiday Monday was on 2 April. From the wording of the email, the extent of the allergy did not appear significant.

23. On 22 March 2018, Ms Caton asked Kevin Read, one of the Respondent's Associate Directors who had been working with the Claimant on the Turner Free Schools project, for feedback on the Claimant's performance, given that she was planning to conduct a two-month probationary review. She also asked him how much time he expected the Claimant to be working on the project given that the Claimant had told her that she would be unable to work on Attleborough for the next week, because of the extent of the work required on Turner Free Schools.

24. On 23 March 2018, the Claimant emailed Ms Caton saying that she needed "to work from home until the perfume levels had been brought down a bit". She had not obtained permission to do so at that point. On the same day, the Claimant spoke to Mr Lickfold for the first time. The Claimant was asking him to create a company policy that products are not freshly applied in the office. She told him in a follow up email that she could taste perfume on her lips and her eyes were burning. As a result, she had had to leave the office.

25. On 25 March 2018, the Claimant emailed to withdraw her agreement to working in excess of the 48 hour working week. On 26 March 2018, Matt O'Reilly, who was the client on the Turner Free Schools programme, sent an email to both the Claimant and to Kevin Read. The email contained the following criticism of the Respondent's performance: "it's

disappointing that we have not received an update re above as requested earlier in the week". The Claimant responded to Mr Read, copying in two Associate Directors, Robert Pettifar and Kate Fregene, saying the following:

> "Hi Kevin, as I mentioned to you several times I have been pulled off Turner to work on Attleborough.
>
> Laila, I will not be able to work on Attleborough this week for I have to get back on Turner.
>
> I relayed to both you and Kate that I did not have the time to do as much as I have been doing. This has put me under a lot of stress.
>
> All, please discuss resourcing in the future to avoid these situations."

26. On 27 March 2018, in an email to the Claimant, Ms Caton noted that the Claimant was going to work from home on that date, as she "needed to focus on finalising the Turner report". She suggested that when the Claimant was in the office, she should sit at one of the individual desks facing outwards along the glazing, which were generally quieter.

27. On 27 March 2018, Ms Caton emailed Katrina Johnstone, one of the HR Managers, asking if she could discuss the Claimant's probationary period with her. It is clear from the wording of the email that Ms Caton was dissatisfied with the Claimant's performance:

> "Issues have arisen over the past few weeks that have raised concerns about Maria's current performance and capabilities in terms of meeting the role requirements of a Senior Project Manager. In addition to this there have been a series of emails from Maria (copies attached) which I am also addressing with her."

28. Around the end of March 2018, the Turner Free Schools Tender Report, for which the Claimant was responsible, was due to be issued. Before then, it had to be reviewed by Kevin Read, Associate Director. During the morning of 29 March 2018, Mr Read had been involved in meetings, precluding him from signing off on the report. At 15:39 on 29 March 2018, the Claimant emailed Kevin Read with the following text in the Subject line:

> "Kevin – I have to leave soon, I did not take lunch TFS Tender Report"

29. That short email contained only the following sentence in the content of the message: "You will have to issue the document yourself, I cannot find you". It was the Claimant's responsibility to ensure that the document was sent out on time. 29 March 2018 was the last working day before the start of the Easter weekend, and the client's deadline for receiving the Tender Report. The way the Claimant worded her email indicates she did not see herself as personally responsible for ensuring that the deadline was met. This was a surprisingly worded email for an employee on probation to send to an Assistant Director in these circumstances.

30. On 28 March 2018, Vicki Smith, Assistant Facilities Manager, emailed the Claimant. The title of the email was "Special Risk Assessment". She stated that it would

be good to get the Claimant and her line manager to complete a special risk assessment to ensure that the Respondent could put measures in place to prevent risks. The blank risk assessment template was forwarded to the Claimant on 6 April 2018 and completed by her the same day. She sent it to Ms Caton with another brief covering email, saying "attached is the completed Special Risk Assessment". This was the first time that this level of detail had been provided to Ms Caton about her condition. By that point, she and the Claimant had not yet had the planned discussion about her allergies.

31. The special risk assessment identified foreseeable significant hazards prompted by sitting or standing in the workplace exposed to spraying of aerosol products and the application of perfumes. These included "difficulty breathing, swelling, painful irritations of the mucous membranes and the eyes, severe headaches, nausea and disorientation" as well as "film sensation on lips and tongue, unpleasant acidic taste" and "extreme fatigue".

32. When she read the risk assessment, Ms Caton was concerned about the extent of the Claimant's apparent difficulties. In an email on 9 April 2018, the next working day, she posed a series of questions to the Claimant asking her why she had not raised these difficulties with her in person at an earlier stage, and how her condition would impact on her being seconded to a client's offices. In the Claimant's response, also on 9 April 2018, she explained that she regarded medical conditions as a private matter and did not consider it necessary to raise it with Ms Caton. She understood she had flexibility to work from home for some of the time and that most people were "reasonable about her condition". She stated that it was a "manageable [condition]" and did not consider that it was "a big issue unless of course people chose to make it a big issue".

33. On about 11 April 2018. Ms Caton discussed with Ms Smith and Mr Lickfold how they could support the Claimant and what measures could be implemented to help her. The discussion included flexibility about the desk at which she sat in the office and the floor on which she was working. They agreed that the Claimant could work from home by prior arrangement with Ms Caton**.** They also agreed that if this continued to be a problem for her, they would suggest an occupational health assessment.

34. On 16 April 2018 the Claimant was sent a meeting invitation to attend her mid-term review the following day. She emailed that meeting invitation to her personal email address, writing the following words in her forwarding email: "And it begins". In cross examination, the Claimant explained her comment, saying it was prompted by the plan to hold back to back probation review and risk assessment meetings.

35. The meetings were scheduled as back to back meetings, because Ms Caton was not in the Aldgate Tower office on a day to day basis, and it made sense to hold them both on a day when she was physically present. The mid-term probation review meeting was held first, and attended by Rob Pettifar. The topics covered are reflected in the interim probation review form at [293-294]. This set out four business goals and one communication goal. The first business goal was that she should:

> "Improve and develop working relationships and integration within the wider Free Schools team, both with the technical advisor colleagues and the cost management colleagues, so that there is less reliance upon Kevin [Read] and Rob [Pettifar] for day to day support."

36. The fourth business goal was as follows:

> "Maria needs to continue to work towards improving her utilisation. We have flagged that she has a much lighter workload than the majority of other colleagues with only Attleborough feasibility and the Turner Free Schools instruction. All other TA are working across 3 or 4 ESFA PSBP2/Free School instructions."

37. The communication goal was expressed as follows:

> "Maria has been asked to restrict all direct communication with colleagues if she has any issues or concerns with any perfumes, after-shaves or products that they are using and instead flag and discuss the issue with Laila Caton as her line manager. It has been highlighted that a number of her approaches to individuals have not been considered as very diplomatic by the recipients."

38. During the meeting, Ms Caton expressed her concerns about the Claimant's interactions with other staff in general terms, rather than raising particular instances. At this point, she was not raising it as an issue of misconduct, although the Claimant ought to have understood that it may become the subject of more formal conduct proceedings if she continued to speak to her colleagues in same inappropriate manner.

39. Once the probation review meeting had finished, Mr Pettifar left the meeting as originally intended. At that point, the meeting turned to discuss the Claimant's health. Ms Caton wanted to find out more detail about the Claimant's condition and how it could be best managed and supported. Several potential solutions were discussed, including flexibility as to the desk at which the Claimant worked, use of the accessible toilet (which did not have an automatic deodoriser installed), occasional home working with prior agreement, and the involvement of the health and safety team to consider whether any further steps could be taken. At this meeting, the Claimant declined Ms Caton's offer to inform the team of her product sensitivity, so that they could limit their use of fragrances when near the Claimant. Ms Caton discussed the Special Risk Assessment with the Claimant that had been emailed to her just over a week previously.

40. The Claimant alleges that during this meeting Ms Caton made certain comments that she found offensive and which she alleges amount to direct disability discrimination. These comments are categorically denied by Ms Caton. We do not find that Ms Caton said "Why do you work if you have this condition?" Nor do we find that Ms Caton said that the Respondent could no longer second the Claimant to client offices or said "you need to be more like us". Where there is a conflict of evidence, we prefer the evidence of Ms Caton to that of the Claimant. The Claimant struggled when giving her oral evidence to the Tribunal to be clear and consistent as to exactly what was said by Ms Caton. The Claimant may have felt that she experienced a grilling during this meeting, given that she evidently regarded medical matters as personal to her. However, this was only because Ms Caton needed to have a better understanding of the condition so that she could investigate what help to provide. The fact that Ms Caton discussed a potential referral to occupational health and the involvement of the health and safety team confirms that she had an open mind about the extent to which the Respondent would be able to support the Claimant.

41. The risk assessment discussed at this meeting was only partially completed. It needed the columns headed "Initial risk level" and "Control measures in place and existing monitoring process. Action to be taken and proposed monitoring process" to be

completed. That was done subsequently and it was finally signed at a subsequent meeting on 24 July 2018**.**

42. On 24 April 2018 at 15:53, the Claimant emailed Ms Caton and Mr Lickfold to say that she had had to leave her desk because someone had just applied a product in the workplace that was making her sick. She asked them to look into creating a policy that prohibited people from applying products in the office. She concluded by saying that "freshly applied versus already wearing it to work is very different".

43. On 25 April 2018 at 20:48, the Claimant announced to Ms Caton that she would be working from home the following day "to seek a bit of reprieve". She said that she was not feeling all that great since yesterday, and apologised for the short notice.

44. On 26 April 2018 Mr Lickfold responded to the Claimant's request for a policy. He said that he had passed the Claimant's email onto the Health and Safety team to review company policy but could confirm that there was no restriction on employees applying products in the office. He said he was sorry to hear that she was unwell and added that Ms Caton would be speaking to her to review the strategies she could use to avoid further challenges.

45. Her client contact on Attleborough was Cyril Okolie, with whom she had a difficult working relationship. In her first witness statement (at para 74) Ms Caton accepted that Mr Okolie could be challenging to work with, but considered the Claimant should have been able to maintain a professional relationship with him, as she herself had done. In an email exchange that started on 2 May 2018, Mr Okolie was critical of the Claimant's apparent unwillingness to make amendments to a report. At one point he wrote "Like you I have other demands on my time and will not wait an additional minute for a simple task to be effected. I will do this myself and thanks once again for all your help on this". The Tribunal finds that Mr Okolie was being ironic when thanking the Claimant in this way. These emails were copied to Kate Fregene, Associate Director. Ms John was sufficiently concerned to speak to Eloise John, one of the Directors, and then to forward to her the chain of emails. Ms John emailed the Claimant directly, saying the Claimant needed to be careful in her language in her emails, because her language in the email to Mr Okolie "isn't great (not terrible either)".

46. On 10 May 2018, Ms Fregene forwarded a revised copy of the Attleborough feasibility study to Mr Okolie. This had been checked by Ms Fregene but included the work that the Claimant had previously done on this project. Mr Okolie responded that "for the umpteenth time you keep sending me reports with errors on it which frankly is unacceptable", and said that this inability to produce a report would be duly escalated. This implied criticism of the standard of the Claimant's work. The Claimant followed this with an email to Ms Caton and Ms Fregene in which she accused Mr Okolie of being abusive and yelling at her on the telephone, and not giving her the opportunity to speak. She stated that this behaviour needed to be addressed with him. Ms John decided that the best course of action would be for Ms Caton to conclude the feasibility report and for the Claimant to be released from further work on the Attleborough project.

47. In the meantime, on 8 May 2018 17:09, the Claimant emailed Ms Caton and Mr Lickfold to complain that another person had just sprayed perfume in the desk across from her. In the subject line she added the words "Not Acceptable" which were written in capitals. She said that she was sick and was leaving work. She followed up with a further

email in which she stated that she needed to be forewarned if someone was going to spray something in her vicinity.

48. On 22 May 2018, the Claimant emailed Ms Caton identifying that as she was no longer working on Attleborough, there were definitely two days, perhaps more, available for other work. The Claimant asked Ms Caton to identify how she should be spending the remainder of her time.

49. Previously on 17 May 2018, the Claimant notified Ms Caton that she intended to spend 37 hours on the Turner Free School project that week, effectively almost the whole of her working week. On 18 May 2018 Mr Read responded stating that the Respondent would need to review her utilisation given that Turner Free School would not support her booking 40 hours per week to it. The reference to 40 hours was because all fee-earning employees were required to record 40 hours per week, although not all of this would be fee earning work.

50. On the same day, 18 May 2018, Ms Caton asked the Claimant to populate the tracker with the time that the Claimant would need to spend on Turner for the next 4-6 weeks. This would help with resource planning and assist in looking for other opportunities for her. Until that point, the Respondent had tried hard to identify suitable work it was reasonable to expect the Claimant to manage, but this had not been possible due to concerns over how she related to clients and about her performance levels, as well as her health sensitivities. Ms Caton had spoken to Mr James Date, a Director, to try to identify a suitable project to assign to the Claimant or alternatively a client secondment. The Claimant did not raise her spare capacity at team resourcing meetings, as would have been expected when her time was under-utilised.

51. On 18 June 2018 at 09:18, the Claimant emailed Ms Caton saying that she needed to work from home for a couple of days that week. She announced that she would work from home on that day, adding that tomorrow she might be on the job site, pending confirmation. She did not ask permission first. That evening she emailed Ms Caton again, saying that her job site meeting had been cancelled and saying that she would be working from home again tomorrow, which she hoped would be okay.

52. Despite the email from Mr Read telling the Claimant that she could not book a full week to the Turner Free Schools programme, Ms Caton noticed on 21 June 2019 that the Claimant was continuing to book almost a full week on this programme. At that point she was asking to book 38.5 hours to Turner Free Schools. On 25 June 2019, Ms Caton told the Claimant that the fee from the client would not accommodate her working solely on the Turner Free Schools project going forwards. On the same date, the Claimant emailed Mr Read (the client) and Mr Pettifar (the Associate Director to whom she reported) a lengthy email headed “Resourcing – Possibly moving onto other projects”. The email contained the following text:

> “It is also important that ESFA adopts the understanding that the timeframe allocated to their projects is as such. I am concerned that they will want constant attention and immediate attention. Several times we have encountered situations where they do not grasp that we need time to do our work after others deliver, that we cannot be on standby to overcompensate for everyone else; that we do work on other projects and that the expectation to drop everything for them is not

reasonable and puts us in a situation where we have to be unprofessional to other clients."

53. This was a curiously worded email given that the Claimant did not have any responsibilities at that point for other clients. It was unprofessional and inappropriate to complain to her Associate Director about a client in an email which she also sent to that client.

54. Ms Caton asked James Date, Director**,** to suggest additional projects for the Claimant to undertake. There was a concern at the time that the Claimant was overbooking her time to the Turner project, threatening the budget allocated for the entire work; alternatively if the total time booked reflected the total time spent by the Claimant then the Claimant was not working efficiently**.**

55. 25 June 2018 was a Monday. The previous weekend, Brookfield had released an industrial deodoriser into the common parts of the building to neutralise a sewage smell that had developed. This use of a deodoriser had apparently not been notified to those using the building in advance. As a result, the Claimant suffered a reaction to what she described in an email on that day as a "hairspray like product" and a "nail polish like product". Her email to Ms Caton stated that she was nearly in tears as she was writing the email on the Tube, given her reaction. She said that she could not come into work if this product was being used. She asked Ms Caton and HR to investigate and to let her know when it was safe for her to return to work.

56. On the following day, 26 June 2018, at 13:09, Ms Caton responded, copying in three directors, Nigel Whittingham, James Date and Eloise John. She said she was sorry that the Claimant was unwell. She said that the Claimant "cannot just decide to work from home, this is something I need authorised by the Directors with previous agreement". She authorised the Claimant to work from home on that day but told her that she expected her to return to the offices tomorrow. She promised she would investigate the use of the air freshener in the building, adding that she would need to discuss the option of sending the Claimant to Occupational Health, for which she may need access to the Claimant's medical records. She attached the Respondent's Attendance Management Policy to her email. The Tribunal considers it was reasonable for Ms Caton to copy in more senior individuals to her response to the Claimant's email, given that it concerned the relationship between the Respondent and Brookfield and how to ensure that the Claimant could safely work at Aldgate Tower.

57. The Claimant responded at 17:36 on 26 June 2018 and again on 27 June 2018 at 09:37, stating that had been in Folkestone on 26 June 2018, and did go to work there. She had not spent the day working from home. She attached an email she had sent Ms Caton at 15:37 on 25 June 2018, confirming her intention to be in Folkestone on 26 June 2018. The Tribunal finds that it was an oversight by Ms Caton to overlook that the Claimant had previously told her she would be working at the client's site on 26 June 2018. The Tribunal finds that this oversight was understandable in that, on previous occasions, the Claimant had chosen to work from home without prior permission; and the Claimant had not in fact been in the office on that day.

58. The Claimant told Ms Caton in these emails that she had spoken to Brookfield about the chemical. She said that the occupational health proposal was an afterthought and would not be beneficial or effective immediately when she went to work. In the first of

these two emails she asked again for information about the product used by Brookfield, a request repeated in the second email on 27 June 2018. On Tuesday 26 June 2018, Mr Lickfold and the Claimant discussed matters by phone. Mr Lickfold told the Claimant not to contact Brookfield to establish what chemical had been used at Aldgate Tower. He said this because he wanted the Respondent's facilities management team to be the single point of contact with Brookfield.

59. The Claimant attended work at Aldgate Tower on Wednesday 27 June 2018 and could not detect the industrial deodoriser in the lobby when she arrived. However, she emailed Ms Caton telling her that by lunchtime she had starting to feel dizzy and would move down to work on the 10th floor to see if she started to feel better.

60. She was then off sick on Thursday 28 and Friday 29 June 2018. On 28 June 2018, Ms Caton sought advice from Mr Lickfold on various issues involving the Claimant, including homeworking and working whilst sick, Brookfield's release of chemicals in the common parts of Aldgate Tower, performance concerns, and the forthcoming probation review. Mr Lickfold's views are summarised in an email to Ms Caton dated 2 July 2018.

61. When the Claimant returned to work on Monday 2 July 2018, the Claimant considered she was still experiencing a significant medical reaction to the chemical released by Brookfield into the ventilation system. She phoned Ms Caton to tell her of her symptoms. During the call the Claimant was upset and angry, and according to Ms Caton, the Claimant was screaming down the phone. The Claimant accepted in evidence that her tone during that conversation was inappropriate for a conversation that took place in the open plan office. Given Ms Caton's reference to the Claimant's tone during this phone call in an email sent to the Claimant on the same day, we accept Ms Caton's evidence that the Claimant's tone was angry and inappropriate.

62. Given the extent of her symptoms, Ms Caton told the Claimant to go home for the remainder of the day and rest. In a subsequent email sent to Ms Caton and Mr Lickfold on the same day, 2 July 2018, the Claimant asked that details of the chemical be provided to her immediately, and described Brookfield's actions as reckless. In a second email she stated that she did not want to meet to discuss and reiterated in bold her need to know the chemistry of the products that Brookfield had used.

63. Ms Caton wrote a detailed response. She was sympathetic to the Claimant's health issues, and promised she would provide information about the product used by Brookfield when that information was supplied to the Respondent. She stated she was greatly concerned by the tone of the Claimant's email. She attached an Occupational Health consent form to allow the Respondent to investigate how best it could support the Claimant. She said she could not agree with the Claimant not wanting to meet to discuss the situation, telling her that she had diarised a meeting with her at 11.30am on 3 July 2018. Unless she was off sick, the Claimant was expected to attend this meeting.

64. On the same day, Ms Caton asked Mr Read to speak to the Claimant to establish the amount of work needed on the Turner Free School project and the extent to which any part of the project could be delivered by working from home.

65. In preparation for the intended meeting with the Claimant to discuss her conduct as well as her health, Ms Caton asked those who had previously raised concerns about how the Claimant had conducted herself in the office with her colleagues to provide her

with specific examples. As a result, on 2 July 2018 Ms Caton received an email from Tasha Northwood, one of the PAs working in the team, reporting a complaint made by Bronwyn Roberts, one of the Respondent's Facility Managers. Ms Roberts was complaining that the Claimant had been yelling about her sensitivity to chemicals and behaving in a very angry manner. This appears to have been prompted by overhearing the way that the Claimant was conducting herself in her conversation with Ms Caton. In a second email, Ms Northwood recorded concerns about the rude way the Claimant had spoken to other staff and to a contractor. Eileen Hoang also reported to Ms Caton that the Claimant had "vocalised her frustrations" in a way she regarded as inappropriate.

66. Again on 2 July 2018, the Claimant emailed Brookfield asking for information about the deodoriser that had been used in the common parts of Aldgate Tower. In doing so, she was acting contrary to Mr Lickfold's instruction in the telephone call on 26 June 2018.

67. On 2 July 2018 at 18:38, Ms Caton sent the Claimant a meeting invitation for a catch up meeting at 11.30 the following day. No detail was provided as to what would be discussed in this meeting. Initially this invitation was declined by the Claimant, but subsequently at 10:58 the following morning the Claimant said she was back in the office following a doctor's appointment and was able to meet at 11.30. In her cross examination of Ms Caton, the Claimant complained she had not received advance warning of this meeting and this was unfair to her. Ideally, she should have been given more notice and more detail as to what Ms Caton planned to discuss with her. However, the Claimant was willing to meet with Ms Caton that morning and the meeting proceeded to discuss her health and her conduct. She did not ask for the meeting to be postponed either before she met with Ms Caton or at the start of the meeting.

68. In advance of the meeting, Ms Caton prepared handwritten notes of the issues she wanted to discuss. After the meeting typed notes were prepared that we find are a fair summary of the general nature of the discussion:

a. The meeting started by discussing Brookfield's release of chemicals. Ms Caton told the Claimant that she had requested the COSHH sheets from Brookfield in relation to the release of chemicals. Ms Caton told the Claimant not to contact Brookfield directly. She did so because Brookfield had complained that it had received an approach from the Claimant. This did not amount to intimidating the Claimant into not contacting Brookfield, but was in accordance with Brookfield's request that they should not be contacted directly by the Respondent's employees;

b. They then discussed the Claimant's health, trying to identify the parts of the building where the Claimant had particular difficulties, and exploring what the doctor had told the Claimant at the meeting that morning;

c. The Claimant was asked if she would like an occupational health referral and responded by saying that she needed further information before she could make a decision;

d. The focus of the meeting then turned to the Claimant's conduct. Ms Caton told the Claimant that she had received three separate complaints regarding how loud and disruptive the Claimant had been when speaking on the

telephone to Ms Caton the previous day, which other staff had overheard. Ms Caton advised her to be more considerate when on calls with others and explained how the Claimant should make calls without disturbing others. The typed notes record that the Claimant responded that she did not care if she was being loud in the office. This was not challenged by the Claimant in cross examination, and the Tribunal finds on the balance of probabilities that it accurately records the Claimant's response.

e. Ms Caton told the Claimant that over the last three months there were now three specific instances of "behaviour issues in the office". As a result, this was now being discussed with her in a formal way. This was a warning to the Claimant that she might, in the future, face disciplinary action unless her behaviour changed. It was not a threat that she would face disciplinary action as a result of the incidents to date.

69. Ms Caton's note records that throughout the meeting, the Claimant burped out loud on numerous occasions, which the Claimant explained as being the result of her symptoms.

70. We do not find that there was any instruction given by Ms Caton in this meeting that the Claimant should sit in an isolated area. The Claimant may be confused in her recollection in that at the earlier meeting on 17 April 2018, Ms Caton had suggested that the Claimant could choose to work in a quieter part of the open plan office where she may be less exposed to others using perfumes or deodorants.

71. Later the same day, 3 July 2018, the Claimant sent a lengthy email to Ms Caton, which she also forwarded to Mr Lickfold, describing it as her grievance. It covered the release of chemicals by Brookfield, and what she considered was the Respondent's failure to respond appropriately. She accused Ms Caton of making a discriminatory comment about her chemical sensitivity during the meeting that morning. She complained about the Respondent's lack of action in stopping people applying chemicals in public work spaces, lack of a policy concerning chemical usage, and mixed messages concerning working from home. She ended her email "By all means, please have your Occupational Health experts contact me. Please let me know who in advance it will be".

72. In a later email to Mr Lickfold also on 3 July 2018, she repeated that she considered an alleged comment made by Ms Caton to be discriminatory. This was her allegation that Ms Caton had asked her "why do you work if you have this chemical sensitivity?". She added it had been said angrily and judgmentally and expressed Ms Caton's prejudices. The Tribunal does not find that such a comment was made by the Claimant during this meeting.

73. Also on 3 July 2018, the Claimant emailed Mr Lickfold to attach her email contacting Brookfield about the release of chemicals. On the same day, as it had previously done on 27 June 2018, Brookfield told her to contact the Respondent's own Facility Manager, rather than approach Brookfield directly.

74. On 4 July 2018 at 12:38, the Claimant emailed Ms Caton to say she was not feeling well. Her head was tingling and she was dizzy. As a result, she had to leave work. She asked if she could work from home. The next day, 5 July 2018, she emailed Ms Caton at 08:17 to say that she was extremely unwell and would be off work sick [414].

The email was copied to Mr Lickfold and to Mr Read. Ms Caton responded that she was sorry to hear that the Claimant was feeling unwell again. She attached detailed COSHH information about a deodoriser released by Brookfield, which was headed "White Blossom Tea". Her email said that the product had only been used through the ground floor lobby area and not in the general ventilation system for the upper floors of the building.

75. In response, the Claimant thanked the Respondent for this information, but asked for the chemical properties of the "industrial cleaner like product present on the 25 June 2018", which she described as smelling like hairspray. This is because, as she clarified on 9 July 2018, she believed that the chemical data provided was not for the product used on 25 June 2018. Ms Caton responded that she would follow up with a further request to Brookfield for the information about a cleaning product, but this might take a number of days to be issued.

76. On 9 July 2018, Andrew Wain was appointed to hear the Claimant's grievance, and wrote to the Claimant inviting her to a meeting on 12 July 2018.

77. The Claimant remained off work on sick leave until 9 July 2018. On that date, she submitted her completed Occupational Consent Form. This did not identify her GP or treating specialist, which her entry recorded as "Private". She ticked boxes on the form stating that she did not agree to AXA PPP healthcare collecting and using personal data to deliver the occupational health service; she did not agree to attend an independent medical assessment; she did not agree to the AXA PPP healthcare team releasing medical information from the assessment to her own GP and did not agree to AXA PPP healthcare applying for medical information from her own GP or treating specialist.

78. Mr Lickfold responded to say that, given the options she had selected, AXA would not be able to proceed with an assessment. He stated that it was essential to involve her GP in getting an overall picture of the challenges and how best the Respondent could work to support them. He invited her to reconsider her choices and to complete a new consent form. The Claimant refused to do so, saying that her position remained the same. She regarded contact between the Respondent and her GP as an invasion of her privacy. Mr Lickfold replied that there would be no occupational health assessment.

79. On 11 July 2018 at 17:14, the Claimant sent Mr Lickfold an email with the subject "Someone Just sprayed cologne". It was not copied to Ms Caton but was copied to the Claimant's personal email address. The email was worded as follows:

> "Someone just sprayed cologne right in my vicinity and I am now incredibly sick.
>
> It is important that AECOM addresses companywide awareness about this matter. At the very least, I require **advance warning** before people spray, apply chemicals so that I can physically remove myself before I inhale the chemicals so that I avoid getting as sick as I am right now. What is perfume to other people is poison to me.
>
> I am leaving work.
>
> I have a meeting tomorrow at 10am and a deliverable and I may not be well enough to come to work."

80. Mr Lickfold responded at 07:59 the following morning, saying he was sorry to hear she was unwell again. He asked if the Claimant was happy for her to share her condition with some more of the office teams and also with the health & safety teams to see how the Respondent could further support her. He told her that Ms Caton had been informed but asked that she kept Ms Caton informed as to her health. He concluded his email by noting that a number of recent emails had been copied to a personal email address. He asked who this belonged to and why this had been done. The Claimant responded at 12:46 that day, 12 July 2018, saying that she was at work. She said that what she wanted was "just a general awareness information to employees". She stated that she had ordered masks to filter the chemicals and would start to wear the mask throughout the day. She did not respond to the question about her personal email address, although this email from the Claimant did not appear to be copied to that email address.

81. On 12 July 2018, Ms Caton sent the Claimant further COSHH sheets in relation to the products that were in use on 25 June 2018. These pdf documents were labelled "reception coshh"; "bathroom coshh"; "lift lobby coshh" and "toilet cleaning coshh".

82. On 13 July 2018, the Claimant attended a grievance meeting conducted by Mr Wain. No specific complaint is made about the conduct of the grievance meeting. At the meeting Mr Wain considered the matters that the Claimant was raising.

83. At around this time, the Claimant started wearing a mask on occasions in the office. The Claimant complains in these proceedings that another employee had taken a photograph of the Claimant wearing this mask. However, that complaint was never raised at the time, either as part of the grievance or subsequently. Given the passage of time before this complaint was raised, and given the lack of detail on this point in the Claimant's evidence, the Tribunal is unable to make any specific findings as to the circumstance in which any such photograph may have been taken. The only contemporaneous evidence is that the Claimant emailed herself on 13 July 2018 stating in the subject line that "some idiot just took a picture of me with the mask".

84. At this time, the Claimant was in an email exchange with Matt O'Reilly at the Department of Education in relation to the Turner Free School project. She sent him an inappropriately worded email, copied to Kevin Read, limited to the following sentence:

> "Then we must ask that you support our requests as oppose to facilitating the contractor's excuses."

85. On 17 July 2018, Mr Read wrote to the Claimant that the Turner Free School project was under significant financial pressure, and therefore could not sustain the hours which were currently being booked by her against it. She asked Nigel Whittingham and James Date, who were copied into the email, if they knew of any other projects that the Claimant could assist or become involved with.

86. On 19 July 2018, Ms Caton asked Mr Read for his feedback about the Claimant's performance on the Turner Free School project and asked him for client feedback from Matt O'Reilly. Mr Read provided Ms Caton with specific criticisms about the Claimant's performance as set out in Ms Caton's statement at paragraph 144, which was not challenged in cross-examination. We find that the five subparagraphs at paragraph 144 reflect genuine concerns on Mr Read's part spanning her ability to follow guidance; the

accuracy of her work; the extent to which the Claimant occupied management time for someone at her level of seniority, and her lack of appreciation of the client's requirements.

87. Also, on 19 July 2018, the Claimant emailed Mr Lickfold to say that someone had just sprayed something and she had not been warned in advance. In reply, Mr Lickfold asked her to consent to the office knowing of her condition so they would be mindful of her reaction. He added that he could not tell people to stop using the product. Ms Caton suggested that the situation might "be slightly easier to manage if you have a more permanent base [rather than working between the 10th and the 16th floors] that we notify people sitting around you of your sensitivity with products". The Claimant replied that "either solution is acceptable as long as I am warned … it is the surprise, after the fact situation, that makes it impossible to manage". In so replying using this particular wording, she was not providing her unequivocal agreement that individuals working nearby could be told of her chemical sensitivity.

88. On 23 July 2018, Mr Wain sent the Claimant a three-page long grievance hearing outcome letter by email. He dealt with each aspect of her grievance. His conclusion was that her grievance was not upheld. Before reaching that conclusion, he had met with Ms Caton to discuss the Claimant's concerns with her. Specifically, in his outcome letter he rejected various criticisms that the Claimant was making about the way Ms Caton had line managed her, including rejecting her criticism that she was discriminating against the Claimant.

89. On the same day, 23 July 2018, the Claimant responded from her personal email address with her comments on the grievance outcome. In her email, she stated she was not disputing the outcome but said she was not expecting a different position. She again accused Ms Caton of discriminating against her. She did not, at that point, choose to appeal the grievance outcome. She finished by saying that someone had sprayed perfume again today, forcing her to close her computer and leave to avoid getting sick. Because it was 5.30pm at the time, she said she hoped this would not be escalated into an attendance issue, or an issue of lack of communication. She followed this email with a further email five minutes later, again to Mr Lickfold. She was again complaining about the effect of perfume use on her health, emphasising this by a section in red font, underlined and partly in capitals. She ended the email "Thank you for ignoring this".

90. On 24 July 2018, the Claimant met with Ms Caton to review her probation. At the meeting she signed the completed Health and Safety Risk Assessment prepared for the Claimant's condition. This identified the control measures that were in place to limit or avoid the risks identified. The probation review meeting discussed concerns relating to the Claimant's performance, failure to meet her required objectives for utilisation and conduct issues within the office. There were no notes in the Tribunal's bundle recording the discussion at the meeting. The best evidence of what was said is contained in the letter sent by Ms Caton to the Claimant by email on the same date, which the Tribunal accepts.

91. The Claimant alleges that Ms Caton smiled at the conclusion of the meeting on 24 July 2018 when she told the Claimant that the probation period had not been passed, adding "I'm sorry". This is denied by Ms Caton. The Tribunal prefers the evidence of Ms Caton that she did not smile as the Claimant alleges when informing the Claimant of the conclusion of the probation review meeting.

92. Following the meeting, Ms Caton wrote her a letter, headed "Re Probation Review – Contemplation of Dismissal" [586]. The letter invited her to a meeting on 27 July 2018, which would provide her with an opportunity to raise any points about the contemplation of her dismissal. It emphasised that the letter did not constitute formal notice of dismissal and no decision to dismiss had been taken at that stage. Due to a typing error, the letter referred to a potential dismissal date of 24 July 2018, if the outcome of the meeting on 27 July 2018 was the Claimant's dismissal.

93. A potential outcome of the intended meeting on 27 July 2018 was to extend the probation period. This route could have been chosen if the Claimant was able to rebut some of the Respondent's concerns, or if the Claimant could identify other mitigating factors that suggested she was capable of performing the role to a satisfactory standard with further support. The Tribunal finds it was not a foregone conclusion that failing the probation would inevitably lead to the Claimant's dismissal.

94. After the meeting on 24 July 2018, the Claimant emailed Ms Caton, noting that she took the outcome of the meeting to be definitive and that she had been given two weeks' notice. She said she would like to use her remaining annual leave during her notice period. Ms Caton replied that the Claimant should liaise with Mr Lickfold. The Claimant wrote that she would be in the office for the remainder of 24 July 2018 and "also tomorrow morning" ie 25 July 2018.

95. The agreed deadline for the feasibility report on the Turner Free Schools project was 13 July 2018. It had been extended to that date because the Claimant had not instructed the correct surveys at the outset. Despite this extension, the Claimant had only issued a draft report on the day of the deadline itself. On 23 July 2018, the Claimant emailed Matt Bourner, one of her contacts at the client, saying that she had received comments on the draft report, she was incorporating those comments and she hoped to re-issue the document "early this week" [610]. Matt O'Reilly asked her when she would be issuing a final draft and the Claimant responded on 24 July 2018 with the following wording:

> "Feasibility was submitted on 13 of July 2018. The ESFA review process and approval is in progress. The internal review is in progress."

96. As a result, on 24 July 2018, Karen Summers, the Project Director at ESFA (who had been copied into this email exchange), emailed the Claimant and Robert Pettifar in the following terms [608]:

> "Aecom's Feasibility Report was issued in draft form on 13th July and not to a particularly good standard, hence more comments were returned to assist you in presenting the information that might achieve an approval, therefore we do not consider that draft as meeting the deadline.
>
> Reading from the bottom up on this thread, the RTA gave comprehensive comments the Aecom's previous Feasibility Report on 14th March, and due to the error by Aecom of not obtaining an intrusive GI report or the Asbestos Demolition survey report, he agreed to postpone to 13th July, it is now 24th and we are still waiting.

> This is not the service we expect from our Technical Advisors and slipping this project by 4 months from the original date for issue of the Feasibility Report at 16.03.18 to still outstanding, has high risk of putting delivery of the project in jeopardy.
>
> The RTA needs 5 days to review the report, please confirm when this will be issued in final submission status so that he can allocate the appropriate time."

97. Although not specifically directed at the Claimant, this was in reality a criticism of the Claimant's performance, given that she was essentially responsible for the drafting of the Feasibility Report.

98. On 25 July 2018, Ms Caton emailed the Claimant to clarify that the meeting on the previous day had been to tell her that she had not passed the Final Probation Review and therefore there was a need for a formal review meeting. The Claimant had not been advised she was dismissed. On the same date, Mr Lickfold emailed the Claimant asking her to be mindful of the tone of her emails. He said it was not appropriate to send one line emails making demands. He added that she was still an employee of the Respondent and had not been dismissed. The Claimant's response was that she did not wish to continue the discussions and she accepted the dismissal.

99. Also on 25 July 2018, in an email sent at 11:52, Ms Caton wrote to tell the Claimant she had not been dismissed. She added she had not authorised any annual leave and should the Claimant leave without authorisation, then the Claimant would be treated as being absent without leave. Employees were expected to give reasonable notice of their intention to take annual leave. She took the view it was unreasonable for the Claimant to ask for holiday at such short notice.

100. Ms Caton said that she was happy for the Claimant to work from home "for today and tomorrow" and the Claimant should then attend the meeting on 27 July 2018, which had been scheduled for 3.30pm. She finished by saying that, as annual leave had not been authorised, it would not be paid.

101. Despite that, the Claimant handed in her Aecom property at noon on 25 July 2018. She set an email out of office, which stated she was on annual leave from 25 July 2018 through to 7 August 2018. This is clear from an email she sent to herself at 15:26 on 25 July 2018. She did not report for work on 26 July 2018.

102. On 26 July 2018, Ms Caton emailed the Claimant a letter, with the subject of the email "Absent without leave". This was a true reflection of the Claimant's situation. She had not been dismissed nor did she have permission to be absent from the office. The letter stated that Ms Caton was expressing her concern that the Claimant had not attended work on 26 July and had handed in her equipment the previous day, appearing to stop work at 12pm. In Ms Caton's view, no explanation had been provided for her absence that morning. Attempts had been made to contact her on her mobile phone, but she had not returned messages. If she intended to resign, then Ms Caton asked her to put her resignation in writing. The letter reminded her that if she failed to set out the reasons for her absence, then the absence would be classified as unauthorised and therefore unpaid. It warned her that it might be necessary to take action under the Absence Management Policy, and she might be required to attend a disciplinary hearing in relation to her unauthorised absence.

103. The Claimant responded shortly afterwards, at 14:07, saying that Ms Caton was to stop the bullying. The email included the words 'bullying' and 'harassment' in capital letters, for emphasis. It added:

> "Ms Caton, you are never to contact me again. If you attempt to do so I will look into seeking a restraining order against you."

104. She emailed Mr Lickfold, also on 26 July 2018, to say that she had accepted the Respondent's dismissal; that she had no interest in prolonging her stay at the Respondent; and that she would not be attending a meeting on 27 July 2018. She finished by saying "Please try to understand that I cannot engage in this dialogue anymore. I wish you all the best".

105. A meeting was held on 27 July 2018 in the Claimant's absence. The outcome was summarised in a letter of the same date, which was sent to the Claimant by email at 17:46. The email came from Mr Lickfold, but the letter was signed by Ms Caton. It referred to five issues that had been considered during the meeting, including unsatisfactory performance on the two projects she had been assigned, her failure to work to the same capacity as other Project Managers on the Free Schools Programme, her rude and aggressive behaviour towards colleagues, her failure to follow the company processes and reasonable management requests, and going absent without leave. It stated that despite the support provided, she had not met the required standards to successfully pass her probation period. A decision had therefore been taken to terminate her contract of employment and she would not be required to work her contractual notice. Her last date of employment would be 27 July 2018. The letter ended by referring to the Claimant's right to appeal against the dismissal decision, asking her to do so within 5 working days of the date of the letter. An appeal should state her grounds for appealing against the decision.

106. By way of brief one-line response, the Claimant acknowledged receipt, saying "Many thanks for the confirmation. It was a pleasure and all the best sir".

107. There was a further email exchange between the Claimant and Mr Lickfold on 8 and 9 August 2018. Mr Lickfold confirmed that the Claimant would be paid in lieu of notice and in respect of untaken holiday. The Claimant denied that she was guilty of misconduct or had provided poor performance. She reiterated previous criticisms of Ms Caton, saying she was judgmental, she had discriminated against the Claimant's medical condition and was determined to push her out. She stated that this would be the last email where she shared her experiences with the Respondent. The Tribunal finds this was not an appeal against dismissal or against the outcome of the Claimant's grievance.

108. On 23 August 2018, the Claimant received legal advice from the Mary Ward Legal Centre about whether she had suffered discrimination because of her multiple chemical sensitivity.

109. On 17 September 2018, the Claimant emailed Mr Lickfold with the subject "Dismissal and Grievance Appeal Letter", attaching a three-page long letter appealing against both the outcome of the dismissal and of the grievance process. On 24 September 2018, Mr Lickfold replied stating that the Respondent was not able to proceed with either of the Claimant's appeals as the period for appealing was 5 days and that period had long expired. This was reiterated to the Claimant again on 27 September 2018.

Legal principles

Disability

110. The statutory definition of disability in Section 6 of the Equality Act 2010 is as follows:

> "A physical or mental impairment which has a substantial and long-term adverse effect on the Claimant's ability to carry out normal day to day activities."

111. The Tribunal must assess whether this definition is satisfied as at the date of the alleged discrimination, by reference to the evidence as to the extent of the impairment at that point in time. The Tribunal is to deduce the extent of the impairment caused by the underlying condition, where possible, if the Claimant was not taking medication.

112. An impairment is long-term if it has lasted or is likely to last for at least 12 months. The phrase 'likely to last' means 'could well' last. An impairment is substantial if it is more than trivial. The focus is on what the Claimant cannot do, rather than on what he can do.

113. Where applicable, the Tribunal must have regard to the Secretary of State's Guidance on matters to be taken into account in determining questions relating to the definition of disability. None have been referred to by either party and none appear to be particularly pertinent here.

114. It is for the Claimant to prove, on the balance of probabilities, that she satisfies the definition of disability.

Direct disability discrimination

115. Section 13 of the Equality Act 2010 is worded as follows:

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

116. The Claimant seeks to compare herself against how a hypothetical non-disabled employee would have been treated. A comparator must be in all other respects, apart from her disability, in a comparable position to the Claimant. She seeks to compare herself to how a hypothetical person with a nut allergy or someone with a common cold would have been treated. That is not the appropriate comparison, in that those individuals' situations are not materially identical to the Claimant's situation, save for the fact that those individuals do not have a disability. In particular, identifying and controlling the source of the problem is easier with someone who has a nut allergy, and a common cold is not triggered by any controllable factor in the workplace as is a temporary condition.

117. The focus is on the mental processes of the person that took the decisions said to amount to discrimination, which in the present case is essentially Ms Caton, and in relation to certain allegations, Mr Lickfold. The Tribunal should consider whether Ms Caton and/or Mr Lickfold were consciously or unconsciously influenced to a significant (ie a non-trivial) extent by the Claimant's disability. Her motive is irrelevant.

118. Section 136(2) of the Equality Act 2010 is worded as follows:

(2) If there are facts from which the Court could decide in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred;

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

119. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 22-32).

120. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that her treatment was in part the result of her disability.

121. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established that it is insufficient for the Claimant merely to show a difference in status (ie a disability) and detriment treatment (see *Madarassay* at paragraph 54). To shift the burden of proof, a Claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between her disability and her treatment, in the absence of a non-discriminatory explanation.

122. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the Claimant's treatment.

Failure to make reasonable adjustments

123. The Tribunal must assess whether the Respondent applied a Provision, Criterion or Practice which placed the Claimant at a substantial disadvantage in comparison to those employees not sharing her disability. If so, the duty to make reasonable adjustments is engaged. The Tribunal must then consider whether a reasonable adjustment might have eliminated or reduced that disadvantage.

124. In order for the disadvantage suffered by the employee to be "substantial" it must be more than minor or trivial: *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 at paragraph 21.

125. Paragraph 20 of Schedule 8 to the Equality Act 2010 is worded as follows:

> "An employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know … that the employee has a disability and is likely to be placed at a disadvantage."

126. The burden of proof is on the Claimant to establish the existence of the provision, criterion or practice and to show that it placed her at a substantial disadvantage - see *Project Management Institute v Latif* [2007] IRLR 579 at paragraph 45. In other words, to establish that the duty to make reasonable adjustments has been engaged.

127. Thereafter the onus remains on the Claimant to identify the potential reasonable adjustments with a sufficient degree of specificity to enable the Respondent to address them evidentially and the Tribunal to consider the reasonableness of providing them. At the point where the duty to make reasonable adjustments has been engaged, and the Claimant has identified one or more potential reasonable adjustments, the burden of proof is reversed. The Respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved – *Latif* at paragraphs 53-54.

128. The reasonableness of the steps to be taken to avoid the disadvantage is to be determined on an objective basis: *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 at paragraph 73.

129. Guidance as to the considerations that are relevant in assessing reasonableness is provided in paragraph 6.28 of the Employment Statutory Code of Practice. The Tribunal is required to have regard to this Code when considering disability discrimination claims.

Victimisation

130. Section 27 of the Equality Act 2010 is worded as follows :

(1) A person victimises another person (B) if A subjects B to a detriment because:

(a) B does a protected act; or

(b) A believes that B has done, or may do, a protected act

131. The Claimant must therefore establish that:

a. The Respondent subjected the Claimant to a detriment; and

b. The Respondent did so because:

i. The Claimant did a protected act; or

ii. The Respondent believes that the Claimant has done, or may do, a protected act

132. Under Section 27(2)(c) EqA 2010, the Claimant will have done a protected act if she has done any other thing for the purposes of or in connection with the Equality Act.

133. Under Section 27(2)(d) EqA 2010, the Claimant will have done a protected act if she has made an allegation (whether or not express) that A or another person has contravened the Equality Act.

Law on time limits

134. Section 123 of the Equality Act 2010 is worded as follows:

1. Proceedings on a complaint brought within Section 120 may not be brought after the end of –

    a. The period of 3 months starting with the date of the act to which the complaint relates; or
    b. Such other period as the employment tribunal thinks just and equitable

2. ….

3. For the purposes of this section –

    a. Conduct extending over a period is to be treated as done at the end of the period;

    b. Failure to do something is to be treated as occurring when the person in question decided on it.

135. Under Section 123 of the Equality Act 2010, proceedings on a complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates. The three-month time for bringing Tribunal proceedings is paused during Early Conciliation such that the period starting with the day after Early Conciliation is initiated and ending with the day of the Early Conciliation certificate does not count (Section 140B(3), Equality Act 2010). If the time limit would have expired during Early Conciliation or within a month of its end, then the time limit is extended so that it expires one month after Early Conciliation ends (Section 140B(4), Equality Act 2010).

136. Conduct extending over a period is to be treated as done at the end of the period (Section 123(3) Equality Act 2010). There is conduct extending over a period if there is a continuing discriminatory state of affairs as opposed to a succession of unconnected or isolated specific acts. If so, then the three-month time period for bringing a claim only runs from the date on which the state of affairs ends (*Metropolitan Police Commissioner v Hendricks* [2003] ICR 530).

137. If the claim has been brought outside the primary limitation period, then the Tribunal has jurisdiction to consider the claim if it was brought within such other period as the Tribunal considers just and equitable. Considering a claim brought outside the three-month time limit (as extended by the Early Conciliation provisions) is the exception rather than the norm. Time limits are exercised strictly in employment and industrial cases. The onus is on the Claimant to establish that it is just and equitable for time to be extended (paragraph 25 of *Robertson v Bexley Community Centre (t/a Leisure Link)* [2003] IRLR 434, CA).

138. Factors which are almost always relevant to an exercise of the discretion are the length of and the reasons for the delay, and whether the delay has prejudiced the Respondent (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 at paragraph 19). However:

> "There is no … requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature

of any such reason are relevant matters to which the tribunal ought to have regard (*Abertawe* at para 25)"

139. It is not necessary for a Tribunal to consider the checklist of factors set out in Section 33 of the Limitation Act 1980, given that that Section is worded differently from Section 123 of the Equality Act 2010, so long as it does not leave a significant factor out of account.

140. It will frequently be fair to hold Claimants bound by time limits which they could, had they taken reasonable steps, have discovered. If the delay in issuing proceedings has been caused by the fault of an adviser, this is a potentially relevant factor that potentially excuse a failure to issue proceedings in time, or a delay in issuing proceedings thereafter (*Hunwicks v Royal Mail Group plc* EAT 0003/07; 20 March 2007 per Underhill J at paragraphs 9 and 13). However, to be a relevant factor, the bad advice must have been the reason for the delay.

Conclusions

Disability

141. The Tribunal concludes that the Claimant's condition of Multiple Chemical Sensitivity satisfied the definition of disability in Section 6 of the Equality Act 2010. On the Claimant's unchallenged witness evidence, MCS had a substantial (ie more than a trivial) impact on her normal day to day activities. Her potential reaction to airborne chemicals, especially perfumes and deodorants, limited the locations where the Claimant could work in the office, and where she was able use the toilet facilities. On occasions it also impacted on how the Claimant was able to travel to work. Self-evidently it impacted on the fragrances that the Claimant was able to use herself. Although it may have fluctuated in intensity over time, apparently peaking whilst in the Respondent's employment, it was a long-term condition. It had lasted for more than twelve months, in that the Claimant's evidence (which we accept on this point) was that she had suffered from this condition since the age of 18.

Knowledge of disability

142. The extent of the Respondent's knowledge of the impact of the Claimant's condition increased over time. Initially, it had no knowledge of her symptoms, because the Claimant had chosen not to refer to any symptoms when applying for the role, or when first appointed. Thereafter the Respondent's knowledge was limited to what the Claimant chose to share. The first reference to any problem was the Claimant's email of 13 March 2018 worded in terms of her being "very sensitive to certain chemistry of many products [which] has been a rare occurrence and so far only at the end of the day". Subsequently, the Respondent's knowledge was limited to what the Claimant chose to include on the written risk assessment emailed to Ms Caton on 6 April 2018, and what was then discussed with her at the meeting on 17 April 2018. At a later point, the Respondent knew that she was suffering distressing symptoms when colleagues chose to apply perfumes in close proximity to her, and when Brookfield release a chemical product into the ventilation system towards the end of June 2018.

143. However, the Respondent's knowledge of the specific triggers for her symptoms and of the practical steps that it could take to help the Claimant remained limited. This is

because the Claimant chose to be somewhat secretive about the extent of her symptoms and the circumstances in which she experienced difficulties, given the importance to her of her privacy; she refused to allow the Respondent's occupational health department proper access to her medical records such that it was not possible for the Respondent to seek meaningful advice from occupational health; and the Claimant herself did not fully understand her own medical condition and the circumstances in which it could be triggered.

Direct disability discrimination

144. The Tribunal starts by considering the allegations of direct disability discrimination itemised at paragraph 4 of the list of issues.

Allegation (a): *From mid to late February, by various colleagues, reacting in a hostile way when the Claimant asked a colleague if she had reapplied or sprayed perfume*

145. This allegation is not factually proven. The allegation is unspecific and is not sufficiently supported by the documents or by the Claimant's witness evidence. The Claimant has not identified the dates on which these incidents took place, the colleagues alleged to have used perfume, the colleagues who reacted inappropriately to the Claimant's question, and how the reaction was hostile. This is despite the Claimant being asked for further particulars of this allegation by email dated 8 May 2019. There was no response to that request.

Allegation (b): *By the Claimant's manager, Leila Caton, being dismissive in a conversation in February 2018 about the Claimant's medical condition*

146. We do not find that Ms Caton was dismissive of the Claimant in a conversation in February 2018. The Claimant had not complained of any difficulties with airborne fragrances to any manager until March, as we have found above. Therefore, this allegation fails on the facts.

Allegation (c): *By the Claimant's line manager, Laila Caton, denying on 17 April 2018 that the Claimant had previously raised this with her and alleging that the Claimant ought to have raised this with her rather than going to HR*

147. We do not find that Ms Caton said this to the Claimant on 17 April 2018. It is not recorded in the notes of the meeting. Ms Caton had received a completed Special Risk Assessment from the Claimant on 6 April 2018 containing details of the Claimant's condition. In her email in response dated 9 April 2018 she had asked the Claimant for clarification of various matters. In that email, Ms Caton had said, perfectly reasonably, she would have expected these matters to be raised and discussed with her in person prior to the issue of a special risk assessment. Ms Caton's language in this email was appropriate.

148. In any event, she would have treated a non-disabled person in the same way. In circumstances where a health condition potentially impacted on her day to day duties, it was reasonable and appropriate for Ms Caton to ask the Claimant to discuss the impact with her as her line manager in the first instance.

Allegation (d): ***Carrying out the Claimant's mid-term probation meeting and medical risk assessment meeting back to back on 17 April 2018 and thereby linking the two***

149. It was sensible for Ms Caton to undertake both meetings on the same day during the same visit given that they were both topics that needed to be covered with the Claimant. Ms Caton was not based in Aldgate Tower and only visited that office infrequently. The two meetings were kept separate and only one was attended by Robert Pettifar. The juxtaposition of the two meetings did not thereby link the different issues covered by each meeting. The same format would have been adopted for an employee in the same situation as the Claimant who did not have a disability.

Allegation (e): ***By Ms Caton, telling the Claimant "You need to be more like us" at her mid-term probation meeting on 17 April 2018***

150. The Tribunal finds that this was never said. There is no contemporaneous reference to any such comment in the documents. The Tribunal considers that the evidence of Ms Caton, who denied making this comment, is more reliable than the evidence of the Claimant.

Allegation (f): ***By the Claimant's manager Laila Caton, stating at the meeting to discuss the medical risk assessment on 17 April 2018 "We can no longer send you to work in the client's office" because of the Claimant's medical condition***

151. The Tribunal finds that this was never said in these terms. Ms Caton may have been understandably concerned that it would have no control over the working environment in a client's office, but she did not say that this would preclude the Claimant from working for any client. She did not have enough information about the impact of Claimant's condition to be able to make such a decision, and the Tribunal does not find it likely she would have done so without sufficient information.

Allegation (g): ***By Ms Caton, requiring the Claimant to work in an isolated area from 3 July 2018***

152. The Tribunal finds that this was never said. It would be contrary to the Respondent's unwritten agile working policy. The Claimant may be confused with a remark made by Ms Caton in an email on 27 March 2018 that when the Claimant was in the office, she should consider sitting at one of the individual desks facing outwards along the glazing, which were generally quieter.

Allegation (h): ***By Ms Caton, in a telephone call held around 27 June 2018, criticising the Claimant for choosing to sit on the 10th Floor rather than the 16th Floor during a telephone call and by Ms Caton, requiring the Claimant to inform her if the Claimant was working on another floor***

153. The Tribunal finds that this was never said. The Respondent had an agile working policy that enabled employees to choose their work location. In her email communications with the Claimant, Ms Caton showed flexibility in terms of the Claimant's work location, allowing her to choose where she based herself. Ms Caton did not require the Claimant to inform her of the floor on which she was working.

Allegation (i): On 26 June 2018, by Ms Caton accusing the Claimant of being absent without leave and copying three directors into that email

154. When she sent the email, Ms Caton genuinely thought that the Claimant did not have permission to be absent from the office. She had overlooked an email from the Claimant saying that she would be at a client's offices in Folkestone. Ms Caton apologised at the time for this oversight. It was not inappropriate for the Claimant to involve Directors in these communications given that they also concerned the relationship between the Respondent and the building's management company, Brookfield, and the latter's release of a chemical odouriser. The reason for sending the email she did was because of Ms Caton's oversight, rather than because of the Claimant's disability.

Allegation (j): ***On 26 June 2018, by email from Ms Caton, requiring the Claimant to attend Aldgate Tower to work there***

155. This allegation is factually incorrect. On 26 June 2018, in her email, Ms Caton authorised the Claimant to work from home on that date but sought to re-emphasise that the same requirements that applied to other employees about working from home also applied to her, in terms of seeking permission first.

Allegation (k): ***By Mr Michael Lickfold, failing to take the Claimant's request for a new line manager made to Mr Lickfold on 26 June 2018 seriously***

156. The Claimant never asked Mr Lickfold in a telephone conversation for a new line manager, although she may have raised complaints about Ms Caton with Mr Lickfold in a conversation around this time. Had the Claimant asked him for a new line manager in a telephone call and this been refused (as she now alleges), it is likely she would have repeated this request in an email sent shortly afterwards. There was no such email in the bundle of documents, confirming that the request was never made.

Allegation (l): ***By Mr Lickfold, telling the Claimant on or about 26 June 2018 that she should not contact Brookfield to establish what chemical was used at Aldgate Tower***

157. It was entirely appropriate to tell the Claimant that she was not to contact Brookfield herself to enquire with them the chemical properties of the substances they had released at Aldgate Tower. Brookfield had asked the Respondent to ensure that all communications with them came through their usual point of contact rather than from the Respondent's employees in general, and made this clear to the Claimant directly. A non-disabled employee would have been treated identically had that person chosen to contact Brookfield directly.

Allegation (m): ***By Ms Caton, in a meeting on 3 July 2018, accusing the Claimant of misconduct concerning the Claimant's communication with colleagues***

158. Ms Caton did inform the Claimant that she needed to raise the issue of the Claimant's conduct formally at this meeting, given the number of similar instances of her inappropriate communication with colleagues. However, this was not in itself disciplinary action. It was appropriate for Ms Caton to do so, given the extent of the complaints that had been made about the Claimant's conduct in the office. In cross examination, the Claimant accepted that she had behaved loudly and inappropriately in the open plan office area. There is no prima facie case the way in which Ms Caton spoke to the Claimant could

have been influenced by her medical condition. Ms Caton would have chosen to raise the issue of the Claimant's conduct in the same way regardless of her health condition.

Allegation (n): ***By Ms Caton, making working from home a contentious issue. The Claimant alleges that this was an ongoing situation from 17 April 2018, but particularly in a conversation on 2 July 2018***

159. It was the Respondent's policy that employees should work in the office unless they had permission from their line manager to work from home. There was good reason for this, to foster better dialogue between colleagues in relation to particular issues or clients. In the Claimant's case, as an employee still in her probation period where there were genuine and significant concerns about her performance, it was even more appropriate to expect her to be working in the office. Notwithstanding this, Ms Caton showed significant flexibility in permitting the Claimant to work from home on several occasions, even where the Claimant's desire to work from home was only communicated after the Claimant had started the day's work from home.

160. The Tribunal has made findings of fact in relation to the telephone conversation on 2 July 2018. It was the Claimant who behaved inappropriately during that conversation, rather than Ms Caton.

161. For these reasons, the Respondent did not treat the Claimant unfavourably in relation to home working because of her disability.

Allegation (o): ***By Ms Caton, not giving the Claimant further work to do from mid April or May onwards despite the Claimant stating that she had potentially two days per week available to do more work***

162. The Tribunal has dealt with this earlier in these Reasons in relation to its findings of fact. As set out in those findings, the Respondent worked hard to try to identify suitable other work for the Claimant but without success. However, we accept the evidence of Ms Caton that it was difficult to identify suitable alternative projects given the Claimant's performance on her existing projects, concerns about her interactions with clients, and concerns that placing her on secondment would exacerbate her medical condition and make her health worse.

163. The same efforts were made in relation to finding further work for the Claimant that would have been made in relation to a non-disabled employee in an equivalent situation.

Allegation (p): ***By Ms Caton, during the 17 April 2018 meeting to discuss the risk assessment, being angry that the Claimant had not disclosed her medical condition in her job interview and asking the Claimant "why did you not tell me about this medical condition at the interview?"***

164. This allegation is not factually correct. The Tribunal rejects the contention that Ms Caton asked the Claimant this question during the meeting on 17 April 2018. When the Claimant was recruited and had completed the initial paperwork, she had chosen not to declare her health issues. That had continued to be the position until 13 March 2018 and she had not communicated any health issues to Ms Caton in detail until 6 April 2018 after she had already contacted Mr Lickfold. It is evident from Ms Caton's email of 9 April 2018 that she was frustrated at that point that the Claimant had chosen to raise this issue

directly with HR rather than with her as the Claimant's line manager. However, the Tribunal does not accept that she complained in the 17 April 2018 meeting about the Claimant's failure to raise this issued during the initial interview. She had already raised this specific issue in her email to the Claimant on 9 April 2018.

Allegation (q) : ***By Ms Caton, during the 17 April 2018 meeting, asking how often the Claimant would be sick and absent***

165. The Claimant may have misinterpreted the extent of the questions asked by Ms Caton in the meeting on 17 April 2018 as a grilling or unduly intrusive. We do not find that the extent of the questions was inappropriate given that the Claimant condition was complex, and was not a condition that Ms Caton had previously experienced. Ms Caton's questions did not ask the Claimant how often she would be sick and absent, given that this was not in the contemporaneous notes of the meeting. Ms Caton would have questioned a non-disabled person in a similar manner if that person had a medical condition that had an equivalent potential impact on their ability to attend work and carry out full work duties.

Allegation (r) : ***By Ms Caton, during the 17 April 2018 meeting, asking the Claimant "why do you work if you have this condition?"***

166. The Tribunal has found that this was not said. Such an insensitive comment would not, on our assessment, have been said by Ms Caton.

Allegation (s): ***On 24 July 2018, by Ms Caton, telling the Claimant at the end of her six month probation that she may be dismissed***

167. The Tribunal accepts that the Claimant was told she was at risk of dismissal, although the Respondent repeatedly made it clear to the Claimant in communications around this time that she had not in fact been dismissed. Telling her she was at risk of dismissal was appropriate given that she had failed her probation period. Scheduling a further meeting for 27 July 2018 provided her with a fair opportunity to raise specific mitigating features that could have persuaded the Respondent to delay any dismissal decision so she could prove she was capable of performing the role in which she had been employed. The communications on this issue were the same communications that would have been had with a non-disabled employee who had failed their probation period.

Allegation (t): ***On 27 July 2018, by Ms Caton, dismissing the Claimant***

168. The Tribunal finds it was reasonable for the Claimant to be dismissed on 27 July 2018. Her dismissal was not an act of direct disability discrimination. She did not attend the meeting on 27 July 2018, nor had she attended work during the afternoon on 25 July 2018 and the whole of 26 July 2018. She was absent without leave in circumstances where she had been told that she was not dismissed. She had failed her probation period and had not made any representations as to why her employment should be extended, notwithstanding this failure. There are numerous emails in the bundle from clients showing their dissatisfaction with the work for which the Claimant was responsible. In addition, her manner as shown in several emails was brusque and insensitive towards managers and when speaking in those emails of colleagues. Finally, she appeared to be unable to deliver the same volume of work as others at her level who were responsible for 3 or 4 projects compared to the two projects initially allocated to her and the one project she undertook after being taken off the Attleborough project. We find that the only reason for

the Respondent's decision to dismiss are the five matters of conduct and performance listed in bullet points in the dismissal letter. A comparable non-disabled employee would also have been dismissed given similar concerns about their performance and conduct.

Failing to make reasonable adjustments

169. The Tribunal first considers whether the Respondent had the Provisions, Criteria or Practices for which the Claimant contends and if so, whether they placed the Claimant at a substantial disadvantage. It then considers, if the duty to make reasonable adjustments has thereby been engaged, whether there has been a failure to make reasonable adjustments in the present circumstances.

PCP A: permitting members of staff to spray perfumes and deodorants in the open plan office

170. This was a practice adopted by the Respondent. However, the Tribunal does not consider that there is sufficient evidence from the Claimant for the Tribunal to find that this placed her at a substantial disadvantage. Whilst there are occasional emails from the Claimant as noted in our findings of fact, the Claimant has provided no specific evidence as to:

a. The frequency with which employees chose to use spray perfumes and deodorants whilst in the open plan office whilst in close proximity to the Claimant;

b. When so used, the frequency with which she was liable to experience an adverse reaction;

c. If she was liable to experience an adverse reaction, whether or not she was able to remove herself from the affected area and choose to work elsewhere so as to avoid suffering a reaction.

171. As a result, the existence of this PCP cannot form the basis of a claim for discrimination by way of failing to make reasonable adjustments. The duty to make reasonable adjustments has not been engaged.

PCP B: permitting members of staff to wear perfumes and deodorants in the open plan office

172. This was a practice adopted by the Respondent. Again, however, the Tribunal does not find on the evidence before it that the Claimant has established that this practice placed her at a substantial disadvantage. There is no evidence that the Claimant ever complained of suffering an adverse reaction as a result of staff wearing deodorants or perfumes in the open plan office (in contrast to applying or reapplying deodorants or perfumes). The Claimant herself had said in an email on 24 April 2018 that applying perfumes at work was "very different" from wearing perfumes to work.

173. There is no evidence that the Claimant was unable to move desks so that she could avoid working in close proximity to someone wearing strong perfume or deodorants.

PCP C: Permitting members of staff to spray perfumes and deodorants in the accessible bathrooms

174. It is not sufficiently clear to the Tribunal that there was such a practice from staff – the Claimant's evidence before the Tribunal only refers to one instance when this was done. In any event, there is no evidence that this placed the Claimant at a substantial disadvantage. On that occasion, she could have used the accessible bathroom on a different floor. It was as if the first accessible bathroom that the Claimant had tried was occupied by another member of staff, so that she had to find another accessible bathroom on another floor.

PCP D: A requirement that employees work in the open plan office

175. It was a requirement that all employees work in the open plan office, when they were not at client's offices or working from home by prior arrangement. No employees had their own offices. As part of the agile working policy, employees were able to choose the desk at which they worked. They could therefore choose not to sit near anyone wearing particular perfumes or deodorants; or alternatively move away from anyone who chose to work next to her if they were wearing particular fragrances. In addition, if the Claimant saw someone nearby about to apply a perfume or a deodorant, she could always ask them to do so in the bathroom area, or ask them to wait until she had moved elsewhere.

176. Therefore this particular PCP, in its full context, did not place the Claimant at a substantial disadvantage, notwithstanding her health condition. The duty to make reasonable adjustments has not been engaged.

177. As a result, the Tribunal concludes that the duty to make reasonable adjustments has not been engaged here. In case we are wrong, we go on to consider whether if the duty had arisen there would have been a failure to make reasonable adjustments.

Reasonable adjustments in general

178. The Claimant was not willing to agree that the occupational health service should have access to information about her medical position, even if this information was not shared with her employer without her consent. The result was that, quite reasonably, the Respondent decided not to progress an occupational health referral in circumstances where the Claimant was expecting occupation health (and therefore the Respondent) to take her word for her symptoms without any corroboration from the medical records. The Claimant had not provided the Respondent with equivalent health information through an alternative means, such as a letter from her GP or treating consultant. In those circumstances it was not reasonable to expect Respondent to make significant changes to its working practices involving most of its staff to cater for one individual where that person's health need had not been clearly established through potentially available medical evidence.

179. Even during the course of the Tribunal proceedings, the Claimant has not produced medical evidence to support the extent of her symptoms and her need for reasonable adjustments.

Reasonable adjustment (a): Introducing a rule that staff members cannot spray perfumes or deodorants in the office

180. Even if the duty to make reasonable adjustments had been engaged, it would not have been reasonable to have required all staff across each floor to have refrained from spraying perfumes and deodorants in the open plan office in circumstances where she was generally unwilling to identify herself as having the particular condition, and had not identified particular products that were liable to cause her to experience an adverse reaction**.** Given the number of staff working in the building and the importance of respecting their personal autonomy to wear their choice of fragrance, it would have been wholly disproportionate to have introduced such a rule. Some staff may have needed to use chemical products for medical reasons.

Reasonable adjustment (b): Allowing the Claimant to work in an enclosed office

181. This would not have been a reasonable adjustment. As Mr Lickfold stated in his supplementary witness statement, everyone regardless of seniority, was expected to work in an open plan environment in order to create a sense of teamwork and promote the core value of collaboration. There were a limited number of meeting rooms which were in high demand, and allocating the Claimant her own room would have removed a room from being available for use for meetings. In any event, in order to access the meeting rooms the Claimant would have had to walk through the common parts of the building and the open plan office area. Finally, given her privacy concerns, the Claimant was seemingly unwilling to identify her medical condition to the workforce as a whole. Widespread knowledge about her condition would have been the inevitable consequence of her uniquely having her own office.

Reasonable adjustment (c) : Allowing the Claimant to work from home as her health required

182. This would not have been a reasonable adjustment, given the extent of the condition as established to the Tribunal and known by the Respondent. As the Claimant had effectively refused to allow occupational health to carry out a meaningful assessment of the extent of her condition, in practice this adjustment would leave it to the Claimant to self-assess whether she felt well enough to work in the office on any given day, and for how long she needed to remain at home. It would remove any role for Ms Caton as her line manager in assessing whether for work reasons it was appropriate for the Claimant to be working in the office rather than at home. Her role as the Claimant's line manager in determining the Claimant's proper work location on a particular day was particularly important in circumstances where the Claimant was still in her probation period and there were performance concerns. If the Claimant was ill, she should not have been working, whether in the office or at home.

183. In practice, the Claimant had been permitted to work from home as her health required.

Reasonable adjustment (d) : Introducing awareness training for members of staff that spraying chemicals may adversely affect someone else's health

184. This would have been a disproportionate step to have taken without the Claimant first enabling the Respondent to understand the extent of the problem from the Claimant's point of view, in the light of a full and sufficient occupational health assessment or her providing equivalently detailed medical evidence. In addition, there were two features here that made such a proposed step unreasonable. First, the Claimant had never given the Respondent her unequivocal consent that she could be identified to other members of

staff as someone with a particular sensitivity to airborne chemicals, such as perfumes or deodorants – so that those working near her could be mindful of her condition. Secondly, the Claimant had never fully and clearly identified those particular products that were liable to cause her a problem. As a result, of those two features, any such training could not be sufficient targeted so as to be proportionate and effective, whilst permitting sufficient freedom to other employees to use fragranced products for medical or aesthetic reasons.

185. Generic awareness training about chemical sensitivity would not have avoided the disadvantage, if any of the PCPs did place the Claimant at a substantial disadvantage.

Reasonable adjustment (e) : Warning the Claimant before spraying and applying chemicals so she could remove herself from the area before getting sick

186. The fundamental problem with this proposed adjustment is that the Claimant was not willing for herself to be identified as someone with severe chemical sensitivity. She could only be warned if others knew that she had this particular condition. As a result, it would not be a reasonable adjustment.

Reasonable adjustment (f) : Introducing a rule that staff members cannot spray perfumes or deodorants in the accessible bathrooms

187. It had been agreed as part of the risk assessment process that the Claimant would use the accessible bathrooms, rather than the general bathroom. Once this risk assessment had been implemented the Claimant did not subsequently complain that she experienced any difficulties in using the accessible bathrooms. In cross-examination, the Claimant identified in general terms only one occasion on which she was aware that perfume had been sprayed in the accessible bathroom. Insofar as an adjustment had been made, it appeared it was generally effective and did not need to be further adjusted.

Victimisation

<u>Protected act</u>

188. In relation to the alleged protected acts itemised at paragraphs 9(a) to (c) of the issues listed above, only 9(c) amounts to a protected act.

189. We have already found that Ms Caton never asked the Claimant “Why did you work if you have this condition?” during the meeting on 17 April 2018. As a result, the Claimant never responded “If I can’t work who is going to support me? Do I not have the right to work?”. Even if the Claimant had said this, then such a comment would not have come within the statutory definition of a protected act. It was not an allegation, express or implied, that there had been a contravention of the Equality Act. Nor did it amount to doing any other thing for the purposes of or in connection with the Equality Act.

190. The second alleged protected act appears to be a reference to the Claimant’s email to Ms Caton sent at 19:15 on 25 June 2018. This email referred to the symptoms she had experienced as a result of the release of a building wide air freshener used in the public spaces. It asked for Ms Caton to investigate and let her know when it was safe for her to come back to work; and said that she would work from home until she had an assurance that release of the building wide air freshener had been stopped. This was not

an express or implied allegation of discrimination or any other contravention of the Equality Act. Nor did it amount to doing any other thing for the purposes of or in connection with the Equality Act. It was therefore not a protected act.

191. The only alleged protected act that in law amounted to a protected act was the Claimant's grievance filed on 3 July 2019. The grievance contained the following allegation of discrimination:

> "I would like to point out that your comment that I heard during our last meeting "why do you work if you have a chemical sensitivity" is discriminatory. Our relations can only improve when the discrimination and your purposeful actions against me stop."

192. There were no other allegations of discrimination contained in the grievance, whether express or implied.

Detriments

193. As a result of the date of the only protected act, 3 July 2019, earlier alleged detriments cannot have been caused by that protected act.

194. The only alleged detriments occurring after 3 July 2019 which have been proved to have occurred are warning the Claimant that she may be dismissed on 24 July 2019, and dismissing the Claimant on 27 July 2019. No part of the reason for the warning about dismissal and her subsequent dismissal was her grievance of 3 July 2019. As we have concluded above, the Claimant was dismissed for the various reasons set out in the dismissal letter, which had nothing to do with the contents of her grievance and the allegations it contains.

195. Therefore, the victimisation claim fails.

Time limits

196. For the reasons given above, each of the Claimant's complaints fail on their merits. As a result, it is not necessary to consider whether the Tribunal would have lacked the jurisdiction to provide a remedy in relation to some of the Claimant's claims because they were out of time.

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Employment Judge Gardiner
Date: 5 March 2020