Case Numbers: 2201378/2019
2201817/2019

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs E Aylott		BPP University Limited

Heard at: London Central Employment Tribunal

On: 25, 26, 27, 28, 3, 4, 5 March 2020; 6, 13 March 2020 (chambers)

Before: Employment Judge Adkin
Ms CI Ihnatowicz
Mr R Baber

Representations

For the Claimant: Ms H. Platt (Counsel)
For the Respondent: Mr R. Jones (Counsel)

JUDGMENT

The judgment of the Tribunal is that the Respondent did:

(a) Constructively unfairly dismiss the Claimant pursuant to sections 95 and section 98(4) Employment Rights Act 1996;
(b) Unfavourably treat the Claimant because of something arising from disability pursuant to section 15 of the Equality Act 2010 ("EqA").

The following claims do not succeed and are dismissed:

(a) Direct disability discrimination under section 13 of the Equality Act 2010;

(c) Harassment relating to her disability under section 26 of EqA;
(b) Indirect disability discrimination under section 19 of the EqA 2010;
(c) Failure to make reasonable adjustment under section 20 – 21 of EqA.

REASONS

1. By a claims presented on 15 April 2019 and 9 May 2019 the Claimant presented claims of disability discrimination and constructive unfair dismissal, following her resignation on 25 April 2019.

The Issues

2. The issues in this matter were agreed between the parties as follows:

> "Disability
>
> 1. the Claimant suffers from the following mental impairments which have a substantial and long term adverse affect on C's ability to carry out normal day-to-day activities:
>
> a. Autistic spectrum disorder;
>
> b. Anxiety (and related irritable bowel syndrome); and
>
> c. Depression.
>
> 2. the Claimant was disabled over the whole time of her employment with the Respondent and many years before because of her longstanding mental health conditions of ASD, anxiety (and related IBS) and depression.
>
> 3. When did R have knowledge of C's disability? The Claimant alleges that the Respondent had actual knowledge from 1 September 2013. The Respondent denies having knowledge of the Claimant's condition until 14 December 2018, in respect of depression and anxiety, 6 August 2019, in respect of ASD and 13 September 2019, in respect of the anxiety-related IBS.
>
> Jurisdiction
>
> 4. In respect of C's allegations of discrimination predating 02 November 18, did these form part of a continuous course of conduct continuing to that date?
>
> 5. If not, is it just and equitable to extend time?
>
> Direct disability discrimination

6. Has R treated C in the following ways?

a. the Claimant was not offered more than 15 days contractual sick pay. The Respondent accepts that she was not.

b. the Claimant was informed she could not have a phased return to work by Steven Shaw / David Donnarumma on 6 November 2018.

c. C's depression was not considered "life threatening" despite the fact that she experienced suicidal ideation which was known by Steven Shaw and David Donnarumma.

d. In about May 2018 Juliette Wagner said that the Claimant was, "Mad as a box of frogs, but a good worker". The Respondent accepts that the comment was made.

e. Later in about May 2018 David Donnarumma reported Juliette Wagner as having said that the Claimant was, "As mad as a box of frogs".

f. In about October /November 2018 - Steven Shaw rebuked the Claimant by stating that someone of the Claimant's age and experience should be able to prioritise and manage her workload. The Respondent denies that Steven Shaw referred to the Claimant's age or that the comment amounted to a rebuke but otherwise accepts that the comment was made.

g. On 6 November 2018, Steven Shaw stated that many managers were working similar hours within the University and words to the effect of "while this was clearly not their contractual hours, managers routinely worked them to get jobs done as part of their management responsibilities". The Respondent accepts that the comment was made.

h. Whilst the Claimant was off sick because of depression / anxiety she was told by Steven Shaw that she was costing the Respondent £3k per month for being off sick and was made to feel worthless and a burden (2019).

7. If so, in respect of each treatment, was C treated less favourably than an actual or hypothetical comparator? C relies on Simon Atkinson and Ruth Miller as actual comparators in relation to 6a - c above.

8. Was C's disability the reason for any less favourable treatment?

Discrimination arising from disability

9. Has R treated C in the following ways?

a. A complaint was made about her and she was told by Juliette Wagner on about 19 September 2018 during a telephone call to be careful with the tone and wording of emails she was sending. The complaint had been discussed with members of the senior management team, however the Claimant was not provided any specific details or sight of the complaint itself. The fact of the complaint and manner in which it was handled were both distressing to the Claimant who was already clearly suffering under the effects of her anxiety.

b. She was told by David Donnarumma on 19 September 2018 that she was overreacting to the complaint.

c. She was told that she should not say "no" to work requests and she should sound as though she was able to meet demands by Stuart Ansell (Operations Business School) in the Autumn of 2015, and Juliette Wagner on 3 January 2019.

d. She was not referred to Occupational Health in a timely manner (either in 2013 when she completed an Occupational Health Form; or in March 2014 when off sick with low mood; or in Autumn 2015 when she informed Stuart Ansell that her workload was making her ill; or on February 2018 when she disclosed that she was taking antidepressants; or in April 2018 when she told Juliette Wagner of her mental health problems during a telephone call; or in May 2018 following a hospital visit and being advised to reduce her workload; or in August 2018 when Juliette Wagner agreed to reduce her workload; or in June 2018 when David Donnarumma described her as "frazzled"; or in September 2018 when she disclosed to Mr Donnarumma that she was not coping and was drinking alcohol heavily to help her cope with work pressure and to reduce her anxiety levels; or in October 2018 when she was signed off work; or on 5 November 2018 when she disclosed her problems to Mizan Ur-Rahman; or on 6 November at a Return to Work meeting or at any point prior to 23 January 2019) and she should not have had to request such a review.

e. She was not made subject to a risk assessment (either in May or October 2018 or at all).

f. She was not offered any alternatives to a settlement agreement in a sickness review meeting on 6 November 2018.

g. Her sickness absence was not effectively managed, in particular from 6 November 2018 the Respondent did nothing to allow the Claimant's health to recover and did not manage her sickness absence at all.

h. She was informed that there was no phased return to work policy by Steven Shaw / David Donnarumma on 6 November 2018.

10. If so, in respect of each such treatment, was it unfavourable?

11. If so, in respect of each unfavourable treatment, was it because of something arising in consequence of C's disability? C relies on the following as "something":

a. Her reliance on alcohol to manage her feelings of anxiety, her need for adjustments to accommodate her mental health and the stigma of mental health illness;

b. Her reliance on alcohol to manage her feelings of anxiety, her need for adjustments to accommodate her mental health and the stigma of mental health illness;

c. Her need for adjustments to accommodate her mental health and her vulnerability to stress;

d. Her need for adjustments to accommodate her mental health and the stigma of mental health illness;

e. Her need for adjustments to accommodate her mental health and the stigma of mental health illness;

f. Her sickness absence;

g. Her sickness absence and her need for adjustments (including a phased return to work) to accommodate her mental health; and

h. Her sickness absence and her need for adjustments (including a phased return to work) to accommodate her mental health.

12. If so, can R show that the treatment was a proportionate means of achieving a legitimate aim?

13. Did R know, or could R reasonably have known, at each material time, that C had the disability?

Indirect disability discrimination

14. Does/did R have the following provisions, criteria or practices?

a. The practice of requiring managers to routinely work in excess of contractual hours and / or to routinely work 55 – 60 hours a week.

b. The policy of not treating suicidal ideation as life threatening.

c. The sickness absence policy and payment of 15 days' company sick pay.

d. The practice of not having a written phased return to work policy.

15. If so, in respect of each PCP, does it put persons with the disabilities of depression and anxiety and/or ASD at a particular disadvantage when compared with persons who are not disabled?

16. The Claimant relies on the following disadvantage:

a. Exposure to stress, becoming ill and/or suffering a deterioration in mental health due to a consistently heavy workload;

b. Sick pay limited to 15 days for non life threatening illnesses and financial distress (the Respondent avers that sick pay is limited to 15 days in all cases, but can be extended as a matter of management discretion);

c. As above at b;

d. Distress caused by the lack of certainty around returning to work following a period of ill health.

17. If so, in respect of each PCP, did it put C at that disadvantage?

18. If so, can R show that the PCP is a proportionate means of achieving a legitimate aim? In respect of limiting company sick to 15 days, R relies on the legitimate aim of conserving its financial resources.

Failure to make reasonable adjustments

19. Does/did R have the following PCPs?

a. The duties and arrangements of a Student Learning Manager in the Functional Skills Team.

b. The practice of not allowing employees to say “no” to work requests and requiring them to sound as though they are able to meet demands.

c. The practice of requiring managers to routinely work in excess of contractual hours and / or to routinely work 55 – 60 hours a week.

d. The practice of not acting on disclosures of reliance on alcohol.

e. The policy of not treating suicidal ideation as life threatening.

f. The sickness absence policy and limiting company sick pay to 15 days.

g. The practice of requiring personal / direct engagement in grievance and / or sickness absence procedures.

h. The practice of not having a written phased return to work policy.

i. The practice of not considering sabbaticals or reducing the scope of roles.

20. If so, in respect of each PCP, does it put a disabled person at a substantial disadvantage in comparison with persons who are not disabled?

21. If so, in respect of each PCP, did R take reasonable steps to avoid the disadvantage? C alleges that R should have made the following reasonable adjustments:

a. Reducing C's workload and/or providing C with additional support and/or resources and/or ensuring her workload was covered to allow her time off to recuperate;

b. Allowing C to refuse work requests.

c. Ensuring C was not overworked by reducing her workload; monitoring her workload, providing support and resources when they were requested and allowing her to refuse work requests and to ensure that her workload was covered and would be dealt with in her absence to allow her time off to recuperate.

d. Heeding indications that C was not coping, in particular, her disclosures to Mr Donnarumma in about September 2018 that she was relying on alcohol to manage her anxiety, that she was not coping and listening to C's requests for support / resources and her wish to pay for a medical report so the R could understand her ASD and noting the times C was working.

e. Treating suicidal ideation as life threatening and allowing C to draw contractual sick pay for more than 15 days.

f. As above at e.

g. Agreeing to contact C by some other method namely indirectly, via her solicitor or disability advocate.

h. Allowing C to undertake a phased return to work.

i. Reducing C's role, removing some responsibility or allowing her to take a sabbatical.

22. Did R know, or could R reasonably have known, at each material time, that C had the disability?

Harassment

23. Did R engage in the following conduct?

a. In about May 2018 Juliette Wagner said that the Claimant was, “Mad as a box of frogs, but a good worker”. The Respondent admits that the comment was made.

b. Later in about May 2018 David Donnarumma reported Juliette Wagner as saying that the Claimant was, “As mad as a box of frogs”. The Respondent admits that the comment was made.

c. In about October /November 2018 - Steven Shaw said that someone of the Claimant’s age and experience should be able to prioritise and manage her workload. The Respondent denies that any reference was made to the Claimant’s age but otherwise admits that the comment was made.

d. Whilst the Claimant was off sick because of depression / anxiety she was told that she was costing the Respondent £3k per month for being off sick and was made to feel worthless and a burden.

e. On 6 November 2018, Steven Shaw stated that many managers were working similar hours within the University and words to the effect of “while this was clearly not their contractual hours, managers routinely worked them to get jobs done as part of their management responsibilities”.

24. If so, in respect of each conduct, was it unwanted?

25. If so, in respect of each unwanted conduct, was it related to C’s disability?

26. If so, did it have the purpose or effect of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

27. If any unwanted conduct had the effect set out in Issue 26 above, was it reasonable in all the circumstances for it to have that effect?

Constructive unfair dismissal

28. Did R breach the term of trust and confidence as follows?

a. By each act of discrimination and harassment set out above (whether or not it amounts to a breach of the Equality Act 2010).

b. By the time it took the Respondent to provide the appeal outcome.

c. By the appeal outcome not satisfactorily dealing with the Claimant’s concerns or addressing her arguments.

d. By conducting a superficial investigation.

e. By rejecting C's appeal.

29. If so, was any such breach sufficiently serious as to justify C in treating her contract of employment as being at an end?

30. If so, did C resign in response to any such breach?

31. Did C delay terminating her contract of employment so as to affirm her contract of employment or waive any breach?

Wrongful dismissal

32. If C succeeds in showing she was constructively dismissed, she will be entitled to her notice pay.

Personal injury

33. Was C's mental health condition exacerbated by R's discrimination?

Remedy

34. What remedy is C entitled to (if any)?"

The Evidence

3. For the Claimant the Tribunal heard from the Claimant herself and Mr Kevin Sharman.

4. For the Respondent the Tribunal heard evidence from Ms Juliette Wagner and Mr David Donnarumma.

5. We received a bundle of documents containing 1,160 pages contained within three lever arch files. Frustratingly this had been arranged thematically in 16 separate sections, meaning that it is difficult to follow events chronologically without having to navigate around between different sections of the various files.

Adjustments in the hearing

6. To assist the Claimant during the course of the hearing we ensured that we took regular breaks. There were several occasions outside of regular breaks where the Claimant needed time to compose herself which she did either by going out of the hearing room with her sister, who was present throughout, or alternatively by the Tribunal taking a short adjournment.

THE LAW

Constructive Unfair dismissal

7. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

8. It is established law that (i) conduct giving rise to a constructive dismissal must involve a fundamental breach (or breaches) of contract by the employer; (ii) the breach(es) must be an effective cause of the employee's resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.

9. *Fundamental breach* - in this case the Claimant claims breach of the implied term that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer (*Malik v Bank of Credit and Commerce International SA* [1997] ICR 606, per Lord Steyn 621)). In these reasons the terms "serious breach", "fundamental breach" and "repudiatory breach" are used interchangeably.

10. In considering the question of constructive dismissal the primary focus is on the employer's conduct, not the employee's reaction to it. In other words, what amounts to a serious breach is to be judged objectively not by the subjective view of the employee.

11. Merely unreasonable conduct is not sufficient to amount to a serious breach (*Bournemouth University Higher Education Corporation v Buckland* 2010 ICR 908 CA). *Buckland* made clear that attempts to make amends by an employer do not undo a fundamental breach and if an employee chooses to reject the offer to make amends and resign they can still do so. It is open to an innocent employee to waive or accept the breach such that the employee relation continues (per Sedley LJ).

12. It is irrelevant that the employer does not intend to damage this relationship, provided that the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it (*Woods – v- Car Services (Peterborough) Limited* [1981] ICR 666).

13. It is not however enough to show that the employer has behaved unreasonably although "reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach" (Buckland).

14. A finding of discrimination does not automatically lead to the conclusion that there has been a fundamental breach (*Amnesty International v Ahmed* 2009 ICR 1450, EAT, per Underhill P at para 71), however as Underhill P observed:

> "Of course in many if not most cases conduct which is proscribed under the anti-discrimination legislation will be of such a character that it will also give rise to a breach of the trust and confidence term; but it will not automatically be so. The question which the tribunal must assess in each case is whether the actual conduct in question, irrespective of whether it constitutes unlawful discrimination, is a breach of the term defined in Malik"

15. Even where the employer's actions do amount to a repudiatory breach of contract, the employee can only claim constructive dismissal if his or her resignation was caused by the breach. Thus an employee who waits too long before resigning, or otherwise acts in such a way as to indicate that he or she would wish the contract to continue, will be taken to have waived the breach and affirmed the contract.

16. *Last straw doctrine* - in *Omilaju v Waltham Forest London Borough Council* 2005 ICR 481, CA, the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. In *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833; [2018] EWCA Civ 978 the Court of Appeal gave the following guidance as to the approach to be followed (para 55 per Underhill LJ):

> (1) What was the most recent act (or omission) on the part of the employer which the em-ployee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para [45], above.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?

Discrimination

17. *Discrimination* – we have considered guidance on the burden of proof in discrimination cases, in particular as referred to by the Claimant *Nagarajan v London Regional Transport* [1999] IRLR 572, *Madarassy v Nomura International*

plc [2007] IRLR 246 CA, *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. In *Hewage v Grampian Health Board* [2012] ICR 1054, SC in which Lord Hope endorsed the following guidance given by Underhill P in *Martin v Devonshires Solicitors* 2011 ICR 352, EAT:

> "'the burden of proof provisions in discrimination cases… are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent's motivation… they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law'.

18. Regarding *PCP*s, in *Ishola v Transport for London* [2020] EWCA Civ 112, the Court of Appeal confirmed that one off events are not necessarily provisions criteria or practices (i.e. PCPs) and must be examined carefully to see whether it could be said that they are likely to be continuing.

19. Relevant to *time limits*, section 123 EqA provides:

> 123 Time limits
>
> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (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.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) then P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

20. *Time limits for omissions* - in the absence of a deliberate failure to act or an act inconsistent with the failure to do something so as to engage section 123(4)(a),

section 123(4)(b) requires a Tribunal to consider when the act not done might reasonably be expected to be done (*Kingston upon Hull City Council v Matuszowicz* 2009 ICR 1170, CA).

21. Section 15 EqA provides:

> 15 Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

22. EHRC Employment Code suggests that unfavourable treatment should be construed synonymously with 'disadvantage'. At paragraph 5.7 it states:

> 'Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably'

Requirement for a Claimant to put a particular allegation in cross-examination

23. It is an error of law for the Tribunal to make a finding based on a part of the Claimant's case that has not been put to the relevant Respondent witness (*Secretary of State for Justice and anor v Dunn* EAT 0234/16, per Simler P at paragraphs 26-29). In that case the employer successful appealed based on natural justice in relation to the direct discrimination findings on the basis that allegations were not put to the relevant witnesses.

THE FACTS

The Claimant's disabilities

24. The Claimant Mrs Aylott was 50 at the time that her employment with the Respondent came to an end. She had lifelong Autistic Spectrum Disorder ("ASD") (sometimes called Asperger's Syndrome) which went undiagnosed until diagnosis on 30 July 2019. By September 2018, the Claimant herself clearly thought that this was a possibility and had raised this with the Respondent. Her sister had raised this possibility with her historically.

25. Dr Kathryn Newns, Clinical Psychologist in her report dated 5 December 2019 gave the following opinion about the Claimant's diagnosis:

> "Depressive order with anxious distress (recurrent, mild to moderate); adjustment disorder with mixed anxiety and depression (reactive to stress at work) and generalised anxiety disorder…
>
> Since February 2018 she has experienced a clinically significant mental health disorder…
>
> Her underlying anxiety is secondary to ASD. When her depression and anxiety worsen to clinically significant levels it is difficult for her to distinguish her depressive symptoms from anxiety. When her mental health is poor or she is very anxious, her ASD traits are more severe"

26. The Claimant is intelligent, hard working and plainly had a sense of humour. In common with some other high-functioning people with ASD she was able to "mask" the symptoms, meaning that she was generally able to present to colleagues as "neuro-typical". She made friendships with colleagues. Manifestations of ASD were in the main subtle. She occasionally demonstrated naivety navigating the politics of the Respondent organisation and occasionally her communications were abrupt, particularly when she was under pressure.

History

27. The Claimant originally trained as a physiotherapist, but had to leave this job because of an injury to her back after a serious injury in 1991 resulting in spinal fusion.

28. In mid-1990s the Claimant suffered from a period of depression which was triggered by back pain. She suffered from a period of post-natal depression in 2006-7. She continued to suffer back pain. She was prescribed Citalopram, an anti-depressant at this time.

29. In August 2007 the Claimant's husband died and her grief was noted by her GP. She continued to take Citalopram for years after this point at a comparatively low dose and continued to report depression and back pain from time to time to her GP.

Work for the Respondent

30. In 2009 the Claimant started working as an associate lecturer for the Respondent. Her areas of specialism included Human Resources and Employment Law.

31. In February 2013 it was noted by the Claimant's GP that she was under lots of stress from working overtime. She was on 10mg of Citalopram and drinking three glasses of wine to help her stop work and sleep.

32. On 17 May 2013 the Claimant filled in health declaration form as part of an application for a permanent position with the Respondent, which was received by the Respondent on 20 May. The significant aspects of this form are:

> Do you have any physical or mental impairment that could be classed as a disability under the Equality Act 2010? Answer: Yes
>
> You regularly take tablets or medicine? Answer: Yes codyromol [a reference to Co-dydramol which is paracetamol and codeine] and citropram [a reference to citalopram, which is an antidepressant]
>
> I was a physiotherapist. Injured back. Medically retired at 21 years. Had spinal fusion. Left with a degree of chronic back pain manager by a v. Low-dose of painkillers. I also take a low dose of antidepressant since my husband died.
>
> Do you suffer from any of the following… Anxiety, depression or any other nervous complaint? Answer: yes

Early Employment History with the Respondent

33. On 1 September 2013 the Claimant commenced employment by the Respondent as a Lecturer.

34. In response to the medical declaration, on 20 September 2013 Tracey Seymour, HRBP wrote to the Claimant asking her to let her know if she had problems with either her back or depression. The Claimant responded the same day to say that if she felt she needed any help she would be in touch. She made reference to physio and the back condition but no reference to the depression at all.

35. Between 28 March 2014 -11 April 2014 the Claimant was signed off work for nine days by her GP with “low mood” and “not fit to work” due to problems outside work. At that time on 28 March 2014 an offer of ‘Employee Assistance’ made by Samantha Lavelle, Faculty Manager. This is a confidential helpline.

36. On 7 April 2014 the Claimant resumed work on altered hours under GP certificate which recorded “has low mood which has affected her work and home situation”.

37. In April 2014 the Claimant’s teenage son was diagnosed with ME.

38. In approximately August September 2014 the Claimant’s then line manager Stuart Ansell briefed Kevin Sharman, a recently promoted Faculty Manager that the Claimant’s home circumstances were “complicated” and that she was “vulnerable”. No mention of a disability was made, nor any suggestion of ASD. We heard evidence from Mr Sharman, who was called by the Claimant as a witness.

39. On 16 October 2014 the Claimant asked two colleagues for feedback to help her with a performance appraisal. Jennifer Park’s replied by email stating that the Claimant was hard working and was friends with many people and that she wanted

to be "perfect" in her work. She said that she was emotional and sensitive and overshared about her personal life. She also cautioned in respect of workload management about repeatedly saying "yes" and highlighted that she should raise it if the workload was too much.

40. In August September 2015 Kevin Sharman became the Claimant's line manager for a short period. He gave evidence to the Tribunal that this experience led him to conclude that what he had been told about her personal circumstances being complicated and her potential vulnerability were accurate. He observes however that these matters did not impact on her work. He kept a watching brief. He maintains that he "would have" handed this assessment of the Claimant to her new manager Mrs Juliette Wagner, but does not have a precise recollection of this. We find that any handover in this respect was limited. He did not make an OH reference. We find that there was not an obvious need to refer at this time.

41. In November 2015 the Claimant was depressed and her GP recorded that she was "very busy with 2 jobs in London + home life".

Student Learning Manager

42. On 1 December 2015 the Claimant was promoted to Student Learning Manager, reporting to Mrs Wagner. The Tribunal finds that the two of them established a rapport over some shared experiences. Each of them had significant domestic responsibilities as single parents and had children who were suffering significant health problems. They each had experience of bereavement. Given that both frequently worked remotely, the communication was often by telephone and Skype. We note Mrs Wagner's evidence that she had a high opinion of the Claimant and found her hard-working and intelligence with a brilliant sense of humour, with friends at work and well-liked. The Claimant said during the grievance process she "had liked" Mrs Wagner. It seems unfortunately that these friendly relations between these two cooled towards the end of the Claimant's employment with the Respondent.

43. We note Mrs Wagner's evidence that the way that the Claimant presented during the hearing in front of us, anxious and at times overwrought, was different to her ordinary workplace persona for the majority of the history of working for the Respondent.

44. Mrs Wagner has experience of autism. She has an autistic son. She worked for a number of years on a doctorate relating to autistic spectrum disorder, albeit in an educational rather than a clinical setting.

45. In the period March-May 2016 the Claimant experienced depression and stress which she related to a "busy work life". Her son's ME was noted by the GP.

46. In Summer 2016 Ishan Kolhatkar joined the team as the Deputy Dean of Education Services. The Claimant found this addition to the team difficult, and felt somewhat threatened by Mr Kolhatkar's relationship with Mrs Wagner and the fact that he was given some of "her" responsibilities with what she regarded as inadequate

consultation, whereas Mrs Wagner considered that this was another person to share the workload.

47. On 9 January 2017 the Claimant was diagnosed with anxiety and depression.

Long hours culture & flexible working

48. In 2017 the Claimant was involved with a coordination group for a National Student Survey. Mr Shahban Aziz, Head of Student Experience, Operations wrote to various members of this group including the Claimant and Mrs Wagner a lengthy email which included the following comments on the Claimant and the team:

> "Liz has brought energy and vigour to the NSS team with support from an L&T and Schools perspective as well as speaking at staff conferences and calculating and sending out the weekly updates for a three month period which is no easy task. These are just a couple of the many dozens of skills and achievements of each member of the team. Every member of this NSS team works seven days a week and I have seen so much work from you on weekends – I acknowledge and appreciate all the work you do and I know that others do to. Anwar is currently working which (sic) in Poland, James has worked none-stop (sic) since the student away day, without exaggeration I've been working at least 60 hour weeks every week whilst in my four years at BPP and Liz I have seen the work you do from the very last email at night to the first in morning… … I don't know what happened between 3pm and midnight but there seems to be a flurry of emails over an action plan that won't be created until after we get the results on Friday…"

49. The Tribunal find that there was a 'long hours' culture amongst the management team of which the Claimant was part. It is clear that emails were sent from early in the morning to late at night and on weekends and that this was normal.

50. We also find that the Claimant in common with a number of her senior colleagues worked a significant number of days from home and that there was a degree of flexibility which enabled domestic and other responsibilities to be blended in during the working day. One of the results of these working practices was that for the Claimant it was difficult to 'switch off' from working or thinking about work.

Claimant's performance

51. The Claimant was clearly highly regarded by her colleagues, even taking account of the somewhat effusive writing style of Mrs Wagner. On 2 August 2017 Mrs Wagner wrote to the Claimant "you are such a clever lady and a hard worker and an all round thoroughly decent person. X"

52. In November 2017 the Claimant received a positive appraisal from Mrs Wagner:

> "Liz is a very gifted author and writes excellent report for the Board and Academic Counsel. Liz has a great deal of expertise around retention and assessment and we are seeing the benefits of this expertise in the project Liz is running for us. This plays an instrumental role in getting us ready for our upcoming QAA visit. Liz is 100% dependable and extremely capable. Liz is a pleasure to have in our team and I hope I can work with her to nurture and refine her skills in order for her to build a leadership career within the HD sector. I have complete faith in Liz's ability to lead and implement projects across the University and I know she always delivers to the highest standards and is always punctual."

The Claimant's other work

53. In 2017 and the early part of 2018 the Claimant was working in her own time of a revision of a book entitled "Employment Law". We infer that this was more than simply a superficial revision. The Claimant told the publisher that it "really improved the book". On 10 February 2018 she handed in the proofs of this work to the publisher. After this point there was further proofing to be done as well as obtaining endorsements. The process of working on a book must have required a substantial number of hours' work to be fitted in around her other commitments. We accept the Claimant's evidence to the effect that the Lion's share of this work was completed by February 2018, but there was some work from this point onward.

54. The Claimant also carried out marking for the Respondent's business school. This was outside of her contractual responsibilities and she was paid separately, in essence as a freelance lecturer.

Claimant's anxiety about rumours of restructure

55. In mid-November 2017 the Claimant attended an away day with the Respondent. The Claimant was told by a colleague to consider looking for a job as she had heard that there would be a restructure of Education Services. In the event this did not come to anything and appears to have been nothing more than workplace gossip. We accept however that at the time it caused the Claimant significant anxiety. Mrs Wagner told the Tribunal that she had also heard the rumour

56. The Claimant mentioned her concern to Ihsan Kolhatkar. This was escalated up the management line with the result that the Claimant's second line manager Tim Stewart rang her on her mobile to attempt to reassure her.

Business School induction

57. The Claimant was involved in putting together a three day induction for the Respondent's Business School which took place on 23, 24 and 25 January 2018. She started this work in October 2017. She was in sporadic email correspondence with Sarah McIlroy, Dean of the Business School in the period 30 November to 12 January about the content of Ms McIlroy's 15 minute welcome to incoming students. Initially Ms McIlroy seemed surprised that the Claimant was involved

preparing the Business School's induction. Despite the Claimant chasing Ms McIlroy it was only on 12 January that the latter raised concerns that the content of the whole three day timetable on the basis that it did not align with the school's strategy and approach. On the same day the Claimant write to Ms McIlroy:

> "We have been working on this since the autumn. In the HE landscape session I am covering the corporate dimension, Stuart will be mentioning apps, financial services and online. Any more that you wish to add cannot be added for this induction.
>
> I am sorry Sarah but I have been working on getting the induction together since October and this is my last available day to complete it."

58. The Claimant had run out of time because she was due to be on holiday the week commencing 15 January 2018.

59. Ms McIlroy's response was polite and she acknowledged her own fault for not having looked at the matter earlier. She suggested that the material be reviewed before the next induction .

60. Mrs Wagner had been copied in on the email exchange and wrote a separate email to the Claimant on 12 January with the title "Please be careful"…

> "I don't want us to come across as unhelpful. I know you've put a lot of work in here but we are a service to them and the last person I want to upset is Sarah M."

61. The Claimant contends that this was an instance where she was being told that it was inappropriate to say no. We accept that this is the way she may have interpreted it. In our view, objectively, the message being communicated was more nuanced. Mrs Wagner was acknowledging the work that the Claimant had done and was urging caution in appearing not to be responsive to a concern raised by Sarah McIlroy, the Dean of the Business School. The comment "the last person I want to upset" was clearly because of the seniority of this individual. We find that this was guidance that was expressed in a reasonable way.

62. Mrs Wagner told the Tribunal that her view was that steps could have been taken within the Department to try to address some of Ms McIlroy's concerns, and this did not necessarily need to be done by the Claimant. If that was her thought process, that is not clear from the short email she sent on 12 January 2018.

Graham Geddes meeting planned then cancelled

63. On 2 February 2018 the Claimant arranged a meeting with Graham Gaddes the Respondent's CEO. Mr Gaddes was CEO of the Respondent and was three levels above the Claimant in the reporting line.

64. The Claimant said that she felt that there was a disconnect between the way Mr Gaddes was being described by her immediate superiors and a video presentation

she had seen him deliver. She her told second line manager Vice Chancellor Tim Stewart "it is not meant to go above either you or Juliet, but I wanted him to know that I'm keen to be part of BPP University". Mr Stewart replied in quite direct terms "I am sorry but I don't think it is appropriate or sensible".

65. Following on from this the Claimant initially tried to cancel the meeting, although ultimately it did take place.

Meeting with mentor

66. On 9 February 2018 the Claimant met her mentor Professor Lynn Gell, Dean of the School of Nursing.

67. We have not received detail evidence about this discussion. We infer that the Claimant continued to feel sidelined, in part because of appointment of Mr Kolhatkar and Mrs Wagner's reallocation of responsibilities.

68. The Claimant says that Ms Gell said that this was constructive dismissal, and that she should talk to both HR and Juliette Wagner to try to resolve this.

69. The Claimant was away from work and sat as a non-legal member of the Reading Employment Tribunal in the period 5-8 February 2018.

70. The Claimant then spoke to Steven Shaw (HR Business Partner) on 9 February 2018. Mr Shaw asked her whether she thought it was constructive dismissal. The Claimant did not answer. He told her that some managers need to be managed, and that the Claimant should speak to Mrs Wagner. He made the point that managers would take away work if an employee was not performing well.

Graham Geddes meeting

71. On 22 March 2018 the Claimant had a meeting with Mr Geddes. At this stage the Claimant felt reassured and looking forward to being able to fully contribute to the future of BPP.

72. The Claimant seems to have recognised in retrospect that to arrange and press ahead with this meeting was politically naïve, insofar as it caused concern in the minds of the two layers of management above her. She did not fully appreciate this at the time. We accept that this may have been a manifestation of her ASD.

Move to functional skills – April 2018

73. In April 2018 a decision was taken to second the Claimant to 'Functional Skills'. This was to support David Donnarumma, the Associate Dean Education Services in administration of the Respondent's provision of basic levels of English and Maths.

74. In respect of this move Mrs Wagner wrote on 18 April 2018 to the Claimant and Mr Donnarumma "Liz is going to be the fairy godmother". It was not suggested by the Claimant that she interpreted this slightly curious comment in a negative way.

Based on Mrs Wagner's generally positive comments about the Claimant in a professional context, we think the appropriate interpretation is that the Claimant was going to be seconded to an area, Functional Skills, that was somewhat unloved and needed a transformation.

75. On 20 April 2018 the Claimant's secondment to Functional Skills commenced.

76. On 23 April 2018 the Claimant told Mrs Wagner about her symptoms of anxiety. The Claimant suggests that she was telling Mrs Wagner about mental health problems. Mrs Wagner appears to have related what she was being told to the pressure that the Claimant was under domestically. Mrs Wagner apparently offered to coach the Claimant to help her manage anxiety in meetings, although in fact this did not materialise. Also in this telephone call Mrs Wagner explained why Mr Kolhatkar was taking certain responsibilities, namely that he was "better with negotiation, getting on with other men, and his degree in IT provided him with digital skills expertise". Mrs Wagner wanted the Claimant to specialise in student retention.

77. Mrs Wagner admitted to us that by April 2018 she was aware that the Claimant was taking antidepressants.

Working for David Donnarumma

78. Although the Claimant continued to report formally to Mrs Wagner, during her secondment to Functional Skills, she had a 'dotted line' reporting line to Mr Donnarumma. It is clear that the Claimant felt that she developed a close friendship with Mr Donnarumma and that the breakdown of her employment relationship and the bringing of proceedings has caused her considerable distress.

79. At around the time of the Claimant's secondment in April 2018 Mrs Wagner told Mr Donnarumma that the Claimant was "mad as a box of frogs but a good worker".

80. The pattern of long hours and working outside of conventional hours continued. On 7 May 2018, at 08:20 on a Bank Holiday Monday Mr Donnarumma wrote requesting assistance with marking from the Claimant. She wrote back at 09:42

> "I cannot get to this today but will tomorrow. I am marking for the business school today – they always seem to need me and I find it hard to say no."

81. The reference to business school marking was to work which we understand fell outside of the Claimant's contractual responsibilities.

82. Mr Donnarumma repeated to the Claimant that Mrs Wagner had said that the Claimant was "mad as a box of frogs but a good worker". We heard conflicting and somewhat confused evidence in the Tribunal hearing as to the timing of this comment, which Mr Donnarumma admits he repeated to the Claimant.

83. The Claimant's pleaded case was that this happened in May 2018, although her oral evidence was that this was in June or July.

84. Ms Platt on behalf of the Claimant explored with Mr Donnarumma in cross examination whether in fact he had made the comment twice and on the second occasion in response to the Claimant raising the possibility that she had Asperger's syndrome. We consider that if this had been true, this would have been highly likely to have been highlighted in the Claimant's grievance or claim. The Claimant was experienced in matters of employment law and has plainly reflected carefully on the events in the last year of her employment. When the Claimant says that she "reflected on the comment", we find this was a reflection on a comment made some time earlier. She does not put her claim on the basis that this comment was said by Mr Donnarumma twice, which would have been notable had it happened.

85. The Tribunal finds that Mr Donnarumma repeated this comment in May 2018 and the Claimant reflected on it later. We do not find it was said in response to the Claimant raising the possibility that she had Asperger's syndrome.

Work pressure

86. The Claimant was involved in producing a report for the Department of Education which was submitted on 25 May 2018. She felt under pressure as a result of this. On 23 May 2018 she suffered from pain along her left arm and chest which she thought were symptoms of a heart attack. She attended A&E. It seems however that these triggered by anxiety and would be better characterised as a panic attack. She was advised to reduce her workload.

87. The Claimant spoke to Mrs Wagner by telephone and apologised for her "hypochondriac nature" and said that it was because she was tired and slumping at the computer as she worked. Mrs Wagner was given the impression that it was a musculo-skeletal problem. We find that she was entitled to take this at face value based on what she was told.

88. On 26 May 2018 on the Saturday of a bank holiday weekend Mr Donnarumma wrote to the Claimant at 09:21 wrote to her requesting that she go back and sort out some data. The Claimant wrote back that afternoon "I can look at something over the weekend but trying to "chill" or work on the apprenticeship".

89. On 27 June 2018 in an email exchange in the evening Mr Donnarumma told the Claimant that he wasn't feeling 100% and referred to the stress caused by a freelancer in the team dropping out. The Claimant was sympathetic in response and offered to deputise or support saying "I have an understanding of how you might feel".

Examination administrative error

90. At the end of June 2018 it came to light that the Claimant had some months earlier made an administrative error regarding the timing of an examination which resulted in a maths exam paper not being provided. Sarah Oram, the Programme Lead Investment Operations at the Respondent's Apprenticeship School complained to Mr Donnarumma by email. Her complaint related to the Claimant's attitude to the situation rather than the mistake. In an email dated 28 June she said "I do

appreciate we are all under pressure in our roles, however we still need to remain professional".

91. Mr Donnarumma wrote to Mrs Wagner that day "Liz was exhausted and frazzled. I've told her to rest and that we can't do everything."

92. Mrs Wagner replied "Oh dear poor Liz".

93. That evening at 22:52, the Claimant wrote to Mr Donnarumma regarding a request that had been made to her by a member of the Respondent's apprenticeship team:

> "FYI – why I find this stressful: below. … I have drafted a number of emails to Juliette and you, but deleted them. I am feeling unsupported by Juliette – she needs to know the mess we are in, to be prepared for complaints as we are unresponsive to internal and external clients (a little) as we work out who the hell our students are.
>
> Outside of work life is very hard for me (but less hard than many) and you and your team give me most of what a good relationship at work would do. You make me laugh, when Jack [her son] is unlikely to get better soon; you make me forget, when I am lonely; you all do so very much – not what you are paid for but valued the less.
>
> Rest.
>
> Thank you."

94. Mr Donnarumma replied the following morning, Friday 29 June at 05:54

> "Liz, hi,
>
> I know, I do understand.
>
> FS [functional skills] – you can't do everything. We can't do everything. It's going to take time to sort out.
>
> 1. It is just work.
>
> 2. The learner comes first.
>
> 3. any complaints, I will deal with, that why I am here.
>
> 4. I will support you in this, if we need Juliette, we will ask her.
>
> You have a tough home life, as there is just you to care for a number of people. I get that.
>
> TODAY YOU REST AND LEAVE WORK.
>
> D"

Workload in Summer 2018

95. The Tribunal accept the Claimant's evidence that in the Summer of 2018 she was working 55 – 60 hours a week, including work at weekends and evenings.

96. The Claimant took 2-10 August as holiday. She was due to have a further 7 days holiday. During the Summer the Claimant discussed with Mr Donnarumma their objectives to be achieved in August. He was due to fly abroad on holiday in August at the same time that she was due to be away. After discussing this with him she cancelled the holiday that she had planned to take in August and instead worked from home.

97. On 20 July 2018 Mrs Wagner intervened when it was suggested by her deputy Mr Kolhatkar that the Claimant was at risk of losing holiday days when the next annual leave year commenced in September. She requested that 5 days were carried over "as she has worked such long hours and many weekends through the year and I did promise to fix this".

98. The Claimant continued to carry out teaching for the Respondent's Business School on a 'freelance' basis for which she invoiced outside of her contract of employment. She had teaching responsibilities to teach 1 ½ hour sessions on 31 July, 7, 21 and 28 August teaching remotely from home. Domestically, as well has her son being unwell, her father's health deteriorated during 2018 (sadly he eventually died in October 2019). It seems to us likely that the Claimant's mother, who provided some help domestically, would have had to spend more of her efforts assisting with her husband's care.

99. In August 2018 Mrs Wagner says that she offered the Claimant part time working on the basis that she'd not had the support at home she'd previously had and her son was worse. Mrs Wagner said that her own manager had made a similar offer to Mrs Wagner herself to go part-time. She said that she didn't consider that the Claimant was at crisis point but that she thought this was a helpful offer if the Claimant's support network had diminished. Nothing appears to have come of this.

100. On 12 September 2018 the Claimant had an email exchange with a member of teaching staff in which she encouraged him to seek advice about the possibility that he had Asperger's syndrome. She told him that her nephews and brother-in-law had it and that "we are all somewhere on the spectrum". She admitted to him that she had "mental health and dyslexia issues". Dyslexia has not formed part of the case presented to the Tribunal, but we infer from this email exchange that the Claimant was closely evaluating her own mental health and the possibility that she had ASD at this time.

The September "complaint"

101. On 12 September 2018 Mrs Wagner received an email from James Hammill, Director of Apprenticeships at the Respondent. This email was referred throughout the hearing as "the complaint".

102. It is clear that the complaint was a pivotal matter in the Claimant's perception of a breakdown of the relationship with her employer. In her oral evidence the Claimant repeatedly queried when asked about various events whether these were before or after the complaint.

103. Mrs Wagner's evidence to the Tribunal was that the complaint was about the Claimant being rude to a client on a webinar. In reality this appears to have been one of a number of concerns being raised about the Claimant by another department within the Respondent which was a 'client' of her department.

104. These concerns had been raised with Mr Hammill by Laura Hopwood, Head of Programme Design in BPP Apprenticeships. Her email also of 12 September 2018 reads

> "Please see attached recent examples of functional skills issues as discussed, I've not watched the full webinar yet (on train and keep losing connection). I'm just concerned about Liz as it clear that she isn't coping and some of these conversations are in front of associate staff to which is not really professional."

105. Attached to this email were 47 pages of emails, much of which could be, broadly speaking, characterised as the Respondent's programmes team making requests on behalf of learners and the Claimant "pushing back" on behalf of the functional skills team on the basis of workload, other pressures (including her non-contractual marking responsibilities) and on the basis that her team is being asked to do things that others could do. Her tone was in some cases abrupt and it clear that she felt under pressure.

106. For example, on 10 September 2018 in an email to Mr Donnarumma, Nadia Nasir, Susan Lawson (programme team) the Claimant explains the pressures on the functional skills team. In another email the Claimant was abrupt in tone with Ms Hopwood (programme team). She refers to workload being intense and suggesting that learners can do things themselves rather than requiring the involvement of the Claimant's team.

107. A further example was on 11 September when the Claimant says that she is not able to reply to a matter because she is marking and mentions that she will be marking into the evening on a holiday day. She complains about having to mark and "continue to abandon any holiday", which we infer is a reference to cancelling one of her two periods of holiday in August. Also in an email exchange within the programmes team, it seemed that a client Unilever, had expressed some concerns about the amount of time that they are waiting for notification of results. It was suggested that 20 days was too long to wait.

108. In an email on 12 September 2018 Sarah Oram, Programme Lead Investments Operators wrote

> "Liz [the Claimant] was almost manic on the phone conversation, I appreciate that they are understaffed, however we all still need to remain professional. When I spoke with David Donnarumma he said that Liz was "frazzled" and wasn't really that concerned

> and he did try to offer a solution, which I had to action with C&G [City & Guilds] myself.

Consequences of the complaint

109. Mrs Wagner forwarded the complaint of 12 September to Mr Donnarumma on 19 September 2018 with the line "Tim [i.e. Stewart, Vice-Chancellor] has taken it very seriously and I need a plan. Please could you review."

110. We infer from her oral evidence and this email that Mrs Wagner did not consider the detail of the complaint at any stage.

111. In the afternoon of 19 September 2018 Mrs Wagner told the Claimant that a complaint had been made against her. She was told her to be careful of the tone and wording of emails. The email of complaint was never forwarded to the Claimant however, nor were the details ever shared with her.

112. The plan that evolved was to smooth things over rather than meaningfully discuss the matter with the Claimant or consider whether there was a more fundamental problem. We find that this approach was expedient rather than malicious.

113. The effect on the Claimant however was significant. She had worked extraordinarily hard under some pressure, particularly during the Summer of 2018. She was now told that there was a complaint about her but not given any specifics, and not given the chance to defend herself or to explain herself.

114. On 19 September 2018 the Claimant was feeling angry and frustrated. She wrote at 19:30 to Mr Donnarumma

> "at the moment I think that I will be requesting my 9 days leave and time of[f] in lieu to cover about 4 hours each evening for the last month from Monday. I may feel differently but this is what BPP owes me."

115. He replied "Please leave your email and rest. I understand. We can speak tomorrow. D."

116. A few minutes later the Claimant wrote to James Newton in the Respondent's learner support function (copying Mr Donnarumma), that she thought she has Asperger's syndrome and

> "I have not wanted to go anywhere near this, but now seems to be the time, though I am not sure I am brave enough to."

Work pressure and drinking

117. On 19 or 20 September 2018 the Claimant informed Mr Donnarumma in a telephone call that she was not coping and that she was drinking alcohol to help her cope with work pressure. Mr Donnarumma said that the Claimant was overreacting. The Claimant said that she was drinking too much and said this is what BPP [the Respondent] has done to me. The Claimant's evidence to the

Tribunal was that she was drinking 4 – 5 gin and tonics every night to "self-medicate". We accept that the Claimant did flag up that she was drinking too much to Mr Donnarumma at this time, but do not consider that she told him that she was drinking during the day, which appeared to be the way that her claim was being put in the Tribunal hearing. Daytime drinking was not suggested by her oral evidence, nor by the references to drinking in the contemporaneous documentary evidence. The Claimant told Dr Chris Cull in her examination by him on 30 July 2019 that drinking held her "stop working", by implication at the end of the working day.

118. It was around this time that the Claimant reflected on the "mad as a box of frogs comment" and wondered if there was some truth in it.

119. The Claimant took sick leave on 20 September 2018 but had two telephone calls on that day with Mr Donnarumma.

120. On 20 September 2018 AT 13:14, Mr Donnarumma wrote in an email to Mrs Wagner:

> "Liz is very upset, a number of issues (senior people thinking bad of her, tired, workload, home). I think she will rest now, and I will sit and talk things through next week and tomorrow. We have an interim and longer term plan.
>
> She did want to know who, and what etc, but I explained this was not important – emphasised we need her to stay with us, we don't want to lose her.
>
> She is tired and lonely, Juliet, and fills her life with work, I think."

121. A bit later at 15:43 Mr Donnarumma wrote to Mrs Wagner

> "Spoke to her again. Feeling better, Lamprini replacement will help. Have sorted out some support, and spoken to various people in apprenticeships, who are fully supportive of Liz (shared this with her). Taking today and Friday as sick days and will be there on Monday.

122. Mrs Wagner wrote back to Mr Donnarumma "well done you deserve the Nobel Peace Prize".

123. On 26 September 2018 Emily Oswald, Head of Group Apprenticeship Operations acknowledged that there had been tensions between the teams but referenced a more positive working relationship and in particular thanked the Claimant. The Claimant responded to Mr Donnarumma and Mrs Wagner

> "Thank you for passing this on, today of all days [it was an Ofsted inspection]
>
> To two good colleagues and great friends
>
> Lx"

Ofsted inspection

124. Mr Donnarumma's written evidence was that an Ofsted inspection was announced on 28 September 2018 and that there was very little preparation that could be done. We find that this is inconsistent with the contemporaneous evidence.

125. On 24 September 2018 Mr Donnarumma wrote to the Claimant and a colleague Mr Blanco "Ofsted is coming in Wednesday and Thursday. Help!!!!"

126. The Ofsted inspection actually took place on 26-27 September 2018.

127. We accept the Claimant's evidence that it was "all hands to the pumps". She worked on making sure that her department's data matched that which was on the Self-Assessment Report (SAR) which OFSTED would view. She helped provide information to a Skills Development Coach whose call with a learner was going to be observed.

128. In an email sent at 06:42 on 26 September (i.e. the day before the inspection) Mr Donnarumma thanked the Claimant for "all your support yesterday". In short therefore, we find that there was work to be done and that the Claimant assisted with it.

Sick absence

129. On 30 September 2018 the Claimant requested a psychological assessment from Dr Emma Cosham, a Chartered Clinical Psychologist.

130. Mr Donnarumma arranged for Mark Kidd to start supporting the Claimant from 1 October 2018 onward. In fact she seems to have been off sick during the first week of October.

131. On 4 October 2018 the Claimant sent an email to Christopher Costigan, Associate Dean Partnerships about an upcoming City & Guilds inspection

> "I like you very much Chris, but must [not?] try to expect you to be an expert in everything! I also will need to try to hide my anxiety so that it is less noticeable to others …. I have a challenging personal life and though happy to do it I have I believe worked too hard over the summer – neither of these will change in the foreseeable future" [671]

132. In an email dated 6 October 2018 (a Saturday) the Claimant wrote to Mr Donnarumma about cover:

> "David, I am working today because I have to cover work from yesterday and that was only one day off. We are chronically understaffed and this has affected my health."

133. By 8 October 2018 the Claimant was off sick and wrote:

> "I David
>
> I am going to take today off with stress and call the Dr to make an appointment. I will join the board this afternoon….
>
> … Someone will need to cover functional skills while I am off – I am not sure how long I will be signed off for - I have copied Juliette as she is my manager and Avril as you are busy with the Phoenix project. Sorry"

134. Also on 8 October 2018 Mr Donnarumma wrote to Avril Wood in the FS team

> "Liz is struggling personally and professionally at the moment, so we need to work out how to support. Mark is doing 15 hours per weeks of support. I think we are going to need Dave to do some extra support. If we get someone else in to help they will be new and temporary."

135. Again on 8 October 2018 an email was sent to the Claimant from a resource planner in the School of Business and Technology Resourcing with regard to some sessions that were being cancelled. The Claimant responded on 9 October 2018 to say that she was off sick.

136. On 10 October 2018 the Claimant emailed Mr Donnarumma stating that she was resting (she was still on sick leave), but dated that

> ".. But there are a couple of worries I have. I am resting but concerned that I will return to work with a great deal to catch up with and there will be no extra support. I will need to know what is in place to stop me being ill again. I am also worried that this mental health issue will be seen as weakness, as will any mistake I have made while understaffed and the exceptional circumstances of the report for DoE report, Pics final list, Ofsted and then City & Guilds over the summer, will not be taken into account. I need to know my mental health will be protected"

137. Mr Donnarumma wrote to the Claimant on 11 October 2018 in an email entitled 'FOR WHEN YOU ARE BACK' "When you get back, and we draft a ML description for FS. I have suggested Mark picks up 20-hours a week if needed".

138. On 15 October 2018 the Claimant signed off by her GP as only being fit for 2 – 4 hours' work per day. The dosage of sertraline that was being prescribed to her was increased to 200mg per day.

139. On 18 October 2018 Mr Donnarumma wrote to the Claimant:

> "Have asked Dave to cover what you are away. Mark is freelancing for us. A little slow, but getting there. Have put in for permanent extra help, let see. Admin coming and we have Mark. Get well please and don't worry."

140. On 19 October 2018 wrote with an update to Mr Donnarumma reporting "heightened anxiety" and the steps she is taking to try to reduce this.

141. On 21 October 2018, at a time when she was supposed to be working a maximum of 4 hours a day the Claimant emailed about work related matters at 22:43 on Sunday night.

142. On 24 October 2018 the Claimant was signed off until 16 November by her GP as being fit for work for only 2 hours per day "stress".

143. On Saturday 27 October 2018 the Claimant wrote to Mr Donnarummar and Mrs Wagner in the context of a request by Kevin Couplant, Head of the Apprenticeship School for some management information from the FS team:

> "If I am going to be able to protect my mental health on return I need to have the ability to say "no". I have not replied again to Kevin, as I leave this to David to boot. David this is non-negotiable until we have another person as well admin.
>
> I am not going to be convinced by David that it will be better when I am back and we have two days of admin. If I cannot say "no" then I will not be safe in this environment. Juliette you asked what I needed. I need to be listened to and asked not to promise things that are not possible."

144. On 29 October 2018 the Claimant reported not feeling well enough to work today and feeling anxious.

Telephone call with Steven Shaw

145. On 29 October 2019 the Claimant had a telephone call with Steven Shaw, HRBP, following her email request for this.

146. Mr Shaw told her that someone her age and experience should be able to prioritise and manage their workload. Save for the reference to the Claimant's age, the Respondent admits that these words were said. Mr Shaw did not give evidence to the Tribunal. We have heard the Claimant's evidence, which we accept on the point in dispute.

Panic attack

147. On 30 October 2018 the Claimant drove to the Respondent's office in Shepherd's Bush. She says she had a panic attack while driving. It is notable that despite being in email correspondence with Mr Donnarumma the following day the Claimant did not make any reference to this, although she did tell him in an email sent at 21:29 that she was thinking about completing work over the weekend, in contravention of her GP's recommendation.

148. Mr Donnarumma forwarded the Claimant's email of 1 November 2018 Steven Shaw and Juliette Wagner stating

> "I am a little concerned here about what to do…. We originally agreed Liz would work between 10 and 12 (2 hours everyday as agreed with her GP. She is now working much later in the evening, and I am concerned. I have put extra staff in place to support her being on sick leave. It is making it difficult for everyone to work like this. I would like to advise her to rest, and we can pick things up now, but I am apprehensive about how to proceed, and the knock-on effect onto Liz.
>
> Please can you advise."

Contractual sick pay

149. On approximately 3 November 2018 Mrs Wagner decided that the Claimant should not be offered contractual sick pay in excess of 15 days based on the fit notes saying "stress"

150. She justified this in her oral evidence as a decision taken 'holistically'. However, it was clear from her evidence that she took this decision in advance of the meeting on 6 November 2018 at which the Claimant gave more detail of her health difficulties including suicidal ideation (dealt with below). What she did not do is reconsider that decision once it had been relayed to her that the Claimant was experiencing health difficulties and reporting suicidal ideation.

151. On 4 November 2018 the Claimant wrote to Mr Donnarumma in an email that she needed to be left alone to recover quietly.

152. Mr Donnarumma replied "If you are not well enough to attend, then you shouldn't. I have copied in Steven from HR, to see what he thinks."

153. On 4 November 2018 the Claimant requested a referral to Occupational Health ("OH") to Mr Donnarumma, Mrs Wagner, Dave Blanco and Steven Shaw:

> "I really just want to see OH. And I feel that I need to defend my reputation, to say that this could have happened to anyone working at this intensity and that I have done much more than would be expected of anyone. …
>
> Then I can rest, knowing I have said what I needed to, perhaps (certainly) in a poor way, but hopefully understood. Please listen as though I like you I feel that you do not listen or hear me, or I am long-winded or unclear, and cannot get that message across. …
>
> I will talk to my GP tomorrow and hope that I am well enough to get my information to you and to work towards returning – I STRONGLY want return to BPP, I have enjoyed working with BPP and want very much to continue to make a positive difference"

154. On 5 November 2018 the Claimant had a call with Mr Mizan Ur-Rahman (HR). She told him that she was not coping and that she was drinking alcohol excessively

to cope with work pressure. The Claimant told him that she would be prepared to accept a reduction for a reduced role.

Sickness review meeting 6 November

155. On 6 November 2018 the Claimant attended a Sickness review meeting with Mr Donnarumma and Mr Shaw. There is a significant dispute between the parties as to what was said.

156. The Claimant produced a two page note of this meeting on 11 November 2018.

157. Mr Shaw produced a note of this meeting, a draft of which he sent to Mr Donnarumma for approval on 3 December 2018. Mr Donnarumma did not amend or produce his own notes. Mr Shaw sent it to the Claimant on 6 December 2018 a month after the meeting. The Claimant contends that this was materially inaccurate and only produced after her solicitor wrote letters on 23 and 26 November 2018. We have only seen the second of these as the first contained 'without prejudice' proposals.

158. Mr Donnarumma's oral evidence to the Tribunal was that there was a decision taken at the meeting to refer the Claimant to Occupational Health after the meeting. This is at odds with Mr Shaw's note which Mr Donnarumma did not challenge which suggests that the Claimant was offered a referral to Occupational Health but she confirmed that she was receiving counselling already and thanked them for the advice. We also find it was unlikely given the content of Mr Shaw's letter of 6 December 2018 which said:

> "We will some point need to consider a referral to Occupational Health if you decide not to take up the early intervention service, for their recommendations on how we can support you to return to work."

159. It seems unlikely that if a decision had been taken to make a referral to Occupational Health Mr Shaw would have written in such terms. We are therefore left with two possibilities. Either occupational health was not mentioned at all (the Claimant's case), or alternatively it was mentioned but the Claimant said she was already receiving counselling. That latter possibility seems unlikely given that the Claimant had written two days earlier that she wanted to see OH (see above). The Claimant raised in her grievance on 11 January 2019 "I wanted to ask to see Occupational Health, but this was not offered".

160. We find that the following matters were said at the meeting:

160.1. Mr Shaw told the Claimant that there was no phased return to work policy. This was despite the fact that she was on a phased return to work at this time.

160.2. Mr Shaw told the Claimant that she would only receive 15 days' full pay and discretion would not be exercised to extend sick pay with the result that she would only receive statutory sick pay after 15 days.

160.3. The Claimant told them that she had been working 55 – 60 hours a week. Mr Shaw said that many managers were working similar hours routinely to get jobs done, but there were peaks and troughs. The Claimant disagreed with this.

160.4. The Claimant said that she had suffered a breakdown, felt over-loaded and could no longer cope. She mentioned being a widow and raising two children. Mr Shaw suggested that her feelings of stress were based on her perception, Mr Donnarumma had made various supportive interventions and there were various 'external factors'.

160.5. The Claimant said that she was experiencing suicidal thoughts and that the statutory sick pay of £80 per week was not enough. The Claimant said that she had experienced panic attacks while driving, which is why she had asked her Vicar to drive her to the meeting and he was waiting to take her home. She made a reference to contemplating deliberately crashing the car to stop how she was feeling. When this was queried she said that this was a thought she'd had the previous day and she would not do it [797].

160.6. Mr Shaw proposed a settlement agreement and re-engagement as a contractor unprompted neither by the Claimant nor by Mr Donnarumma. The Claimant was distressed at the prospect of losing her employment.

161. We find that there was no reference to an OH referral in the meeting.

Further sick absence

162. On 16 November 2018 the Claimant was signed off as being unfit for work for 4 weeks with "anxiety with depression".

163. On 21 November 2018 the Claimant received an email from Rhiannon Webb, Head of the Respondent's Operations and Recruitment about a DBS check.

164. On 26 November 2018 the Claimant's solicitor wrote a letter to the Respondent requesting that arrangements could be made to redirect calls for the Claimant from staff or students.

165. The Claimant had a Psychological Assessment on 26 November 2018 with Dr Emma Cosham, a Chartered Clinical Psychologist.

166. On 26 November 2018 Mr Shaw expressed alarm about the final tone of an email sent by the Claimant to Ms Webb which said among other things "I will miss you". He wrote "it might just be a badly worded email from her, given her state of mind, would prefer to check".

167. In response to the Claimant's email to Ms Webb, Mr Shaw called asked her whether she was resigning.

December 2018

168. On 10 December 2018 Mr Shaw called the Claimant and left a message on her mobile.

169. On 14 December 2018 the Claimant signed off work for a further two months, again citing 'anxiety with depression'. The Respondent accepts that it had knowledge of the Claimant's condition of depression and anxiety at from point.

170. By a letter dated 18 December 2018 Mr Shaw wrote to the Claimant confirming that a deduction was being made from her pay for the period where she had worked less than her contractual hours.

Grievance

171. On 11 January 2019 the Claimant submitted a grievance referring explicitly her disability and her rights under the Equality Act 2010 and specifically (i) a breach of section 15; (ii) a failure to make reasonable adjustments; and (iii) victimisation. She referenced suicidal thoughts. She wrote "Both Juliette Wagner and David Donnarumma were kind, considerate and tried to support, but the 'can do' culture and wish to protect me from HR influenced their decisions".

172. In respect of sick pay she wrote "I believe I was treated differently because my issue was a mental health issue". She wrote "I was relying on alcohol to support me".

173. Ms Joanna Preston-Taylor, Director of Business Improvement was appointed to hear the grievance, with the help of Catherine Baxter (HR).

174. On 16 January 2019 Ms Baxter wrote to the Claimant purportedly offering to refer the Claimant "again" to OH, which in the assessment of the Tribunal mischaracterises the content of Mr Shaw's letter dated 6 December 2018, since the reference to the 'early intervention service' in that letter quite clearly related to an insurance policy relating to Canada Life rather than the Respondent's OH service.

175. By an email dated 20 January 2019 the Claimant suggested that it was very late in the day to send her to OH. She requested her solicitor be an intermediary for correspondence.

176. In an email to Ms Baxter dated 24 January 2019 the Claimant changed her position regarding the involvement of Occupational Health:

> "I do not feel an OH referral will be beneficial to me at this stage, and in fact believe it will be detrimental to my health. However I am willing to look at the details of how an OH referral could be made so I am reflect on whether it is something that I could manage."

177. By a letter dated 31 January 2019 the Claimant's GP wrote to the Respondent to request that all communication be directed via her solicitor because direct contact

was causing the the Claimant to have panic attacks, increased anxiety and suicidal ideation.

178. On 1 February 2019 the Claimant contacted ACAS for Early Conciliation.

Occupational Health referral

179. On 6 February 2019 the Claimant was finally referred to Occupational Health by Ms Baxter, leading to an examination 12 February 2019. Gillian Gladwell, an Occupational Health Advisor concluded that:

179.1. The Claimant had a severe depressive illness with anxiety and panic attacks for which she was under the care of her GP and a clinical psychiatrist and was on medication. This did amount to a disability falling under the Equality Act 2020. There were thoughts of self-harm and suicidal ideation. She was drinking relatively heavily.

179.2. She had significant and long term mental health issues, most of which stemmed from the tragic and sudden death of her husband in 2007. Additional causes of personal stress were the ill health of her son and her elderly father who was at that time in hospital, "but it also appears that there is allegedly, a significant work related component to this as well".

179.3. She had been struggling with her work for some time. She felt unsure of her role. She was working longer and longer hours and had become mentally and physically exhausted.

179.4. She was not currently fit for her role. Her return to work was likely to be dependent on the investigation and result of the grievance.

179.5. She could not communicate directly with the Respondent in relation to her grievance but could via writing or a representative to attend meetings on her behalf.

Cost of Claimant's absence

180. On 27 February 2019 Mr Donnarumma wrote an email to Ishan Kolhatkar which indicated that the Claimant's absence was costing £3,000 per month from October amounting to approximately £12,000 to date. This email was not sent to the Claimant at the time, but she subsequently read it as part of a Subject Access Request which she received on 20 March.

Investigation of the grievance

181. Mr Donnorumma was interviewed by Ms Preston-Taylor in a telephone call on 28 February 2019. The basis of this appears to be a handwritten single page on which approximately a dozen questions are written. We do not appear to have received the answers given by Mr Donnarumma.

182. The equivalent list of questions for Mrs Wagner contained six questions. Her answers have not been supplied to us.

183. The Claimant supplied written responses as part of the grievance investigation on 28 February 2019. She wrote

> "I believe that Juliette Wagner was concerned about me, but that her prior experience of HR was that they very readily offered to remove employees. I believe that she thought she was protecting me"

184. Ms Preston Taylor interviewed Mr Shaw and Mr Blanco on 7 March 2019.

185. By a letter dated 8 March 2019 the Claimant's grievance was rejected. Ms Preston-Taylor concluded that:

185.1. First, at no stage had the Claimant requested an Occupational Health referral from her line manager. This was factually incorrect since on 4 November, two days before the Sickness Review Meeting the Claimant had requested "I really just want to see Occupational Health" in an email to Mr Donnarumma, Mr Shaw and Mrs Wagner.

185.2. Second, the Claimant had not been treated differently to Ruth Miller and Simon Atkinson. In fact however, it seems that both of these individuals had received the benefit of discretionary contractual sick pay after 15 days absence, in contrast to the Claimant.

Grievance appeal

186. On 11 March 2019 the Claimant appeal against the grievance outcome. She requested a transcript of Ms Preston-Taylor's interviews. These notes should have formed part of disclosure, given that the adequacy of the investigation was in issue between the parties. Such notes as were produced were provided on last day of the Tribunal hearing and only when expressly requested by the Tribunal.

187. The grievance appeal letter specifically highlighted that the Claimant's solicitor had already highlighted that she did not continue to receive phone calls from staff and students on her mobile phone, yet she continued to do so.

188. On 11 March 2019 Mr Donnarumma immediately wrote to staff and students asking them not to contact the Claimant whilst she was off on sick leave.

189. On 13 March 2019 the Claimant was signed off work for a further month with anxiety with depression.

190. On 15 March 2019 the ACAS certificate was issued.

191. The Claimant was provided with details of other employees who had received discretionary sick pay in an email dated 3 April 2019 from Mizan Ur-Rahman (HR). The reasons given in these cases were:

191.1. November 2018 – full pay for 13 weeks for hernia operation and sepsis;

191.2. November 2018 – breast cancer full pay ongoing with 2 monthly reviews;

191.3. November 2018 – full pay for 3 days following a heart attack;

191.4. November 2018 – full pay for 4 months for stress given that her husband had throat cancer;

191.5. January 2019 – full pay for 6 weeks for preventative cancer operations.

192. On 10 April 2019 Garry Buick updated that Claimant that he was carrying out an investigation of the grievance appeal.

193. The Claimant submitted her first claim to the Employment Tribunal on 15 April 2019.

194. In mid-April 2019 the Claimant was receiving phone calls from Exam Centre staff. Mr Shaw wrote an email on 17th April requesting that they made contact with others instead.

195. On 23 April 2019 there was an outcome to the grievance appeal. The outcome was to reject the appeal, and specifically the Claimant's criticism that the original grievance investigation had been a "superficial" review. The conclusion appeared to acknowledge that the Claimant had been under pressure with a significant workload and long hours. This was seen as being the background to elements of the Claimant's role being allocated to others to attempt to manage the Claimant's workload. The final conclusion was "Having reviewed and discussed the nature of this complaint my opinion is that it is now best dropped."

Resignation

196. In a letter dated 25 April 2019 the Claimant resigned. In a letter that was little over four pages of fairly close type she complained of discrimination and many of the allegations which are now the substance of her claims.

197. On 9 May 2019 the Claimant submitted a second claim bringing a claim of constructive unfair dismissal.

CONCLUSIONS

Disability & Respondent's knowledge

198. [**Issue 1**] C suffers from the following mental impairments which have a substantial and long term adverse affect on C's ability to carry out normal day-to-day activities:

198.1. Autistic spectrum disorder;

198.2. Anxiety (and related irritable bowel syndrome); and

198.3. Depression.

199. C was disabled over the whole time of her employment with the Respondent and many years before because of her longstanding mental health conditions of ASD, anxiety (and related IBS) and depression.

200. [**Issue 3**] When did R have knowledge of C's disability?

201. The Claimant alleges that the Respondent had actual knowledge from 1 September 2013.

202. The Respondent denies having knowledge of the Claimant's condition until 14 December 2018, in respect of depression and anxiety, 6 August 2019, in respect of ASD and 13 September 2019, in respect of the anxiety-related IBS. The IBS has not been a feature of this case and we therefore do not need to resolve this part.

203. Based on the telephone conversation between the Claimant and her line manager Mrs Wagner on 23 April 2018 (considered in the context of the level of communication between the two at that stage) we find that the Respondent from this point in time onward had knowledge of the Claimant's taking anti-depressants and symptoms of anxiety and depression.

204. In respect of the Claimant's Autistic Spectrum Disorder, we note that the Claimant did not receive any formal diagnosis until 30 July 2019, which was significantly after her employment had come to an end. To the extent that she may have had suspicions, we find that the Claimant was adept at masking the symptoms outside of periods of particular stress. This masking was referred to by the Claimant herself in her oral evidence but also by Dr Cull in his report dated 20 August 2019 following an assessment on 30 July 2019 [162].

205. We find that based on the Claimant's email to her "dotted line" manager Mr Donnarumma on 19 September 2018 in which she raised the possibility of that she had Asperger's syndrome, the Respondent was on notice of and had constructive knowledge of the Claimant's ASD from this point onward.

Jurisdiction

206. [**Issue 4**] In respect of C's allegations of discrimination predating 02.11.18, did these form part of a continuous course of conduct continuing to that date?

207. The Claimant complains about:

207.1. Alleged failures to refer her to Occupational Health in 2013, in March 2014 and in Autumn 2015 (Issue 9d);

207.2. Stuart Ansell (Operations Business School) in the Autumn of 2015 (Issue 9c).

208. Matters in 2013-2015 are very significantly out of time. We do not find that there are continuing acts to bring these matters in time.

209. As to the harassment claim and the 'mad as a box of frogs' comment made by Mrs Wagner in May 2018 and repeated around that time by Mr Donnarumma, we do not find that that there was a continuous course of discriminatory conduct which connects this to the actions of Mr Shaw in November 2018.

210. [**Issue 5**] If not, is it just and equitable to extend time?

211. The Tribunal has a wide discretion to extend time under section 123 EqA (*Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 ICR 1194, CA). There is an onus on a Claimant to convince a Tribunal that it is just and equitable to extend; the exercise of this discretion is the exception rather than the rule (*Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, CA).

212. The Claimant has at all material times had personal expertise in employment law. In respect of that the earlier period this is not a case in which she has discovered matters about which she was unaware at the time, nor a situation in which the Respondent concealed matters. Considering all of the circumstances, we do not find that it would be just and equitable to extend allow the Claimant to bring claims about matters in 2013-2015 that are very significantly out of time.

213. Turning to events in 2018, and particularly the "box of frogs" comment made about her and then repeated to the Claimant in May 2018. The three month time limit expired in August 2018 for events in May 2018. We have taken account of the fact that the Claimant did not reflect upon the significance of this comment until September 2018. Had the claim been presented in September or very shortly thereafter, there might be an argument for a short extension.

214. The Claimant waited however until 1 February 2019 to commence the ACAS early conciliation process and presented her first claim on 15 April 2019. The onus is on a Claimant to show why time should be extended. No particular good reasons have been advanced in this case why the claim was presented late respect of matters in May 2018, nor particular reasons why we should extend time. The Claimant had expertise in employment law. We can see from the correspondence that she had instructed a firm of solicitors by 23 November 2018.

215. There is inevitably prejudice to the Respondent caused by delay. Although the Respondent's witnesses have been able to give evidence about this comment, the degree of confusion over the timing and context of Mr Donnarumma repeating the "box of frogs" comment suggests that memories have faded.

216. We do not find, considering all of the circumstances, that it would be just and equitable to extend time.

Direct disability discrimination (section 13 EqA)

217. [**Issue 6**] Has R treated C in the following ways? [**Issue 7**] If so, in respect of each treatment, was C treated less favourably than an actual or hypothetical comparator? Used this C relies on Simon Atkinson and Ruth Miller as actual comparators in relation to 6a – c. [**Issue 8**] Was C's disability the reason for any less favourable treatment?

218. These three issues are dealt with together for convenience under each allegation below.

219. [**Issue 6a**] C was not offered more than 15 days contractual sick pay. It is not in dispute that the Claimant did not receive more than 15 days contractual sick pay.

220. Was this because of the Claimant's disability? We do not consider that the reason for this treatment was the Claimant's disability. This was the decision of Mrs Wagner. She appears to have been sceptical about whether the Claimant's sickness absence was because of a disability, and found it difficult in her oral evidence to the Tribunal to acknowledge that the Claimant had symptoms which might amount to a disability. She characterised the depression as merely a reactive sadness to events.

221. The Respondent's policy is only to pay contractual sick pay for longer than 15 days in "exceptional circumstances". The stated reason by the Respondent for not exercising the discretion to pay the Claimant contractual sick pay for longer than 15 days was that her condition was not deemed to be life-threatening. Mrs Wagner said that it was a decision taken "holistically"

222. In any event, while this decision on the part of Mrs Wagner might be criticised, we do not think it could be characterised as "because of" the Claimant's disability.

223. We note that the "comparators" in this case are included in a list of five individuals who did receive the exceptional benefit of contractual sick pay for longer than 15 days. The first individual had hernia operation and developed sepsis. This person may or may not have been disabled. The second individual with breast cancer was disabled. The third individual who suffered a heart attack may have been disabled, although this is not entirely clear. The individual who suffered stress because her husband had throat cancer was probably not disabled herself although her husband obviously would be. The individual undergoing preventative cancer operations may not be disabled if they did not have cancer, although they would be disabled if they already had cancer. This comparative exercise does not lead us to the conclusion that disabled or nondisabled status is the reason why decisions were being taken generally within the Respondent in respect of discretionary sick pay.

224. As to the question of "life threatening", on the Claimant's own version of the discussion on 6 November 2018 reference to suicidal ideation was qualified by her and explained to be a thought she had had the day before, she clarified "I would not do it". We do not consider therefore that this should be characterised as life-threatening in the same way as post-operative sepsis or cancer is in the case of other employees who did receive contractual sick pay.

225. We do however find that this decision, and the failure to reconsider the decision following the meeting on 6 November 2018 did contribute something to the fundamental breach of contract see below.

226. [**Issue 6b**] C was informed she could not have a phased return to work by Steven Shaw / David Donnarumma on 6 November 2018.

227. The grievance appeal outcome contained an acknowledgement of sorts that the communication on this point had not been clear. The Respondent's policy appears to be that there is no standard return to work policy, but that each case is dealt with on its merits. The information given by Mr Shaw on 6 November 2018 was incorrect insofar as the Claimant was already on a phased return to work.

228. We do not find that this miscommunication or poor communication about the policy in itself was sufficiently serious to amount to less favourable treatment. In any event we do not find that it was because of the Claimant's disability.

229. [**Issue 6c**] C's depression was not considered "life threatening" despite the fact that she experienced suicidal ideation which was known by Steven Shaw and David Donnarumma.

230. We repeat the comments under issue 6a about the comparators and the question of "life threatening" above.

231. We do not find that this amounted to less favourable treatment because of disability.

232. [**Issue 6d**] In about May 2018 Juliette Wagner said that the Claimant was, "Mad as a box of frogs, but a good worker". [**Issue 6e**] Later in about May 2018 David Donnarumma reported Juliette Wagner as having said that the Claimant was, "As mad as a box of frogs".

233. The Respondent accepts that these comments were made. We consider that these comments should properly be considered as harassment under section 26 EqA rather than direct discrimination, but are in any event are out of time.

234. [**Issue 6f**] In about 29 October 2018 - Steven Shaw rebuked the Claimant by stating that someone of the Claimant's age and experience should be able to prioritise and manage her workload.

235. The Respondent denies that Steven Shaw referred to the Claimant's age or that the comment amounted to a rebuke but otherwise accepts that the comment was made.

236. We consider that this was a crass and insensitive comment made to an employee who was plainly at this stage struggling and was unwell. We do not consider however that this comment was made because she was disabled. On the contrary it was a comment made with a lack of awareness as to the Claimant's disability.

237. We do however find that this comment did contribute something to the fundamental breach of contract below.

238. [**Issue 6g**] On 6 November 2018, Steven Shaw stated that many managers were working similar hours within the University and words to the effect of "while this was clearly not their contractual hours, managers routinely worked them to get jobs done as part of their management responsibilities". The Respondent accepts that the comment was made.

239. Again, this may be an insensitive comment to have made at this time, although no doubt Mr Shaw regarded it as plain speaking to point out that other managers were typically working in excess of their contractual hours. As we have found above, there was a culture of working long hours amongst managers.

240. We do not consider however that this comment was made because she was disabled. We find that it was a comment that he might have made to a nondisabled colleague.

241. We do however find that this comment did contribute something to the fundamental breach of contract below.

242. [**Issue 6h**] Whilst the Claimant was off sick because of depression / anxiety she was told by Steven Shaw that she was costing the Respondent £3k per month for being off sick and was made to feel worthless and a burden (2019).

243. While the cost of the Claimant's absence was referred to in an email to which she was not a party, we have not received sufficient evidence from which we could conclude that Mr Shaw made this comment directly to the Claimant. The Claimant has not satisfied the initial burden of proof on her.

Discrimination arising from disability (section 15 EqA)

244. [**Issue 9**] Has R treated C in the following ways? [**Issue 10**] If so, in respect of each such treatment, was it unfavourable? It is convenient to take these issues together.

245. [**Issue 11**] If so, in respect of each unfavourable treatment, was it because of something arising in consequence of C's disability?

246. The structure of the agreed list of issues is that allegations 11a, 11b, 11c etc describe the 'something arising in consequence of the Claimant's disability' which correspond to the alleged unfavourable treatment described at 9a, 9b, 9c respectively. Accordingly we have considered cause and effect together in each case.

247. [**Issue 11a**] Alleged 'something arising': Her reliance on alcohol to manage her feelings of anxiety

248. While we accepted the Claimant's view that the Claimant was drinking too much on occasions we are not satisfied that this should be characterised as "reliance on alcohol". She was drinking too much at the end of the day. This could be 'something arising'.

249. [**Issue 9a**] Alleged 'unfavourable treatment': A complaint was made about the Claimant and she was told by Juliette Wagner on about 19 September 2018 during a telephone call to be careful with the tone and wording of emails she was sending. The complaint had been discussed with members of the senior management team, however the Claimant was not provided any specific details or sight of the complaint itself.

250. A complaint was made about the Claimant following which Mrs Wagner did tell the Claimant to be careful with the tone and wording of emails that she was sending. It is clear that Tim Stewart the Vice Chancellor was taking this seriously and had communicated as much to Mrs Wagner. The Claimant was not provided with any specific details or sight of the complaint itself. She did find the fact of the complaint distressing. The way it was handled was to essentially seek to brush the whole matter under the carpet, fail to engage with the details of the complaint and fail to give the Claimant the opportunity to understand or answer the allegations being made against her. Mrs Wagner acknowledged during the Tribunal hearing, having understood from the Claimant's evidence the effect on her, that the Claimant should have been given the opportunity to see the complaint.

251. On balance we find that the failure to allow the Claimant the opportunity to see the complaint or defend herself was unfavourable treatment.

252. Causation: We were not satisfied on the basis of the evidence we heard that this was because of use of Claimant's use of alcohol at all. Our finding is that, whether due to apathy, their own overwork, or lack of curiosity, Mrs Wagner and Mr Donnarumma did not engage with the detail of the 'complaint'. We do not consider that the Claimant's use of alcohol was any part of this.

253. We do however find that this contributed to the fundamental breach of contract.

254. [**Issue 11b**] Alleged 'something arising': Her reliance on alcohol to manage her feelings of anxiety, her need for adjustments to accommodate her mental health and the stigma of mental health illness

255. Our conclusions on reliance of alcohol above under Issue 11a can be repeated here.

256. As to the need for adjustments and stigma of mental health, we do not consider that at this stage that other of these matters played a part in Mr Donnarumma telling the Claimant that she was overreacting. His approach of playing down the complaint and smoothing things over was not connected to adjustments nor to stigma of mental health.

257. [**Issue 9b**] Alleged 'unfavourable treatment': She was told by David Donnarumma on 19 September 2018 that she was overreacting to the complaint.

258. While the specific comment about overreacting may have been well meant in the sense that Mr Donnarumma was trying to minimise the significance of the complaint, this was a manifestation of the approach described under Issue 9a, which was a failure on the part of Mrs Wagner or Mr Donnarumma to engage with

the detail of the complaint, which was more fundamental than a single comment made in a webinar.

259. We did not consider that the Claimant has demonstrated a connection between alcohol and Mr Donnarumma's treatment.

260. [**Issue 11c**] Alleged 'something arising': Her need for adjustments to accommodate her mental health and her vulnerability to stress.

261. Given that we did not find that Issue 9c (below) was unfavourable treatment, it is not necessary to consider this issue further.

262. [**Issue 9c**] Alleged 'unfavourable treatment': She was told that she should not say "no" to work requests and she should sound as though she was able to meet demands by Stuart Ansell (Operations Business School) in the Autumn of 2015], and Juliette Wagner in January 2018.

263. We have found that events in 2015 are out of time and we have not used our discretion to extend time.

264. We do not accept that the Claimant was told in terms that she could not say no to work requests. The actual communication from Mrs Wagner in January 2018 was far more nuanced. When she said "the last person I want to upset is Sarah M" she was plainly highlighting to the Claimant that it was politically unwise to upset the Dean of the Business School. This is not the same as saying that the Claimant could not say no.

265. We do not find that this amounted to unfavourable treatment.

266. [**Issue 11d**] Alleged 'something arising': Her need for adjustments to accommodate her mental health and the stigma of mental health illness

267. We consider that by September/November 2018 the Claimant did have a need for adjustments of some sort. She was not coping, and occupational health input was required.

268. [**Issue 9d**] Alleged 'unfavourable treatment': She was not referred to Occupational Health in a timely manner (either in 2013 when she completed an Occupational Health Form; or in March 2014 when off sick with low mood; or in Autumn 2015 when she informed Stuart Ansell that her workload was making her ill; or on February 2018 when she disclosed that she was taking antidepressants; or in April 2018 when she told Juliette Wagner of her mental health problems during a telephone call; or in May 2018 following a hospital visit and being advised to reduce her workload; or in August 2018 when Juliette Wagner agreed to reduce her workload; or in June 2018 when David Donnarumma described her as "frazzled"; or in September 2018 when she disclosed to Mr Donnarumma that she was not coping and was drinking alcohol heavily to help her cope with work pressure and to reduce her anxiety levels; or in October 2018 when she was signed off work; or on 5 November 2018 when she disclosed her problems to Mizan Ur-Rahman HRBP; or on 6 November at a Return to Work meeting or at any point prior to 23 January 2019) and she should not have had to request such a review.

269. The Tribunal has found that events in 2013-2015 are out of time. We have not exercised our discretion to extend time. We do not find that events in 2018 represent a continuing omission such that time should run from 2013 as submitted by the Respondent. The circumstances changed and different people were involved. We consider that the decision not to refer in September and November 2018 represented new omissions given the new developments at these points in time.

270. It is accepted by the Respondent that it did not refer the Claimant to OH at any time before 6 February 2019. On 24 January 2019 the Claimant stated, "I do not feel an OH referral will be beneficial to me at this stage, and in fact believe it will be detrimental to my health". The Claimant also stated in cross-examination that if she had been referred to OH at any time, it may well have made her suicidal.

271. Referrals to Occupational Health, particularly in cases of mental health may be very unwelcome and may have the effect of damaging relations between managers and employees. The potential sensitivities are alluded to in the Respondent's grievance appeal outcome letter. There is in our assessment however a point at which the signs of a mental health problem are so clear that a referral must be made. In our assessment that point was reached around 19/20 September 2018 due to the information the Claimant disclosed to Mr Donnarumma including that she was drinking heavily and she was concerned that she might have Asperger's.

272. On 6 November 2018 there was also a point at which it was obvious that an Occupational Health referral should be made. We come to this conclusion not least because the Claimant had requested such a referral on 4 November and further Mr Donnarumma believed that such a referral was being made, although as we have found it was not.

273. We conclude that the lack of referrals in September and November 2018 did amount to unfavourable treatment.

274. Causation 11d/9d: the Respondent submitted that this was not put to the Respondent's witnesses. It is clearly a question of natural justice that a particular thought process which is the basis for a discrimination claim is put to the relevant witness who is alleged to be the discriminator. We accept that the section 15 allegation summarised by Issues 11d/9d was not put in those terms to Mr Donnarumma. We cannot see that we can uphold this allegation against Mr Donnarumma.

275. Steven Shaw on the other hand did not give evidence, and accordingly it was impossible for Claimant's counsel to have put the claim to him. Mr Donnarumma believed that an outcome of the meeting was to make a referral to occupational health. This is not what happened. Mr Shaw (HRBP) took the next step after this meeting which was to confirm the notes on 3 December and sent a letter to the Claimant on 6 December 2018. No referral to OH was made and in fact a reference to a possible future referral was mentioned.

276. Mr Donnarumma's witness statement is quite clear that Mr Shaw was pursuing his own approach to this case (DD's w/s paragraph 8.8). It was Mr Shaw's initiative

to propose a settlement agreement. It is clear from Mr Donnarumma's evidence that he did not think that the Claimant was in the right frame of mind to deal with this proposal, nor did he think it was appropriate. In short Mr Donnarumma and Mr Shaw were not of one mind in dealing with the Claimant.

277. Do we accept that the failure to refer the Claimant to Occupational Health was caused by the Claimant's need for adjustments and the stigma of mental health illness? There appear to be to distinct elements to the "something arising" here. We have not received evidence which leads us to infer conclude that the stigma of mental health illness was something that was particularly acting in the mind of Mr Shaw.

278. Considering the other element, the need for adjustments (contractual hours only and the ability to say no) we consider that the Claimant has satisfied the initial burden on her to demonstrate this part of the claim. Mr Shaw was plainly of the view that managers working in excess of contractual hours was "normal". He also seemed to be of the view that the Claimant was experienced enough to manage her workload. The Claimant had in express terms on 4 November, two days before the meeting on 6 November said that she wanted an occupational health referral. This request together with the circumstances at this stage would naturally suggest that this would be a normal step to be taken by an employer. Furthermore Mr Donnarumma told the Tribunal that this is what he thought was going to happen.

279. We consider that a Tribunal could reasonably infer from the surprising failure to obtain Occupational Health advice that Mr Shaw did not want to obtain OH input nor to make adjustments to the role and instead was focused on terminating the Claimant's employment by means of a settlement agreement.

280. We have not had any evidence from Mr Shaw, whether live oral evidence nor in a witness statement. We do not consider that the Respondent has rebutted this allegation which therefore succeeds.

281. [**Issue 11e**] Alleged 'something arising': Her need for adjustments to accommodate her mental health and the stigma of mental health illness

282. This is dealt with under Issue 11d above.

283. [**Issue 9e**] Alleged 'unfavourable treatment': She was not made subject to a risk assessment (either in May or October 2018 or at all)

284. We do not consider that there was a failure to make a risk assessment in this case which amounted to unfavourable treatment. We consider that there was an onus to refer to OH, which we have dealt with under Issue 9d.

285. [**Issue 11f**] Alleged 'something arising': Her sickness absence

286. It is clear that the Claimant's sick absence in October 2018 was arising from her disability.

287. [**Issue 9f**] Alleged 'unfavourable treatment': She was not offered any alternatives to a settlement agreement in a sickness review meeting on 6 November 2018.

288. It was clarified that by 'alternatives to a settlement agreement' the Claimant really meant a referral to Occupational Health. We have dealt with this under Issue 9d.

289. In short this was unfavourable treatment, but it adds nothing to 9d.

290. Causation: we consider that a Tribunal could reasonably infer that Mr Shaw was focused on terminating the Claimant's employment by means of a settlement agreement because of her sick absence. She had been absent. The nature of the meeting was a Sickness Absence Review.

291. Again and for similar reasons to issue 11d/9d we consider the initial burden of proof on the Claimant is satisfied. We have not had any evidence from Mr Shaw, whether live oral evidence or in a witness statement. In any event we do not consider that the Respondent has rebutted this allegation, which therefore succeeds.

292. [**Issue 11g**] Alleged 'something arising': Her sickness absence and her need for adjustments (including a phased return to work) to accommodate her mental health.

293. We find that the Claimant's sickness absence and need for adjustments (including phased return to work) both arose from her disability.

294. Insofar as this relates to managing communication of staff and students with the Claimant, Mr Donnarumma attempted to address this on 11 March 2019 when it was raised in the grievance appeal document.

295. [**Issue 9g**] Alleged 'unfavourable treatment': Her sickness absence was not effectively managed, in particular from 6 November 2018 the Respondent did nothing to allow the Claimant's health to recover and did not manage her sickness absence at all.

296. It is clear from the evidence in this case that the Claimant had used her personal mobile telephone quite extensively for work with the result that a number of staff and students had this telephone number as a contact detail for her. Some of these individuals tried to make contact with her while she was on sick leave. Steven Shaw tried to contact her on sick leave in December 2018.

297. The Claimant raised in her grievance appeal on 11 March 2019 that despite a request from her solicitor she was continuing to receive calls. Mr Donnarumma on that same day took steps to prevent this from happening.

298. While we accept that telephone calls from work during sick leave may have been unwelcome and on occasions may have caused anxiety, we do not consider that this was unfavourable treatment, but rather it was the result of number of different students and staff having her telephone number.

299. Causation: we do not however consider that the Claimant has demonstrated that because of these matters arising from her disability there was a failure to effectively manage her sickness absence.

300. [**Issue 11h**] Alleged 'something arising': Her sickness absence and her need for adjustments (including a phased return to work) to accommodate her mental health.

301. The sick absence arose from disability.

302. [**Issue 9h**] Alleged 'unfavourable treatment': She was informed that there was no phased return to work policy by Steven Shaw / David Donnarumma on 6 November 2018.

303. We consider that this was no more than a mistake or a miscommunication, in particular given that the Claimant was already on a phased return. We do not find that this amounted to unfavourable treatment.

304. [**Issue 12**] If so, can R show that the treatment was a proportionate means of achieving a legitimate aim?

305. We do not understand the Respondent to have argued a justification defence applicable to the parts of the section 15 claim that we find are successful above.

306. [**Issue 13**] Did R know, or could R reasonably have known, at each material time, that C had the disability?

307. We consider that at the time of the meeting on 6 November 2018 did or could reasonably be expected to know of the Claimant's disabilities.

Indirect disability discrimination (section 19 EqA)

308. [**Issue 14**] Does/did R have the following provisions, criteria or practices ("PCPs")?

309. [**Issue 14a**] The practice of requiring managers to routinely work in excess of contractual hours and / or to routinely work 55 - 60 hours a week.

310. We find that there was a practice of expecting managers work routinely in excess of contractual hours. During the Summer running into the Autumn 2018 we accept the Claimant's evidence, that she was working 55 – 60 hours a week.

311. [**Issue 14b**] The policy of not treating suicidal ideation as life threatening.

312. Following *Ishola*, we find that this was a one-off event very much confined to the circumstances of the Claimant's case. We do not find that this should be treated as an ongoing PCP.

313. [**Issue 14c**] The sickness absence policy and payment of 15 days' company sick pay.

314. The Respondent's policy was only to pay in excess of 15 days' sick pay in exceptional circumstances.

315. [**Issue 14d**] The practice of not having a written phased return to work policy.

316. The Respondent's Sickness Absence Policy [page 788] suggests that in fact the Respondent did have a policy of a phased return to work, notwithstanding what Mr Shaw may have said about this. This was not a PCP.

317. [**Issue 15**] If so, in respect of each PCP, does it put persons with the disabilities of depression and anxiety and/or ASD at a particular disadvantage when compared with persons who are not disabled?

318. We have only considered particular disadvantage where we found the PCP established.

319. Considering Issue 14a (working in excess of contractual hours and working 55 – 60 hours a week), we do not consider that we have received evidence that satisfies us that working long hours would put people with depression/anxiety/ASD at a particular disadvantage when compared with those who are not disabled. This is not self-proving.

320. Considering Issue 14c (paying only 15 days' contractual sick pay), we do not consider that we have received evidence that satisfies us that this policy would put people with depression/anxiety/ASD at a particular disadvantage when compared with those who are not disabled. This is not self-proving.

321. [**Issue 16**] The Claimant relies on the following disadvantage:

322. [**Issue 16a**] Exposure to stress, becoming ill and/or suffering a deterioration in mental health due to a consistently heavy workload;

323. Given our conclusion on Issue 15 it is strictly unnecessary to make this determination. Given however that this is an important part of the Claimant's case we have gone on to deal with this.

324. It seems that the Claimant did suffer a deterioration in mental health in Summer/Autumn 2018 which coincided with a particularly busy period at work. As to the question of whether she became ill or suffered a deterioration in mental health due to a consistently heavy workload, this is less clear based on the evidence we have received.

325. The Claimant appears to have been caused particular stress by factors other than workload. One example was the addition of Mr Kolhatkar to the team and the allocation of responsibilities to the Claimant which she regarded as belonging to her. It was the reduction in workload that led to a sense of unease and anxiety. The rumours of a restructure (which came to nothing) plainly caused the Claimant significant stress. The disconnect as the Claimant saw it between the way her superiors described Mr Geddes and how she perceived him, which led to her (perhaps politically naïve) decision to meet directly with him and the fallout from this caused her degree of stress. The Respondent's handling of the "complaint" of September 2018 appears to have been pivotal in the breakdown of the relationship between the Claimant and her employer. None of these factors related to workload.

326. We note that Claimant took on a significant workload outside of her contractual responsibilities, for example by marking for the Respondent's Business School and authoring and then subsequently revising a book on employment law.

327. The Claimant had stresses and responsibilities in her private life, which are referred to repeatedly in contemporaneous emails. She had two teenage children. Her son was unwell. Her elderly father was blind, had vascular dementia and his was health was deteriorating. While we accept that the Claimant's mother was a source of domestic support, inevitably this domestic situation would place demands on the Claimant herself. The Claimant has had to deal with past sources of grief and trauma such as the death of her husband. According to the medical evidence symptoms of depression and anxiety have been prominent since her husband's death in 2007.

328. The medical evidence we have considered does not suggest simple causation between workload and the Claimant's breakdown in the later part of 2018. Part of the picture appears to be the Claimant's realisation/acknowledgement that she might have ASD, which is a life-long condition. Reviewing the medical evidence:

328.1. In her report dated 26 November 2018 Dr Emma Cosham describes a number of stressors over the past 2½ years. She did not particularly identify workload.

328.2. Ms Gladwell's report dated 12 February 2019 identified the difficulty in the Claimant's role as being not being completely sure of her role, given that parts had been reassigned as well as the Claimant working longer and longer hours to try to ensure she did not make mistakes.

328.3. Dr Chris Cull of the National Autistic Society in his report dated 30 July 2019 noted that the Claimant attributed anxiety to difficulties in expressing herself in the workplace. More generally she doesn't feel that she has ever appeared to be relaxed or happy in herself. He notes that this "masking" or "camouflaging" of symptoms is very tiring. He stated

> "There have been challenging experiences for Mrs Aylott particularly in her adult life, including, among other things, her own significant physical health issues; caring for members of her family who have physical health issues; the death of her husband and being a single parent to their children. These experiences can be considered to be traumatic, are very demanding of Mrs Aylott and undoubtedly have an impact on her well-being. However these would not be sufficient to account for the challenges that Mrs Aylott has in relating to the world around which have been long-standing." He does not particularly highlight workload as being a central difficulty.

328.4. Dr Kathryn Newns in her report dated 5 December 2019 noted the Claimant's tendency to overwork and struggle to know when to stop working. While there were significant symptoms of depression and anxiety from February 2018 in fact these symptoms have been suffered as far back

as her 20s and this is a lifelong vulnerability. Dr Newns characterises the anxiety as secondary to the ASD.

329. In conclusion, we do not consider that the evidence leads us to conclude that the Claimant was caused a particular disadvantage by workload.

330. [**Issue 16b**] Sick pay limited to 15 days for non life threatening illnesses and financial distress (the Respondent avers that sick pay is limited to 15 days in all cases, but can be extended as a matter of management discretion)

331. Plainly this was a disadvantage in the case of the Claimant.

332. [**Issue 16c**] As above at b. See 16b.

333. [**Issue 17**] If so, in respect of each PCP, did it put C at that disadvantage?

334. This has been considered above where necessary.

335. [**Issue 18**] If so, can R show that the PCP is a proportionate means of achieving a legitimate aim?

336. We have not needed to consider this justification.

Failure to make reasonable adjustments (sections 20-21 EqA 20)

337. [**Issue 19**] Does/did R have the following PCPs?

338. [**Issue 19a**] The duties and arrangements of a Student Learning Manager in the Functional Skills Team.

339. Following *Ishola* we did not consider the secondment of the Claimant to the FS team amounted to a PCP. This was simply an event in her career.

340. [**Issue 19b**] The practice of not allowing employees to say "no" to work requests and requiring them to sound as though they are able to meet demands.

341. As dealt with above, we do not consider that there was a policy of not allowing employees to say no. As we have found, in her email of 12 January Mrs Wagner was trying to help the Claimant navigate the politics of the situation.

342. [**Issue 19c**] The practice of requiring managers to routinely work in excess of contractual hours [is a practice] and / or to routinely work 55 - 60 hours a week.

343. We have dealt with this at 14a above. There was a practice of expecting managers work routinely in excess of contractual hours. During the Summer running into the Autumn 2018 we accept the Claimant's evidence, that she was working 55 – 60 hours a week.

344. [**Issue 19d**] The practice of not acting on disclosures of reliance not reliance on alcohol.

345. Following *Ishola*, we find that this was a one-off event very much confined to the circumstances of the Claimant's case. We do not find that this should be treated as an ongoing PCP.

346. [**Issue 19e**] The policy of not treating suicidal ideation as life threatening.

347. Following *Ishola*, we find that this was a one-off event very much confined to the circumstances of the Claimant's case. We do not find that this should be treated as an ongoing PCP.

348. [**Issue 19f**] The sickness absence policy and limiting company sick pay to 15 days. [policy was only to pay in excess of 15 days' sick pay in exceptional circumstances]

349. The Respondent's policy was only to pay in excess of 15 days' sick pay in exceptional circumstances.

350. [**Issue 19g**] The practice of requiring personal / direct engagement in grievance and / or sickness absence procedures.

351. We consider that this mischaracterises the Respondent's policy given that (i) she was expressly told by Mr Donnarumma that she did not need to attend the sickness absence meeting on 6 November 2018 and (ii) she was allowed to participate in the grievance and grievance appeal by written submission only.

352. [**Issue 19h**] The practice of not having a written phased return to work policy.

353. This was not the PCP. This is dealt with at 14d above.

354. [**Issue 19i**] The practice of not considering sabbaticals or reducing the scope of roles.

355. We do not find that this was the PCP. Mrs Wagner offered the Claimant the opportunity to reduce the number of hours she worked.

356. [**Issue 20**] If so, in respect of each PCP, does it put a disabled person at a substantial disadvantage in comparison with persons who are not disabled?

357. The only PCPs we have found established were 19(c) and 19(f), both of which have already been considered in the indirect discrimination claim.

358. We consider that there is no reason in the circumstances of this claim to treat 'substantial disadvantage' for the purposes of the reasonable adjustments claim as materially different to 'particular disadvantage' under the indirect discrimination claim.

359. We adopt our reasoning under Issue 15 above. There was no substantial disadvantage in this case.

360. [**Issue 21**] If so, in respect of each PCP, did R take reasonable steps to avoid the disadvantage? C alleges that R should have made the following reasonable adjustments:

361. It has not been necessary to consider this issue given our findings at Issue 19. However, we consider that the following adjustments contended for do highlight management failings that contributed to the fundamental breach of contract:

361.1. (**a**) Reducing the Claimant's workload and/or providing the Claimant with additional support and/or resources and/or ensuring her workload was covered to allow her time off to recuperate;

361.2. (**d**) Heeding indications that the Claimant was not coping, in particular, her disclosures to Mr Donnarumma in about September 2018 that she was relying on alcohol to manage her anxiety, that she was not coping and listening to the Claimant's requests for support / resources and her wish to pay for a medical report so the Respondent could understand her ASD and noting the times the Claimant was working.

362. [**Issue 22**] Did R know, or could R reasonably have known, at each material time, that C had the disability and was likely to be placed at a substantial disadvantage?

363. While this is not necessary for this head of claim, it has been considered under Issue 3 above.

Harassment

364. [**Issue 23**] Did R engage in the following conduct? [**Issue 24**] If so, in respect of each conduct, was it unwanted? [**Issue 25**] If so, in respect of each unwanted conduct, was it related to C's disability? [**Issue 26**] If so, did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? [**Issue 27**] If any unwanted conduct had the effect set out in Issue 26 above, was it reasonable in all the circumstances for it to have that effect?

365. It has been convenient to deal with all of these issues together for each allegation.

366. [**Issue 23a**] In about May 2018 Juliette Wagner said that the Claimant was, "Mad as a box of frogs, but a good worker". The Respondent admits that the comment was made. [**Issue 23b**] Later in about May 2018 David Donnarumma reported Juliette Wagner as saying that the Claimant was, "As mad as a box of frogs". The Respondent admits that the comment was made.

367. We have found that both these parts of the claim are brought out of time and it is not just and equitable to extend time.

368. [**Issue 23c**] In about 29th October 2018 - Steven Shaw said that someone of the Claimant's age and experience should be able to prioritise and manage her workload. The Respondent denies that any reference was made to the Claimant's age but otherwise admits that the comment was made.

369. We consider that this was said and was unwanted, but we do not find that this related to the Claimant’s disability.

370. [**Issue 23d**] Whilst the Claimant was off sick because of depression / anxiety she was told that she was costing the Respondent £3k per month for being off sick and was made to feel worthless and a burden.

371. We have not found that this was actually said. This allegation therefore does not succeed.

372. [**Issue 23e**] On 6 November 2018, Steven Shaw stated that many managers were working similar hours within the University and words to the effect of "while this was clearly not their contractual hours, managers routinely worked them to get jobs done as part of their management responsibilities".

373. We do not find that this relates to the Claimant's disability. This does not succeed.

Constructive unfair dismissal (section 95 & 98 ERA)

374. [**Issue 28**] Did R breach the term of trust and confidence as follows?

375. We consider that the following matters, viewed cumulatively, amounted to a fundamental breach of trust and confidence:

375.1. The "mad as a box of frogs" comment made by Mrs Wagner and relayed to the Claimant by Mr Donnarumma. This comment was inappropriate and unprofessional both when it was made and when it was repeated to the Claimant. We consider that we can take account of this past conduct when considering the acts and omissions of the Respondent cumulatively following *Kaur*.

375.2. The decision not to pay the Claimant non-contractual sick pay after 15 days following the content of the Sick Absence Review meeting on 15 November 2018.

375.3. Mr Shaw telling the Claimant that someone of her Claimant's age and experience should be able to prioritise and manage her workload which we find was crass and insensitive particularly in the context of her recent sick absence and poor mental state at that stage.

375.4. The failure to allow the Claimant to understand the "complaint" made against her in September 2018 and failure to allow her to defend herself.

375.5. The failure to reduce workload and/or providing the Claimant with additional support and/or resources and/or ensuring her workload was covered to allow her time off to recuperate. It was of particular concern that she felt obliged to cancel a week's holiday in August 2018.

375.6. The failure to heed indications that the Claimant was not coping, in particular, her disclosures to Mr Donnarumma in about September 2018 that she was drinking too much and that she was not coping.

375.7. The attempt by Mr Shaw on 6 November 2018 to steer the Claimant toward termination of her employment under a Settlement Agreement

rather than make the Occupational Health advice referral that the Claimant had expressly requested on 4 November 2018.

375.8. The grievance investigation was superficial. It was clear from the limited notes disclosed on the final day of the hearing that a limited interview process was carried out to investigate the Claimant's grievance, which is surprising given that this took nearly two months from 11 January to 8 March 2018. The outcome contained material inaccuracies as discussed above.

375.9. The appeal outcome did not consider or address all of the Claimant's arguments, for example it did not refer to victimisation nor to the 'mad as a box of frogs' comment which required investigation. This was sufficient to amount to a 'last straw'.

376. [**Issue 29**] If so, was any such breach sufficiently serious as to justify C in treating her contract of employment as being at an end?

377. We consider, that viewed cumulatively the matters set out above amounted to a fundamental breach of contract.

378. [**Issue 30**] If so, did C resign in response to any such breach?

379. It is clear from the letter of resignation that the Claimant did resign in response to the breach. She had already indicated that she considered that there had been a fundamental breach of her contract in her grievance letter of 11 January 2019.

380. [**Issue 31**] Did C delay terminating her contract of employment so as to affirm her contract of employment or waive any breach?

381. We do not consider that the Claimant affirmed the contract of employment nor waived any breach. From the period 11 January 2019 to 8 March 2019 she was in the grievance process. From 11 March to 23 April 2019 she was in the grievance appeal process. From October 2018 onward she was either signed off sick or working reduced hours at all times until her resignation. We do not consider it could be said that she'd affirmed the contract.

Wrongful dismissal

382. [**Issue 32**] If C succeeds in showing she was constructively dismissed, she will be entitled to her notice pay.

383. This will be considered further at a remedy hearing.

Personal injury

384. Was C's mental health condition exacerbated by R's discrimination?

385. This is a question to be addressed at a remedy hearing.

Remedy

386. What remedy is C entitled to (if any)?

387. This is a question to be addressed at a remedy hearing.

388. The Parties should be aware that although the Orders below were given at the last hearing, this will of course subject to developments in the present Covid-19 pandemic. At present only closed Preliminary Hearings and Judicial Mediations are taking place at London Central are taking place, this is using telephone/video link technology. Hearings from 29 June 2020 remain listed. The parties are to advised to keep abreast of Presidential guidance.

389. Should the parties be interested in a one day Judicial Mediation by telephone/video link to attempt settlement Employment Judge Adkin will recommend to the Regional Employment Judge that this facility is made available, subject to her approval. This would be with a different judge.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Remedy hearing

1.1 A remedy hearing is listed with a time estimate of two days to heard by at the Employment Tribunals, London Central Employment Tribunal, Ground Floor, Victory House 30-34, Kingsway, London WC2B 6EX on **Monday 13 and Tuesday 14 July 2020**.

2. Updated Schedule of Loss

2.1 The Claimant is to produce an updated schedule of loss (including quantification of financial losses claimed) together with updating documents in support (e.g. mitigation of loss, documents relevant to injury to feeling) by **15 May 2020**.

2.2 The Respondent shall provide to the Claimant a counter-schedule by **29 May 2020**.

3. Remedy Bundle

3.1 The Claimant shall produce an agreed, indexed remedy bundle by **5 June 2020**.

4. Witness evidence

4.1 The Parties shall exchange any witness evidence by **16 June 2020**.

Employment Judge Adkin

Date: 23/4/2020

WRITTEN REASONS SENT TO THE PARTIES ON

24/04/2020

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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.