EMPLOYMENT TRIBUNALS

Claimant: Mrs C Lahiri

Respondent: Foreign and Commonwealth Office

Heard at: London Central

On: 2, 3, 4, 7 & 8 December 2020

Before: Employment Judge Khan
Mr R Pell
Mr F Benson

Representation
Claimant: In person, supported by her husband, Mr T Lahiri
Respondent: Mr O James, Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claims fail and are dismissed.

REASONS

1. By an ET1 presented on 27 November 2018 the claimant indicated that she brought claims for unfair dismissal, age discrimination, a redundancy payment, notice pay (i.e. breach of contract), holiday and arrears of pay, and other payments. She proceeds with claims for unfair dismissal, age discrimination and breach of contract. The respondent resists these claims.

2. The claimant was ordered and has paid two deposits of £125 as a condition of continuing to advance her claims for direct age discrimination and age-related harassment.

3. On the first day of this hearing the claimant withdrew one allegation of direct discrimination in relation to the Positive Action Pathway course and one allegation of harassment in relation to an incident in 2013.

The issues

4. We were required to determine the following issues which were enumerated in the case management Orders dated 22 March 2019 and 20 May 2019 and clarified following discussion with the parties during the hearing:

1. Unfair dismissal

1.1 What was the reason for dismissal? The respondent asserts that it was for a reason which related to conduct which is a potentially fair reason under section 98(2) of the Employment Rights Act (ERA). It must prove it had a genuine belief in the misconduct and that this was the reason for dismissal.

1.2 Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?

1.3 Was the decision to dismiss a fair sanction i.e. was it within the band of reasonable responses available to a reasonable employer?

1.4 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

1.5 Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And / or to what extent and when?

2. Breach of Contract

2.1 It is not in dispute that the respondent dismissed the claimant without notice.

2.2 Does the respondent prove that it was entitled to dismiss the claimant without notice? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

2.3 To how much notice was the claimant entitled?

3. Direct discrimination because of age (section 13 of the Equality Act 2010 (EQA))

3.1 Did the respondent subject the claimant to the following alleged treatment:

a. Denying her assistance during the Positive Action Pathway course specifically: (i) Yasmeen Haji did not put the claimant in touch with other course participants; and (ii) Paul Kett did not help her with a project as he had agreed to do.

b. Colin Barratt tricking the claimant into forfeiting the Crossing Thresholds course in February 2017.

3.2 Was this less favourable treatment i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others in not materially different circumstances? The claimant relies on hypothetical comparators.

3.3 If so, was this because of the claimant's age and / or because of the protected characteristic of age more generally?

3.4 If so, has the respondent shown that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the proper management of training resources and financial resources.

4. Harassment related to age (section 26 EQA)

4.1 Did the respondent engage in the following alleged conduct?

a. Leslie Beats:
   (i) her write up of a meeting on 17 May 2017 did not tally with the claimant's grievance.

b. Kelly Evans:
   (i) refused on 6 December 2016 to look into a grievance submitted by the claimant on 2 September 2016;
   (ii) wrote a threatening email to the claimant in 2016;
   (iii) avoided a discussion regarding a grievance matter on 2 November 2017 with the excuse that the deadline had gone;
   (iv) in 2017 failed to replace the claimant's laptop and ignored her requests (including on 5 December 2017) about it.

c. Mr Barratt:
   (i) pushed the claimant to give up the Crossing Thresholds course in February 2017;
   (ii) made a false offer to allow the claimant to work for a band B role in exchange for giving up this course;
   (iii) incorrectly recorded the contents of meetings held on 16 February 2017 and mid-March 2017, failing to note the claimant's position regarding the promise of band B work;
   (iv) stated that the contents of these notes were agreed when they were not.

d. Nicola Webb:
   (i) talked about irrelevant things in a meeting on 20 April 2017 to discuss the problem the claimant was having with Mr Barratt;
   (ii) sent an email on 20 April 2017 that did not reflect the meeting but accused the claimant of not working at the

performance level required for band A, which was the claimant's work grade.

4.2 If so, did it relate to the protected characteristic of age?

4.3 Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5. Statutory defence

5.1 If the claimant was subjected to discrimination has the respondent proven the matters required by section 109(4) EQA?

6. Jurisdiction (section 123 EQA)

6.1 The claim form was presented on 27 November 2018, the claimant having entered early conciliation on 25 October 2018. Accordingly, any act or omission which took place before 26 July 2018 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

6.2 Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

6.3 Was any complaint presented within such other period as the tribunal considers just and equitable?

The evidence and procedure

5. The claimant gave evidence herself as did her husband, Tushar Lahiri. The respondent did not object to the claimant relying on an amended version of her witness statement nor a reformatted version of Mr Lahiri's statement.

6. For the respondent, we heard from: Colin Barratt, Deputy Head of the Secondments & Interchange Unit and the claimant's line manager in 2017; James Goldman, Deputy Head of Mission and HM Consul General for Oman (formerly Acting Deputy Head, National Security Secretariat) and investigating officer; Sarah Hulton, British High Commissioner for Sri Lanka (formerly temporary Deputy Director of HR) and appeal officer; Lesley Beats, Deputy Team Leader HRD Management Advice Service; Peter Walter, HRD Employment Law and Relations Adviser; Nicola Webb, Head of the Secondments & interchange Unit; Kelly Evans, Head of HRD Management Advice Service.

7. We permitted the respondent to rely on supplemental witness statements in relation to Ms Hulton, Mr Walter and Ms Evans whilst noting that the respondent had failed to obtain prior agreement from the tribunal and also that these statements were sent to the claimant two days before the first

day of the hearing. We were satisfied that no prejudice was caused to the claimant because the additional material was limited, the claimant and Mr Lahiri had an opportunity to review it and to put questions to the witnesses in relation to the same. We were also mindful that the claimant was able to rely on an amended version of her statement.

8. Mr Barratt, Mr Goldman, Ms Hulton and Ms Beats gave evidence via video-link.

9. In considering the evidence the claimant gave during cross-examination we remained mindful of what Mr Lahiri told us, which we accepted, that because of medication she was taking her responses were slower and she had anxiety. We also allowed the claimant and Mr Lahiri to put questions to the respondent's witnesses in cross-examination.

10. There was a hearing bundle of 1103 pages. We read the pages to which we were referred.

11. We also considered the closing submissions made by both parties.

The facts

12. Having considered all the evidence, we make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

13. The claimant was employed by the respondent for 17 years, from 20 August 2001 until her dismissal on 31 August 2018. At all relevant times, she was employed as an Administrative Officer which was a band A role.

14. For the purposes of the claim it is unnecessary to recite any background facts prior to 2009.

Misconduct charge in 2009

15. In September 2009 the claimant was given a level 2 (i.e. serious misconduct under the respondent's Misconduct Procedures) final written warning to remain effective for 12 months. This related to three allegations of misconduct all of which were upheld. The claimant was found to have used words in an email to a colleague i.e. "you may regret it" which could be perceived as intimidating and threatening.

Corporate Pool (CP)

16. In 2010 the claimant returned to the CP. This was where the respondent placed staff who were between assignments pending deployment to a substantive post. The role of the CP was to assign staff where needed based on their skills and availability. These assignments were temporary and varied in length from a few days to several months. Staff who were placed in CP for temporary deployment were required to 'bid' i.e. apply for substantive roles.

17. Between February 2011 and February 2013 the claimant was deployed to

15 assignments. Eight of these assignments were terminated early because of issues with the claimant's conduct and / or attitude to her work.

18. For any assignments which exceeded three weeks, the assignment manager was required to provide individual feedback which would be copied to the CP. In August 2011, Lesley Beats, became the claimant's reporting officer (RO) i.e. line manager, upon her appointment as Head of the CP. We accepted her unchallenged evidence that generally managers were often reluctant to give negative feedback directly and would instead send this feedback to her. We also accepted her evidence that the general feedback concerning the claimant was consistently poor: the claimant was inflexible in relation to her working hours, negative, rude, unwilling to take on certain tasks and lacked basic skills. Not all of this feedback was passed on to the claimant. However, Ms Beats did provide feedback on 26 October 2012 following the termination of an assignment after only four days. This included the criticism that the claimant had failed to engage with her work or demonstrate commitment to complete assigned tasks, and she had communicated with a manager "negatively". In an email summarising their discussion, Ms Beats noted that the claimant's emails to the CP team were "aggressive and accusatory" and she appeared to blame the team for the early termination of her assignments. The claimant was warned that disciplinary action would be considered if she continued to fail to take a professional approach to assignments, take on tasks willingly, fulfil her duties and build productive working relationships. We find that from this date the claimant was on notice that her attitude to work was unacceptable, required improvement and could lead to disciplinary action.

19. In her evidence to the tribunal, the claimant said that her issue with Ms Beats was that she had not given her any written feedback, however, the claimant agreed that she would not have accepted any written negative feedback she was given. This was in fact the case in relation to the written feedback which the claimant was given in relation two of her assignments in the Conflict Prevention Team and the Recruitment Team.

20. The claimant also agreed that she had a habit of sending emails in haste to her managers many of which, as will be seen, were intemperate in language and tone.

Misconduct charge in 2013

21. In April 2013 the claimant was given a second level 2 final written warning to remain effective for 12 months. This related to two allegations: firstly, that she had failed to follow Ms Beats' instruction to take a professional approach to assignments; secondly, that she had communicated inappropriately in emails to managers. This second allegation included a description of Ms Beats "as an unpleasant character who insulted her and whose clutches she wanted to escape from…" The claimant's appeal against this disciplinary sanction was dismissed.

2013 Grievance

22. The clamant submitted a grievance on 7 May 2013 in which she complained about the written feedback which Ms Beats had given her in relation to two

assignments and she alleged that Ms Beats had harassed her. She asked for a change of line manager and also that this negative feedback was removed from her file. The grievance was not upheld. The grievance investigation concluded that Ms Beats had not bullied or harassed the claimant but had tried to manage the claimant's poor performance which the claimant refused to accept despite evidence to substantiate it.

23. The claimant was deployed to work in the Americas Directorate in June 2013. In her evidence to the tribunal, the claimant said that she was very happy in this assignment and with her line managers. This included Alan Gogbashian, who completed her performance review in March 2015 in which he noted that the claimant wanted to work towards promotion to band B but needed first to demonstrate the full range of band A competencies. Mr Gogbashian highlighted that the claimant tended to be detached from the department, needed to participate more in team meetings and take the initiative; and also that the claimant's written communication could on occasion be blunt. Although the claimant did not agree with all of this feedback, in her evidence, she accepted that it was a fair reflection made by a manager who knew her work and had encouraged her. The claimant also agreed that this feedback was in no sense whatsoever related to her age. We find that the claimant was not therefore meeting all band A competencies.

2015 Grievance

24. The Americas Directorate assignment was due to end in June 2015. When the claimant's request to extend this assignment so that she could focus on promotion was refused, she submitted a grievance in which she complained again about Ms Beats and the failure to progress her career. The outcome she sought was to "be allowed to work towards promotion to Band B unhindered and I want the process to begin as soon as possible". However, as we have found, the claimant was not meeting all band A competencies and until she was able to demonstrate this she could not be considered for promotion.

25. As will be seen, this was one of several persistent features of the claimant's conduct. In addition to being focused on promotion to band B whilst failing to demonstrate she was meeting her band A competencies, the claimant: sent emails to her managers and HR that were emotive, and often inflammatory, and offensive in content and tone; refused to accept grievance outcomes and continued to pursue the same complaints; and refused to engage with HR processes that were applied to her.

26. Before she submitted this grievance the claimant emailed the Management Advice Service (MAS), a department within the HRD, for advice. She complained that there was "a lot of bullying going on here" and also that the "manageress [Ms Beats] cooked up a lot of stories". She stated that she was "poised once again to enter the Corporate Pool and do not want to waste further time". In reply, Robert Perry, an MAS adviser, suggested that the claimant moderated the tone of her communication, noting she had made several comments about colleagues and the organisation "that are potentially derogatory and disrespectful and I would urge you to adapt more measured language in any future correspondence". Although the claimant

replied to apologise for "any rude tones" she failed to moderate her language as directed when she proceeded to complain "I have been tricked by some people in the FCO into wasting my time".

27. The claimant's grievance was dismissed on 18 June 2015 because of a lack of evidence of inappropriate or unfair treatment and also, in relation to Ms Beats, because these complaints were substantially outside the 28-day time limit for bringing a grievance. The claimant was invited to submit evidence to substantiate her grievance and reminded of the deadline. We find that the claimant's complaints about Ms Beats had already been investigated and she was therefore attempting to resurrect these historic complaints.

28. The claimant returned to the CP later that month.

Positive Action Pathway (PAP) course (allegation 3.1 (a))

29. The claimant responded to an advertisement on FCONet, the respondent's intranet, for the PAP, a course of training relating to promotion. She passed the online test and was accepted on to the course. This course ran for one day a month for 12 months. It commenced on 9 July 2015. The claimant completed this course on 5 July 2016.

30. Notwithstanding her participation on this course, the claimant still needed to make the improvements which Mr Gogbashian had identified in her 2015 performance review. In her evidence, the claimant agreed that these issues remained outstanding.

31. The claimant was introduced to a mentor, Yasmeen Haji. The claimant complains that Ms Haji did not put her in touch with other PAP participants. Her unchallenged evidence was that she requested this support at their second or third meeting. The claimant said that Ms Haji was in place for around six to eight weeks before she moved to another department whereupon her involvement with the claimant ceased. Although we find that Ms Haji did not provide the claimant with this support, the claimant did not explain how this put her at any disadvantage. It was not clear to us whether the claimant was able to contact other PAP participants directly and if so, whether she attempted to do this. Nor did the claimant explain the basis on which she felt this was related to age.

32. As a PAP course participant the claimant was encouraged to speak to her line manager about work opportunities to improve her prospects for promotion. On the claimant's own evidence, when she discussed this with her line manager, Paul Kett, he agreed to support her and told her that he had identified an assignment which would give her experience of band B work. The claimant began this assignment in April 2016. Mr Kett therefore supported the claimant by assigning her onto a project which would support her career development into which she was assigned. The claimant complains that this assignment ended abruptly and Chris Freestone, who was her RO for this short-lived assignment, was not interested in giving her any developmental work. This is not part of the claim brought by the claimant. Nor did it involve Mr Kett.

2016 Grievance (allegations 4.1 (b)(i) and (ii))

33. The claimant submitted a grievance on 16 August 2016 to complain about an appraisal which Mr Freestone had completed. Her complaint was that this was a "false appraisal" which had been completed after her assignment had ended. She stated that she was "scared" and "harassed". She felt that an appraisal was inappropriate because this was a temporary assignment, objectives had not been agreed at the outset nor had there been a mid-year review. She also disagreed with the content of Mr Kett's appraisal. She wanted this document to be expunged from her file.

34. In her evidence, the claimant agreed that she had not engaged with the appraisal process. She felt that this was not a valid mechanism for feedback and she treated the efforts made by Mr Freestone to encourage her to engage with this process as harassment. She therefore refused to meet with Mr Freestone or to complete the appraisal document and failed to take this opportunity to record her own assessment of her performance. Notably, in one email, the claimant gave the following response to Mr Freestone about the need for an appraisal: "A short report could have been written by now, if that was your intention. As this has not happened, it would be a good idea to forget about it." We find that this was another example of blunt correspondence which was inappropriate in tone and content. This contrasted with the emollient tone of Mr Freestone's communications with the claimant.

35. Samantha Croucher, MAS Deputy Team Leader, wrote to the claimant a week later, on 22 August 2016, to explain that the correct mechanism for challenging this appraisal process was a formal appraisal appeal instead of a grievance. She included the link to the guidance for this process. Although the claimant thanked Ms Croucher for "pointing me in the right direction" she disregarded this advice and submitted a second grievance on 2 September 2016 in relation to her appraisal. She complained that Mr Freestone had harassed her and had, together with her counter-signing officer, "concocted the appraisal…to put on my file to harm my reputation". She wrote that she wanted the perpetrators of this "bullying" to be punished.

36. This grievance was treated by the respondent as a formal appraisal appeal which was investigated by Nicola Mockridge, South Asia Department, who met with the claimant on 13 September 2016. Ms Mockridge wrote to the claimant on 19 October 2016 to confirm the outcome to uphold the appraisal grading. Whilst the outcome letter conceded that the appraisal process had not been "ideal" the steps taken by Mr Freestone were found to be acceptable. In this letter, Ms Mockridge also referred to several negative comments made by the claimant when they met, in the following terms: "You were rather negative about the FCO in general. You said that the 'FCO is not an organisation I like being in. I've tried to get out. There are too many people like Chris in it'".

37. When the claimant submitted an appeal against this outcome on 24 November 2016 she was told that there was no further right of appeal under the appraisal process. The claimant refused, once again, to accept the advice given. Little more than an hour later, she emailed Peter Walter, Employment Law and Relations Adviser, whose name she had found on the

intranet, to complain about her appraisal. Mr Walter referred the claimant to the HRD complaints procedure. Despite this, the claimant sent her complaint to Kelly Evans, Head of MAS, who confirmed, on 6 December 2016, that the previous advice from her team stood and there was no further right of appeal. In her evidence to the tribunal, the claimant agreed that there was no right to a second appeal.

38. We find that Ms Evan's refused to consider the claimant's complaint because it had already been investigated under the correct process for which there was no further right of appeal. We do not therefore find that this decision was related to age.

39. Notably, Ms Evans also told the claimant "It is not appropriate to keep challenging in this way by asking different people the same question. You have received the correct advice, and although I appreciate that it is not what you want to hear, I would encourage you to accept it and move on…" This was clear guidance.

40. Although the claimant alleged that Ms Evans sent her a threatening email in 2016 she was unable to identify this email nor did she provide any evidence in relation to it. When this broad allegation was put to Ms Evans in cross-examination she denied it. We do not therefore find that Ms Evans sent the claimant an email of a threatening nature in 2016 as is contended for by the claimant.

Crossing Thresholds (CT) course (allegations 3.1 (b) and 4.1 (c)(i) and (ii))

41. On 31 January 2017 the claimant was assigned to the Secondment Unit (SU), which was situated within the HRD, in the role of Supporting Officer. She had an initial discussion with her new RO, Colin Barratt, Deputy Head of the SU, when she told him that she had enrolled on the CT course which was due to start imminently and would run for one day a month for 12 months. She told him that she was keen for promotion into a band B role.

42. Mr Barratt worked from home for four days a week. This meant that much of their interaction was conducted by telephone or email.

43. The CT course was a mentoring programme to support women who were looking to develop their career. There were five facilitated themed modules: career goal-setting and planning; work / life balance; interview success; raising personal impact; and positioning for success. In evidence, the claimant agreed that except for the module on interview success, the CT course was similar in scope to the PAP course she had completed. These were not vocational courses which trained participants on specific work tasks.

44. We find that the claimant discussed the similarities between these two courses with Mr Barratt despite the claimant's evidence to the contrary. This is because we find that this issue was discussed at their meetings on 16 and 28 February 2017 and it was also referred to in emails dated 22, 23 and 27 February 2017.

    (1) This was initially discussed at a meeting on 16 February 2017. In an

email which Mr Barratt sent to the claimant on 23 February 2017 he confirmed that he had asked the claimant at this meeting to provide her certificate of completion for the PAP course and "Details of what the 'Crossing the Threshold' course would provide over and above what had been covered on the PAP course and what the time commitment was". The claimant did not challenge the veracity of this part of Mr Barratt's record of this meeting (in her near-contemporaneous annotated copy of this email).

(2) An email exchange between them dated 22 and 23 February 2017 referred to this issue as well as to a meeting scheduled on 28 February 2017 to discuss it. We do not find it likely that these emails were fabricated as the claimant alleged. Although the claimant said that she would not have used the plural "syllabi", the email which was sent from the claimant's email account dated 22 February 2017 was consistent with other email correspondence sent by her. In this email, which we have found was sent by the claimant, she wrote "Maybe after looking at the two syllabuses you will be able to tell me if it is worth following the Crossing Thresholds." The claimant was therefore engaging in this comparative exercise with her line manager.

(3) An email exchange which included an email from the claimant on 27 February 2017 in which she referred to the meeting scheduled the next day and that Mr Barratt could "let me know whether or not to start the course". We do not find that this was fabricated. We find that this email is consistent with the ongoing discussion they were having about these courses.

(4) Following their discussion on 28 February 2017 Mr Barratt emailed the claimant on 2 March 2017 to confirm that they had agreed that the courses covered a lot of the same ground and that it was not appropriate for the claimant to take up her place. It was too late to obtain a refund of the course fees of £1600 and another officer would take up the claimant's place.

45. During this ongoing discussion Mr Barratt referred to a new band B role that was being created in the SU and agreed to support the claimant in working towards band B competencies. We find that this was a genuine offer made by Mr Barratt for practical support which he felt would be of greater benefit to the claimant in achieving her goal of promotion than participating on the CT course. We also find that the fact that this support did not materialise was due to ongoing concerns about the claimant's performance in her band A role and did not mean that this proposal was not made genuinely.

46. The claimant drafted an email withdrawing from this course which she sent to Mr Barratt. He made some amendments and asked the claimant to send it to the Civil Service Learning email address. We were taken to an email sent at 14:58 from a version of the claimant's email address which had the suffix '99' after her name. The claimant denied sending this email, although she did not deny sending an email to withdraw from the CT course. This was one of two emails we were taken in which the '99' suffix appeared. The claimant also identified another email in which her email address had the prefix "IICSA". When giving evidence, the claimant alleged that these emails had been tampered with or fabricated. We found no evidence to substantiate this allegation. We accepted the respondent's evidence that the '99' suffix appeared on an email account which had been dormant for

90 days or more and was quarantined or suspended. We also accepted that the prefix 'IICSA' denoted an instruction applicable across all governmental departments not to delete a dormant or closed account. We also found that the emails in question were consistent with the claimant's other correspondence.

47. In relation to the decision to withdraw from the CT course, we find that this was ultimately Mr Barratt's decision which he persuaded the claimant to follow. Notably, this was what the investigation into the claimant's subsequent grievance concluded. The claimant was keen to complete this course as she remained focussed on promotion and no doubt believed that the CT course would help her to achieve this long-standing objective. We do not find that in persuading the claimant to give up this course that Mr Barratt tricked her as she alleges. Mr Barratt was acting within the ambit of his managerial duties. He decided that the claimant should not take up the CT course because he concluded that there was a significant overlap between the CT and PAP courses, which the claimant accepted when giving evidence. Mr Barratt was also mindful of the cost of the course and felt that this was not the best use of the budget. This was the explanation he gave to the claimant at the time which we find to be genuine. Mr Barratt also provided the same explanation to the claimant in an email on 20 March 2017. We do not therefore find that this was because of the claimant's age or had anything to do with the protected characteristic of age.

Meetings with Mr Barratt on 16 February and mid-March 2017 (allegations 4.1 (c)(iii) and (iv))

48. Mr Barratt's emailed the claimant with a record of their meeting on 16 February 2017 which we find was accurate.

    (1) We find that this was an agreed record of the meeting. We accept Mr Barratt's evidence that they had a follow-up discussion on 22 February 2017 when they reviewed their meeting the week before, the claimant queried some of what they had discussed and they agreed it was an accurate reflection of their discussion. We found this to be a credible explanation. We note that the claimant did not flag this part of Mr Barratt's email in her near-contemporaneous review of it, when she highlighted and annotated other content which she disputed.
    (2) Although the claimant annotated these parts of the email to signify her disagreement, we accept Mr Barratt's evidence that they discussed two basic errors which the claimant had made: she had failed to send an attachment with an email; and she had forwarded an email to a third party which included internal correspondence which was not intended to be shared. We find that it is likely that having discussed these issues, the claimant acknowledged the fact of them. The claimant did not deny that these errors had been made. As far as Mr Barratt was concerned these were basic errors which someone at the claimant's grade should not have made. We also find that the claimant's lack of focus was discussed. This is what Mr Barratt felt and was consistent with his instruction to the claimant to send him a list of her work tasks each morning. Mr Barratt felt that this was necessary so that he could support the claimant in prioritising her daily work.

(3) We find that Mr Barratt alluded to the Secondment Salaries & Receipts budgets. The claimant did not highlight or annotate this part of the email in her contemporaneous review. We find that this was discussed. We accept Mr Barratt's evidence that this was the only budget which the team was responsible for at this time. We find that it is likely that they discussed budget work at this meeting which concerned objective-setting. This was also an area which the claimant agreed she was interested in developing her skills. Mr Barratt did not have confidence in the claimant to work on this specialised budget nor that she had the specific financial skills required to work on this specific budget.

(4) We also find that Mr Barratt discussed line management. The claimant did not highlight or annotate this part of the email. This was another area that the claimant was interested in developing. Mr Barratt's comment that the claimant needed to show that she was able to manage her own workload before she was given line management responsibility was consistent with the level of support he was giving her in relation to her daily work tasks. It was also a reasonable requirement for the claimant to demonstrate that she was fulfilling her band A competencies before she was given other duties commensurate with a band B role.

(5) Mr Barratt asked the claimant to provide details of what the CT course would provide over and above the PAP course. As we have found, this was discussed and requested, Mr Barratt wanted to evaluate the benefit to the claimant of attending the CT course because she had already completed the PAP course.

49. This meeting on 16 February 2017 was not part of a formal performance management process. It was a discussion which focussed on the claimant's competencies, set agreed objectives and included measures for supporting her in her work.

50. Mr Barratt sent the claimant a job description on 15 March 2017. This referred to financial and IT work which the claimant was interested in. They met on or around this date to continue the discussion about the claimant's performance and objectives. On the same Mr Barratt sent the claimant a draft note of the meeting which included amended and additional objectives. Mr Barratt did not state that this was an agreed record, he asked the claimant to confirm whether it was correct. In her evidence to the tribunal, the claimant said that this record was inaccurate in one respect only in that Mr Barratt referred to an allegation that she had been sleeping which she denies they discussed. We find that the sleeping issue was discussed. Mr Barratt summarised their discussion in relation to this issue in great detail; and when the claimant replied to the draft note on 20 March 2017 to agree to the amended objectives, she referred to the sleeping allegation which she denied. This was a live issue. Nor did she complain that this note was inaccurate in any way, including in relation to this issue or the absence of any reference to working towards band B competencies. In the same email the claimant made several complaints in the following terms:

> "I do not enjoy working in the office. Coming in the office fills me with dread. Sadly, I am forced to spend eight hours of my day in the company of unfriendly and selfish people who gang up on certain

people."

51. The claimant said that this email was fabricated. However, we find that the contents of this email are entirely consistent with the claimant's other communications. In the same email, the claimant also complained that Mr Barratt had "coaxed me to forfeit the [CT] course" and she wanted to regain her place on it. In his reply, Mr Barratt referred the claimant to the respondent's Employee Assistance Programme and to guidance on the intranet on the Bullying and Harassment Policy. He also reiterated his view that the claimant had little to gain from the CT course and he referred to the agreed amended objectives which would help prepare the claimant for promotion.

52. Mr Barratt discussed the claimant's performance with her again on 28 March 2017. He remained concerned that the claimant was still failing to meet the band A competencies as well as her lack of engagement with the team, and the HRD more widely. We accepted Mr Barratt's evidence that he felt that the claimant was not engaging with the small team. She did not ask colleagues for assistance, she did not contribute to team meetings and she demonstrated a lack of interest in what the SU did. This was consistent with the previous feedback the claimant had been given.

53. Following the death of her father, the claimant took two week's bereavement leave in April 2017.

Meeting with Nicola Webb on 20 April 2017 (allegation 4.1 (d))

54. The claimant emailed Nicola Webb, Head of the SU, and her CO, on 18 April 2017 to complain about "increasing tension" with Mr Barratt when she alleged that he "often distorts things I say" and she was "afraid" to discuss work matters with him. She wrote "I am not happy about this situation and would like to meet with you to resolve it. If this matter is not resolved then I shall have to escalate it". Ms Webb agreed to meet.

55. When she met Ms Webb two days later, on 20 April 2017, the claimant's focus was on her promotion and not Mr Barratt's conduct. Ms Webb was surprised by this because she felt that the claimant was patently underperforming in her band A role. She had found that the claimant had been unable to maintain a secondment spreadsheet or take a complete note of meetings; these were tasks commensurate with her grade. In her unchallenged evidence, Ms Webb recalled that the claimant's only complaint about Mr Barratt was that he was not helping her with her objective to be promoted and the claimant did not refer to any inappropriate interactions between them. We therefore find that the concerns about Mr Barratt which the claimant had referred to in her email on 18 April 2017 were not discussed at the meeting on 20 April 2017 because the claimant did not raise them with Ms Webb as she was instead focussed on promotion.

56. Ms Webb emailed the claimant with a summary of their discussion after this meeting. In doing so, we find that it is likely that she expanded on the performance issues they had discussed. We also find that these performance concerns were genuinely held by Ms Webb and she provided this additional detail in order to reinforce her message that the claimant was

underperforming in her role and needed to address this before she could be considered for promotion. We therefore find that the provision of this additional material which was related to what they had discussed was related to age.

57. We accepted Ms Webb's unchallenged evidence that she had regular meetings with Mr Barratt when he appraised her of the support he was giving to the claimant. As noted, Mr Barratt was having daily discussions with the claimant about her work. By this date, he had also set up weekly meetings which he referred to in an email he sent to the claimant on 27 April 2017. The issue of weekly meetings was also referred to by the claimant in the text of an email (which was cut and pasted into an email Mr Barratt forwarded to Ms Croucher the previous day) in which she told Mr Barratt that she did not want weekly meetings. Although the claimant did not accept these were her words we find that they were. They were consistent with the content and tone of her other communications and complaints: they referred to her commute, her "miserable" work/life balance, there being "no prospects for promotion" and her request to work a second day from home. They also included the following threat:

> "From past experience I found offers of help not genuine. Unless you offer what I have asked for above, I will begin to resolve this problem my way".

We therefore find that Ms Webb's email correctly identified that Mr Barratt had set up regular meetings with the claimant (which the claimant did not want).

2017 grievance (1)

58. The claimant submitted a grievance against Mr Barratt on 8 May 2017 when she wrote "I am not getting along with my RO. I find the man intimidating and working with him difficult. I am frightened of him and need some advice". Ms Beats, who was now MAS Deputy Team Leader, responded to the claimant to explain that she was required under the Dispute Resolution Policy to explore informal resolution in the first instance. The claimant had not done this despite having the opportunity to do so when she had met Ms Webb on 20 April 2017. Ms Beats also told the claimant that she needed to provide more detail in relation to Mr Barratt's alleged conduct without which an investigation could not proceed. However, in reply, the claimant referred to feedback from Mr Barratt. She did not identify any specific allegations of bullying or intimidation. Her focus was once again on promotion and she clearly viewed Mr Barratt as an obstacle to this. The claimant's grievance was not therefore progressed.

59. During a discussion on 16 May 2017 when the claimant asked Mr Barratt about work allocation that would enable her to apply for promotion, he told her that he intended to implement the Managing Poor Performance Policy (MPP) because she was not meeting the standards of a band A officer.

60. Later that day the claimant contacted MAS and was referred to Ms Beats whom she emailed to request a meeting. When Ms Beats offered to meet, the claimant said that she had written to her in a panic and did not want to

waste her time. Ms Beats replied to say she remained available and they agreed to meet the next day.

Meeting with Ms Beats on 17 May 2017 (allegation 4.1 (a))

61. The claimant met with Ms Beats on 17 May 2017. We accepted Ms Beats' evidence that the focus for the claimant was on the performance management issue. Ms Beats encouraged the claimant to engage with the process. She felt that this was the claimant's best chance of successfully completing the performance review process. We also accepted Ms Beats' evidence that the claimant told her that she did not want to raise a grievance about Mr Barratt. When Ms Beats asked the claimant for examples of Mr Barratt's conduct the claimant explained that the issue was about his expectations of her work and the difficulty in developing a good working relationship because Mr Barratt worked remotely for most of the week. This was reflected in a note of this discussion which Ms Beats emailed to the claimant about an hour after their meeting ended. In her evidence, the claimant agreed it was an accurate account. We therefore find that the claimant was given an opportunity to discuss her complaints about Mr Barratt at this meeting and told Ms Beats that she did not wish to pursue a grievance against him, as Ms Beat's contemporaneous email confirmed. This was why it did not refer to the contents of the 8 May 2017 grievance itself. This reason was not therefore one which related to age.

62. Mr Barratt emailed the claimant on 24 May 2017 when he referred to their discussion on 16 May 2017. He included a note of their meeting on 28 March 2017 which he had delayed sending because of the claimant's recent bereavement. This included a table in which he set out eight competencies which the claimant was not meeting. He noted that the claimant had demonstrated an improved attitude over recent days which was encouraging. He told the claimant that he would review her performance over the next fortnight and if there was a continued improvement he would not apply the MPP. We find that this outcome was not fixed in Mr Barratt's mind and was dependent on the claimant's actions. He was giving the claimant a final opportunity to improve her performance before he applied the MPP.

63. Two weeks later, on 7 June 2017, Mr Barratt wrote to the claimant to confirm that the MPP would now be implemented. He invited her to a meeting to discuss this with him in the following week. This meeting did not take place because the claimant went on sick leave. The claimant emailed Mr Barratt on 11 June 2017 to confirm that she felt very stressed by work and had booked an appointment with her GP. Mr Barratt replied the following day to ask her to confirm whether her GP had signed her off work and if so, for how long. In her evidence, the claimant agreed that from this date she knew that she was required to keep the respondent updated on her sickness absence and to provide timely Statement of Fitness for Work forms ('fit notes'). This requirement was set out in the respondent's Sick Absence Management: Policy and Procedures (SAP) which warned that a failure to follow these rules could result in an absence being treated as unauthorised, cessation of pay and action being taken under the Misconduct Procedures.

2017 grievance (2)

64. By this date the claimant had submitted another grievance, on 9 June 2017, in which she complained about her managers and the decision to implement the MPP. She referred to Ms Beats as "heartless" and stated that "My last four months have been spent in the company of two selfish and unpleasant characters, the RO [Mr Barratt] and the CO [Ms Beats]." She also complained that her managers were "bullies", she felt "cheated" by them and she wanted a change of line management. She concluded: "I am giving HR the last chance to sort out this matter otherwise I will take it to an employment tribunal". The claimant agreed, in evidence, that by this date she had ruled out returning to work in the SU.

65. This grievance was acknowledged by Ms Evans when she told the claimant that it would be dealt with separately but concurrently with the MPP. The claimant submitted an amended version of her grievance on 13 June 2017. Although this version did not contain the same emotive language identified above, the claimant alleged that Mr Barratt, Ms Webb and Ms Beats "have plotted to harm my career" and it was sent together with a covering email in which she complained that Mr Barratt "had sneakily arranged" the MPP meeting without presenting any evidence.

66. Ms Evans replied on 15 June 2017 when she told the claimant to refrain from making "personal remarks about people or make accusations that aren't supported by evidence". The claimant responded later that day when she ruled out returning to the SU. She confirmed that her grievance was brought against Mr Barratt, Ms Webb and Ms Beats. The claimant was particularly exercised by an animus towards Ms Beats about whom she wrote in the following emotive and threatening terms:

> "Lesley Beats is a well known bully who tried to be [sic] act smart with me a few years ago doing the same thing as Colin Barratt did. She cooked up some false reports and tried to throw me out of my job…I sent a grievance about her then but it was not dealt with properly…Obviously Lesley Beats was not punished for her bullying otherwise she would not have the guts to repeat it. This time I will try my best to have her punished because I don't want her coming near me again."

67. In her reply, Ms Evans told the claimant that she was required to keep Mr Barratt updated on her sickness absence because he remained her line manager. In relation to her complaints against Ms Beats which had been investigated the claimant was told "it is not acceptable for you to repeat allegations which have been considered and discounted in this way". Ms Evans also warned the claimant:

> "If you continue to be rude and aggressive in your communication, and/or make personal attacks or allegations that aren't evidenced, then I will need to consider that as potential misconduct…"

This was a clear instruction to the claimant that the content and tone of her written communications were unacceptable, and capable of amounting to misconduct; and that it was not acceptable for the claimant to reiterate her

historic allegations against Ms Beats.

68. Ms Evans had to chase the claimant for an update on her health status on 22 June 2017, because her previous fit note had expired on 19 June 2017. The claimant's initial response was to say that Mr Barratt was not her line manager and that she would treat any insistence by Ms Evans to the contrary as "pestering" and report it to the Police. Ms Evans replied to remind the claimant that unless her absence from work was covered by a fit note or treated as annual leave, it would be deemed as unauthorised absence with the result that her pay would be stopped and action taken under the Misconduct Procedures. From this date the claimant was on notice that a failure to provide timely fit notes could constitute misconduct as well as result in the cessation of her pay.

69. This prompted the claimant to submit a fit note dated 17 June 2017. We find that it is likely that the claimant retained this note for several days before sending it to the respondent. As will be seen, the claimant failed repeatedly to submit timely fit notes throughout the period of her sickness absence which continued until her dismissal on 30 August 2018. In her evidence, the claimant said that these delays had arisen because her GP instructed her not to request another note until her previous one had expired and it would then take a few days for another note to be prepared. We do not find this explanation to be credible. This is because the claimant repeatedly waited until prompted to provide the respondent with fit notes that had been completed and dated several days earlier by her GP. We find that it is likely that this delay was deliberate and not caused by the claimant's GP.

70. The claimant sent another fit note on 27 July 2017 (dated 24 July 2017), having been chased by Ms Evans on the same date.

Grievance investigation

71. The claimant's grievance was investigated by Nicola Pollitt. It was not upheld. Ms Pollitt concluded that there was evidence of reasonable management support, informal performance management and that the claimant was not meeting the expectations of her job band. In relation to the CT course, the investigation concluded that the claimant had been "persuaded" to give it up although it found that this was reasonable in the circumstances. The complaints made against Ms Beats were found to have been based on historic events unrelated to the claimant's assignment in the SU and which related to her previous grievance against Ms Beats; there was a "high level of emotion running through Chandra's commentary on her relationship with Lesley"; and came very close to being "vexatious and made in bad faith" and any repetition of these allegations warranted disciplinary action. Ms Pollitt recommended that: the MPP proceeded; the engaged constructively with her managers to improve her performance and to address any concerns she had; Clare Allbless, the new Deputy Head of the SU, supported the claimant in returning to work; and "MAS to make clear that should Chandra continue to use emotive and aggressive language against any member of FCO staff this would be considered under the misconduct procedure". This report could not have been any clearer. The claimant was therefore on notice that unless she was able to engage constructively with her managers, desist from repeating her historic and

emotive allegations against Ms Beat or from using unacceptable language in her written communications, she faced disciplinary action.

72. The claimant did not appeal this outcome. Although she completed an appeal form on 15 September 2017 she confirmed in the same document that she would not be submitting an appeal herself and would let her union representative "resolve the case".

73. When Mr Barratt emailed the claimant on 20 September 2017 about her return to work as her latest fit note had expired she asked him to stop contacting her. In reply, Mr Barratt reminded the claimant that without a fit note she would be treated as being on unauthorised absence. The claimant responded that she was not returning to SU, she had experienced bullying there and felt unsafe, and she had asked her union representative, Andy Dallas, to pursue her grievance.

74. The claimant sent a fit note to Mr Barratt on 24 September 2017. This certificate had been completed by her GP almost a week earlier, on 18 September 2017. The claimant had failed once again to provide the respondent with this documentation in time and not without being prompted by her managers, and warned of the consequences of failing to provide it.

Meeting with Ms Evans and Mr Dallas on 2 November 2017 (allegations 4.1 (b) (iii) and (iv))

75. With the intervention of Mr Dallas a meeting was arranged between the claimant and Ms Evans on 2 November 2017. Ahead of this meeting, Ms Evans emailed the claimant to ask her to bring her laptop to the meeting. She explained that this was required because of the ongoing Tech Overhaul project. Ms Evans told the claimant that she would be provided with a replacement laptop when she returned to work. She therefore made it clear that the provision of a replacement laptop was conditional on the claimant's return to work.

76. When the claimant met Ms Evans on 2 November 2017 she handed over her laptop. Ms Evans then found Mr Dallas who joined them. We accept Ms Evans' evidence that the purpose of this meeting was to discuss the claimant's return to work. It was not a meeting to discuss the claimant's grievance appeal. A substantive appeal had not been lodged by the claimant or Mr Dallas. Ms Evans did warn the claimant against repeating her complaints against Mr Barratt and Ms Beats because these had already been investigated. We find that the claimant's grievance appeal was not discussed. The claimant did not raise it. The deadline for an appeal had in any event expired. Notably, on receiving Ms Evans' email summarising their discussion and which made no reference to an appeal, the claimant replied to thank her for this record and did not complain that it was inaccurate.

77. During this meeting Ms Evans also highlighted the claimant's repeated failure to provide timely fit notes and warned that this would normally result in pay being stopped and action taken under the Misconduct Procedures. She reiterated this in her email. This was necessary because the claimant had failed to provide another note to cover her ongoing absence. It was agreed that the claimant would be line-managed by Ms Allbless and she

agreed that she would be able to return to work a few days after her current fit note expired. The claimant said in evidence that she agreed to this so that the meeting could finish. She had no intention of returning to the SU.

78. The claimant forwarded two fit notes dated 30 October and 4 November 2017 covering the period 17 October – 30 November 2017 to Ms Evans on 12 November 2017.

79. Ms Evans wrote to the claimant again on 30 November 2017 to query whether she had another fit note or intended to return to work. The claimant replied that she was not going back to the SU. She reiterated her allegation that Mr Barratt was a bully and complained that six months after submitting a grievance she was waiting for a fair outcome. She asked about leave. The claimant wrote again, on 1 December 2017, in which she alleged that Mr Barratt and Ms Webb were "rude and intimidating" and Mr Barratt "has lied and cheated me".

80. The claimant received written notification that her pay would go down to half-pay on 26 December 2017 and nil pay on 27 June 2017.

81. The claimant regretted handing over her laptop and asked for it to be returned on 5 December 2017 so that she could complete a leave request. We do not find that Ms Evans ignored this request as is contended. Ms Evans replied on 11 December to explain that the claimant could request leave via herself or by contacting Ms Allbless. She did not therefore need a laptop for this purpose. To the extent that Ms Evans' response amounted to a refusal to replace the claimant's laptop we find that this was the reason for her decision. Furthermore, as we have noted, Ms Evans had already told the claimant, a replacement laptop would be provided when she returned to work. We do not find therefore find that this decision was related to age.

82. The claimant did not identify or adduce any evidence in relation to any other occasions when she says she asked Ms Evans for her laptop to be returned or replaced.

83. The claimant sent a further fit note to Ms Evans on 15 December 2017 which had been completed by her GP on 12 December 2017 and covered the whole month.

84. The claimant also told Ms Evans that she would report her to ACAS if she threatened her with misconduct. Later that month, on 28 December 2017, the claimant referred to a tribunal claim and said that she would return to work until judgment had been passed.

85. The claimant wrote again to Ms Evans on 8 January 2018 to confirm that she was not going to engage with the MPP and would not be sending in fit notes, she wanted Mr Barratt to be punished and she had brought a tribunal claim. In her evidence, the claimant initially said that this email had been tampered with. She then re-read this email and agreed that she had written it but had not been in the "right frame of mind". We find that the claimant was being deliberately obstructive. She was refusing to engage with the MPP and the SAP. Ms Evans replied to note that because the claimant was refusing to comply with the SAP rules her pay would be stopped. The

claimant sent in another fit note the next day, dated 1 January 2018 which covered the entire month. Her pay was reinstated.

86. On 5 February 2018, Ms Allbless emailed the claimant to query whether she was fit to return to work, as her certified period of sickness had expired, and to suggest a meeting to discuss her return. The claimant replied later that day when she made her first reference to discrimination, although she did not link this with her age or any other protected characteristic. She complained about her managers and "the nasty gangs which now operate in HR" and "the crooks in HR". This was another example of the claimant making offensive and unsubstantiated statements about her managers and HR which persisted despite the clear instructions and warnings she had been given.

87. This was forwarded to Ms Evans who emailed Mr Walter the following day for advice on proceeding with 'misconduct action' against the claimant on two grounds: firstly, that she had failed to comply with the SAP by providing timely fit notes, despite several reminders; and secondly, she continued to reiterate her historic allegations and write "in unacceptable terms about her former line manager and HR colleagues…I am not prepared to have my team mates referred to as crooks and nasty gangs…" In his reply, Mr Walter agreed that the claimant's comments were unacceptable, he queried whether she had already been warned about misconduct action and if she had not, he suggested that it would be prudent to give the claimant a warning before such action was taken. Ms Evans confirmed that the claimant had been warned about the consequences of her actions. We find that she was warned by Ms Evans in relation to both issues and also by Ms Pollitt in relation to her language and repetition of historic allegations. A decision was therefore taken to proceed with action under the Misconduct Procedures.

88. Ms Allbless confirmed that this action was being taken in an email to the claimant on 16 February 2018 with further details to be confirmed in writing. She also reminded the claimant of her obligation to inform her line manager in relation to her sickness absence. The claimant's latest fit note had expired on 31 January 2018 and she was told that if she did not provide another note by 19 February 2018 she would not be paid that month. Once again, this prompted the claimant to provide her another fit note, the next day. This note had been completed by the claimant's GP more than three weeks' earlier, on 22 January 2018. It expired at the end of February 2018. When Ms Allbless chased the claimant in early March 2018, she explained that she had been unable to see her GP because of adverse weather conditions. The claimant also stated that had left the SU and queried why Ms Allbless was writing to her. Ms Allbless forwarded a letter formally notifying the claimant that she was being investigated under the Misconduct Procedures. She also reminded the claimant of the sickness absence reporting requirements and the consequences of non-compliance.

89. This letter confirmed that James Goldman, then Acting Deputy Head, National Security Secretariat, had been appointed to investigate two allegations under the Misconduct Procedures: "your repeated failure to adhere to the FCO Sick Absence Management Policy and Procedures, and the offensive way you have responded to FCO colleagues during the course

of your HRD assignment, including your absence period."

The investigation conducted by James Goldman

90. Mr Goldman made initial contact with the claimant on 27 March 2018 to invite her to an investigation meeting on 5 April 2018.

91. This prompted the claimant to send a fit note to Ms Allbless on the same date, which ran out two days later. Ms Allbless replied also on the same date to remind the claimant again about the absence reporting requirements when she forwarded a copy of the SAP.

92. In a second email to Mr Goldman that day, the claimant told him that she was too unwell to attend any misconduct hearings and she regarded this process as further harassment by the SU.

93. The claimant does not take issue with the investigation process conducted by Mr Goldman. She agreed in evidence, that Mr Goldman gave her every opportunity to participate in this investigation. He offered to meet the claimant outside of work. He suggested a telephone interview. In the end, they agreed that the claimant would respond to questions which Mr Goldman sent her by email.

94. In the course of her correspondence with Mr Goldman she sent him a fit note covering the period 28 March – 30 April 2018. Thereafter, she stopped sending fit notes because she no longer trusted the people to whom she was required to send them. As she said in evidence, "I didn't want these people having my data".

95. Mr Goldman completed his investigation and concluded that there was a case to answer in relation to both allegations. He concluded that the claimant had repeatedly failed to adhere to the SAP, and specifically the requirement to provide timely fit notes, despite being given clear instructions and a copy of the SAP; the claimant had been accommodated by a change of line manager and the requirement to send fit notes to Ms Allbless was a reasonable one. In relation to the second allegation, Mr Goldman found that Mr Barratt and Ms Allbless were credible, and he concluded that Mr Barratt who had made a genuine attempt to support the claimant had been particularly impacted by the claimant's conduct. Having reviewed the claimant's communications, including her communications with himself, he found repeated examples of language which he deemed unacceptable; this had persisted despite the claimant being repeatedly warned about her language. He also found that the claimant's reiteration of allegations which had been investigated and concluded was vexatious, and an abuse of process.

96. Ms Allbless wrote to the claimant on 21 June 2018 to confirm that the investigation had been completed and concluded that there was a case to answer in relation to the following allegations of gross misconduct which could result in her dismissal if substantiated:

    (1) That she repeatedly failed to follow the SAP, including instances of unauthorised absence which was ongoing.

(2) That she had behaved in an offensive way to colleagues during the course of her HRD assignment, including behaviour amounting to bullying.

Mr Goldman's investigation report was included. The claimant was told that she was required under the Misconduct Procedures to submit a written reply within five working days of receiving this report to confirm whether she admitted or denied these allegations together with any evidence she wished to rely on in mitigation, if she admitted, or to support her case, if she denied, them.

97. The claimant signed for this material on 23 June 2018. With no response having been received by 3 July 2018, Nalini Sadia, a member of the MAS team, emailed the claimant to extend the deadline by a further two days, to 5 July 2018. The claimant replied on 5 July 2018 to deny both allegations. In relation to sickness reporting, she complained that she had been without a laptop, and explained that she had stopped sending her fit notes because she had been instructed by Ms Evans to send them to people she did not trust, and neither Ms Allbless nor Mr Goldman had not told her which department she should send them to. In relation to her communication, the claimant said that she had "only reacted to the dishonest behaviour I came across from the assigned RO, CO and some other members of HR". She stated that she did not feel safe going back to work and would not do so "until my problem has been cleared". It is clear, from the claimant's subsequent correspondence, that this was a reference to her grievance against Mr Barratt which had been investigated in 2017.

The dismissal process

98. Mr Walter reviewed Mr Goldman's report and the claimant's reply, and concluded that the matter should proceed to a Gross Misconduct Panel hearing. We find that this was a reasonable decision to take. Mr Goldman's investigation had found that there was a case to answer and the claimant had denied both allegations and it was therefore necessary to evaluate Mr Goldman's investigation findings and give the claimant an opportunity to make representations. Mr Walter wrote to the claimant on 9 July 2018 to invite her to a hearing on 18 July 2018. He recited the two allegations under consideration and warned the claimant that this hearing could result in her dismissal by reason of gross misconduct with or without notice. The claimant was reminded of her right to bring a companion.

99. When Ms Sadai emailed the claimant the following day to confirm that Mr Walker had written to her to invite her to a hearing on 18 July 2018, the claimant replied that she had sent her fit notes for the period from June 2017 to April 2018 to Mr Barratt, Ms Evans and Ms Allbless and had stopped sending these because she felt unsafe sending personal details to "unknown / untrusted people". She stated that her GP would not issue any more certificates and the respondent would need to contact her GP directly about this. She again queried what Mr Goldman had to do with her case and why a second meeting had been arranged in relation to the same misconduct allegations. She concluded her email in the following terms:

> "It is over one year since I submitted a grievance to HR but it has not

> been dealt with fairly... I am waiting for it to be sorted out. Until this happens, I will not cooperate with HR in any false investigations. Also, I do not want to hear from you again or receive any more material at my address relating to this allegation. If this happens again, I will consider it as harassment and take legal action."

The claimant therefore remained focussed on her 2017 grievance which had been investigated and concluded, and which she had not appealed, and unwilling to engage with the misconduct process.

100. Ms Sadai replied on 13 July 2018 to explain the process which the hearing panel would follow and that this would continue, even if she refused to engage with it. She told the claimant that the panel could rearrange the hearing date to suit her availability within a week of the original date. The claimant was encouraged to attend this hearing so that her views could be fully considered. In relation to the claimant's grievance, Ms Sadai noted that this had been concluded. The claimant replied that she could not attend the hearing on 18 July 2018 owing to an unspecified personal engagement. She sent another email to Ms Sadai three days later in which she complained that her grievance had not been fairly investigated and she had been "tricked into missing the appeal deadline" by Mr Dallas and Ms Evans.

101. The misconduct hearing was rearranged to take place on 26 July 2018 to accommodate the claimant. In the meantime, the claimant obtained support from Harringay Law Centre who wrote to the respondent within a few days of this rescheduled hearing to request a second postponement, on medical grounds. When Ms Sadai clarified that a postponement could not be agreed without a medical certificate, the claimant obtained one on 25 July 2018 which was forwarded to the respondent on the same date. The claimant was therefore able to obtain and forward a medical certificate on the same date. This certificate covered a five-month period from 28 May – 29 October 2018. It did not refer to the claimant's fitness to attend the misconduct hearing.

102. The reconvened hearing was postponed. In confirming this, Ms Sadai emphasised that the claimant needed to engage with Occupational Health ("OH") to assess her fitness to attend a hearing. The claimant refused to do so. When Ms Sadai tried a final time to seek the claimant's cooperation she wrote

> "I do not wish to be disturbed during the period stated in my 'Statement of Fitness for Work'. I have seen the FCONet that HR cannot force an employee to engage with Occupational Health…You have offered Occupational Health and I have declined. Let us leave things at that. I do not want to engage with HR at the moment so if you wish to hold a misconduct hearing then you will have to do so without my participation. My GP has advised me to take some rest and resume solving my work-problems when I am able to do so".

It is likely, that this another reference to the claimant's 2017 grievance.

103. Ms Sadai sought advice from OH who made no further recommendations than those already offered to the claimant. She then emailed the claimant on 22 August 2018 to update her on this OH advice and to confirm that the

misconduct hearing would now take place on 30 August 2018. She asked the claimant to confirm whether she would attend in person, or if not whether she wanted to dial in, send written representations and / or have a union representative or work colleague attend on her behalf. The claimant was told that this hearing would proceed in her absence, if necessary. The claimant did not attend this hearing. She emailed Ms Sadai the day before, on 29 August 2018, to confirm that she was not feeling well enough.

The decision to dismiss the claimant

104. The hearing therefore proceeded in the claimant's absence on 30 August 2018. This was reasonable, the respondent had rescheduled this hearing twice, offered alternatives, sought OH advice which the claimant had not engaged with. In her evidence, the claimant agreed that she was given every opportunity to attend a misconduct hearing.

105. Mr Walter chaired the panel of three. Mr Goldman dialled in to outline the investigation he had conducted. The panel considered the documentary evidence which evidenced the claimant's repeated failure to provide timely fit notes (it counted seven occasions) and to send them belatedly upon the prompting of her managers. The claimant had also failed to send any fit notes for several months. She had sent a fit note in late July 2018 which was backdated to 28 May 2018. The period between 1 – 27 May 2018 remained unaccounted for. In her evidence to the tribunal, the claimant agreed that she had not engaged with her employer at the level they expected throughout her sickness absence. The panel also considered the evidence in relation to the claimant's written correspondence with managers and HR, and concluded that she had been rude, threatening and aggressive. The panel took account of the repeated nature of the claimant's conduct in relation to both allegations which had persisted despite being given clear instructions and warnings about the consequences of her actions. She had continued to refuse to engage with her managers and HR. It found that this demonstrated a complete breakdown in trust and confidence.

106. The panel also considered the potential impact of the claimant's mental health on her conduct but in the absence of any medical evidence and noting that the claimant had refused to engage with OH, and participate in this hearing it decided to proceed on the basis of the information it had. We find that this was reasonable. The claimant had refused the many opportunities she had been given to engage with this misconduct process and she had not provided any medical evidence nor had she indicated that her conduct was health-related.

107. In his evidence to the tribunal, which we accepted, Mr Walter confirmed that the panel were unanimous in their view that both allegations under consideration constituted gross misconduct, although the breach of the SAP was the less serious allegation of the two. They referred to the respondent's guidance and concluded that the following examples of gross misconduct applied:

    (1) Repeated or persistent failure to follow reasonable instructions: this related to the claimant's repeated and persistent failure to provide fit

notes in a timely manner and to communicate with colleagues in an appropriate manner.

(2) Very offensive behaviour: this related to the claimant's written communications in which she had repeatedly criticised the professionalism and integrity of colleagues she worked with, for example, by calling them "crooks", "gangs of bullies" and "liars", which went beyond signalling her disagreement with them.

(3) Significant or repeated breach of the Civil Service Code: this related to the claimant's communications which the panel deemed be very offensive and in breach of the Code and also Home Service Regulation 2: General Principles of Conduct which required colleagues to treat each other with respect and "not fall short of the professional standard expected of members of the Civil Service".

108. As required under the Misconduct Procedures, having found that these allegations of gross misconduct were substantiated it was necessary for the panel to consider mitigation and also the claimant's career history before deciding on the penalty to be applied. We accepted Mr Walter's evidence that the presumption was that a finding of gross misconduct warranted dismissal. The panel took account of the level 2 warnings the claimant had been given which although historic they found presented, together with the conduct under consideration, a pattern of misconduct. We also accepted Mr Walter's evidence that these previous warnings were not given significant weight but were a factor which the panel relied on to conclude that there were not sufficient mitigating factors which warranted a deviation from the sanction of dismissal for gross misconduct. The panel also concluded that this longer-term incidence of misconduct suggested that the claimant's more recent misconduct was not health-related in the absence of any evidence to the contrary.

109. The decision was made to dismiss the claimant by reason of gross misconduct with immediate effect and therefore without notice. A note recording the panel's decision-making process was sent to the claimant the next day, on 31 August 2018, together with an outcome letter confirming this decision and a standard guidance document for staff who had been dismissed. It is notable that in confirming this decision and advising the claimant of her right to appeal, Mr Walter emphasised that the panel had not had the benefit of the claimant's input and he urged her to engage fully with the appeal process if she decided to appeal her dismissal.

Appeal process

110. The claimant appealed against her dismissal on 11 September 2018. Sarah Hulton, then temporary Deputy Director of HR, was appointed to deal with this appeal. She wrote to the claimant two days later to invite her to an appeal hearing on 27 September 2018. When Ms Evans emailed the claimant to establish whether she intended to attend this hearing, the claimant replied to say that she was not feeling well enough, she referred to "trumped up charges" and complained of harassment by Ms Evans and her colleagues in HR, and she resubmitted her grievance in relation to the events in 2017 and further back in 2013 and 2015.

111. Ms Evans responded to offer the claimant an alternative hearing date or the

option of taking part by phone or through a work colleague or union representative. The claimant was told that if she decided not to engage then the appeal would proceed on the basis of her written appeal. Ms Evans also confirmed that the claimant's grievance had been investigated and concluded, and was closed. When she was contacted again on 4 October 2018 about the arrangements for the appeal hearing, the claimant was adamant that she would not be engaging with this "trumped-up appeal hearing for the trumped-up charges". In response to these charges she asserted: she had provided fit notes as and when she had received these from her GP and questioned why she had been required to provide them; and the charge of "being rude to colleagues" was made "by a group of dishonest staff who bullied me throughout my assignment in the Secondment Unit and beyond". She explained that she had nothing more to say about these issues and she would be proceeding with a tribunal claim. It is notable that when taken to this document in evidence the claimant initially denied sending this email and suggested it was fabricated before agreeing that she wrote it and denying it was in any way inappropriate. The claimant was told that her appeal would therefore proceed as a paper exercise.

112. Ms Hulton considered the appeal on the papers and concluded that there was no basis on which to interfere with the panel's decision to dismiss the claimant. She considered the decision taken by the misconduct panel, and concluded that they had examined the evidence in relation to both allegations and had followed the correct procedures. She spoke to Mr Walter, Ms Evans and Ms Beats. Her outcome was sent to the claimant on 22 October 2018. We find that this was a reasonable process. The claimant had been given every opportunity to participate in this process and had refused on the basis that the charges against her and the appeal process itself were "trumped-up". In her evidence to the tribunal, the claimant said that she felt that the appeal process was a foregone conclusion and decided to let it take its course. She thereby chose, once again, not to engage with her employer.

The law

Direct discrimination

113. Section 13(1) EQA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

114. The protected characteristic need not be the only reason for the treatment but it must have been a substantial or "effective cause". The basic question is "What, out of the whole complex of facts before the tribunal, is the 'effective and predominant cause' or the 'real or efficient cause' of the act complained of?" (see O'Neill v Governors of St Thomas More RC Voluntarily Aided Upper School and anor [1997] ICR 33, EAT).

Detriment

115. Section 39(2)(a) EQA provides that an employer (A) must not discriminate against an employee of A's (B) by subjecting him to any other detriment.

116. A complainant seeking to establish detriment is not required to show that he has suffered an adverse physical or economic consequence. It is sufficient to show that a reasonable employee would or might take the view that they had been disadvantaged, although an unjustified sense of a grievance cannot amount to a detriment (see Shamoon v Chief Constable of RUC [2003] IRLR 285, HL).

117. The EHRC Employment Code provides that "generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage".

118. Any alleged detriment must be capable of being regarded objectively as such (see St Helens MBC v Derbyshire [2007] ICR 841).

Harassment

119. Section 26(4) EQA provides that:

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

120. In deciding whether the conduct "related to" a protected characteristic consideration must be given to the mental processes of the putative harasser (see GMB v Henderson [2016] IRLR 340, CA).

121. In Pemberton v Inwood [2018] IRLR 542, CA Underhill LJ re-formulated his earlier guidance in Richmond Pharmacology v Dhaliwal [2009] IRLR 336, EAT, as follows:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

122. The claimant's subjective perception of the offence must therefore be objectively reasonable.

Burden of proof

123. Section 136 EQA provides that if there are facts from which it could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

124. Section 136 accordingly envisages a two-stage approach. Where this approach is adopted a claimant must first establish a prima facie case at the first stage. This requires the claimant to prove facts from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination; and something more than a mere difference in status and treatment (see Madarassy v Nomura International plc [2007] ICR 867, CA).

125. The two-stage approach envisaged by section 136 is not obligatory and in many cases it will be appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatsoever in the adverse treatment, the complaint fails (see Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16/RN). Accordingly, the burden of proof provisions have no role to play where a tribunal is able to make positive findings of fact (see Hewage v Grampian Health Board [2012] IRLR 870).

126. Tribunals must be careful to avoid too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such a ground (see Igen Ltd v Wong [2005] IRLR 258, para 51).

Conclusions

Direct discrimination

127. This claim fails.

128. Allegation 3.1 (a)(i) fails because we have found that this was not a detriment. Even had we found that it was a detriment we would not have found that a significant or effective cause for this was the claimant's age or the protected characteristic of age. This is because we find that the claimant did not establish a prima facie case of age discrimination. When asked to explain her case, the claimant said that when she did not get the support she felt she needed to progress her career having enrolled onto the PAP course, she began to suspect this was to do with her age. The claimant was unable to point to any specific evidence which suggested that her age or age, more generally, were factors which motivated Ms Haji to act as she did. We do not therefore find that Ms Haji would have acted any differently in relation to a hypothetical comparator who was younger than the claimant.

129. Allegation 3.1 (a)(ii) fails because we have found that Mr Kett provided the claimant with the assistance he promised.

130. Allegation 3.1 (b) fails because we have found that Mr Barratt did not trick the claimant as alleged. We have found that Mr Barratt persuaded the claimant to withdraw from the CT course because he concluded that this was not the best use of the budget given the substantial overlap with the PAP course which the claimant had already completed. This decision was not because of the claimant's age or age, more generally. We have also found that Mr Barratt's proposal to support the claimant in working towards band B competencies which was genuinely made did not materialise due to the ongoing concerns about her performance in her band A role.

Harassment

131. This claim fails.

132. Allegation 4.1 (a) fails because we have found that the claimant told Ms Beats that she did not wish to pursue a grievance against Mr Barratt when they met on 17 May 2017. This was why Ms Beats' record of this meeting, which the claimant agreed was accurate, did not refer to her grievance. This was not therefore related to age.

133. Allegations 4.1 (b)(i) to (iv) fail. This is because we have found: Ms Evans refused to look into the claimant's grievance because it had already been investigated under the correct process and there was no further right of appeal (something which the claimant accepted in her evidence); Ms Evans did not write a threatening email to the claimant in 2016; the claimant's grievance was not discussed on 2 November 2017 because the purpose of this meeting was to facilitate the claimant's return to work, the claimant had not lodged an appeal and she did not raise this issue at this meeting; Ms Evans did not replace the claimant's laptop because she had not returned to work and she did not require a laptop to request leave. In respect of 4.1 (b)(i) and (iv) which we have found took place we did not therefore find that this conduct was related to age.

134. Allegations 4.1 (c)(i) to (iv) fail. This is because we have found: Mr Barratt persuaded the claimant to withdraw from the CT course for reasons which were not related to age; he did not make a false offer in relation to band B work; Mr Barratt's records of the meetings on 16 February and mid-March 2017 were accurate; the contents of the note of the first of these meetings was agreed by the claimant and Mr Barratt's note of the second meeting was patently a draft record which he sent to the claimant for her agreement.

135. Allegations 4.1 (d)(i) and (ii) fail. This is because we have found: Ms Webb discussed the claimant's performance which was relevant because the claimant wanted to discuss promotion and not Mr Barratt's conduct at the meeting on 20 April 2017; although Ms Webb set out her concerns about the claimant's performance in greater detail than they had discussed on 20 April 2017, these were genuinely held concerns which were provided so that the claimant understood that she was underperforming in her role; Ms Webb's reference to regular review meetings between the claimant and Mr Barratt was accurate. We did not therefore find that this conduct related to age.

136. Reminding ourselves of the terms on which claimant was ordered to pay a deposit as a condition of proceeding with the claims for direct discrimination and harassment we have found that the impugned treatment was not detrimental nor that the claimant was able to adduce any evidence to show or suggest that this treatment or conduct was or could have been because of her age, or age, more generally, or that it related to age. Other than the claimant's suspicion that her age was a factor when she failed to obtain the support she felt she needed to secure a promotion after enrolling on the PAP course the claimant advanced no other basis for bringing these claims under the EQA and told us that she did not know what goes on in other people's minds.

Unfair dismissal

137. This claim fails.

138. We find that the respondent had a genuine belief that the claimant's actions amounted to gross misconduct. We find that this was the reason for dismissal. Mr Goldman's investigation had concluded that the claimant had a case to answer in relation to both allegations of misconduct. The misconduct panel reviewed the investigation report and material, including the claimant's correspondence, and concluded that the claimant's conduct amounted to gross misconduct under the terms of the Misconduct Procedures.

139. We find that the dismissal process was within the band of reasonable responses:

    (1) The claimant took no issue with the investigation process, nor did we find there to be any.
    (2) Although the misconduct panel proceeded in the claimant's absence, this was the third time a hearing was scheduled; the claimant had been given the opportunity to participate by alternative means via telephone, written representations or a representative; she refused to engage with OH; she refused to engage with the process and complained that the allegations made against her were false. The claimant agreed in evidence that she was given every opportunity to take part in this process.
    (3) For the same reasons, it was also reasonable for the appeal process to be conducted on the papers and in the claimant's absence.

140. We find that the respondent had a reasonable belief in the claimant's misconduct. There was unequivocal documentary evidence which substantiated both allegations under consideration. The misconduct panel found that: there were seven separate occasions when the claimant had failed to provide timely fit notes in breach of the SAP; the claimant's written correspondence was offensive, threatening and aggressive towards her managers and HR; she had persisted in this conduct despite being given clear instructions and warnings about the consequences of her actions.

141. We find that the decision to dismiss the claimant was within the band of reasonable responses. The misconduct panel concluded that both allegations constituted gross misconduct and the claimant's offensive

communications had breached the Civil Service Code, and also Home Service Regulation 2. It also found that there were no mitigating factors which militated against dismissal. Although the panel considered the claimant's expunged level 2 warnings when it decided on what level of sanction to apply, we find that this did not impermissibly influence the outcome but was a background factor which the panel were reasonably entitled to consider and from which it concluded that there was no reason to deviate from the presumption of dismissal in a well-founded case of gross misconduct. Overall, it found that the claimant's repeated and persistent conduct was demonstrative of a complete breakdown in trust and confidence.

Wrongful dismissal

142. This claim fails.

143. We find that the respondent has been able to show that the claimant's conduct amounted to gross misconduct.

    (1) As we have noted, the claimant agreed when giving evidence that she had not engaged with her employer at the level they expected throughout her sickness absence. We find that in failing to comply with the SAP between July 2017 and July 2018, the claimant repeatedly and persistently failed to follow reasonable instructions.
    (2) We also find that the claimant sent repeated written communications which were individually and / or cumulatively very offensive and through which she failed to treat her colleagues with respect as required by the Civil Service Code.
    (3) The claimant's actions breached the respondent's trust and confidence in her.

144. We therefore find that the claimant's conduct had the effect of repudiating her contract. In relying on this conduct to dismiss the claimant without notice the respondent did not breach her contract.

145. For all of these reasons, the claims fail and are dismissed.

Employment Judge Khan

08.03.21

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

09/03/21.....

FOR EMPLOYMENT TRIBUNALS