Case Number: 1601801/2018
1601802/2018
1601048/2019
1601053/2019
1601568/2019
1600519/2020

EMPLOYMENT TRIBUNALS

Claimants: **(1) Mrs J Hanks**
(2) Mrs R Jarman

Respondent: **Wilco Retail Ltd**

Heard at: **Cardiff via CVP** **On: 15, 16, 17, 18, 19, 22 and 23 February 2021**

Before: **Employment Judge S Jenkins**
Members: **Mr D Gwyer-Roberts**
Mrs L Owen

Representation:
Claimant: Ms P Ashworth (Counsel)
Respondent: Ms H Gardiner (Counsel)

RESERVED JUDGMENT

1. The First Claimant's, Mrs Hanks', claims of; direct discrimination on the ground of sex, victimisation and unfair dismissal; all fail and are dismissed.

2. The Second Claimant's, Mrs Jarman's, claims of; direct discrimination on the ground of sex, victimisation, failure to make reasonable adjustments, failure to deal with a flexible working request, and unfair dismissal; all fail and are dismissed.

REASONS

Background

1. The cases of the two Claimants were combined on the basis that, although the issues underpinning them were managed separately in the workplace, they shared many common elements.

2. Mrs Hanks initially brought a claim on 14 December 2018 relating to equal pay, direct sex discrimination and victimisation; the protected act for the purposes of the victimisation claim being said to be a grievance she had raised about unequal pay. Further and better particulars of that claim were provided on 14 March 2019. Mrs Hanks brought a second claim on 16 July 2019 raising further detriments as part of her victimisation claim, and she then brought a third claim on 5 February 2020 raising a claim of unfair dismissal.

3. Mrs Jarman also brought her initial claim on 14 December 2018, also raising complaints of equal pay, direct sex discrimination and victimisation but, in addition, raising a complaint of disability discrimination, albeit without any particularisation. Further particulars of the disability discrimination claim, which confirmed that it was a claim of failure to make reasonable adjustments, were provided on 4 March 2019, and further and better particulars of the claims generally were provided on 14 March 2019. Mrs Jarman brought a further claim on 9 July 2019, adding further elements to her claim of failure to make reasonable adjustments, further detriments in respect of her victimisation claim, and also a claim of failure to deal with a flexible working request. She then brought her third claim on 3 September 2019 in relation to unfair dismissal.

4. The Respondent, whilst resisting all the claims, accepted that Mrs Jarman was disabled at the relevant times, by reference to three physical conditions.

5. The “like work” elements of the equal pay claims were considered at a hearing before an Employment Tribunal chaired by Employment Judge Beard on 5 and 6 March 2020. That Tribunal found that the Claimants’ claims against three named comparators were well founded in respect of specified periods. The Respondent had accepted that the comparators had been undertaking like work to that of the Claimants and had been paid more than them, but had defended the claims on the basis of an asserted material factor of needing to pay more to attract external candidates. That material factor defence was not accepted by the Tribunal. The Claimants

claims of "equal value" remain to be considered by an Employment Tribunal in April 2021.

6. We heard evidence from the Claimants on their own behalf, and from two trade union representatives; Gabrielle Smith, Senior Shop Steward at the time; and Paul McGuire, a full time Convener; who had both represented the Claimants at internal meetings. On behalf of the Respondent we heard from Mike Brennan, Operations Manager; Carla Quinton, Senior Digital Fulfillment Manager; Chris Ryan, General Manager; Gareth Jenkins, HR Business Partner; Heath Twist, Head of Logistics; Alan Phillips, Operations Manager; Nathan Simmonds, Shift Manager; Neil Smith, General Manager; and Sally-Anne Humphries, HR People Partner. To clarify, the Respondent operates two distribution centres; DC1 at Worksop and DC2 at Magor. The Claimants and their trade union representatives all worked at DC2, and all the Respondent's witnesses, save for Mr Smith and Ms Quinton who worked at DC1, all worked at DC2.

7. We considered the documents in the main bundle spanning 1,266 pages and the supplemental bundle spanning 156 pages to which our attention was drawn. We also had regard to agreed chronologies in respect of both Claimants.

Issues

8. Lists of the issues to be determined, very largely agreed between the parties, were produced to us at the outset of the hearing. They were as follows:

A. Mrs Hanks

1. ***DIRECT SEX DISCRIMINATION***

1.1.1 Was the Claimant treated less favourably than the named comparators in the equal pay proceedings in respect to less favourable payment terms?

1.1.2 If so, was the reason for the treatment the Claimant's sex?

1.1.3 [The Claimant's position is that this matter has already been determined in light of the judgment of EJ Beard – given the finding that they were paid less and there was no justifiable reason put forward to dispel the suggestion of the Claimants that is was as a result of sex.]

2. ***VICTIMISATION***

2.1 Has the Claimant done a 'protected act', specifically:

2.1.1 the Claimant's equal pay complaint in June 2018 (and subsequent grievance process) [the Respondent concedes that the Claimant carried out a protected act by the grievance process]

2.2 Was the Claimant subjected to the following detriments as a result:

2.2.1 Being actively obstructed from furthering her career; the Claimant applied for two roles, the first being an Orange Grade manager role in ***August 2018****, following which she was given no constructive feedback;*

2.2.2 Being told by Chris Ryan in ***September 2018*** *that he did not see the Claimant performing in a management role (and therefore that Chris Ryan could not justify any enhancement for covering the shift manager role);*

2.2.3 Being actively obstructed from furthering her career. Specifically, the interview process of a health and safety role at the end of ***November 2018*** *was shelved;*

2.2.4 Not having her request for annual leave on the weekend of 13th April 2019 granted;

2.2.5 That the Claimant's relationship with her male peers soured/ leaving the Claimant isolated/ unsupported as follows:

(a) Mike Brennan rearranged a meeting with the Claimant throughout the period April - June 2018;

(b) Mike Brennan and Chris Ryan stopped saying "good morning" and engage in dialogue;

(c) Mike Brennan and Chris Ryan would stop telephoning the Claimant to relay instructions or provide updates;

(d) Not being invited on the Department Leader and Manager's night out in December 2018

3. ***UNFAIR DISMISSAL***

3.1 What was the reason for the Claimant's dismissal [the Respondent contends that the potentially fair reason was capability];

3.2 Did the Respondent consult the Claimant regarding the reasons for their absence?

3.3 Did the Respondent make reasonable efforts to facilitate the Claimant's return to work?

3.4 Did the Respondent reasonably believe that the Claimant was unfit to carry out their job (with any reasonable adjustments)?

3.5 Was dismissal within the range of reasonable responses open to the Respondent?

3.6 Did the Respondent and the Claimant comply with the ACAS Code of Practice?

*4. **JURISDICTION***

4.1 Was the claim form submitted more than 3 months after some of the conduct complained of?

4.2 If so, did that conduct form part of a chain of continuous conduct which ended within 3 months of the claim form being submitted?

4.3 If not, would it be just and equitable for the Tribunal to hear that part of the claim which relates to the conduct which occurred more than 3 months before the claim was submitted?

*5. **REMEDY (IF APPLICABLE)***

5.1 What remedy does the Claimant seek?

5.2 What financial compensation is appropriate in all of the circumstances?

5.3 Should any compensation awarded be reduced in terms of Polkey v AE Dayton Services Ltd and, if so, what reduction is appropriate?

5.4 Has the Claimant mitigated loss/taken reasonable steps to mitigate loss?

*6. **RECOMMENDATIONS***

6.1 Regardless of the outcome of the hearing commencing 15 February 2021, the Claimant is seeking a recommendation from the tribunal in relation to a full audit of pay of employees being conducted on the back

of EJ Beard's Judgment to ensure no discrimination with regard to pay because of an employee's sex, age, gender, sexual orientation, or disability.

B. Mrs Jarman

1. ***DIRECT SEX DISCRIMINATION***

1.1.1 Was the Claimant treated less favourably than the named comparators in the equal pay proceedings in respect to less favourable payment terms?

1.1.2 If so, was the reason for the treatment the Claimant's sex?

1.1.3 [The Claimant's position is that this matter has already been determined in light of the judgment of EJ Beard – given the finding that they were paid less and there was no justifiable reason put forward to dispel the suggestion of the Claimants that is was as a result of sex.]

2. ***VICTIMISATION***

2.1 Has the Claimant done a 'protected act', specifically:

2.1.1 the Claimant's equal pay complaint in June 2018 (and subsequent grievance process) [the Respondent concedes that the Claimant carried out a protected act by the grievance process]

2.1.2 [it is the Claimant's position that the equal pay complaint was initially raised in March 2018 and an email sent to HR dated April 2018]

2.2 Was the Claimant subjected to the following detriments as a result:

2.2.1 On 1st October 2018 RJ was allegedly told that she was not currently fulfilling DL role and was therefore being moved from role heading up training department to the Goods Inward Department. RJ allegedly told by Nathan Simmons "you know how this works, don't come back with "I can'ts""

2.2.2 That the Claimant's relationship with her male peers soured/ leaving the Claimant isolated/ unsupported as follows:

(a) Carl Cusick only engaged in serious work communication;

(b) Mike Brennan became very frosty with RJ from early June 2018 and showed frustration with her;

(c) Mike Brennan stopped saying "good morning" to RJ;

(d) On or around 13th June 2018, Mike Brennan referenced RJ's complaint in an open plan office, causing embarrassment;

(e) On 14th June 2018, Mike Brennan allegedly told RJ that pay queries should be raised with him;

(f) Gareth Jenkins allegedly said that he was no longer prepared to discuss RJ's pay complaint at the end of May / beginning of June 2018;

(g) In or around June 2018 Ceri Irvine and Gareth Morgan allegedly told RJ that they were not prepared to discuss her pay complaints;

(h) On 10th August 2018, Jane Preece allegedly told RJ to drop her equal pay complaint as it would lose and the Claimant would lose a lot of money.

(i) On 4th October 2018 RJ was shouted at by Allan Phillips re changes to a training document;

(j) RJ was not permitted to carry over 5 days of annual leave from 2018 (this was rejected after RJ raised a grievance in March 2019);

(k) On 11th April 2019, Allan Phillips allegedly conducted himself in an "unacceptable and aggressive manner" towards RJ during a grievance appeal hearing.

3. ***DISABILITY DISCRIMINATION (Failure to make reasonable adjustments)***

3.1 Allegation 1:

3.1.1 Did the Respondent apply a PCP of "requiring all Department Leaders to be capable of working a full complement of shifts covering 6am to 10pm at least"

3.1.2 Did the PCP, above, place RJ at a substantial disadvantage in comparison with persons who are not disabled?

3.1.3 Did the Respondent take such steps as was reasonable to take to avoid the substantial disadvantage? The Claimant asserts that it would have been reasonable to have permitted the Claimant to work early morning, early afternoon and day shifts only/ granting RJ's flexible working request (which was refused on 19th March 2019)

3.2 Allegation 2:

3.2.1 Did the Respondent apply a PCP of "requiring all annual leave to be taken within the same year and not permitting annual leave carry over"

3.2.2 Did the PCP, above, place RJ at a substantial disadvantage in comparison with persons who are not disabled?

3.2.3 Did the Respondent take such steps as was reasonable to take to avoid the substantial disadvantage? RJ asserts that it would have been reasonable to have permitted the RJ to carry over her annual leave (which was refused on 29th March 2019)

3.3 Allegation 3:

3.3.1 Did the Respondent apply a PCP of the attendance policy for long term absence, which provides that team members remaining on long-term absence into the start of the new financial year will not automatically receive full CSP benefit from week 1.

3.3.2 Did the PCP, above, place RJ at a substantial disadvantage in comparison with persons who are not disabled?

3.3.3 Did the Respondent take such steps as was reasonable to take to avoid the substantial disadvantage? RJ asserts that it would have been reasonable to extend the CSP benefit (which was refused on 29th March 2019)

4. ***FAILURE TO DEAL WITH FLEXIBLE WORKING REQUEST***

4.1 Did the Respondent fail to deal with RJ's Flexible Working Request in a reasonable manner contrary to section 80G(1)(a) of the Employment Rights Act 1996

5. ***UNFAIR DISMISSAL***

5.1 What was the reason for the Claimant's dismissal [the Respondent contends that the potentially fair reason was capability];

5.2 Did the Respondent consult the Claimant regarding the reasons for their absence?

5.3 Did the Respondent make reasonable efforts to facilitate the Claimant's return to work?

5.4 Did the Respondent reasonably believe that RJ was unfit to carry out her job (with any reasonable adjustments)?

5.5 Was dismissal within the range of reasonable responses open to the Respondent?

5.6 Did the Respondent and RJ comply with the ACAS Code of Practice?

6. ***JURISDICTION***

6.1 Was the claim form submitted more than 3 months after some of the conduct complained of?

6.2 If so, did that conduct form part of a chain of continuous conduct which ended within 3 months of the claim form being submitted?

6.3 If not, would it be just and equitable for the Tribunal to hear that part of the claim which relates to the conduct which occurred more than 3 months before the claim was submitted?

7. ***REMEDY (IF APPLICABLE)***

7.1 What remedy does RJ seek?

7.2 What financial compensation is appropriate in all of the circumstances?

7.3 Should any compensation awarded be reduced in terms of Polkey v AE Dayton Services Ltd and, if so, what reduction is appropriate?

7.4 Has RJ mitigated loss/taken reasonable steps to mitigate loss?

8. ***RECOMMENDATIONS***

8.1 Regardless of the outcome of the hearing commencing 15 February 2021, the Claimant is seeking a recommendation from the tribunal in relation to a full audit of pay of employees being conducted on the back of EJ Beard's Judgment to ensure no discrimination with regard to pay because of an employee's sex, age, gender, sexual orientation, or disability.

9. A point raised by the Respondent's representative at the commencement of the hearing, which we had ourselves identified as a point which required clarification, was that the specified claims of direct sex discrimination, both in the Claim Forms and the Lists of Issues, referred to the Claimants having been treated less favourably in respect of payment terms. Section 70 of the Equality Act 2010 ("EqA") provides that the inclusion in a claimant's terms of a term that is less favourable than that of a comparator is not sex discrimination for the purposes of Section 39(2) EqA. That provision mirrors the previous dichotomy between equal pay claims, which were to be dealt with under the Equal Pay Act 1970, and sex discrimination claims, which were to be dealt with under the Sex Discrimination Act 1975. In essence, Section 70 provides that matters relating to contractual terms are to be dealt with under the equal pay provisions of the Equality Act and not under the discrimination provisions. After some reflection, the Claimants confirmed that their claims relating to less favourable payment terms could not be considered as claims of direct sex discrimination, and they were therefore dismissed on withdrawal.

10. With regard to the issues identified under the headings, "Recommendations", we ultimately considered that it would be more appropriate for the Tribunal dealing with the equal value issue in April 2021 to address that point.

Law

11. The applicable law was largely encapsulated within the Lists of Issues. However, we were mindful of the following additional points in relation to the various claims:

Jurisdiction.

When considering whether an act formed part of a chain of continuous conduct we took into account the direction of the Court of Appeal, in Hendricks -v- Metropolitan Police Commissioner [2002] EWCA Civ 1686,

that the test is whether the Respondent is responsible for an ongoing situation or a continuing state of affairs.

Victimisation

The Respondent accepted that grievances raised by the Claimants in June 2018 were protected acts for the purposes of the Claimants' victimisation claims, although there was a dispute as to whether steps taken by the Claimants prior to that, in April and May 2018, also amounted to protected acts.

In addition to resolving that point, our focus in relation to the victimisation claims was on whether the Claimants had been subjected to a detriment because they had done a protected act. In that regard, we were mindful of the direction provided by the House of Lords, in Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] UK HL11, that a detriment arises if a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which they had to work. In terms of causation, we were mindful of the fact that we were not looking at causation in a "but for" sense, but were focusing on the reason why the Respondent may have acted as it did.

Flexible working request

We noted that Section 80G of the Employment Rights Act ("ERA") requires an employer to deal with an application for flexible working "*in a reasonable manner*", that notification of the decision on the application must be made within the period of three months beginning with the date on which it is made, with a similar timescale applying to any appeal, and that refusal can only be on one of nine specified grounds. The legislation does not provide any guidance as to what is considered to be "*a reasonable manner*".

Unfair dismissal

If we were satisfied that the reason for dismissal of the Claimants had been capability, our consideration of whether dismissal for that reason was fair in all the circumstances would need to be assessed from the perspective of whether the decision fell within the band of reasonable responses open to an employer acting reasonably in the circumstances. In the context of incapability dismissals arising from ill health, we noted that the Employment Appeal Tribunal ("EAT"), in Monmouthshire County Council -v- Harris (UKEAT/0332/14), noted that the employment tribunal's reasoning would need to "*demonstrate that it had considered whether the Respondent could have been expected to wait longer, as well as the question of the adequacy*

of any consultation with the Claimant and the obtaining of proper medical advice".

With regard to obtaining medical advice, the EAT, in East Lindsey District Council -v- Daubney [1977] ICR 566, noted that steps should be taken by the employer to discover the true medical position prior to any dismissal, and also stressed the importance of consultation, noting that "*unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves on the true medical position, it will be found in practice that all that is necessary has been done*".

With regard to consultation, the Court of Session, in S -v- Dundee City Council [2014] IRLR 131, emphasised the need to consult the employee and to take their views into account, but noted that this could operate both for or against dismissal depending on the circumstances. If the employee states that they are anxious to return to work as soon as possible and are able to do so in the near future then that would operate in their favour, but if they stated that they were no better and did not know when they would be able to return to work then that would be a significant factor operating against them.

Both representatives also referred us to the case of Royal Bank of Scotland -v- McAdie [2008] ICR 1087, which provided guidance in relation to dismissing employees where the underlying illness which led to the employee's dismissal was attributed to the conduct of the employer, although we noted that the Respondent did not accept that it had been the cause of the Claimants' illnesses. In that case, the Court of Appeal confirmed that it may be necessary to "*go the extra mile*" in such circumstances, for example by being more proactive in finding alternative employment or putting up with a longer period of sickness absence. However the Court emphasised that the fact that an employer may have been at fault for causing the incapacity does not in any sense mean that a resulting dismissal for that incapacity will be unfair.

Findings

12. We make two preliminary observations before recording our specific findings. The first is that we were aware that a further hearing is scheduled to take place in April 2021 in relation to the remaining elements of the Claimants' equal pay claims. We were conscious therefore not to make any formal findings which may impact on that case, and any references we make to the duties undertaken by the Claimants or by their comparators is only for the purposes of the background to the claims we were considering and should not be taken to bind the subsequent Tribunal.

13. The second is that we were conscious that the parties, both in terms of the evidence given by witnesses and their representations, had been adamant that the evidence presented by and on their behalf was accurate and truthful and, by extension, any contradictory evidence put forward by the other side was inaccurate, and indeed untruthful. However, we noted that we were dealing with evidence which was, even in relation to the most recent matters, well over a year old, and in relation to earlier matters was the best part of three years old. We also noted that witnesses to events may genuinely and wholeheartedly believe that their recollection is entirely accurate. However, we all view matters from our own individual perspectives, and it is very common for our recollection of matters to be influenced by what we want our recollection of matters to be even if that recollection is not entirely accurate.

14. We considered that this case included several prime examples of that. There were a number of occasions where the parties were not at all far apart in their recollections of what had happened, but interpreted events entirely differently. Overall, our view in relation to the evidence provided by the Claimants was that, whilst we had no doubt that they were genuinely and openly expressing what they believed had occurred, because they felt so badly let down by the Respondent's unwillingness to accept that they were paid unequally without justification, it led to them interpreting the Respondent's actions with suspicion and to them believing that they had been treated badly, and indeed victimised, when we did not consider that that had been the case. We felt that they tended to view the actions of the Respondent's management through a prism of unfairness which led them to consider that inappropriate treatment arose, almost at every turn.

15. As we have noted, there were many occasions where it seemed to us that what had happened as a matter of fact was not particularly disputed, but had been interpreted by the parties in entirely different ways. Where matters were clearly disputed as having taken place at all, we formed our conclusions on the balance of probabilities, taking into account the

documentary evidence that existed in relation to those matters, the evidence from other parties in relation to them, and the general consistency and plausibility of the evidence in relation to those matters. On that basis, our findings were as follows.

16. The Respondent is the well-known high street retailer, and the relevant events all took place at its distribution centre in Magor. The centre operates on a 24-hour basis. Its management structure has a General Manager (Green Grade) at the top, followed by Operations Managers (Red Grade), Shift Leaders (Orange Grade), Department Leaders (T Grade), Section Leaders (R Grade), Team Leaders (P Grade) and DC Operatives (M Grade).

17. The Claimants started work in 2000 and 2002 respectively. and both were promoted at the same time, in February 2016, into Department Leader ("DL") roles. At the relevant times there were around ten or eleven DLs at DC2.

18. Both Claimants were well respected and effective employees, with no issues ever having arisen regarding their performance, conduct or attendance.

19. At the time of their promotions into DL roles, both Claimants worked on the operational side of the business. In May 2017, Mrs Hanks switched to undertake a role as the night shift duty manager. This was initially to be for only a period of some eight to ten weeks, but Mrs Hanks ended up undertaking that role for some eighteen months.

20. Mrs Jarman, due to her health conditions, moved from an operational role into a training and development role, seemingly around February 2017.

21. Concerns on the part of the Claimants that they were being paid unequally in comparison with male DLs arose at the end of March 2018, when Mrs Jarman overheard two male DLs discussing their pay. It appeared to her that her male colleagues were being paid more than her, and Mrs Hanks, being friendly with Mrs Jarman, became aware of that at a similar time.

22. Questions were asked about this disparity by the Claimants of the Respondent's HR Department, principally Mr Glyn Gasson, HR Adviser, in April and May 2018. Mrs Hanks attempted to meet with Mr Brennan to discuss pay issues in April and May, with a meeting eventually taking place on 1 June 2018, having been rescheduled on several occasions. That meeting appeared principally to be about Mrs Hanks' pursuit of extra remuneration for the work she was doing on the night shift, but also

encompassed the apparent disparity in pay between Mrs Hanks and her male colleagues. Following the meeting, Mrs Hanks sent an email to Mr Brennan on 4 June 2018, confirming her request for more pay in relation to her night shift work, and she also on the same day sent an email to Mr Jenkins raising the equal pay issue. Mrs Jarman also sent emails to Mr Gasson seeking responses to what she described as her "equal pay query" and her "gender pay gap query" in May 2018. Mrs Jarman sent an email to Mr Jenkins on 4 June 2018, noting her previous attempts to gain information from Mr Gasson and stating that she felt she had no option other than to deal with the matter formally.

23. In addition to the attempts made by the Claimants to obtain information about the apparent pay discrepancy, we heard reference to evidence given by Carl Cusick (at the time a Shift Leader but who had since left the Respondent's employment) at the Employment Tribunal hearing in March 2020, that the query raised by the Claimants had been discussed at a managers' meeting in April 2018. There was no recollection of that by the managers who gave evidence before us who would have been likely to have attended such a meeting. However we noted that there was an email on 1 May 2018, between Mr Gasson and Mr Brennan, referring to a conversation that they had had in a "partnership meeting". which we understood to be a different type of meeting to the managers' meeting, about salary rates for DLs, and that an explanation for the different rates had been sought. We also noted that Mr Gasson had previously emailed Mr Jenkins, on 9 April 2018, with the comparative pay rates for DLs. We were ultimately therefore satisfied that the queries raised by the Claimants about the apparent inequality in respect of their pay was known within the Respondent's management structure at that time.

24. Following the issues raised by the Claimants in their emails of 4 June 2018, Mr Brennan undertook an investigation. It appears however that he did no more than ask the Respondent's central HR Team in Worksop to look into the pay of the DLs. They informed him that there was no unequal pay, and he passed that information on to the Claimants without undertaking any investigations of his own or, it seems, without challenging the information provided to him by the HR Department.

25. Although identical issues were and are raised by the two Claimants, at no time were their complaints joined and dealt with collectively, and individual meetings were held with them, and responses provided to them, at all times.

26. Mr Brennan provided the response to the query over pay to the Claimants verbally in meetings, on 14 June 2018 with Mrs Jarman, and in the early

hours of 15 June 2018, on the night shift being worked by her, with Mrs Hanks, following which he provided them each with a written response.

27. In advance of the meetings he spoke to Mrs Jarman on 13 June 2018 to see if she was going to be in on the following day and, if so, at what time she would be available. This was included as one of the acts of detriment in the List of Issues relating to Mrs Jarman on the basis that Mr Brennan had "*referenced RJ's complaint in an open plan office, causing embarrassment*".

28. There was no dispute between Mrs Jarman and Mr Brennan in relation to the fact that he had indeed approached her, and had told her that a meeting would be held the following day to provide a response to her pay query, and that she was entitled to bring a witness to it. A handwritten note, which we presumed was made relatively contemporaneously, on a printed copy of the email meeting invite noted that three other individuals had been sat around Mrs Jarman at the time, and then simply recorded what Mr Brennan had said in the terms we have outlined above.

29. Mr Brennan indicated that he did not think that he was doing anything out of the ordinary, and did not think that he had spoken loudly enough for any of Mrs Jarman's colleagues to have heard what he had said. We noted however, having seen a plan of the office layout, that the relevant employees sat fairly close together in an open plan environment, and we considered therefore that it would have been likely that Mrs Jarman's colleagues would have overheard the conversation.

30. However we considered that it was an anodyne conversation in which, as recorded by Mrs Jarman, Mr Brennan had only said that he had had a response from Head Office and wanted to meet. The only matter within that discussion which might have been somewhat out of the ordinary was the reference to Mrs Jarman being entitled to bring a witness. However, overall we did not consider that this conversation should have reasonably caused Mrs Jarman to feel embarrassed.

31. The letters provided to the Claimants dated 13 June 2018 were identical. Both recorded that Mr Brennan had conducted an investigation which involved a review of DLs' pay rates across both distribution centres. The letters went on to say that, whilst Mr Brennan could not share the detail of the findings, he could confirm that he was satisfied that the Claimants had no grounds for complaint and therefore that he was not upholding the grievances. The letters concluded by informing the Claimants about their right of appeal.

32. Mr Brennan confirmed that the letters had been drafted by the Respondent's HR Department, and he also confirmed that whilst the letters had stated that he had conducted an investigation, it had in fact been undertaken by the Respondent's HR Department.

33. Mr Brennan also provided a response to Mrs Hanks on 22 June 2018 in relation to her request for additional remuneration for her night shift work. In that he confirmed that no additional remuneration had been agreed, but that the Respondent would be looking to put additional support into the Nights Leadership Team in the form of an additional DL and the attendance on a night shift of the Red/Orange Leadership Team each week.

34. Both Claimants, via their Union Representative Mr McGuire, lodged appeals against Mr Brennan's response to their equal pay query. His email in fact refers to Mrs Hanks wishing to raise the matter as a "proper" formal grievance. He also requested that the matter be dealt with independently from the DC2 structure. Initially, Joanne Allwood, whom we understood to be a DC1 manager, was earmarked to deal with the next stage, but ultimately she was unable to do so. Instead, Ms Quinton, as we have noted a manager based at DC1, stepped in to deal with the matter. Separate meetings with the two Claimants took place on 18 July 2018. Mr McGuire was present, and Jane Preece, HR Business Partner, acted as the notetaker in both meetings.

35. Both Claimants indicated at the outset of their meetings that they did not consider that they were appealing a decision, as they had not raised the matter formally in the first place. Both Claimants then explained their concerns and how they considered they were being paid unequally in comparison with their male colleagues. Mrs Hanks also raised the concern regarding her payment for undertaking the night role. At the conclusion of the meetings Ms Quinton indicated she would investigate the issues that had been put forward and would look to get back to the Claimants in the week commencing 4 August with her decision. During her investigation Ms Quinton spoke to Mr Gasson, Mr Jenkins, Mr Cusick and Mr Brennan.

36. Ms Quinton then met both Claimants separately on 10 August 2018, again with Mr McGuire accompanying them and with Ms Preece acting as a notetaker. During those meetings Ms Quinton read out her outcome letter. In those letters, Ms Quinton confirmed that the rates of pay for all DLs had been reviewed and that she was able to confirm that there was no equal pay disparity between the ten DLs. She noted that the base rate was the same for most of them with some exceptions, and that in line with the living wage implementation (which had taken place in 2016) any DL that was identified as above the agreed pay rate for that role had been red circled. It

transpired that Ceri Irvine, Gareth Morgan and Alan Brehony had all been ringfenced in this way on 27 March 2016, i.e. it appeared that the three of them were paid more than the two Claimants, but following the implementation of the national living wage within the Respondent's organisation, their pay had been ringfenced or red circled such that they would not receive further increases for a period.

37. Ms Quinton therefore confirmed that she was not upholding the grievances. She noted in Mrs Hanks' case that the Respondent could pay an enhancement should an employee be allocated additional responsibilities over and above the normal DL role, and that she would be making a recommendation that Mrs Hanks' request, to be considered for an enhancement for the period she had been supporting nights, be reconsidered.

38. Ms Quinton also confirmed that she considered that the investigative process had been managed poorly and had taken far too long to resolve. She confirmed that this had been fed back to the senior management team at DC2 to ensure that a process for dealing with enquiries of that nature was managed efficiently in the future. She confirmed therefore that she was upholding that part of the grievances. She concluded by confirming that the Claimants had the right to appeal her decision, and both Claimants did so.

39. Mrs Jarman asserted that, after her meeting with Ms Quinton, Jane Preece had beckoned to her to go into Mr McGuire's office and there had threatened her by telling her that the Respondent would win any equal pay litigation, and that she would lose money as a result, the implication, it seems, being that that would arise through incurring legal costs. Mrs Jarman also asserted that Ms Preece had told her that she would deny the conversation had taken place if she repeated it.

40. Mr McGuire's statement supported Mrs Jarman's in relation to the reference to the likelihood of her losing any equal pay case and the cost of pursuing such a claim, noting that he perceived the comment as threat. He did not record that he overheard any exchange about a denial of the conversation. Mr McGuire also indicated that the same conversation had taken place between Ms Preece and Mrs Hanks, but Mrs Hanks did not refer to such a conversation as having taken place.

41. We did not hear evidence from Ms Preece about her side of this conversation, but accepted the evidence of Mrs Jarman and Mr McGuire that she had made a comment about the litigation and the cost arising from it. We did not however consider that Ms Preece had made a comment

about denying the conversation had taken place, or that a similar conversation had taken place with Mrs Hanks.

42. We felt that Mr McGuire would have remembered had he overhead Ms Preece saying that she would deny the conversation had taken place, or that Mrs Jarman would have told him immediately after the comment was made had he not overheard it. We also felt that Mr McGuire was simply mistaken about the fact that Ms Preece had made such a comment in relation to both Mrs Hanks and Mrs Jarman, as we anticipated that Mrs Hanks would have had a recollection of it had it happened in her case.

43. Mrs Hanks then discussed possible additional remuneration for her night shift role with Mr Ryan. Ultimately, Mr Ryan concluded that the role Mrs Hanks was undertaking in relation to the night shift was no different to that undertaken by other DLs on other shifts. He concluded therefore, that he did not consider that Mrs Hanks was undertaking the role of a Shift Manager, but that he did want to recognise that the role she had been undertaking of a Duty Manager had been asked of her on a more regular basis than other DLs. He indicated that the Respondent generally applied a pay enhancement of around 10% for a secondment into a higher grade role and that, as the Claimant had been undertaking duties of a Duty Manager but not a Shift Manager, an increase of 5% would be appropriate. This led to a proposed annual increase for the Claimant whilst she was undertaking the night shift role of £1,575. Mr Ryan put his conclusions into a letter, which was not dated but must have been sent at the end of August or beginning of September 2018, but Mrs Hanks ultimately rejected Mr Ryan's proposal.

44. Also in August 2018, Mrs Hanks applied for an Orange Grade manager's role. Interviews took place and Mrs Hanks accepted that she had not performed well during interview, particularly with regard to answering questions to demonstrate her skills and experience. The application was to replace Mr Cusick who had left the Respondent's employment at that time. Ultimately however, whilst Mrs Hanks was rejected at the interview stage, with other managers potentially progressing further, the role was re-filled by Mr Cusick returning and therefore there was no appointment.

45. Mr Phillips informed the Claimant of the situation by email on 28 September 2018, whilst the Claimant was on holiday. Mrs Hanks replied, indicating that she would like feedback from Mr Phillips about her performance at interview and how it could be improved. She returned to work on 10 October 2018, and Mr Phillips then attended the night shift the following day, i.e. 11 October 2018, and spoke to the Claimant at that point.

46. Mr Phillips, in his evidence, indicated that he provided Mrs Hanks with the questions that were asked during the interview so that she could go through them and put forward answers which he could discuss with her in order to improve the way she brought out her experience and knowledge. Mrs Hanks, in her evidence, complained that all Mr Phillips did was throw the booklet with the questions on the desk in front of her, but we were satisfied that Mr Phillips had given the Claimant the booklet with a view to discussing matters further at a later date. Whilst this was perhaps not as helpful as it could have been, as Mr Phillips could potentially have given some more direct and immediate advice, we did not consider that there was anything unreasonable in his approach. Ultimately it transpired that neither Mrs Hanks nor Mr Phillips took the matter of feedback any further.

47. Both Claimants appealed Ms Quinton's decision, and Mr Smith, General Manager of DC1, was allocated to consider both appeals. He met Mrs Jarman on 14 September 2018 and Mrs Hanks on 17 October 2018. In Mrs Hanks' case the appeal covered both the unequal pay issue and also her concern that she should be paid more for her Night Manager's role.

48. Mr Smith provided his decision to Mrs Jarman by letter dated 24 September 2018. He confirmed that he had reviewed all DL pay rates and enhancements across both sites, and found that of the 40 DLs (11 female, 29 male) 32 were on the same base rate (9 female, 23 male) and 8 were on a higher base rate (2 female and 6 male). Of the 8 on higher base rates, 5 higher payments had arisen due to previous roles or structures and 3 had been recruited externally with higher rates agreed to attract the right candidates at that particular time. He noted that all of the 8 had been red circled and would not receive annual increases until the other salaries caught up.

49. Mr Smith also referred to one male DL previously receiving an enhancement which was being stopped at that point. That appeared to relate to Mr David Pope, where it had become apparent that he had continued to receive a night shift supplement notwithstanding that he had moved to work exclusively days, the error having been discovered following the investigation into the concerns raised by the Claimants. Discussions subsequently took place with Mr Pope as to whether he should repay the additional sums he had received in error or should be red circled pending rectification of the issue, with the latter being adopted.

50. Mrs Jarman had specifically raised a question of the salary of Mr Alan Brehony, and Mr Smith confirmed that he was one of the individuals recruited externally to whom it was thought appropriate to pay a higher rate.

51. Mr Smith also confirmed that he had spoken with Mr Ryan to discuss how Mrs Jarman's grievance had been handled and her concerns that it could affect her career, and reported that Mr Ryan acknowledged that the matter could have been handled differently and may have been able to have been resolved informally, but that he felt very strongly that neither he nor any member of his team would treat Mrs Jarman differently as a result of the matter being dealt with under a formal process. Mr Smith concluded that he was satisfied that there was reasonable justification for the variances in salary and that processes had been put in place to realign them over time. He concluded by noting that his decision was final.

52. Mr Smith then provided a similar letter to Mrs Hanks dated 26 October 2018. He provided the same information regarding the salaries of DLs and the reasons for any differences in base rates. With regard to Mrs Hanks' specific concern regarding her pay for her Night Manager's role, he confirmed that the role was not a direct replacement for the previous Night Shift Manager and that the previous Night Shift Manager had been there to put processes and standards in place to allow the shift to run efficiently and effectively, and that once this had been achieved the night shift was able to be managed by a DL. He confirmed that he acknowledged that Mrs Hanks had undertaken the Duty Manager's role for a longer period, which had been recognised by Mr Ryan, and he confirmed that he was happy with the level of compensation that Mr Ryan had offered.

53. Mr Smith also dealt with a point raised by Mrs Hanks during the appeal hearing, that she return to a rotating day shift. He confirmed that this had been agreed and would be implemented. He also dealt with a concern that Mrs Hanks had raised that other applicants for the Shift Leader role were receiving pay enhancements and development opportunities. He responded by confirming that no enhancements were being paid and that, in terms of Mrs Hanks' development, whilst it was down to her Line Manager to support her, it was her responsibility to lead her own development and be proactive in seeking support. He strongly recommended that Mrs Hanks should sit down with her Line Manager and discuss her recent interviews and build a development plan that would allow her to develop the areas required so that she would be better equipped when applying for future roles. As we have noted, feedback on the interview had been provided by Mr Phillips just before this, and it did not appear that any further feedback was sought by Mrs Hanks.

54. In October 2018, Mr Simmonds, as Shift Manager, discussed with Mrs Jarman the potential for her to move from her training role to an operational role. By this time, Mrs Jarman had been working in the training role for approximately 18 months and had worked day shifts, starting at either

6.00am, 7.00am or 8.00am. Her move into that role, and the structure of her shifts, had been agreed as a way of managing the tiredness she experienced arising from her pernicious anaemia and endometriosis. In October 2018 however a need had arisen for greater operational support due to the movement of two other DLs, and Mr Simmonds had identified that Mrs Jarman would be best placed to provide that support.

55. The two met on three consecutive days to discuss Mrs Jarman's potential return to the operational role on a temporary basis to cover the peak period, i.e. Halloween, Christmas and the New Year. The role would however require rotating shifts, starting at 6.00am one week and then 2.00pm the following week.

56. Whilst the discussions were initially cordial, over the period of three days they appeared to get rather more difficult. Mr Simmonds indicated to Mrs Jarman that she was not carrying out a DL level role whilst undertaking her training role, but Mrs Jarman perceived that to be more of a personal attack on her, and an indication on Mr Simmonds' part that she was not up to working at a DL level. However, we were satisfied that there was never any intention on Mr Simmonds' part to comment on Mrs Jarman's performance, and that his comment was purely related to the scope of the training role.

57. Mrs Jarman also took issue with Mr Simmonds asking her to think about his suggestions and to come back to him with "I can's" and not "I can't's". Mr Simmonds disagreed that he used those words, but accepted that he had asked Mrs Jarman to tell him what she felt she would be able to do. We felt that, whatever the terminology, this was simply an attempt by Mr Simmonds to understand from Mrs Jarman what she could do in terms of the proposed operational role.

58. Mrs Jarman also did not appreciate Mr Simmonds saying that she should give herself a "pat on the back" for the work that she had undertaken in the training role, but we did not find anything improper or unusual about that comment. We considered that it was simply an attempt on Mr Simmonds' part to indicate to Mrs Jarman that his request for her to move to an operational role was not a reflection on the way she had carried out the training role.

59. Over the course of the discussions, Mrs Jarman expressed her concerns about her ability to undertake the roles on the rotational shift basis, bearing in mind that she had worked relatively regular shifts over the previous eighteen months or so in respect of her training role. Various alternatives were discussed, but no agreed position could be reached. That then led Mr

Simmonds to arrange for a referral of Mrs Jarman to Occupational Health in order to get advice on what she might be expected to do.

60. Mr Simmonds and Mrs Jarman then met again on 29 October to discuss the matter further, following which Mr Simmonds confirmed that he would not consider changing Mrs Jarman's work patterns without Occupational Health advice.

61. Ultimately, an Occupational Health Report was obtained, dated 1 November 2018, which confirmed that working rotational shift patterns would be likely to increase Mrs Jarman's fatigue levels and increase her sickness absence. Similarly, the advice was that permanent afternoons or night shifts would impact on Mrs Jarman's sleep patterns, possibly increase her fatigue levels, and impact on her work life balance. The report indicated that Mrs Jarman's current shift regime appeared to be ideal, and that the Respondent may feel it reasonable to allow her to keep to those hours.

62. At that point, Mrs Jarman was absent from 5 November 2018 due to a scheduled hand operation, and her possible return to an operational role was due to be discussed following her return. In the event, she never returned to work and therefore no such discussion took place.

63. Prior to that, an incident occurred on 4 October 2018 between Mrs Jarman and Mr Phillips. Some weeks earlier, Mr Phillips had asked Mrs Jarman to make some changes to a particular training document. It transpired that the document was used across the two distribution centres and therefore that Mrs Jarman felt that she could not make the changes, and that it needed to be done by Human Resources and/or Health and Safety. She did not however inform Mr Phillips of that.

64. On 4 October 2018, Mr Phillips asked Mrs Jarman what had been done with regard to his request, and only learned at that point that his request had not been completed. The exchange clearly did not go well, with Mrs Jarman in her evidence describing Mr Phillips as aggressive and threatening, and as having shouted at her. Mr Phillips described himself as being frustrated by the fact that Mrs Jarman had failed to follow his instruction and by her unnecessarily defensive approach when asked about it, but denied shouting and being aggressive or threatening. Mr Jenkins, who observed the exchange, described it as "direct" and "quite robust".

65. Our conclusions were that the discussion was pointed and there certainly did not appear to be any love lost on either side. We were informed that it was understood that another employee who observed the exchange rang the Respondent's confidential helpline to complain about what had

happened, but no direct confirmation of that was before us in evidence. We also noted Mr Phillips' confirmation in his evidence that he is a large individual, being some 6' 5" tall and some 20 stones in weight. It seemed to us therefore, that an expression of displeasure by Mr Phillips could be perceived by someone on the receiving end of it as somewhat threatening. Overall, we did not consider that Mr Phillips had shouted at Mrs Jarman or consciously been aggressive to her. We considered however that it could be that Mrs Jarman had perceived Mr Phillips as having been aggressive.

66. At around this time, in November 2018, Mrs Hanks was told that a health and safety role that she had been interested in pursuing had been shelved. A potential role had arisen following an internal move and an advert had been placed and applications received, including from Mrs Hanks. However, Mr Jenkins confirmed that the Health and Safety Team had decided that the vacancy that had arisen would not be fulfilled in the short term, and therefore the recruitment drive was put on hold. We saw no evidence that it had been taken further at any time.

67. Mrs Hanks also indicated that she had not been invited on a Department Leader managers' night out in December 2018, and pursued this as one of her victimisation claims. The evidence of the Respondent's witnesses was that there were no regular events for managers at any time, due to the fact that the Respondent operated the distribution centre on a round the clock basis. We also noted that Mrs Hanks' evidence on this point had become rather more elaborate than that originally included in her claim form, and that the evidence was further expanded again under cross-examination, where Mrs Hanks contended that Mr Pope had refused to forward an email about the event, as opposed to her pleading when she said that Mr Pope had said that an email had been sent round but that he could not find it. In the event, there did not seem to be any evidence to support a contention that there had been any formally arranged night out in December 2018 to which Mrs Hanks had not been invited.

68. Mrs Hanks was then absent due to stress and anxiety in December 2018, and when she returned in January 2019 she moved to working day shifts. As we have noted, Mrs Jarman was absent from early November 2018 due to surgery on her hand. She remained absent into 2019, and indeed never returned to work. From January 2019 however her reason for absence changed to stress at work.

69. A welfare meeting took place with Mrs Jarman on 4 January 2019 with Mr Barry Evans from the Respondent's HR Department, during which Mr Evans reiterated that the Respondent was looking for the Claimant to return into an operational role on a rotational shift basis when she was fit to work.

Mrs Jarman then submitted a flexible working request on 15 January 2019. Her request was to work morning shifts (6.00am to 2.00pm) on Mondays, Wednesdays and Fridays (up to 1.00pm on Fridays), and "mid shifts" of 8.00am to 4.00pm on Tuesdays and Thursdays. The matter was discussed during a welfare review meeting with Mr Evans on 19 February 2019, during which Mr Evans indicated he was able to offer Mrs Jarman a trial of the hours she had requested within her flexible working application for a period of one month. Mrs Jarman indicated she was not happy with that proposal and wanted a separate meeting to discuss her application in more detail.

70. In March 2019, Mrs Jarman enquired of Mr Gasson of the HR Department whether she could use a week's holiday entitlement from 2018 (in fact entitlement for the 2018/19 holiday year, i.e. 1 February 2018 to 31 January 2019). This arose due to the fact that Mrs Jarman's company sick pay had expired. She followed that up with a further email two days later, 14 March 2019, indicating that she was also asking for discretion to be exercised and for full pay to be afforded to her in addition to being paid in respect of the week's holiday from 2018. That request was processed by Mr Gasson as a grievance, and a grievance meeting was arranged with Mr Mike Thomas, Shift Manager, on 18 March 2019.

71. In the event, Mrs Jarman did not meet with Mr Thomas on that day, albeit that her representative, Mr McGuire did. Mrs Jarman provided Mr Thomas with an email summarising her concerns. With regard to the holiday carry over, Mrs Jarman noted that she was aware that the Respondent had allowed employees to carry over holiday entitlement on occasions. Following the meeting on 18 March with Mr McGuire, and Mrs Jarman's email, Mr Thomas wrote to her with his decision on 29 March 2019.

72. With regard to holidays, Mr Thomas noted the terms of the Respondent's policy, which was that, with regard to statutory holiday, i.e. that provided for under the Working Time Regulations 1998 as amended, any holiday not able to be taken in a particular holiday year due to sickness absence could be carried forward into the following year. We observed that that was in line with the prevailing European Court case law. However, Mr Thomas noted that the policy confirmed that any holiday over and above the statutory amount had to be used in the particular holiday year and could not be carried forward. Mr Thomas referred to being aware that holidays had been carried over in other circumstances, but did not explain the reasons for that on the basis that they were confidential. He also confirmed that authorisation had been given in advance on those occasions. The evidence from the Respondent's witnesses before us was that carry forward had been authorised in circumstances where an individual had had to work over the peak period of Christmas and the New Year and therefore had been

unable to use all their holiday entitlement before the expiry of the particular holiday year at the end of January. The witnesses also confirmed that prior authorisation had been granted in those cases.

73. With regard to company sick pay, Mr Thomas again referred to the company's policy in that regard. He explained that the terms of that policy meant that an individual's entitlement to company sick pay did not restart in a fresh financial year until the individual had returned to work and commenced a further period of sickness absence. The policy in fact provided that, for someone with Mrs Jarman's length of service, she would be entitled to a maximum of 26 weeks company sick pay in any one financial year, and that any period of sickness which continued into the following financial year would continue to be paid up to the relevant maximum. However when the maximum amount was reached, the employee would switch to statutory sick pay.

74. Mr Thomas observed that Mrs Jarman had been afforded the opportunity to return to work on a four-week trial basis, working her proposed hours, but she had declined. He noted that had she returned, the Respondent could have reviewed the hours and potentially agreed to extend the arrangement for a further period of time, and that Mrs Jarman would have received full pay in respect of that work, which would then have allowed her company sick pay to be recalculated for the current financial year. In the circumstances he concluded that he felt that the Respondent had offered a reasonable compromise, and therefore he did not consider it appropriate to extend company sick pay. He concluded by confirming to Mrs Jarman that she still had the option to return to work on the revised shift pattern that she had proposed on a trial basis.

75. Mrs Jarman's formal flexible working application hearing took place on Wednesday 13 March with Jamie Higgs, Shift Manager. He responded to her with his decision in a letter dated 29 March 2019. In the letter he reported that he was unable to accommodate Mrs Jarman's request due to a detrimental effect on the Respondent's ability to meet customer demand and a negative effect on the distribution centre's ability to provide a quality service to the Respondent's stores. He also felt that the proposal would create unacceptable difficulties in making arrangements to reorganise work amongst other DLs. He referred to five specific issues which he felt would impact on that.

76. Mr Higgs put forward an alternative work pattern of Mrs Jarman finishing at 9.00pm on the afternoon shift rather than 10.00pm, having two rest days off together over the week, and reducing the number of days she worked. He also confirmed that there was an alternative role available as a Section

Leader within which Mrs Jarman's flexible working application could be given consideration as the work could be more easily reorganised. Mr Higgs concluded by informing Mrs Jarman of her right to appeal.

77. At around the same time, an issue arose with regard to the booking of holiday by Mrs Hanks. She indicated in her evidence that she had verbally agreed with Mr Higgs in February 2019 that she could take annual leave on the weekend of 13 April 2019. Her evidence was that she then proceeded to input the request via the Respondent's "Myview" system, an electronic system which was being introduced at that time to replace the previous paper system. Due to a glitch with the system however the application could not be processed. She indicated that she had asked if a paper form was required, but was told that the Respondent was no longer operating a paper system.

78. We did not hear evidence from Mr Higgs, who is no longer employed by the Respondent, but Mr Jenkins gave evidence on his discussion with Mr Higgs at the time about the incident. He recalled that Mr Higgs had told him that Mrs Hanks had not requested the leave in February. Mr Jenkins also confirmed that the Respondent had continued to handle paper requests for holidays, and indeed confirmed that he had recently discovered that that was still the case. We felt that Mr Jenkins, as a senior member of the Respondent's HR Department, was best placed to give evidence on that.

79. The evidence of the parties then appeared to come much closer together towards the end of March 2019. Mrs Hanks' evidence was that when she raised the matter at this point Mr Higgs had told her to wait for the rota for the weekend of 13 April 2019 to be produced, as it could be that she would not be working that weekend in any event. The rota was then released in the week commencing 25 March 2019 and showed that Mrs Hanks was due to work on the weekend of 13 April. Mrs Hanks then asked two of her DL colleagues to swap with her, but they were not willing to do so as they had other commitments. In her oral evidence, Mrs Hanks indicated that there had been an instruction by Mr Cusick to employees not to switch shifts. However, we noted in the bundle that there were minutes of a welfare meeting between Mrs Hanks and Mr Cusick on 3 May 2019, during which the matter was discussed, and Mrs Hanks did not make any assertion that Mr Cusick, or indeed any manager, had given any direction to employees not to swap shifts, and we therefore did not consider that any such instruction had been given. Shortly after this, on 14 April 2019, Mrs Hanks commenced a period of long-term sickness absence from which she did not return.

80. Mrs Jarman submitted an appeal in relation to the refusal of her flexible working application, in which she indicated that she felt that her illness had not been taken into consideration, that DLs working in DC1 had been granted flexible working, and that three DLs in DC2 did not rotate despite being at the same level and grade as her. The appeal was submitted on 4 April 2019 and an appeal hearing took place with Mr Brennan on 9 April 2019. He provided his decision on the appeal by letter dated 12 April 2019.

81. In this he indicated that Mr Higgs had confirmed in the flexible working application meeting that he had an overview of Mrs Jarman's medical condition and that she had not raised any concerns around that. He also noted that the structure of DC1 was different and therefore that the role of DC1 DLs could not be compared. He also confirmed that the other three DL roles in DC2 were non-rotational roles, and that whilst DLs did work mid shifts on occasions, that was only to cover shortfalls due to holidays or absences.

82. Mr Brennan confirmed that the four-week trial was still available to Mrs Jarman, with an additional proposal that she could work one Saturday in every four weeks to enable her to experience the weekend workload and the differences between that and the weekday structure. He also confirmed that the trial could be extended if more time was required to make the decision that it was suitable for both parties. He noted however that Mrs Jarman had refused to undergo a trial period and had stated that she would only consider the hours as a permanent move.

83. Mrs Jarman also lodged an appeal against the grievance outcome in relation to the holiday carry over and company sick pay points. The appeal meeting took place with Mr Phillips on 9 April 2019, accompanied by Mr Gasson as a notetaker, with Ms Smith accompanying Mrs Jarman as her Trade Union Representative.

84. The meeting appears to have been rather testing for those involved, or certainly concluded in a rather testing manner. After the meeting, Mrs Jarman sent an email to the Respondent's senior management complaining about what she described as the unacceptable, unprofessional and aggressive manner in which the meeting had been conducted by Mr Phillips. She commented that she had been talked over continuously and had been subjected to a tirade of leading questions.

85. Mr Ryan conducted an investigation into the complaints and spoke to Ms Smith, Mr Gasson and Mr Phillips about it before concluding that he did not think any further action would be appropriate as he did not believe that Mr Phillips had conducted the appeal meeting in an unacceptable,

unprofessional and aggressive manner. He concluded however that Mr Phillips should have controlled the meeting and kept to the purpose of the appeal which would have avoided tension between the parties, and that it would be prudent to arrange coaching for Mr Phillips on how to conduct meetings of that nature. With regard to that, Mr Phillips confirmed in his evidence that no such coaching had been arranged and nor had he felt that he needed it.

86. We looked at the notes of the meeting and could see that there was a process of questions asked by Mr Phillips of Mrs Jarman. Towards the end of the notes Mrs Jarman commented that she found this stressful, had been talked over, and had found Mr Phillips challenging. Mr Phillips apologised for that, confirmed that he should have stopped the discussion when it moved on to the flexible working request, and that he had not meant to talk over Mrs Jarman.

87. Mr Ryan's notes of his discussion with Mr Gasson indicated that the latter's' perception had been that Mr Phillips had questioned Mrs Jarman and challenged her version of events, which was why she had not been happy about the meeting. He stated however that he had not felt that Mr Phillips was in any way aggressive. Ms Smith had indicated that she felt that Mr Phillips's tone at the meeting had been rather dismissive and that he had been loud, and she felt that there had been no empathy from Mr Phillips. The notes however indicated that Ms Smith had made no comment about how the meeting had been conducted at the time.

88. We considered that Mr Phillips had no doubt been challenging during the meeting, and a different manager may have approached things in a different way. However we did not consider that there was anything unacceptable or aggressive about the exchanges.

89. As we have noted, Mrs Hanks was absent from the middle of April 2019 and a welfare meeting took place between her and Mr Cusick on 3 May 2019. Mrs Hanks was accompanied by Mr McGuire, and Mr Gasson took notes.

90. Points were taken by both Claimants about the role of Mr Cusick, a Shift Leader and therefore quite senior, in managing welfare meetings with them. We noted that welfare meetings were usually undertaken by Mr Evans from HR. However, we noted from earlier meetings that Mr Evans had had with Mrs Jarman, that he felt that welfare meetings might be undertaken by other managers as he was not able to deal with operational queries. We also noted that the two Claimants were both relatively senior managers and therefore decisions about their future employment, whether in terms of flexibility around their shifts or, as ultimately transpired, their dismissal,

would need to be taken by more senior managers. Overall therefore, we found nothing improper in the involvement of Mr Cusick in welfare meetings relating to both Claimants.

91. During the meeting on 3 May 2019, Mrs Hanks repeated her concerns about the issues surrounding the weekend of 13 April 2019, and about other DLs interviewing applicants for roles in her department. Mr Cusick responded by saying that the refusal of the Claimant's request for absence on the weekend of 13 April 2019 had been correct in his opinion, and that other DLs had also had leave declined on weekends for the same reason. He also confirmed that the Respondent was undergoing a large recruitment exercise and DLs were therefore holding interviews for areas other than their own, and that when Mrs Hanks returned she would also be required to be involved in the recruitment process.

92. With regard to Mrs Hanks' health, Mr Cusick asked for her consent to an Occupational Health referral, to which Mrs Hanks indicated that she wished to have some time to consider the request as she felt that a previous referral from January 2019 would be sufficient. Possible options to support a return to work were discussed, including possible reduction of hours or days worked for a period of time, or movement into a different working area for a period of time.

93. The next meeting between Mrs Hanks and Mr Cusick took place on 3 June 2019. During this meeting, Mrs Hanks confirmed that she had had a positive meeting with regard to a flexible working request she had made, and that she wanted a response from that before giving a date to return. In that regard, whilst we noted within the bundle a response in respect to a flexible working request by Mrs Hanks, we could not see the original request or minutes of any meeting in respect of it. Mrs Hanks agreed to the request for an Occupational Health referral, and again Mr Cusick mentioned options that could be explored on a phased basis to facilitate Mrs Hanks' return to work.

94. The advice from the Occupational Health Adviser was received in the form of a letter dated 27 June 2019. This was addressed to Ms Tracey Reynolds, one of the Respondent's operational managers who was, at that time, assisting in the HR Department due, we understand, to Mr Evans' absence. The sight of the Occupational Health report by Ms Reynolds, although the Respondent ultimately concluded that she had not actually seen it, was ultimately a matter of concern to Mrs Hanks, but we considered that there was nothing inappropriate about Ms Reynolds being involved in this matter, and we noted that she was subject to confidentiality duties in respect of her role.

95. The conclusion of the Occupational Health Adviser was that Mrs Hanks was unlikely to make a successful return to the workplace until her current work-related concerns, i.e. principally the equal pay matter, had been successfully addressed. Regular management meetings to look at her perceived work-related stressors were recommended. The Adviser confirmed that she saw no medical reason why, once the current perceived work-related issues were successfully addressed, Mrs Hanks would not be fit to perform her full and usual duties.

96. As we have noted, a flexible working application request was made by Mrs Hanks, and a letter declining that application was sent to Mrs Hanks by Mr Thomas on 7 June 2019. The reason for that refusal was the cost it would cause the business as there would be a need to recruit to cover shifts and Duty Manager duties. Mr Thomas informed Mrs Hanks of her right to appeal that decision, and Mrs Hanks did appeal by letter dated 11 June 2019. The appeal hearing was then held on 1 July 2019 with Mr Phillips and Mr Jenkins.

97. The notes of the meeting indicate that the discussion revolved around the Claimant's need to work hours which fitted in with her husband's rota to enable the periods of time their son was left alone to be minimised. Mrs Hanks confirmed that the maximum period that her son should be left alone was two hours. It was agreed that Mrs Hanks would provide Mr Phillips with a copy of her husband's rota, and then he would look at putting together a rota for Mrs Hanks which suited her needs.

98. Mr Phillips and Mrs Hanks met at a reconvened appeal hearing on 18 July 2019. Mr Phillips explained the rota that he proposed in order to accommodate Mrs Hanks' request. Mrs Hanks confirmed that Mr Phillips had done what she had asked him to do and, in response to a question from Mr Phillips as to whether she was happy to come back in on that rota, Mrs Hanks replied that Mr Phillips had accommodated what she had asked for with regard to her childcare concerns and that she could now do the rota proposed. Mr Phillips confirmed he would pass the rota to Mr Cusick so that the next welfare meeting could be held.

99. Following the meeting between Mr Phillips and Mrs Hanks, he wrote to Mrs Hanks on 19 July 2019 summarising the proposed rota and confirming that she was happy to return for a three-month trial to ensure it suited both her and the business. He concluded by looking forward to her return on 29 July 2019 when her Fit Note expired, or before that if she felt well enough.

100. On 18 July 2019 Mrs Hanks had attended the next welfare meeting with Mr Cusick. During the meeting Mrs Hanks confirmed that she was feeling a lot

better than she had at the previous meeting. The Occupational Health Report was discussed, in particular the possibility of counselling and a workplace stress risk assessment. Mrs Hanks confirmed that the main cause of her stress was her childcare arrangements, but that the proposed flexible rota, subject to the proposed three-month trial which could be extended further, would help resolve her childcare concerns.

101. A possible phased return to work was canvassed, but Mrs Hanks indicated her preference would be to come back on full-time hours. She could not however provide a specific return to work date at that point, as she needed to talk to her husband, particularly about how school holidays would be covered.

102. Mr Cusick also discussed the possibility that Mrs Hanks could come in for keep in touch days, and that there would be regular meetings on her return to work. He confirmed however that if Mrs Hanks was not in a position to provide a return to work date at the next meeting then that could result in her being referred for a formal meeting under the Respondent's policy which could lead to a decision being made to terminate her employment. He confirmed that the next meeting would be held within the next four weeks, and that took place on 19 August 2019.

103. The next welfare meeting for Mrs Jarman took place on 2 May 2019, again with Mr Cusick. Mrs Jarman confirmed that she was disappointed that her flexible working request appeal had been declined, and although not part of the formal process, Mr Cusick discussed what the Respondent could put in place and outlined three options for Mrs Jarman to consider. These were her requested split shifts starting at 6.00am and 8.00am, rotating daily for a period of 12 weeks with review points at 4, 8 and 12 weeks and additional points if required; split shifts starting at 6.00am and 10.00am rotating daily or weekly, whichever suited Mrs Jarman, for a period of 12 weeks with the same review points; or 4 weeks of any shift that suited her needs with a review point at the end. Mr McGuire, on Mrs Jarman's behalf asked if there would be an option to extend the trial if that was beneficial to Mrs Jarman and was operationally viable, and Mr Cusick confirmed that that could potentially happen. Mrs Jarman asked why the offers had not been made at an earlier date, and Mr Cusick replied that the picking operation had recently changed, in line with the move to seven-day working, which had presented a new opportunity to extend the trial time period.

104. It was agreed that Mrs Jarman would reflect on matters and that a telephone conference between Mr Cusick, Mrs Jarman and Mr McGuire would take place to confirm her decision. That phone call took place on 13 May 2019, during which Mrs Jarman confirmed that she did not wish to

choose any of the options. During the meeting Mrs Jarman confirmed that she did not know how she felt about going back into the building and working with Mr Phillips and Mr Simmonds, although she appreciated the offers put forward by Mr Cusick. Mrs Jarman also referred to the fact that Tracey Reynolds was covering for Mr Evans and that she had not been offered that role, and Mr Cusick responded by saying that if that role could be available for a temporary period it could be discussed.

105. In his letter to Mrs Jarman summarising the discussion, Mr Cusick indicated that he did not think a temporary redeployment into Mr Evans' role would provide her with the required consistency as Mr Evans could return at any point. We noted that ultimately Mr Evans was absent for only around two months. Mr Cusick also responded to a concern raised by Mrs Jarman around DLs working mid shifts, i.e. shifts which did not directly coincide with the operational shifts worked by team members. He confirmed the information, previously provided to Mrs Jarman, that three DLs undertaking non-operational roles worked those shifts on a regular basis and had done so for a number of years. He also confirmed that the Respondent had some DLs working mid shifts at that time, due to the need to make temporary adjustments to cover for other DLs out of the business, but that once the Respondent's operations were fully staffed then all DLs would revert to their original patterns.

106. Mr Cusick asked Mrs Jarman to confirm that she would be willing to undergo a further Occupational Health Assessment; she confirmed that she was, and an appointment was arranged for 21 May 2019. Following that, a written report was received by the Respondent dated 29 May 2019. In this, the Adviser confirmed that Mrs Jarman was currently unfit for work due to the ongoing symptoms related to her emotional wellbeing, and that the perceived issues within the workplace needed to be resolved before Mrs Jarman could move forward with her recovery. She indicated that a well-managed mediation was likely to bring about an amicable resolution, which would in turn help to improve Mrs Jarman's emotional wellbeing and assist with a return to work.

107. In answer to specific questions about Mrs Jarman's ability to return to an operational role, the Adviser confirmed that a rotating shift pattern would be a contra-indication for managing Mrs Jarman's symptoms, and that, in her opinion, consideration of the workplace adjustments previously advised would be helpful in supporting Mrs Jarman. The Adviser also confirmed that Mrs Jarman would be able to carry out a shift pattern of early mornings and mid shifts for a period of some six to eight months in order to offer her some consistency and routine, as a shorter trial period would impact on her emotional wellbeing.

108. Following receipt of the report, a further welfare meeting took place with Mr Cusick on 7 June 2019. Mrs Jarman described herself as not feeling any better since the previous meeting and that she had now been referred for mental health support. Mr Cusick went through the Occupational Health Report and discussed the points raised. Mrs Jarman confirmed that she was not willing to have any mediation meeting which involved Mr Phillips, that she would not be fit to return when her current sick note expired at the end of June, and declined the possibility of returning on a phased basis.

109. Mr Cusick confirmed that he could offer Mrs Jarman shifts starting at 6.00am and 10.00am rotating either daily or weekly, depending on how she wanted to work it. That would be in place for an initial period of six months and could be extended if it worked for both the business and Mrs Jarman. The offer of counselling was also discussed, but Mrs Jarman felt that she had the help required through her NHS support.

110. Mrs Jarman indicated that she felt that she could not enter the DC2 building again due to all that she had gone through. Mr Cusick indicated that as Mrs Jarman had now been absent for a period of 31 weeks, as she was unable to commit to a return to work date, the next stage would be for a formal capability meeting to take place where a decision could be made to terminate Mrs Jarman's contract due to incapability. Mr Higgs confirmed the content of the discussion in a letter to Mrs Jarman dated 13 June 2019, in which he confirmed that Jamie Higgs would conduct the capability meeting.

111. That meeting took place on 18 June 2019, with Mrs Jarman being accompanied by Mr McGuire. During it, Mr Higgs discussed Mrs Jarman's current state of health, in relation to her hand, her anaemia, her endometriosis and her mental health. Mr Higgs then asked if there were any adjustments that Mrs Jarman felt could be put in place to enable her to return to work. She replied that she did not know what to say and felt that the situation with Alan Phillips made the thought of going into the building alarming. Mr Higgs suggested that a meeting could be arranged with Mr Phillips to mediate, but Mrs Jarman indicated that she did not think she could participate in such a meeting.

112. Mr Higgs also discussed whether any further rota adjustment would help, to which Mrs Jarman replied that she could not say that it would as she was not well enough to return mentally. Mr Higgs commented that he would support any meeting with the trade union to try to assist with Mrs Jarman's return to work and to explore all avenues, as he did not wish to dismiss Mrs Jarman on the grounds of capability. Mrs Jarman replied to that that she did not feel that she could do it. Towards the end of the meeting Mr Higgs asked if there was anything further that he could do to facilitate Mrs

Jarman's return to work. and Mrs Jarman replied that there was not, that she could not do the things that were being offered, including facilitative meetings, and could not tell if she would be able to do that in six or twelve months' time.

113. Mr Higgs then adjourned to consider matters and, when the meeting reconvened after a break of about 50 minutes, he raised a query as to whether Mrs Jarman would be prepared to consider relocating to a store. Mrs Jarman replied that, as she felt at that point, she could not. In view of that, Mr Higgs confirmed that his decision was to terminate Mrs Jarman's employment on the grounds of her incapability to carry out her role due to illness. He confirmed that she would be paid in lieu of notice and in respect of accrued but untaken holiday, and that she had the right to appeal. Mrs Jarman indicated immediately that she did not wish to appeal and confirmed that in writing. Mr Higgs then confirmed his decision in writing in a letter to Mrs Jarman dated 19 June 2019.

114. Mrs Hanks was invited to a further welfare meeting with Mr Cusick on 19 August 2019. During the meeting Mrs Hanks confirmed that she was feeling a lot better since the previous meeting in July, and that the revised shift pattern covered her childcare needs which was what she had asked for. She confirmed however that she was still feeling stressed about the equal pay claim, which was going through the Employment Tribunal processes at the time. Mrs Hanks indicated that her concerns about equal pay were causing her stress, commenting that it was disheartening that she was not being paid the same as the male managers.

115. Mr Cusick referred back to the previous meeting and noted that Mrs Hanks had been due to discuss a return with her husband in light of the revised rota, and asked where she was with that. Mrs Hanks replied that she needed flexibility and the revised rota would affect her work life balance although it covered her childcare. She confirmed that she had a Fit Note up to 19 September 2019. Mr Cusick questioned whether she could return on that date but Mrs Hanks indicated that she did not know. When Mr Cusick asked what was preventing her returning on that day, bearing in mind the proposed adjustments to her shift pattern, Mrs Hanks confirmed that it was due to the issues with her pay and the fact that male DLs were being paid more than her.

116. Mr Cusick noted that at the last meeting they had discussed the Occupational Health Report and offered a number of options to facilitate her return to work. He commented that if Mrs Hanks failed to supply a return to work date then matters could progress to dismissal on the ground of capability.

117. Mr Cusick explored possible alternatives in the form of a move to a different position, including in one of the Respondent's stores, and confirmed that whilst moves would be feasible, they would be to roles with a lower salary. Mrs Hanks confirmed that she would be happy to move if there was no financial detriment to her.

118. Mr Cusick summarised that in the last meeting it had been established that the reason for Mrs Hanks' absence had been the childcare situation which had been resolved due to the change in rota. Mrs Hanks had also been offered additional support with regard to a possible phased return, counselling and regular meetings. He noted that reason for Mrs Hanks' absence now appeared to be different, and Mrs Hanks confirmed that it had been brought back up to her with her visits to the solicitors with regard to the progress of the equal pay claim.

119. After a brief adjournment for Mrs Hanks to discuss matters with her Union Representative, Ms Smith, Mrs Hanks queried whether she could use some of her holidays before a formal return date. She suggested using four weeks holiday from 9 September which would lead to a return on 7 October. After a further adjournment for Mr Cusick to consider that request, he came back with a proposal that Mrs Hanks would use up just over two weeks' holiday from the Fit Note expiry date of 19 September, taking her up to 7 October, and Mrs Hanks confirmed that that would be acceptable.

120. Mr Cusick summarised the meeting in a letter to Mrs Hanks of 20 August. In this, he summarised their discussion and clarified that he had noticed that Mrs Hanks' current Fit Note expired on 16 September, and therefore had adjusted the holiday discussion such that Mrs Hanks would then take three weeks holiday to return on 7 October. Mr Cusick also confirmed that, as Mrs Hanks had not returned within six weeks of the most recent Occupational Health Report, a further referral would be made.

121. Mrs Hanks met with the Occupational Health Adviser on 5 September 2019, and a written report was received dated 12 September 2019. The Adviser noted that Mrs Hanks' involvement with her solicitors regarding her equal pay claim was causing her stress levels to increase again. She noted however that Mrs Hanks' symptoms had improved and, in her opinion, there was no medical reason for her not to return to work. She noted that Mrs Hanks' symptoms returned when she had to attend her solicitors regarding the Tribunal and that it was likely that this would continue until that matter had been resolved. The Adviser noted that Mrs Hanks was hoping to return after a period of annual leave on 7 October 2019, that she would not require any adjustments on her return beyond the adjustments already discussed and agreed, that Mrs Hanks would be able to return to her full range of

duties, and that Mrs Hanks did not feel that a phased return would be necessary.

122. In the event Mrs Hanks did not return on 7 October 2019, and Mr Cusick therefore met with her on 11 October for a welfare meeting. During this meeting Mrs Hanks raised her concern that the Occupational Health Report had been sent to Tracey Reynolds indicating that, had she known that it would have gone to her, she would not have consented. Ms Humphries, who was present to take notes, confirmed that Ms Reynolds was covering Barry Evans' absence and saw all reports. After an adjournment it was confirmed that Ms Reynolds had only uploaded the referral and had not opened the report. It was also pointed out that Ms Reynolds was subject to a duty of confidentiality in her role. The notes of the meeting indicate that Mrs Hanks seemed particularly perturbed by this point as it seemed to make up most of the discussion.

123. Mr Cusick sought to discuss the Occupational Health Report and noted that Mrs Hanks had now been absent for close to six months. He asked if she could provide him with a return to work date, and Mrs Hanks replied that she could not. After a short adjournment, Mr Cusick confirmed that in the last meeting he had commented that if there was a failure to return it could result in Mrs Hanks being referred for a formal capability meeting at which a decision could be made to terminate her employment. He noted that they were now no further forward and therefore he had gone back to the point of referring the matter to a formal capability meeting and that a formal invite would be issued shortly. Mrs Hanks was subsequently notified on 14 October that the capability meeting would take place on 16 October 2019 with Mr Simmonds. The letter confirmed that, following the meeting, a decision would be made about Mrs Hanks' ongoing employment as a result of her incapability to carry out her duties due to her continued ill health.

124. The capability meeting took place as scheduled, with Mrs Hanks being accompanied by Mr McGuire. At the start of the meeting Mr Simmonds summarised that Mrs Hanks had been absent since 14 April 2019, which amounted to approximately 25 or 26 weeks, and that she had been asked at several points for a return to work date. Mr McGuire indicated that a sick note had been submitted that day confirming Mrs Hanks' unfitness to work up to 2 December 2019.

125. Mrs Hanks confirmed that Mr Cusick had followed the Respondent's processes. Mr Simmonds noted that failing to commit to a return to work could result in the termination of Mrs Hanks' employment and that he needed to assess whether the Respondent had done everything possible to help her return. He asked if there was anything that could be agreed in that

meeting that could get Mrs Hanks back to work. Mrs Hanks commented that, following the previous welfare meeting with Mr Cusick, she submitted a grievance, about the receipt of the Occupational Health Report by Ms Reynolds and a conversation that her son's school had had with someone at the Respondent who had indicated that Mrs Hanks no longer worked for the Respondent, and that she felt that she was unable to return until that was resolved. She commented that she did not feel "*on the back of any outcome*" that she would be able to give a return to work date. Mrs Hanks provided notes for Mr Simmonds to consider and the meeting adjourned for him to read them.

126. After that, Mr Simmonds reconvened the meeting. He noted that he had taken all information into consideration, that Mrs Hanks had been unable to give a return to work date prior to 2 December 2019, had agreed that she had been treated in line with the Respondent's policies and that adjustments had been made for her. He noted that Mrs Hanks had told him that there was nothing that could be agreed to allow a return to work in the next few weeks, and therefore he made the decision to dismiss her on notice for incapability due to ill health. He confirmed his decision in writing the following day, noting Mrs Hanks's ability to appeal.

127. Mrs Hanks submitted an appeal on 17 October 2019, and the appeal hearing took place on 5 November 2019 with Deborah Wilson, Operations Manager. In the meantime, Mr Thomas provided a letter to Mrs Hanks dated 4 November 2019 dealing with her grievance regarding Ms Reynolds's role in the Occupational Health Report. He concluded that he did not believe that there had been any breach with regard to Mrs Hanks' data as Ms Reynolds was authorised to cover People Support when required and had not seen the report.

128. The appeal hearing took place on 5 November 2019, with Ms Wilson, and, following that meeting, Ms Wilson also spoke to Mr Simmonds, Mr Jenkins, Mr Cusick and Mr Brennan to check various points. She provided her decision by letter dated 21 November 2019 confirming that she upheld the decision to dismiss Mrs Hanks on the grounds of incapability due to ill health. She noted that Mrs Hanks had raised a number of different points in the appeal meeting and provided her response in respect of each of them. She concluded that support had been available for Mrs Hanks' return, and that during the capability meeting on 16 October 201, that she could give a return to work date. She concluded therefore that she confirmed the original decision, and she informed Mrs Hanks that she had a further right to appeal.

129. Mrs Hanks submitted that further appeal on 26 November 2019 and the Second Stage Appeal was considered at a meeting with Mr Smith on 10 December 2019. Following the meeting Mr Smith provided his decision by letter dated 18 December 2019. In this, he went through the various points raised in Mrs Hanks' original appeal, paying particular attention to those which related to the dismissal decision. He noted that a return to work date had been agreed in October and that, despite an agreement that Mrs Hanks should use holiday to extend her return to allow her time to prepare, she did not return as indicated.

130. Mr Smith noted that whilst, at the capability meeting, Mrs Hanks had advised that her GP note expired on 2 December 2019, she had indicated that there was no guarantee that she would be able to return to work at that time. He noted that during the meeting with him Mrs Hanks had indicated that it was indeed her intention to return on 2 December even if the current issues had not been resolved, but he felt that that had not been apparent in previous meetings, and in fact that Mrs Hanks had stated that she did not feel "on the back of any outcome" that she would be able to give a return to work date. He commented that, based on Mrs Hanks' comments and her absence timescales, he was not convinced that she would have returned on 2 December 2019. He ultimately concluded that the original decision to dismiss Mrs Hanks on notice for incapability due to ill health was the right decision, and was one which he upheld.

131. In addition to those findings, we set out our findings about more generally pleaded detriments, and those asserted as arising from matters which were said to have stopped happening, e.g. allegations that managers stopped saying, "good morning" to the Claimants, against the specific issues in our conclusions below.

Conclusions

132. Applying our findings to the issues identified at the outset, our conclusions are set out below. We first noted our conclusions on two preliminary, combined points, applicable to both Claimants, before moving on to the specific issues applicable to each of them.

133. Our first general conclusion related to the question of protected acts for the purposes of the victimisation claims. Within the Lists of Issues, it was conceded by the Respondent that equal pay complaints made by both Claimants in June 2018 were protected acts. The List of Issues for Mrs Jarman also noted that her position was that she had raised her equal pay complaint initially in March 2018 and that an email about it was sent to HR in April 2018. Although not expressly referred to within the List of Issues as

a contention that there had been an earlier protected act, we took the reference to it as a contention that there had been.

134. A similar point was not raised in the List of Issues in relation to Mrs Hanks, although there appeared to be some suggestions that she had also raised an equal pay complaint prior to June. In fact, the issue is only of relevance to a small number of the claimed detriments, as the vast majority arose after, or continued, after June 2018.

135. Section 27 EqA 2010 notes, of relevance to these claims, that a protected act is, "making an allegation (whether or not express) that [the employer] or another person has contravened [the] Act". An email sent by Mrs Hanks to Mr Jenkins on 4 June 2018 referred to her being aware that male counterparts were paid more than her, and that she thought that would have been rectified following the introduction of gender pay gap reporting but that had not been the case. She then specified the basic principles of the equal pay provisions of Section 65 of the Act, and asked for the matter to be dealt with at the Respondent's earliest convenience. Mrs Jarman also sent an email on 4 June 2018, to Mr Jenkins, noting that she had spoken to and emailed Mr Gasson over the previous six weeks and had raised the issue with Mr Brennan. She indicated that she had hoped that the matter would be dealt with informally, but felt that she had no option other than to deal with it formally as six weeks without a response was not acceptable. She outlined her concern that she was paid less than her male colleagues in the same role and wanted the matter to be discussed or otherwise it would have to be dealt with formally.

136. We were satisfied that both emails amounted to allegations of contraventions of the equal pay provisions of the Act, as had been conceded by the Respondent. Also, as referenced within Mrs Jarman's email, there had been previous discussions, and she had sent previous emails in relation to the issue of equal pay. However, Mrs Jarman referred throughout those emails to her "pay query", and sought an explanation as to why she was paid less than her male colleagues at DL level. She also referred to her "gender pay gap query". We viewed these acts as only involving the raising of questions, and did not therefore consider that matters had reached the stage of amounting to any "allegation" prior to June 2018.

137. With regard to Mrs Hanks, we noted that there were attempts to arrange a meeting between her and Mr Brennan in the latter part of April and throughout May, before they finally met on 1 June 2018. That meeting involved a discussion of the question of whether Mrs Hanks was paid less than her DL colleagues, but was primarily about her concern that she felt

that she should be paid more for the Night Manager's role that she had been undertaking for the previous eighteen months. Indeed, the email Mrs Hanks sent to Mr Brennan on 4 June 2018, following the meeting on 1 June, referred to her asking him to negotiate a remuneration package in relation to her Duty Manager role on the night shift. The email she sent to Mr Jenkins dealt with her equal pay concern. Again, we did not consider that any protected act, in the form of an "allegation" had occurred on the part of Mrs Hanks prior to June 2018.

138. The second collective conclusion we made related to the claims that both Claimants had been subjected to detriments because they had done protected acts. The List of Issues for both Claimants specified a number of specific detriments, with which we deal below. However, we noted that the focus of the evidence in this case, and in particular the cross-examination of the Respondent's witnesses, was on establishing a general picture of antipathy towards the two Claimants, as women who had, in our words, "rocked the boat", and where their complaints were, in the words of their representative, "brushed under the carpet" or "closed down" as quickly as possible. Most of the Respondent's witnesses were questioned in some detail about the Claimants' underlying equal pay grievances, the way they were handled, and the unfairness, and indeed as ultimately found by an Employment Tribunal, unlawfulness, of their pay, even though those matters were not part of their claimed detriments.

139. Particularly as it ultimately transpired that the Claimants' complaints about the inequality of their pay were justified, both in terms of the lack of depth of the Respondent's response and the Tribunal's ultimate decision on the matter, it was clear that the two Claimants both felt, and indeed had some considerable justification in feeling, that they had been let down by the Respondent's approach to the underlying equal pay question. However, as we have noted in the introduction to our findings, we felt that this infected their approach to their male colleagues and managers, and led to the actions of those colleagues and managers being viewed with suspicion at all times. In our view however, whilst there were a number of justifiable criticisms of the way that the Respondent handled the Claimants' equal pay grievances, we did not see that there was any overarching culture of antipathy or animosity towards the Claimants. In a similar manner, we did not consider that any of the individual detriments asserted by the Claimants had either arisen in the way they asserted, or, if they had arisen in that way, could be said to be detriments arising from their protected acts. Our conclusions in respect of the specific detriments raised by both Claimants are as follows.

A. Mrs Hanks

Victimisation

2.2.1 *Being actively obstructed from furthering her career; the Claimant applied for two roles, the first being an Orange Grade manager role in **August 2018**, following which she was given no constructive feedback;*

We found no evidence that the Claimant was actively obstructed from furthering her career. She herself indicated that the interview for the Orange Grade manager role had not gone well, and there was no evidence that the potential Health and Safety role had been shelved as a method of obstructing her, or of retaliating to her raising of her equal pay concern.

The specific point raised by Mrs Hanks was that she was given no constructive feedback. As we have found however, Mr Phillips informed Mrs Hanks, by email on 28 September 2018, that she had been unsuccessful, and agreed that he would give her feedback on her return. Mrs Hanks returned to work on the night shift of 10 October 2018 and, on the night shift of 11 October, Mr Phillips met with her. He then summarised his feedback in an email sent in the early hours of 12 October.

Mrs Hanks complained that this feedback simply involved Mr Phillips "throwing" the booklet with the interview questions across the table at her, and telling her to work on them. The evidence of Mr Phillips, which was supported by his contemporaneous email and which we therefore accepted, was that Mrs Hanks' inability to demonstrate her experience and knowledge through the answers she gave to questions was what had let her down at the interview. He therefore left her with the questions in order for her to work on them and would then advise her on those answers. In his email he referred to looking forward to reviewing the interview questions when Mrs Hanks had completed them, but that never happened. We did not consider that this involved any detrimental treatment.

*2.2.2 Being told by Chris Ryan in **September 2018** that he did not see the Claimant performing in a management role (and therefore that Chris Ryan could not justify any enhancement for covering the shift manager role);*

As we have noted above, we considered that there was a fundamental misunderstanding by Mrs Hanks of what Mr Ryan was saying. The discussion arose in respect of Mrs Hanks' request to receive greater remuneration for the role she was undertaking on the night shift. Mr Ryan,

in rejecting Mrs Hanks' request, stated that he did not consider that the role Mrs Hanks was performing in undertaking her night shift duties was that of a Night Shift Manager. In particular, he did not consider that it was the same as the role that had previously been carried out by Mr Higgs as the Night Shift Manager. In our view, what Mr Ryan was trying to do was to tell Mrs Hanks that he did not see that she was performing in a shift management role in undertaking her night shift work, and was instead operating at the level of Department Leader. The sense of Mrs Hanks' oral evidence in relation to this point was that she perceived what Mr Ryan was saying as something of an insult, on the basis that he did not see that she would ever be capable of performing in a management role. However, Mr Ryan was clear that he very much saw the Claimant performing, and performing well, a management role, but that he did not see that the night shift role involved the duties of a Shift Manager, i.e. Orange Grade, as opposed to a Department Leader. Again, we did not see that any detrimental treatment arose in this regard.

2.2.3 Being actively obstructed from furthering her career. Specifically, the interview process of a health and safety role at the end of ***November 2018*** *was shelved;*

This has already been dealt with at 2.2.1 above.

2.2.4 Not having her request for annual leave on the weekend of 13th April 2019 granted;

As we have noted above, there was a difference of view over the booking of leave on the weekend of 13 April 2019. As a matter of fact, the Respondent's Myview electronic system was in the process of being introduced at the time, and it may be that the Claimant had attempted to book the weekend off electronically in February as she asserted, but had simply been unable to do so. It was clear however, that there was no booking on the Myview system, and there was no evidence of the point being raised by Mrs Hanks prior to the period leading up to the relevant weekend. We considered that had this been something that Mrs Hanks had clearly wished to book much in advance of the relevant weekend, then she would have flagged up to her manager in an email that the difficulty with booking had arisen, and that she wanted it recorded that she wished to have the time off. However, there was no evidence before us of any such communication and, by the time the Claimant sought to book the weekend off, other managers were already off and were unable or unwilling to change. We saw no evidence of any direction or coordination of that, and therefore concluded that the denial of the request for leave on the relevant weekend arose simply through the circumstances that had arisen and did

not amount to any form of detrimental treatment arising from the Claimant's protected act.

2.2.5 That the Claimant's relationship with her male peers soured/ leaving the Claimant isolated/unsupported as follows:

(a) Mike Brennan rearranged a meeting with the Claimant throughout the period April - June 2018;

As we have noted, this occurred prior to the protected act being raised in June, and therefore could not be said to be detrimental treatment arising from a protected act. In any event, we considered that the meeting was rearranged through force of circumstances at the time, and not in retaliation for the raising of any concern over pay.

(b) Mike Brennan and Chris Ryan stopped saying "good morning" and engage in dialogue;

We saw no evidence to support the conclusion that there had been any change of approach by Mr Brennan and Mr Ryan. The evidence was clear, both from those two individuals and other witnesses of the Respondent, that they, and indeed everyone, would generally issue a collective "good morning" on arrival, unless there were only one or two people in the office, in which case the "good morning" would be directed to that one or those two individuals. We saw nothing to suggest that that practice had changed at any time, and therefore did not consider that any detriment arose.

(c) Mike Brennan and Chris Ryan would stop telephoning the Claimant to relay instructions or provide updates;

The evidence of Mr Ryan was clear that, as General Manager, he would generally pass instructions through the Operations Managers or Shift Managers, and would only rarely give direct instructions to more junior managers, such as Department Leaders. Mr Brennan, as one of the Operations Managers, would similarly liaise mostly with Shift Managers, but would liaise directly with Department Leaders from time to time.

The one specific occasion that Mrs Hanks raised in relation to Mr Brennan was an occasion when he telephoned into the office one morning and spoke to Mr Brehony. Mrs Hanks' evidence, which was not particularly disputed on the specific point by Mr Brennan, was that Mr Brennan had asked Mr Brehony if Mrs Hanks was in the office and, on being told that she was, had asked Mr Brehony to pass a message to Mrs Hanks to add one particular point to be considered when she was undertaking a site inspection later that day.

Whilst Mr Brennan could have rung off and called Mrs Hanks directly, we did not consider that there was anything untoward in him asking Mr Brehony to pass the message on, and Mrs Hanks' evidence did not suggest that Mr Brennan had spoken to Mr Brahoney only to ask him to pass a message on. It seemed to us much more likely that Mr Brennan had spoken to Mr Brehony about a particular point relating to him, and had then simply asked Mr Brehony to pass a message on to Mrs Hanks rather than go through the process of ringing off and calling Mrs Hanks directly. Whilst Mr Brennan could have done that, we did not think that there was anything untoward in his actions, and did not consider that they amounted to any form of detriment.

(d) Not being invited on the Department Leader and Manager's night out in December 2018

We did not hear any evidence from Mr Pope in respect of the night out, so were unable to verify whether any discussion took place as asserted by Mrs Hanks. We noted however the evidence of other managers, particularly Mr Jenkins, that formal nights out did not take place due to the round the clock operation of the distribution centre. We also noted that the issue rather expanded from Mrs Hanks' original claim form, through to her witness statement, and on to her replies to cross-examination questions. Ultimately, we were not satisfied that we could conclude that there had been any night out in December 2018 to which Mrs Hanks was not invited.

Unfair dismissal

140. We first had to consider the reason for the Claimant's dismissal and were satisfied that the Respondent's reason for dismissing Mrs Hanks was capability arising from her ill health. In particular, we did not see that there was any evidence of any ulterior motive behind the Respondent's decision, and Mrs Hanks herself did not go as far as to contend that the act of dismissal was itself a detriment arising from her protected act, i.e. was retaliation for her raising her concern about equal pay.

141. We then had to consider whether dismissal for that reason was fair in all the circumstances. As we have noted above, this involves, in the context of dismissals arising from ill health, establishing the underlying medical position, and consulting with the employee, including over the availability of alternative employment, before deciding whether to dismiss. We also noted that, as indicated in the McAdie case, where the employer is considered to have been responsible for the employee's ill health, then they should "go the extra mile" to find alternative employment, but that dismissal in those circumstances could nevertheless be fair.

142. In this regard, the Respondent undertook several welfare meetings with Mrs Hanks, following the commencement of her sickness absence in April 2019. Mrs Hanks took issue with the fact that these meetings were handled by Mr Cusick, noting that it would usually be a matter dealt with by Mr Evans from the HR Department. However, Mr Evans was absent during this time and, in any event had indicated himself, albeit in relation to Mrs Jarman, that it could be more appropriate for a more senior Operational Manager to undertake the welfare meetings.

143. Ultimately, Mr Cusick was capable of making decisions on the points being raised by Mrs Hanks, and indeed he did put forward a number of suggestions as to how her return to work might be facilitated. We therefore saw nothing improper about Mr Cusick's involvement. He undertook welfare meetings monthly, in May, June, July, August and October 2019, and Occupational Health Reports were received in June and September 2019. Alongside this, Mrs Hanks' flexible working request was considered and, whilst initially declined in June, was accepted in July, with Mr Phillips putting forward a rota to cater for the Claimant's childcaring requirements.

144. In the July welfare meeting it seemed that Mrs Hanks would be likely to return, and the Occupational Health Report in September indicated that there was no medical reason for her not to return. It was also agreed that Mrs Hanks would be able to take three weeks' holiday, and thus return to receiving full pay, before returning to work in October. However, Mrs Hanks did not return in October, raising concerns about the lack of work life balance that would arise from the suggested rota, and also raising a particular concern about the fact that the Occupational Health Report had been addressed to Ms Reynolds. Indeed, in the welfare meeting on 11 October 2019, this seemed to be Mrs Hanks' principal concern, notwithstanding that Ms Reynolds' role was explained to her, as was ultimately the fact that she had not actually read the report.

145. It seemed to us therefore that Mr Cusick had taken matters as far as he could in terms of looking to support a return to work by Mrs Hanks and there was, by that stage, no likely prospect of a return. Indeed, this appeared to be Mrs Hanks' own perspective at the last welfare meeting and at the capability meeting with Mr Simmonds on 16 October 2019. Indeed, Mrs Hanks noted in that meeting that she did not feel that she would be able to return "on the back of any outcome" with regard to her grievance about Ms Reynold's role. Whilst there was some suggestion, principally by Mr McGuire as Mrs Hanks' representative, that a return might be possible on the expiry of the latest Fit Note on 2 December 2019, Mrs Hanks gave no indication that that would be likely, despite the fact, as we have noted, that the Occupational Health Report obtained in September had anticipated that

Mrs Hanks would return in October and had noted that she was fit to return to her current role.

146. Ultimately we were satisfied that, by the time the case had reached Mr Simmonds, the Respondent had obtained all appropriate medical advice, had consulted with the Claimant about her absence and had made reasonable efforts to facilitate her return, and had reached the position where there was no short to medium term prospect of her return. We considered therefore that the decision taken to dismiss Mrs Hanks was fair, and certainly fell within the range of reasonable responses open to the Respondent in the circumstances. We consider that our view on this was the same regardless of any contention that Mrs Hanks' underlying ill health was caused, or at least contributed to, by the Respondent.

147. With regard to procedural matters, we noted that the Claimant had had the benefit of two appeals, as specified within the Respondent's own procedures. She had also been notified in writing in advance of every stage of the process, had been alerted to the fact that dismissal was a possible consequence, and had the right to be accompanied by a Trade Union representative at all times. Consequently, we felt that there were no procedural deficiencies in the dismissal and that overall it was fair.

B. Mrs Jarman

Victimisation

2.2.1 On 1st October 2018 RJ was allegedly told that she was not currently fulfilling DL role and was therefore being moved from role heading up training department to the Goods Inward Department. RJ allegedly told by Nathan Simmons "you know how this works, don't come back with "I can'ts""

The underlying substance of this concern was not particularly disputed by the Respondent. It seemed that it was the view of Mr Simmonds that the role Mrs Jarman was fulfilling with regard to training and development was more of a Section Leader role than a Department Leader role, and that, due to other moves and the approaching peak period of Halloween, Christmas and the New Year, Mrs Jarman would be the best option to move back into an operational role. It was also clear from the notes of meetings and letters within the bundle that there had been discussions between Mr Simmonds and Mrs Jarman about her ability to undertake the operational role, and in particular to work on rotational shifts.

Again, as with Mr Ryan's comments to Mrs Hanks with regard to the extent of the duties she was carrying out in her night time role, we did not consider that Mr Simmonds' conclusion that Mrs Jarman was not operating at a Department Leader level when undertaking her training and development work was in any sense a criticism of her. We noted that Mrs Jarman appeared to take issue with Mr Simmonds' comment that Mrs Jarman should "pat herself on the back" in respect of the work she had undertaken, but we did not consider that it was in any way disparaging.

With regard to the assertion that Mr Simmonds told Mrs Jarman "you know how this works, don't come back with "I can't's"", we concluded, as seemed largely to be accepted by Mr Simmonds in his evidence, that words broadly along those lines were used. This was in the context of Mr Simmonds exploring with Mrs Jarman the prospect of her returning to an operational role and where Mrs Jarman had pointed out to Mr Simmonds her difficulties in doing so. The notes of the meetings indicate that an enquiry about Mrs Jarman's capabilities along those lines was not unreasonable. We considered that Mrs Jarman's interpretation of Mr Simmonds's approach as detrimental was misplaced.

2.2.2 That the Claimant's relationship with her male peers soured/ leaving the Claimant isolated/ unsupported as follows:

(a) Carl Cusick only engaged in serious work communication;

Mr Cusick was not a witness at the hearing and therefore we had no direct evidence surrounding any change of approach by him. We noted however that no other witness noted any change in Mr Cusick's approach or communications. We also noted that, when undertaking the welfare meetings with Mrs Jarman, Mr Cusick appeared to be extremely supportive of her, and had tried his best to assist her with a return. In our view that was not consistent with any assertion that he had been motivated to treat the Claimant to her detriment in his work communications with her. We also noted that Mrs Jarman had wanted Mr Cusick to be involved with her capability meeting. Whilst we noted Mrs Jarman's oral comment that that was because she had dealt with many individuals and did not want anyone else involved, we felt that had she been firmly of the view that Mr Cusick was motivated in any way not to treat her in the same way as he had done previously, then she would not have been happy for him to deal with her capability meeting.

(b) Mike Brennan became very frosty with RJ from early June 2018 and showed frustration with her;

Mrs Jarman complained of two particular occasions in which Mr Brennan showed frustration and irritation with her about her raising pay queries. Mr Brennan denied acting in the manner alleged and commented that he would not have reached, and remained at, the level he had if he behaved in such a way. On balance, we did not consider that Mr Brennan had been frosty with Mrs Jarman or showed frustration with her.

(c) Mike Brennan stopped saying "good morning" to RJ;

This is a similar allegation to one raised by Mrs Hanks, and, for similar reasons, we did not consider it had arisen in fact.

(d) On or around 13th June 2018, Mike Brennan referenced RJ's complaint in an open plan office, causing embarrassment;

As a matter of fact, this incident did happen, as Mr Brennan did speak to Mrs Jarman in the open plan office. However, it was clear to us that Mr Brennan had spoken to Mrs Jarman primarily to establish that she was in the office on the following day so that he could meet with her to provide a response to her equal pay complaint. Whilst we did not accept Mr Brennan's evidence that this was something that would not have been overheard by others, due to the fairly close proximity within which individual employees worked, we did not consider that this should have caused the Claimant any embarrassment or, if it did, that there had been any intention on Mr Brennan's part to do so. The contemporaneous notes suggest that Mr Brennan was surprised that Mrs Jarman had raised this as a concern and he readily apologised, both verbally and in writing, if he had caused any embarrassment. We did not therefore consider that this amounted to any detrimental treatment.

(e) On 14th June 2018, Mike Brennan allegedly told RJ that pay queries should be raised with him;

Similarly, we were satisfied that Mr Brennan had indeed told Mrs Jarman that pay queries should be raised with him. However, that was in the context of Mrs Jarman having attempted to raise matters with Mr Gasson for several weeks but having not received a response. In the meeting with Mr Brennan on 14 June 2018, he acknowledged that the issue should have been addressed more quickly and that Mrs Jarman should first have gone to Mr Cusick and then have gone to him with her concerns. He then suggested that, in future, she should raise matters with Mr Cusick and then with him. We did not consider that this involved any attempt to circumvent any proper process or to circumvent HR, but was simply put forward by Mr

Brennan as a suggestion to Mrs Jarman as to how issues could be dealt with more quickly.

(f) Gareth Jenkins allegedly said that he was no longer prepared to discuss RJ's pay complaint at the end of May / beginning of June 2018;

We were also satisfied that Mr Jenkins had indeed made clear to Mrs Jarman that he would not discuss her pay complaint at that time. Mr Jenkins, whilst denying that he specifically said that he was no longer prepared to discuss the pay complaint, did confirm that it would not be appropriate for him to comment on something which was being pursued as part of a formal process. We did not consider that there was anything unreasonable about that approach and did not consider that Mr Jenkins' actions involved any detriment.

(g) In or around June 2018 Ceri Irvine and Gareth Morgan allegedly told RJ that they were not prepared to discuss her pay complaints;

In cross-examination, Mrs Jarman confirmed that, having originally discussed their pay with her at the end of March 2018, Mr Irvine and Mr Morgan then refused to do so any further when she raised the point with them again in about the middle of April. Ultimately therefore, this preceded the protected act of Mrs Jarman in June 2018. However, we did not consider, in any event, that any refusal by Mr Irvine and Mr Morgan to discuss Mrs Jarman's pay complaints any further would have amounted to any detriment. They had already shown her their payslips in March which indicated that they were being paid at a higher level than her, which gave Mrs Jarman the basis for pursuing her complaint, and any unwillingness to discuss matters further would not have put Mrs Jarman in any form of detrimental position.

(h) On 10th August 2018, Jane Preece allegedly told RJ to drop her equal pay complaint as it would lose and the Claimant would lose a lot of money.

As we have noted, we accepted the evidence of Mrs Jarman and Mr McGuire that there had been such a comment. We noted that Mr McGuire also indicated that such a discussion took place in relation to Mrs Hanks, but Mrs Hanks had not raised such a concern and did not produce any evidence in respect of that. We concluded therefore, that Mr McGuire was simply mistaken about the fact that Ms Preece had made such a comment

in relation to both Mrs Hanks and Mrs Jarman, as we anticipated that Mrs Hanks would have had a recollection of it had it happened in her case.

With regard to Mrs Jarman, we noted that both she and Mr McGuire indicated that Ms Preece had, in Mr McGuire's office as Union Representative, told Mrs Jarman that the Respondent would win the equal pay litigation and that she would lose money, in terms of legal costs, if she pursued it. Mrs Jarman, in her witness statement, said that Ms Preece "threatened" her by saying that, and Mr McGuire said that he "perceived" the comment as a threat to drop the claims internally and any potential Tribunal claim. However neither indicated that Ms Preece had given any indication as to any internal consequences for Mrs Jarman if she did not drop the claim. It appeared that she simply informed Mrs Jarman that she felt that any equal pay claim would be defeated, and that Mrs Jarman would incur legal costs in doing so. Ultimately, neither proved to be the case, as the equal pay claim succeeded, and, as Mr McGuire confirmed in evidence, the Union was always going to cover Mrs Jarman's legal costs.

Mrs Jarman also indicated that Ms Preece had noted that she would deny that the conversation had taken place if she repeated it. However, we noted that the conversation took place in Mr McGuire's room. We saw a photograph of the layout of the room and noted that it was relatively small, and that anyone entering it would immediately see that Mr McGuire was present. We also noted Mr McGuire's evidence that his room was generally kept locked when he was not in it. In our view therefore, had Ms Preece been motivated to threaten Mrs Jarman in relation to the Tribunal claim, she would have done so in a private HR office and would not have walked in to the Trade Union Representative's office in order to do so.

We also noted that no concern was raised by either Mrs Jarman or Mr McGuire about the conversation until the capability meeting held in June 2019, some ten months after it had taken place. Whilst we considered that even pointing out to Mrs Jarman that she would be likely to lose her claim and incur costs was potentially going beyond what Ms Preece should have been doing as a member of the Respondent's HR team, we considered that, had Ms Preece threatened Mrs Jarman in the sense of indicating consequences for her internally had she continued then the matter, then that would have been raised internally by Mrs Jarman and Mr McGuire. We therefore did not consider that Ms Preece's words went beyond those referred to by both Mrs Jarman and Mr McGuire in their witness statements, and did not consider that that amounted to any detrimental treatment of Mrs Jarman.

(i) On 4th October 2018 RJ was shouted at by Allan Phillips re changes to a training document;

As we have noted above, there was a testy exchange between Mr Phillips and Mrs Jarman regarding the training document on 4 October 2018. However we did not consider that Mr Phillips had shouted at Mrs Jarman, although it seemed to us that he had expressed himself in forceful terms. In that regard however we considered that he was simply motivated by what he perceived to have been a failure by Mrs Jarman to carry out his instructions, and that that was not in any way motivated by the protected act done by Mrs Jarman.

(j) RJ was not permitted to carry over 5 days of annual leave from 2018 (this was rejected after RJ raised a grievance in March 2019);

As we have found, the Respondent's policy was clearly limited to the carrying over of statutory leave and did not extend to anything beyond that, which was the status of the five days sought to be carried over by Mrs Jarman. Whilst we noted that there had been occasions when carry forward had been permitted, we were satisfied that those had arisen by prior agreement in circumstances where the individual's ability to take the holiday had been impacted due to work demands. That contrasted with Mrs Jarman's position where she could have taken the leave during her sickness absence in January 2019 but only sought to request the carry forward in the following financial year once her sick pay had expired. We did not therefore consider that the refusal of the retrospective request to carry forward the leave was detrimental or in any way related to Mrs Jarman's protected act.

(k) On 11th April 2019, Allan Phillips allegedly conducted himself in an "unacceptable and aggressive manner" towards RJ during a grievance appeal hearing.

As we have found above, whilst there appears to have been some difficulty in the meeting between Mrs Jarman and Mr Phillips on 11 April 2019, we did not consider that this involved Mr Phillips conducting himself in an unacceptable and aggressive manner. Mrs Jarman described Mr Phillips as challenging, and indeed Mr Phillips apologised for that and for allowing the meeting to be side-tracked by a discussion of Mrs Jarman's flexible working request. However, the meeting notes demonstrate that Mr Phillips asked questions of Mrs Jarman which she answered, and whilst the meeting might not have been dealt with in as sympathetic a manner as Mrs Jarman might have expected, that appeared to us, from his own evidence, to be of a piece

with Mr Phillips's general approach. Again, we did not consider that this amounted to any detrimental treatment of Mrs Jarman and did not arise from her protected act.

Disability Discrimination (Failure to make reasonable adjustments)

Allegation 1

148. The Respondent accepted that it did apply a PCP of requiring Department Leaders to be capable of working shifts between the hours of 6.00am and 10.00pm, and that this put Mrs Jarman at a disadvantage. Our focus therefore was on whether the Respondent had taken such steps as were reasonable to avoid the substantial disadvantage. We noted that the step asserted by Mrs Jarman as having been reasonable was to have granted her flexible working request.

149. We noted however that, albeit not to the extent sought by Mrs Jarman, the Respondent had agreed to her suggestions, in that whilst the flexible working request was formally declined, it was always put to Mrs Jarman that the Respondent was willing to allow a trial period of her proposed pattern, initially over four weeks, subsequently for longer periods, and ultimately, as indicated in the welfare meetings with Mr Cusick, for up to a year.

150. Whilst Mrs Jarman in her evidence was concerned about the lack of certainty that would have arisen in respect of any trial period, in contrast to a formally agreed flexible working request, we did not consider that there had been a failure by the Respondent to take reasonable steps. It had genuine concerns about the ability to accommodate Mrs Jarman's proposed shift pattern as it did not coincide with its normal operational hours. We noted that, whilst DLs did on occasions operate mid shifts, i.e. shifts which did not coincide with the operational shifts of more junior employees, that was only to provide additional cover on a short-term basis. In the circumstances, we did not think it was unreasonable of the Respondent to look to implement a trial period during which the impact of Mrs Jarman's working pattern on the business could be assessed. Also, as we have noted, and in line with Occupational Health advice, the period of any proposed trial was extended, to twelve weeks and ultimately to six months.

Allegation 2

151. Again the Respondent agreed that there was, subject to the potential carry over of statutory leave, a PCP of requiring all leave to be taken in the same year, but denied that this put Mrs Jarman at a substantial disadvantage.

152. We did not agree with the Respondent's contention in that regard in that, due to the potential for increased sickness absence, Mrs Jarman was more likely to be unable to use all, albeit only a comparatively small part, of her annual holiday entitlement in comparison with a non-disabled employee. However, we noted that Mrs Jarman's concern was not that she was denied the ability to take the holiday, but that she was denied the ability to carry the holiday forward, and thus to receive extra pay in the following financial year.

153. In that regard, we noted that the Court of Appeal, in O'Hanlon v Revenue and Customs Commissioners [2007] ICR 1359, had upheld the decision of the Employment Appeal Tribunal, about the claimant's claim that extending sick pay would be a reasonable adjustment, in which it had said:

"*It was suggested that the claimant would suffer hardship as a result of the reduction in pay, but it was not alleged that she was in any essentially different position to others who were absent because of disability related sickness … it seems to us that it would be wholly invidious for an employer to have to determine whether to increase sick payments by assessing the financial hardship suffered by the employee, or the stress resulting from lack of money - stress which no doubt would be equally felt by a non-disabled person absent for a similar period.*"

154. We were also conscious that the European Court case law on the ability to carry forward holiday when prevented from taking it due to ill health, confined it to the statutory holiday period, which the Respondent had complied with.

155. Overall therefore, we did not consider that the Respondent had failed to take reasonable steps to prevent any disadvantage in this regard, as it seemed to us that what the Claimant was seeking was a week's extra pay and not the ability to take the underlying holiday.

Allegation 3

156. Whilst the terms of the Respondent's attendance policy could be viewed as a PCP, we did not consider that they placed Mrs Jarman at a substantial disadvantage in comparison with non-disabled employees. We considered, in fact, that Mrs Jarman was fundamentally misinterpreting the sick pay policy.

157. On our reading, the policy applied to provide an employee on sickness absence, subject to having the appropriate length of service, with a period of full company sick pay, up to a maximum of six months. Whilst there were rules which applied when the company sick pay straddled two financial

years, this did not limit the amount of company sick pay the employee would receive in respect of an individual period of sickness absence; it simply meant that the employee would not become entitled to a further period of full company sick pay in the following financial year once payment in respect of the current sickness absence had been exhausted. We did not consider this put the Claimant at any substantial disadvantage. In any event, we noted that, had Mrs Jarman returned on a trial basis in the 2019/20 financial year, there would have been every prospect that her return would have been sufficiently long to have effectively re-started her entitlement to company sick pay had she then been absent for a further period.

Failure to deal with flexible working request

158. As a matter of fact, we did not consider that this claim was made out. We noted the terms of Section 80G ERA, and concluded that the Respondent had complied with the stipulated time periods. We also noted that Mrs Jarman's flexible working request had been declined on grounds permitted within Section 80G.

159. Whilst we noted the overarching obligation within Section 80G that the employer should deal with an application in a reasonable manner, we did not consider that there was anything unreasonable in the Respondent's approach. As we have noted, the Respondent was, at all times, prepared to allow a trial of Mrs Jarman's proposed shift system, and we felt that that was reasonable in the circumstances.

Unfair dismissal

160. As with Mrs Hanks, we were satisfied, for the same reasons, that the reason for Mrs Jarman's dismissal had been capability in the form of her ill health.

161. We were also then satisfied that the Respondent had obtained appropriate medical input into Mrs Jarman's absence and her ability to return, and had consulted with her about her return. Welfare meetings took place, with a combination of Mr Evans and Mr Cusick, in November 2018 and in January, February, March, May and June 2019. A medical report had been obtained in November 2018, although that had dealt with Mrs Jarman's hand condition and her endometriosis and pernicious anaemia. A further report was however obtained on 29 May 2019 which noted that the perceived workplace issues needed to be resolved before Mrs Jarman could move forward with her recovery, and recommended a well-managed mediation with management to assist with her return. However, Mrs Jarman made

clear that she was not prepared to undertake such a mediation process and was unwilling to indicate when she might be able to return.

162. It appeared to us that Mr Cusick had made strenuous efforts to try to suggest alternatives, encompassing the extended trial of the proposed shift system that we have noted above, and alternative roles or shift adjustments, alongside the facilitated meeting with Mr Phillips. Indeed, it seemed to us that by the end of the welfare meeting process Mr Cusick had almost reached the stage of Mrs Jarman being free to return on whatever basis she might have suggested. However she was not able to give any indication of her ability to return.

163. In the capability meeting with Mr Higgs on 18 June, Mrs Jarman made very similar comments, noting that she was not in a position to say if she could return in six or twelve months' time. In the circumstances, bearing in mind that there was no prospect of Mrs Jarman returning in the short to medium term, we did not consider that the dismissal decision was outside the range of reasonable responses. Again, as was the case with Mrs Hanks, we considered that our view would be the same even if it was concluded that the Respondent was responsible for, or contributed towards, Mrs Jarman's absence.

164. With regard to procedural matters, at all times Mrs Jarman was notified in writing of the meetings that were taking place, and that dismissal might be a possible outcome. She was also allowed to be accompanied by a Union Representative at all times. Finally, whilst no appeal took place, that was at Mrs Jarman's request, and she was afforded the opportunity to appeal if she wished.

165. Overall therefore, we concluded that the dismissal was fair.

<u>Jurisdiction</u>

166. With regard to the jurisdictional issues, as we have decided that all the claims fail, it is not strictly necessary for us to form conclusions on them. We were however of the view that, notwithstanding that some of the asserted complaints took place more than three months before the claim forms were issued, we were satisfied that the conduct complained of formed part of a chain of continuous conduct with the most recent links in that chain ending within three months of the claim forms, such that the claims were submitted in time. Even if we had not been of that view, we would have considered that it would have been just and equitable to extend time to consider all the matters asserted.

Employment Judge S Jenkins
Dated: 23 March 2021

JUDGMENT SENT TO THE PARTIES ON 24 March 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS