EMPLOYMENT TRIBUNALS

Claimant: Miss D Gibbons

Respondents: 1) Mr K Chinambu & 2) Nationwide Building Society

Heard at: London South (by CVP) **On:** 16-20, 23-27 November; and 30 November, 7-9 December 2020 (in chambers)

Before: Employment Judge Tsamados
Ms B Von Maydell-Koch
Ms G Mitchell

Representation
Claimant: Ms G Boorer of Counsel
Respondents: Ms C Scarborough of Counsel

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practical because of the Covid-19 virus.

RESERVED JUDGMENT

The **unanimous** Judgment of the Employment Tribunal is as follows:

1) The complaints of harassment, discrimination arising from disability, indirect disability discrimination, failure to make reasonable adjustments and victimisation are not well founded and are dismissed;

2) The complaint of unfair dismissal is well founded and there will be a remedy hearing, if required, in due course.

REASONS

Background to the Claims

1. This case arises from four separate Claims which Ms Dawn Gibbons, the Claimant, has brought against her former employer, Nationwide Building Society, the Second Respondent and her former line manager, Mr Kawayu

Chinambu, the First Respondent.

2. Her First Claim, in case number 2302505/2017, brought against the First Respondent, was received by the Employment Tribunal on 15 September 2017, following a period of Early Conciliation between 1 August and 1 September 2017. This means that the earliest incident that could be within the relevant time limits as extended by the Early Conciliation process would be on or after 2 May 2017. This Claim raises complaints of disability discrimination against the First respondent. The First Respondent presented his Response to the Tribunal on 23 November 2017 denying the Claim.

3. Her Second Claim, in case number 1401284/2018, brought against the Second Respondent, was received on 12 April 2018, following a period of Early Conciliation between 6 February and 6 March 2018. This means that the earliest incident which could be in time would be on or after 16 December 2017. The Claim raises complaints of disability discrimination against the Second Respondent. The Second Respondent presented its Response to the Tribunal on 9 May 2018 denying the Claim.

4. Her Third Claim, in case number 2303479/2018, brought against both Respondents, was received on 25 September 2018, following a period of Early Conciliation between 21 and 25 September 2018 in respect of the First Respondent and 3 to 25 September 2018 in respect of the Second Respondent. This means that the earliest incident which could be in time would be on or after 22 and 4 June 2018 respectively. The Claim raises complaints of interim relief, whistleblowing, victimisation and unfair dismissal.

5. Her Fourth Claim, in case number 2303988/2018, brought against the Second Respondent, was received by the Tribunal on 2 November 2018, following a period of Early Conciliation between 21 and 25 September 2018. This would mean that the earliest incident which could be in time would be on or after 30 July 2018. The Claim raises complaints of indirect disability discrimination, discrimination arising from disability, failure to make reasonable adjustments, victimisation, detrimental treatment because of whistleblowing and automatic unfair dismissal because of whistleblowing.

6. The Respondents presented a Response to the third and fourth Claims on 29 November 2018 although the attached grounds of resistance only appear to deal with the application for interim relief.

7. There have been a number of Preliminary Hearings on case management in respect of the various Claims.

8. The first of these, in respect of the First Claim, was held on 2 January 2018 and conducted by Employment Judge (EJ) Crosfill. The Claimant appeared in person and the First Respondent was represented by Mr Pipkin, a Solicitor. EJ Crosfill listed the full hearing for five days in July 2018, identified and agreed the issues between the parties, and set a number of case management orders to prepare the matter for the full hearing. The agreed list of issues was appended to the record of the Preliminary Hearing.

9. A further Preliminary Hearing, in respect of the First and Second Claims, took place by telephone on 20 August 2018 and was conducted by (the then) Regional Employment Judge (REJ) Hildebrand. At that hearing both parties were represented. REJ Hildebrand directed that both Claims be heard together, relisted the full hearing for seven days in September 2019 and made a number of case management orders. These included the provision by the Claimant of a Scott Schedule identifying the various complaints that she had brought by reference to the

jurisdictions and Claims in which they arose.

10. REJ Hildebrand conducted a further Preliminary Hearing on 15 November 2018 at which both parties were represented. By this time, the Claimant had issued her Third and Fourth Claims. REJ Hildebrand ordered the Respondents to respond to both of these Claims and directed a further Preliminary Hearing to be listed in late 2019 or early 2020. In addition, REJ Hildebrand also heard the Claimant's application for interim relief against the Second Respondent within her Third Claim and rejected it.

11. A further Preliminary Hearing in respect of all four Claims was conducted by EJ Balogun on 4 June 2019. At that hearing, EJ Balogun relisted the full hearing for 12 days from 16 November to 1 December 2020 on the basis that evidence and submissions concluded by the end of day 10 and that days 11 and 12 would be for deliberations by the Tribunal and delivery of a judgment. A number of case management orders were set including the updating of the Claimant's Scott Schedule. This would appear to be the document headed Claimant's Schedule of Allegations dated 23 September 2019 at pages 193-206 of the bundle.

Documents and Evidence

12. We were provided with an electronic bundle of documents by the Respondents' solicitors in a total of 28 separate parts sent to a drop box and with a separate index. The bundle originally contained approximately 3300 pages but was added to during the course of the proceedings and ultimately contained 3542 pages. Where necessary we will refer to the bundle as "B" followed by the relevant page number. We were also provided with additional documents numbered 1.1, 1.2, 2., a document headed Physical Security Incident Reporting and CMP Resolutions' Report dated 2 May 2018.

13. We heard evidence from the Claimant by way of a witness statement dated 9 November 2020 and consisting of 405 numbered paragraphs and 83 pages, a supplemental witness statement dated 14 November 2020 and consisting of seven paragraphs and two pages, as well as in oral testimony. We also heard evidence by way of written statements and in oral testimony on behalf of the Claimant from Ms Pam Roy, whose witness statement dated 8 November 2020 consisted of five unnumbered paragraphs over two pages, and from Ms Tashan Neil, whose witness statement dated 8 November 2020 consisted of seven numbered paragraphs over two pages.

14. We heard evidence from the First Respondent and on behalf of both Respondents from a number of witnesses by way of undated written statements and in oral testimony. These were as follows: the First Respondent, whose witness statement consisted of 63 numbered paragraphs over 11 pages; Mr Simon Smee, whose witness statement consisted of 15 paragraphs over four pages; Ms Navdeep Sokhey, whose consisted of 21 paragraphs over four pages; Mr Simon Gooding, whose witness statement consisted of 19 paragraphs over four pages; Ms Julie Fairfield, whose witness statement consisted of 27 paragraphs over four pages; Ms Sarah Reid, whose witness statement consisted of 14 paragraphs over three pages; Mr Daniel Crouch, whose witness statement consisted of 32 paragraphs over seven pages; Ms Beverley Bartlett, whose witness statement consisted of 33 paragraphs over seven pages; Mr Kieran Fox, whose witness statement consisted of 12 paragraphs over three pages; Ms Julie Nurse, whose witness statement consisted of 32 paragraphs over six pages; Ms Debbie White; whose witness statement consisted of 22 paragraphs over five pages.

15. We were provided with an opening note from Ms Boorer on behalf of the Claimant and an opening skeleton argument from Ms Scarborough on behalf of the Respondents.

16. We were also provided with a cast list and an initially unagreed but ultimately agreed chronology and list of issues.

The hearing and preliminary matters

17. This hearing was conducted remotely by video link using the Cloud Video Platform (CVP). There were a number of occasions on which there were connectivity issues affecting the ability of one or more of the participants to see and/or hear each other. However, we persevered and were able to overcome these difficulties.

18. Whilst the hearing was listed for 12 days, the last two days (30 November and 1 December 2020) being for deliberations by the Tribunal, as matters progressed it became apparent that this would be insufficient time for a number of reasons set out below.

19. On the fifth day, Friday 20 November 2020, the Claimant emailed the Tribunal prior to the start of the hearing absenting herself from the proceedings until Monday 23 November due to ill-health. Ms Boorer knew no more of the position than we did and had been unable to contact the Claimant. In the circumstances we had no choice but to treat this as an application to adjourn the hearing. We then adjourned for the rest of the day subject to review if the circumstances changed. Unfortunately, my clerk did not advise me that the parties were ready to proceed. It was only by chance when I checked the CVP room at about 2 pm that I discovered the parties were all assembled there. We resumed the hearing. Ms Boorer advised that she had been able to make contact with the Claimant, who advised that she felt unwell during the night, had taken strong painkillers and these made her feel very “foggy” and not able to provide evidence today. She was content for the hearing to proceed in her absence, in hearing the evidence of a witness. Medical evidence in support of the Claimant’s inability to attend on 20 November was later provided.

20. Ms Boorer was unavailable on day eleven, Monday 30 November 2020, due to attendance at a funeral, so it was not possible to overrun the evidence and submissions.

21. To add to our difficulties, it became apparent that I had been double listed to sit on a part heard case on 1 December (the final day of the hearing) which extended to 4 December 2020. And so it was not possible to add additional consecutive days to the scheduled hearing and indeed I could not sit on this case on the final scheduled day. We therefore made arrangements to reconvene as necessary on 7 to 9 December 2020, either in Chambers or to finish hearing evidence and submissions as required. In the event the evidence and submissions were concluded on 27 November.

22. We were provided with electronic copies of the bundle, witness statements and other documents by the parties. As I have said, the bundle was sent by the Respondents’ solicitors to a drop-box in 28 separate parts and with a separate index. It was not apparent from the title given to each part what page numbers were contained therein. This could only be ascertained by opening them all in turn and noting this down.

23. As a result, navigation of the bundle was extremely time consuming. Indeed, the Tribunal panel spent several hours over the weekend, before the hearing commenced, opening and labelling the separate parts of the bundle. I was very grateful to Ms Mitchell in particular, who spent some considerable time in consolidating the separate parts of the bundle into one PDF file and formatting it in such a way as to retain the page numbers as set out within the bundle index.

24. We expressed our discontent at the start of the hearing and indeed as it progressed. We stated that we did not understand why the Respondents' solicitors, a large international firm, could not have provided a consolidated bundle in the first place, or, in the very least, labelled each part of the bundle making it clear what page numbers each part contained.

25. We also expressed our concern that the bundle contained, ultimately, over 3500 pages which, notwithstanding the longevity of the Claimant's employment, did seem disproportionate. I added that I did wonder how many of the pages of the bundle we would actually be referred to. Indeed, as the hearing progressed, we were taken to a number of documents some of which we were only referred to by way of reference to specific pages, but there were many that we were not referred to at all and which we would make it clear we simply did not read.

26. Unfortunately, problems arising from having 28 separate and unclearly labelled parts of the bundle continued to cause difficulties for the witnesses in giving evidence and led to the loss of a considerable amount of Tribunal time. It did not appear that anyone except Counsel and the Tribunal panel had a readily navigable bundle. These are matters that the Second Respondents' solicitors, who prepared the documents, should bear in mind in future preparation of electronic bundles.

27. In addition, it was not helpful that despite the voluminous number of documents within the original bundle, these were added to on a piecemeal basis during the course of the hearing.

28. However, in many respects this was the least of the difficulties that we faced at the start of the hearing. It was clear from perusing the documents and Tribunal file before us, that the matter was simply not prepared for hearing. In particular, there was no agreed list of issues. This made it very difficult for us to read into the case in a focused way because we simply did not know the specifics of the complaints and the issues arising from each. In turn, it created difficulties because the Second Respondent's witness statements had already been drafted on what was known of the case from the pleadings and so did not ultimately address all of the matters relied upon by the Claimant, although they could be dealt with in oral evidence.

29. We would add that it did not assist us in understanding some of the documents within the bundle because they contained handwritten and typed annotations made by the Claimant. In addition, it included documents within which the Claimant had reproduced photographs, images of letters and other documents, and cut-and-paste extracts from documents. This in turn made it difficult for us to ascertain with any certainty what were copies of original documents or amalgamations or annotated versions of documents and who said what. We do not believe that the Claimant has done this in anything other than good faith but nevertheless it did cause difficulties. However, we do not know why these matters were not resolved prior to production of the bundle by reverting to copies of original and complete documents and by removing any inappropriate annotations.

30. On the first day, we spent our time in Chambers reading the witness statements and reference documents as best we could whilst we directed the parties to arrive at an agreed list of issues and chronology by the next day.

31. On the morning of the second day, we received an agreed chronology, but the list of issues was still not agreed completely. I expressed our dissatisfaction with this, although I added that we were not going to dwell on the rights or wrongs of it, but just wished to move things forward in a fair way for both parties. We then spent some time ascertaining what parts of the list of issues the Respondents' objected to.

32. We also heard the parties' submissions in respect of the Claimant's application for

specific disclosure of documents which is set out at paragraphs 11 to 13 of Ms Boorer's opening note. This seeks disclosure of documents relating to mediation undertaken with an organisation called CMP and documents relating to the allegation that the Claimant had gone "AWOL" in 2013. In addition, Ms Boorer sought disclosure of a specific email sent by Ms Debbie White, HR Case Consultant, to the Claimant on 16 August 2018. We were provided with copies of emails in support of the application, which we considered.

33. After lunch on the second day, we gave our decision as to the areas of dispute within the list of issues and directed the Claimant's representatives to amend the document accordingly. This is the list of issues dated 18 November 2020 along with further particulars of the false and demeaning comments referred to at paragraph 3.13, copies of which are appended to this Judgment.

34. In addition, we gave our decision as to the Claimant's specific disclosure application. We granted the application in terms and for reasons given on the day, which I do not propose to repeat here. The terms of the Order were read out to the parties, the Order was reduced to writing and later sent to the parties that day and was subsequently complied with by the Respondents.

35. I asked the Claimant whether there were any matters we needed to take into account in modifying the proceedings in respect of her medical conditions. She indicated that she would like to have regular breaks, every half hour, either to stand up, stretch or to get a glass of water. We agreed to this, although I did tell her to remind me if she needed such breaks during the course of the hearing.

36. We started hearing evidence at 2.30 pm on the second day commencing with the Claimant's case. Evidence continued until 27 November 2020. We then heard submissions in writing and amplified orally from both Counsel. We retired to Chambers over 30 November and 7-9 December 2020 in which to reach our Judgment. It took some time thereafter to perfect the Judgment.

37. For the avoidance of doubt, the complaints against the Respondents are of harassment related to disability, discrimination arising out of disability, indirect disability discrimination, failure to make reasonable adjustments, victimisation and unfair dismissal.

38. The Respondents accept that the Claimant is disabled within the meaning of the Equality Act (EQA) 2010 by virtue of her spinal injury and her Haemoglobin C blood condition.

Findings

39. I set out below the findings of fact the Tribunal considered relevant and necessary to determine the issues we were required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. The Tribunal has, however, considered all the evidence provided and has borne it all in mind.

Overview

40. The Claimant describes herself as Black but her culture is African-American. She was born in Zambia to parents who were originally from British Guiana. The Claimant was employed by the Second Respondent from 19 September 1988 until her dismissal with effect from 20 September 2018, latterly at its Wandsworth Branch. The Claimant lives very close to the Wandsworth Branch.

41. The First Respondent is Black African and was born in Zambia. He is currently

employed by the Second Respondent as the Branch Manager at its Clapham Junction Branch. He was previously employed as the Branch Manager of Wandsworth Branch at the time of the events in question.

42. The Second Respondent is a well-known Building Society with branches throughout the United Kingdom.

43. The Claimant was initially employed as a Customer Representative but was fast tracked through the Second Respondent's managerial training route and promoted to Customer Services Manager and then to Branch Manager and as a senior manager working at the Flagship Branch in Knightsbridge. In September 1996, she was promoted to the role of Financial Planning Manager. It is clear from the documentation that the Claimant was well thought of by the Second Respondent's senior managers, her image was used nationally to promote its services to different ethnic groups to encourage them to become customers. She was and continues to be the face of the Second Respondent's Equality, Diversity and Citizenship Programme.

44. Upon returning from maternity leave in 2009, the Claimant took a step back to work in a part-time role as a Customer Representative. This role involved what is known as host work, that is working on the floor of the banking hall of the Branch, meeting and greeting customers and dealing with their enquiries face-to-face or by telephone, either at a host desk (a podium) or in consultation rooms, and counter work, that is undertaking financial transactions behind the counter as a bank teller. The Claimant intended this to be a temporary move to a less pressurised position until her daughter was well established in primary school.

45. In August 2011, the Claimant sustained injuries to her right dominant arm and shoulder as a result of a fall at a Sainsbury's supermarket. Following her injuries, her then Manager, Mr Adam Naismith, adjusted her Customer Representative role so that she was only carrying out host work as opposed to her full duties. We were referred to her 1:1 Notes[1] of 6 December 2011 at B 320 in support which states:

"Dawn (the Claimant) will be covering the host desk and Adam (Naismith) has agreed to have Dawn covering the host desk as much as possible this is where her skills are best used".

46. The Claimant's position is that this was a permanent adjustment to her role. The Respondents' position is that it was not a permanent concession.

47. The Claimant alleges that it was when the First Respondent became the Wandsworth Branch Manager in February 2012 that there was a change of approach by the Respondents towards her.

48. A summary of her position is as follows. She alleges that the First Respondent was noticeably unhappy about her adjusted role and sought to make her life difficult. She further alleges that she was subjected to a campaign of harassment, disability discrimination and victimisation by the First Respondent and perpetuated by other members of staff and managers. Her position is that this continued until 2018, at which point the Second Respondent purported to carry out mediation to facilitate her return to work after a period of sickness absence. However, she alleges that instead of mediation taking place, a report was produced which victimised her for raising complaints of discrimination and was used to justify her dismissal on the grounds

[1] The Second Respondent's managers conducted monthly one to one meetings with each member of staff. These are referred to at times as "1:1"s and "121"s. These are recorded within an electronic form which was signed off as authorised by both the individual member of staff and the supervisor by way what is referred to as a "PIN". The 1:1s contain a monthly performance rating as well as agreed actions for the future. In additional each member of staff was given quarterly "Behaviour Rating 1:1s", another electronically recorded document, the outcome of which was rated. The ratings for both forms appeared to be graded the same. Namely as: "exceeds objectives" or "exceeded", "met" and "not met". The overall outcome each quarter impacted on the staff member's annual bonus entitlement.

that her relationships with the other members of staff within the Wandsworth branch had irretrievably broken down. The Respondents deny these allegations.

Contractual and policy documents

49. We were not taken to any contractual or policy documents other than the Sickness Absence Policy and the Provisions in respect of Time off In Lieu (TOIL) within the Branch Network Working Arrangements – Manager Guide. However, we did consider the following documents contained within the bundle and have referred to them below in as far as we consider them to be relevant.

50. The Claimant's statement of terms and conditions dated 2 December 2009 at B257-264. This indicates that the Claimant's job title is Customer Representative. And her continuous employment began on 1 November 2009. This date is at odds with the Claimant's stated start date of 1988. However, the Respondents have not taken issue with this matter and so in the absence of anything to the contrary and applying the presumption of continuity we accept that the Claimant's continuous employment began as she states in 1988. We also note that at clause 5, the Claimant's place of work is defined as at the Wandsworth Branch, although there is a mobility clause by which the Second Respondent could, for business needs, require her, from time to time, to work, either temporarily or on a longer term basis, at other locations, in other areas, within a reasonable travelling distance, as defined (at B258). We had regard to clause 11 as to payment of company sick pay at B260-261. Whilst a reference is made to separate disciplinary rules and grievance procedure at B263, we were not referred to either document.

51. The Sickness Absence Policy dated 28 February 2014 at B 268-280. This sets out in more detail entitlement to Company and Statutory Sick Pay and other benefits, how sickness absence is managed as well as Occupational Health (OH) referrals, support, rehabilitation and return to work. It also sets out the sickness notification procedure.

52. The Fair Treatment at Work Policy dated 26 July 2019 at B281-287 deals with, among other things, disciplinary and grievance procedures, ill health capability, and harassment and bullying.

53. The Branch Network Working Arrangements - Manager Guide dated August 2019 at B288-305. As we have indicated this sets out the arrangements for TOIL.

Disability

54. The Claimant has provided a lengthy Disability Impact Statement running to 93 pages (at B3430-3523). This document, like many provided by the Claimant within the bundle, consists of what appear to be cut-and-paste extracts from other documents, as well as annotated scanned extracts from other documents. It appears to be a revised and updated version of the Impact Statement dated 1 March 2018 at B58-81 given that it is much greater in length.

55. Whilst the Disability Impact Statement does touch upon her disabilities along the way, it is predominantly about her life and work history from 1968 to 2018. But the focus is on setting out her substantive case. It provides minimal information about what her health issues are, when they arose and how they have affected her ability to carry out normal day to day activities, which is of course more properly the purpose of such a document and what she was directed to do by EJ Crosfill at the Preliminary Hearing held on 2 January 2018 (at B48). It was therefore necessary to find this information as best we could from her witness statement and oral evidence, the pleadings, the various Case Management Summaries and from medical documents within the bundle.

56. The Claimant is disabled for the purposes of the EQA in respect of two impairments.

57. The first of these is Haemoglobin CC Blood Condition. This is a genetic impairment which the Claimant was diagnosed with in 2002. It affects the Claimant's blood, eyes, bones and spleen and as a consequence her immunity system is compromised.

58. The second of these relates to injuries sustained to her right shoulder and upper back following a fall as a result of slipping over in Sainsbury's supermarket in Wandsworth in August 2011. This resulted in the Claimant undergoing surgery to her right shoulder in November 2012.

59. At some point the Claimant was diagnosed with a back or spinal condition, although whether this was as a result of the injuries sustained in her fall, a separate condition or both, is unclear. However, there are various documents within the bundle which are of assistance in understanding the Claimant's spinal condition as at various times: the letter from the Second Respondent's OH practitioner to the Second Respondent dated 26 September 2013 at B352-354, the medical notes dated 10 July 2014 at B383-384 and the letters from Parkside Hospital and her Consultant in Pain Management of October 2015, the OH Capability Report dated 21 April 2016 at B1107-1108, OSCCAR Review Questionnaire dated 21 April to 29 September 2016 at B1110-1122, and the OHP Management Reports dated 7 February, 6 April & 9 July 2017 at B1890-1893, B1946-1948 & B2874-2877.

60. In any event, the Respondents accept that the Claimant falls within the definition of disability within the EQA in respect of her Haemoglobin CC Blood Condition and her spinal injury.

<u>The First Respondent's appointment as Manager of the Wandsworth Branch</u>

61. The Claimant was absent from work from November 2012 until February 2013 due to her shoulder operation. She returned to work with her right arm in a sling. Her return was on a phased basis on reduced hours and amended duties in line with advice from her GP.

62. There are fitness for work statements from her GP at B334 issued on 8 January and 11 March 2013 respectively. These indicate that because of a right shoulder decompression the Claimant may be fit for work on certain advice. The earliest of these statements advises reduced hours of four per day for one month, amended duties of no lifting, no repetitive actions and no sitting down for more than 30 minutes (no counter work). The second of the statements advises initially working four hours per day, no lifting and no counter work, no repetitive movements and should not sit for prolonged periods.

63. The First Respondent was appointed as the Wandsworth Branch Manager in about February or March 2013. He had been employed by the Second Respondent for 21 years and he was Wandsworth Branch Manager until moving to the Clapham Junction Branch on 1 February 2018.

64. At the time that the First Respondent joined the Wandsworth Branch, the Claimant was performing an adjusted role as "Host" whereby she would meet and greet customers when they entered the Branch and act as host. She was not required to undertake any counter duties which were part of the full Customer Service Representative's duties. This followed her GP's advice.

65. Before commencing work at the Wandsworth Branch, the First Respondent claimed he had been advised by several people that he needed to be very careful with the

Claimant because she was difficult to deal with. However, he stated in evidence that he did not let this affect his view of the Claimant and when he started working with her, he thought that they had a very good relationship.

66. Ms Navdeep Sokhey, the Second Respondent's HR Consultant, also described the Claimant as having quite a strong and challenging personality, which caused various issues in respect of her working relationship with the First Respondent. In evidence she stated that the First Respondent would contact her to raise concerns that he had about the Claimant disrupting the branch, not carrying out her own role and only carrying out other duties. She further stated that her role was to advise and support the First Claimant and the Business on how best to deal with these situations.

67. As we shall see, this view of the Claimant was one which to varying degrees was expressed by other members of the Second Respondent's staff, although we would hasten to add that the Claimant believed it was a false image started and perpetuated by the First Respondent.

68. We observed from both the contemporaneous documents and from the Claimant's own countenance in giving evidence, that she could perhaps be perceived by work colleagues as being difficult to deal with because she is a person who is not slow to assert herself when confronted with actions or views that she disagrees with. This is not meant as a criticism of the Claimant but merely an observation by way of our attempt to understand the circumstances which we have been asked to adjudicate upon.

69. The First Respondent was aware on joining the Branch that the Claimant had suffered a spinal injury and as a result of this she had been absent from work on a number of occasions from November 2012 to February 2013 following her surgery.

70. In September 2013, Ms Sokhey only became aware that the Claimant was working an adjusted role after it was brought to her attention by the First Respondent. In evidence she referred to this as when the Claimant first "came on her radar". Whilst the Claimant believed this expression to be of some significance, and it can have negative connotations, we did not see anything untoward in its use. The First Respondent explained to Ms Sokhey that the Claimant was only carrying out the duties of Host. Ms Sokhey was aware that this had been the case since at least March 2013. She advised the First Respondent to refer the Claimant to the Second Respondent's OH provider to establish her fitness to carry out the full Customer Representative role and any adjustments/support that she needed. She said in evidence that discussions then took place between her and the District Manager (presumably a reference to Mr Robert Halliday), who oversaw the matter, in the light of the Claimant's challenging personality. She further stated that the First Respondent did not deal with the matter due to his lack of experience.

71. It was put to her in cross-examination that the Claimant had been undertaking her adjusted role as host since November 2011 by reference to her 1:1 Notes dated 6 December 2011 at B320 and so there was no need to refer her to OH. Ms Sokhey disagreed and stated that this may have been on doctor's advice, but a doctor would not be aware of what the Claimant's role involved whereas OH would.

72. On 3 September 2013, the First Respondent referred the Claimant to the Second Respondent's OH providers. The First Respondent in his written evidence stated that this was as a result of a statement of fitness for work which indicated that the Claimant would not be able to carry out any counter work or heavy lifting for the following six months. This would appear to be a reference to a statement of fitness for work from the Claimant's GP dated 20 June 2013 at B339.

73. The OH referral form is at B345-347. This sets out the reason for the referral as

follows:

"Dawn (the Claimant) has got a statement of fitness for work document from her GP that states that she cannot do any counter work or heavy lifting for the next 6 months. This is due to an injury she sustained last year. Her role as a customer representative is such that she her (sic) primary role is to do till work and if she cannot do this is a major problem for us…"

74. The referral form goes on to state at B346, that by way of reasonable adjustments:

"we have had the printers adjusted so they sit directly under the PC as she did say. We have also offered to ensure she does not carry anything heavy we would do it for her."

75. The referral form indicates that the Claimant had been absent from work for seven months and ends by stating:

"We are simply concerned that this note from the doctor states she cannot do 90% of what her current role in her workplace needs her to do and that is to operate the till."

76. At some point in September 2013, the Claimant attended a meeting with the First Respondent and Ms Sokhey. This would appear to have been held to discuss the Claimant's adjusted role as Customer Representative.

77. We were referred to a handwritten note of that meeting consisting of brief jottings made by Ms Sokhey. It is apparent that none of the participants remember with any certainty what happened at this meeting beyond this note which is at B335-337 (although the note is dated March 2013 in the bundle index). This note only became available to the Claimant at some later point, we believe as part of a Subject Access Request under the data protection legislation in October 2015, and she does place some significance on the contents albeit in the light of subsequent events which were of concern to her.

78. The note contains the words "18 September went AWOL", a reference to the Claimant allegedly being absent from work without permission. It was clear that this matter was not raised with the Claimant during the meeting and she only became aware of it much later when she saw the note. It was also clear that she was outraged by this allegation and states it is wholly untrue. She views it as denoting the start of the discriminatory treatment that she received from the First Respondent and his painting of a false impression of her conduct.

79. In his written evidence, the First Respondent recalls that the Claimant was absent from work in September 2013 and did not follow the Second Respondent's sickness absence procedures, and that he discussed this with the HR Department.

80. In her written evidence, Ms Sokhey states that the Claimant was off sick from work at this time but failed to comply with the Second Respondent's sickness absence procedure and that she spoke with the First Respondent about this matter. She advised the First Respondent that if an employee had not complied with the procedure, then their absence should be recorded as Absent Without Leave (AWOL) on the system. We were referred to the sickness absence policy at B268-280. Ms Sokhey further states that as a result of this the Claimant was recorded as AWOL.

81. However, in oral evidence the First Respondent said he had no specific recollection of the Claimant being AWOL on 18 September 2013 or whether he raised this with Ms Sokhey or HR. This was his position in interview on 7 November 2015 as part of the Claimant's later grievance against him (at B1454). However, he was more equivocal in a later interview held on 26 July 2018 (at B2894). Further, in oral evidence he accepted that at the time he was in continuing contact with HR and it would have been a situation where the Claimant was absent from work for some time and HR became involved to ensure that the Branch Manager and the employee

are supported.

82. Further, in her oral evidence, Ms Sokhey said that she could not recall this incident, but any information regarding the Claimant going AWOL would have come from the First Respondent or from another manager.

83. It was clear in evidence that such an absence, if it ever occurred, had certainly not been recorded within the Second Respondent's records and no action had been taken against the Claimant in respect of it. This much was found as part of the outcome into the Claimant's later grievance against the First Respondent (at B1696).

84. The note of the September 2013 meeting also contains the words "she's disabled - > face further ET if dismiss". The Claimant said in her written evidence that she found these words shocking when she saw them. She again places some significance on them albeit in the light of matters occurring after the meeting.

85. In oral evidence, Ms Sokhey said that this was something she jotted down from what the Claimant had said in the meeting, which was that if the adjustments to her role were not made, she would take it further to an Employment Tribunal. She denied that it was something that came from the First Respondent or that there was ever any intention to get rid of the Claimant.

86. On 11 September 2013, the Second Respondent's OH providers produced a report on the Claimant which was addressed to the First Respondent. This is at B350-351. The report, from an OH Adviser, sets out the nature of the Claimant's condition and the medical advice she has received. It advises referring the Claimant to an OH Physician for a face-to-face assessment and recommends that in the interim she should continue in her adjusted role. The report states that the Claimant does not fall within the scope of disability under the EQA.

87. On 29 October 2013, the Claimant attended a meeting with Ms Sokhey and Mr Halliday, the Second Respondent's District Manager, to discuss the contents of the OH report. We were referred to an email from the Claimant to Ms Sokhey dated 13 November 2013 at B370-377. Within this email, the Claimant includes Ms Sokhey's original email of 8 November 2013 setting out notes of the meeting, to which the Claimant has added her own response by way of annotations set out in a larger italic font. Essentially, Ms Sokhey's email sets out what had been discussed at the meeting to which the Claimant adds her corrections and commentary.

88. The notes of the meeting indicate that there was a discussion of the OH report and the Claimant's position as Customer Representative. There was a discussion of the Claimant's medical history and events leading up to the referral to OH and the resultant report. Whilst the Claimant has made corrections to this, they do not materially affect the position. There was then discussion of what aspects of the Customer Representative role the Claimant had undertaken in the banking hall, which the Claimant sets out in detail within her corrections and this includes her involvement in the Nationwide Citizenship Programme in her local community and her work supporting the Diversity Agenda. In terms of her role in the banking hall, the additional detail is essentially that of defining various elements of the duties resulting from meeting and greeting customers and dealing with their various enquiries. The notes also indicate that Ms Sokhey confirmed that the Second Respondent "would not create a bespoke role for an employee as there are clear job roles that the Society has in place".

89. On 9 December 2013, the Claimant attended a follow-up meeting with Ms Sokhey and Mr Halliday with Ms Marian Dean from the Nationwide Group Staff Unit (NGSU), which would appear to be akin to a trade union. We were referred to a transcript of this meeting at B395-402. At the meeting, Mr Halliday stated that given the contents

of the OH report, only the roles of Host and Personal Banking Manager (PBM) were suited to the Claimant and whilst there was a podium in Wandsworth which she was using to perform Host duties, these were being removed from smaller branches as and when they were refitted, and there was no Host position in the Branch. The Claimant through Ms Dean stated that whether there was a podium or not, the Claimant was providing invaluable customer services and the only restriction was that she could not perform cashier duties. Ms Dean further stated why wouldn't the Second Respondent want to make a reasonable adjustment for the Claimant to perform the hosting role in Wandsworth? Mr Halliday responded by repeating that the role did not exist but agreed that the business would reevaluate the position. However, he suggested that in the meantime the Claimant consider other options, such as the PBM role and Host role but in other locations. Ms Dean stressed that the Claimant could only work in Wandsworth because of the proximity of her daughter's school and her mother's home. The Claimant added also because of her health. Ms Sokhey summed up that by way of reasonable adjustment the Claimant was asking the Second Respondent to create a bespoke role in Wandsworth, not called a Host role, but carrying on the duties that she was currently undertaking.

90. On 29 January 2014, the Claimant sent an email to Ms Sokhey asking her when the Second Respondent intended to merge the Customer Representative and Host roles. Ms Sokhey responded that there were no plans to do this (both emails are at B418 &419).

91. A further meeting took place on 5 February 2014, but we were not provided with any evidence as to what happened at this meeting.

92. Thereafter the Claimant continued in her adjusted role. On 17 July 2014 she was promoted to the PBM role as a result of the review process, although the Claimant alleges that this was not finalised until September. We were referred to the Second Respondent's offer letter to the Claimant dated 17 July 2014 at B485 (which is incomplete). This indicates a start date of 1 August 2014 in the position of PBM at the Wandsworth Branch, working three days a week.

93. On 8 November 2014, a Saturday, the Claimant went to the Branch to pick up some information and she discovered a number of members of staff at work. They approached her as their NGSU representative and raised a number of concerns about the First Respondent, including that he regularly made them stay late at work, sometimes until 7 pm.

94. The Claimant discussed a number of options with her NGSU colleague, Pam Roye, and decided to raise the matter with Ellen Nelson, the Area Director of Central London. She sent what she calls a "whistleblowing email" to Ms Nelson on 10 November 2014. We were referred to B550-554 which is a document created by the Claimant, which like many other documents she has produced, appears to incorporate cut-and-paste copies of other documents. Within that document would appear to be the email she sent to Ms Nelson of 10 November 2014. However, as with other documents, it was sometimes hard to determine what was the original document and what was the document including annotations and commentary added by the Claimant at a later point. Nevertheless, this email does raise what the Claimant describes as serious failings in the Wandsworth Branch. Whilst in her witness statement the Claimant states that Ms Nelson responded shocked and thanked her, we could not find this within the bundle.

95. Sometime during the middle of November 2014, the Claimant states that she was approached by Ms Bartlett who spoke to her in an aggressive confrontational manner, saying "Why did you go to Ellen?" without even saying hello to her. The Claimant was shocked because her communication to Ms Nelson was supposed to be confidential "whistleblowing". In evidence, Ms Bartlett states that she was

approached by Ms Nelson to discuss some concerns that had been raised by the Claimant although she could not remember what those concerns were beyond that her new role was not being managed properly. She further states that she was new to the District Manager role and was keen to fully understand the concerns and any issues at the Wandsworth Branch. In late November, she states that she recalls asking the Claimant what she was concerned about so that she could talk to the other members of the team and ensure the issues were addressed. Ms Bartlett denied that she confronted the Claimant in the way alleged by the Claimant.

96. The Claimant alleges that she was falsely accused by the First Respondent of being AWOL on a number of occasions in 2015. This relates to an incident on 2 March 2015, in respect of her working to 7 pm, on 31 March 2015, in respect of her working to 9 pm, on 10 August 2015 (although we believe this should be a reference to 5 August), in the afternoon rather than the morning and on 10 August 2015, in respect of her adjusted hours due to taking her daughter to Summer Camp. The First Respondent denied these allegations and stated that he only ever requested the Claimant to keep her TOIL tracker up-to-date on a number of occasions during 2015.

97. The matters relating to August 2015 form part of a Misconduct Report which we deal with below.

98. The two dates in March 2015 apparently arise from entries that the First Respondent made in the records of her 1:1 meetings at B638 and at B613 (this much we gleaned from Ms Boorer's written submissions). However, both of these documents appear to be dated February 2015. The Claimant's position is as follows. The First Respondent's entries suggested that she over claimed TOIL to 9 pm and 7 pm. Given that she had specifically reduced her hours to care for her daughter, there was no basis on which she would have done so. This was a false and baseless allegation and not something the First Respondent addressed informally with her.

99. We could not find any reference to this matter at B638 beyond reference under Actions Agreed to the need for the Claimant to ensure that her "TOIL tracker (is) fully updated by close of play today 2 March 2015" and "to finalise her TOIL by close of play 3 March 2015".

100. There is a reference at B613 to the TOIL that the Claimant had sent through to the First Respondent having incorrect timings, with the Claimant finishing at 9 pm when in fact this should be 5 pm, and the instruction for the Claimant to redo this and submit it to the First Respondent for approval.

101. We considered the Claimant's TOIL figures for the period 29 November to 27 December 2014 as set out in her 1:1 notes of 29 January 2015 at B600. These are clearly incorrect in that working from 9 am to 5 pm is 8 hours and not 9 as stated. Further we also considered the record of the Claimant's Outstanding TOIL figures for 2014 and 2015 at B713 from which we can see that these figures have been revised in the handwritten annotations.

102. In May 2015, the Claimant transferred to work at the Streatham Branch as PBM, there being a vacant position there. The Manager of that Branch was Mr Simon Smee. Mr Smee stated in his written evidence that the transfer was intended to help the Claimant develop and that whilst he was not given any details, he understood that she had transferred after falling out with both the PBM and the Branch manager at the Wandsworth Branch.

103. On commencement at the Streatham Branch, the Claimant provided Mr Smee with a document entitled "Branch Contract Dawn & Simon May 2015" (at B717). This document sets out the Claimant's expectations from Mr Smee. We did take the view that this did appear to be a rather presumptuous thing to present to one's new

manager. Mr Smee said in written evidence that the document set out what the Claimant felt were the key factors for success in their working relationship, that he tried to accommodate these as often as possible whilst making it clear that he would be direct with the Claimant in cases where she was not following the Second Respondent's procedures. He also stated that he felt their relationship started off well and that the Claimant was quickly being signed off on observations for her PBM role.

104. Mr Smee stated that he was aware of and supported the Claimant's extra work including Inclusion and Diversity. He was unclear as to the Claimant's break times given she had a slightly unusual working pattern whereby she worked 16.5 hours spread across three days. However, he accepted in cross-examination that he was mistaken and that she was contracted to work 17.2 hours.

105. The Claimant's Branch Contract document states that she should have a "breakaway" from her computer at least every four hours because of her disability in her upper torso. Mr Smee stated in evidence that he spoke with Ms Bartlett, who had taken over from Mr Halliday in Summer 2014, to clarify the position. He further stated in evidence that he was aware of the Claimant's disability and requirements and was happy to accommodate her need to take short breaks away from her screen as much as possible.

106. We were referred to an email sent to the Claimant by Ms Bartlett on 19 May 2015 at B702. This email confirmed that the Claimant was entitled to an unpaid 20 minute break in any period of six hours working. The Claimant's position is that given that she did not work six hours a day she would not be entitled to any breaks. This was put to Mr Smee in cross-examination and it was further put to him that after this email was sent, he did not allow the Claimant to take any breaks. Mr Smee denied that the Claimant was not allowed any breaks and stated that he always accommodated them when needed. The email went on to discuss the Claimant's proposed later start of 9.30 am to 3 pm and her need to agree this with Mr Smee and as to accommodating the reduction of 45 minutes per week this entailed.

107. In cross examination, Ms Bartlett stated that she asked HR as to the position regarding the Claimant's entitlement to breaks because the Claimant had asked her what her entitlement was. Ms Sokhey said in her written evidence that she told Ms Bartlett that the Claimant was entitled to a 20 minute break for every six hours worked. Her further written evidence is that she understands that in practice however, Branch Managers allow colleagues to take short breaks where possible and that the Claimant was allowed to do this at the branches at which she worked. Ms Bartlett denied in cross examination that she had told the Claimant she could not have the five minute break she was taking in respect of her disability and said that employees can always move around and take a break from their screens. The Claimant's oral evidence was that she was stopped from taking breaks although she accepted that she had always been allowed to take breaks ever since her role had been adjusted.

108. Mr Smee conducted a 1:1 meeting with the Claimant on 26 May 2015, the record of which is at B720-727. During this meeting, the Claimant stated that she felt much happier since her transfer and was feeling positive about their relationship in the future going forward. He conducted a further 1:1 meeting on 23 June 2015, the record of which is at B763-780 (although again this is a document that appears to be an amalgamation of the 1:1 notes and additions and inserted documents). This resulted in the Claimant receiving a Behaviour Rating of "met" (at B706-761). Mr Smee felt that this was the right rating given that the Claimant had only worked in the Branch from the beginning of the month and there were still some areas where she could show that she was going the extra mile in relation to her business activity. Mr Smee said it was clear that the Claimant was angry about her rating and as a

result had an issue with him.

109. By this time, the Claimant had a problem with her car and stated that she felt she could no longer work at the Streatham Branch. There is an email dated 7 July 2015 at B796 to Mr Simon Gooding, the London Central Regional Manager, from Mr Simon Connolly, his line manager, telling him that he had just met with the Claimant who told him that she had no car and cannot get to Streatham, and requested to work in Wandsworth. The email further states that her next working day is Monday (13 July) and that she will report to Wandsworth until further notice. Mr Smee was not copied into this email.

110. The Claimant was arriving at work at 9.30 am rather than 9.15 am as required. In cross-examination Mr Smee stated that he was unaware of such an arrangement having been previously agreed with her line manager. Mr Smee stated in evidence that he spoke with the Claimant regarding making up the extra 15 minutes per day, perhaps by changing her working hours, but the Claimant was not open to discussion about this and it was not resolved. He was referred in cross-examination to an undated document headed Annual Leave & TOIL Dates at B712 which contains a reference to the Claimant's daughter being at Super Camp between 27 July to 14 August 2015. Whilst Mr Smee had not seen this document before, he was aware of the reasons why the Claimant wished to vary her hours and that she was willing to be flexible. However, he stated that whilst there were occasions when she was willing to discuss the matter, there were other occasions on which she would not. He also accepted that he had considered offsetting some of the Claimant's TOIL against the 15 minutes a day that she sought, but for reasons he could not recall, it did not happen.

111. In July 2015, the Claimant states that she contacted Ms Bartlett requesting a transfer back to the Wandsworth Branch alleging that Mr Smee had harassed her. How the above email fits into this chronology was not clearly set out to us in evidence. Mr Smee said in his written evidence that he only became aware of her request for a transfer when the Claimant emailed all of the staff at the Streatham Branch announcing her departure, which had at that point not been approved or agreed. However, he accepted under cross-examination that the matter had been discussed at the Claimant's 1:1 in June 2015 (at B774). The reference to this issue in those notes indicates that it is in the context of the Claimant wishing to return to Wandsworth because she cannot make up the 15 minutes per day and that Mr Smee states that he is happy to accommodate this request but would still manage her remotely. Again, this is part of the document which appears to have been amended and had additional documents added to it, but the bundle index indicates that it is part of the 1:1 dated 23 June 2015.

112. On 27 July 2015, Mr Smee attempted to arrange a further 1:1 meeting and to discuss her buildup of TOIL before the Claimant left the Branch, but she did not respond to this or a further email dated 3 August 2015. We were referred to B861-862. In addition, we have considered Ms Bartlett's email to Mr Smee dated 13 July 2015 and her email to the Claimant dated 5 August 2015 which also deals with these matters (at B808-809).

113. In August 2015, the Second Respondent conducted an investigation into a number of allegations of misconduct against the Claimant. This was conducted by Ms Marie Hann, Quality Supervisor.

114. We were referred to a Report of Misconduct/Incident at B858-868 dated 11 August 2015. However, as was the case with a number of documents, this did appear to be an amalgamation of the original report plus additional commentary and inserts made by the Claimant. At times it was difficult to distinguish one from the other. And so we have simply done the best we can in interpreting the document.

115. The investigation relates to allegations that the Claimant had been absent from work on 5 August 2015, had changed her hours of work from 10 August 2015, both without permission, and had failed to comply with her EDS requirements. It would appear that the matter was escalated to an investigation into allegations of misconduct because the Claimant had not responded to a number of emails sent to her by Mr Smee.

116. From the investigation report, the Claimant's position as to the change of hours on 5 August 2015 was that she telephoned Ms Nadia Persad, the Customer Service Manager at the Wandsworth Branch, to check her diary to see if she could attend work in the afternoon rather than the morning because of an emergency. The Second Respondent's position was that it was inappropriate to ask Ms Persad because she did not have authority to grant such permission.

117. From the investigation report, the Claimant's position as to the change of hours from 10 August 2015 was that she had changed her work pattern for a period of three weeks so as to arrive at work at 9:45 am instead of 9.15 am whilst her daughter attended Summer Camp. She asked the First Respondent, who was happy with the arrangement and asked her to liaise with Ms Persad. In the report the Claimant states that unfortunately the First Respondent is forgetful, and it is not anything personal, it is part of his personality. In cross-examination, the First Respondent could not recall having agreed to this arrangement although he accepted that it was the sort of thing he would agree to and stated that he had always been flexible in his approach to the Claimant. He did not accept that he had deliberately denied the existence of the arrangement because of the Claimant's disability and to make it reflect badly on her in the subsequent grievance investigation.

118. In August 2015, the Claimant also contacted the Second Respondent's Security Incident Team to obtain details of the times that she was entering and leaving the Branch given issues as to her start time. Ms Sokhey explained to her that this was not necessary as no one was questioning her on this. Ms Sokhey stated in evidence that the Claimant clearly seemed to feel that the situation was confrontational when it was not.

119. We could not find any indication that any action was taken against the Claimant as a result of this misconduct investigation.

120. We had regard to the outcome of the Claimant's later grievance as to this matter at B1698. The investigating officer, Ms Amanda Rice, found that the investigation was focused on the Claimant's alleged failure to respond to management requests from Mr Smee linked to EDS requirements and changes to her work hours on 5 and 10 August 2015. She further found that she was satisfied that there was a miscommunication in relation to 10 August 2015 and that the First Respondent as a supportive manager may well have agreed to this. She did not believe that the First Respondent instigated the investigation maliciously and found that it appeared that the investigation was as a result of the Claimant's communication breakdown with Mr Smee and other matters coming to the forefront at the same time.

121. Part of the Claimant's case is that the First Respondent told her to her face that she was doing a good job, but behind her back was denigrating her to Ms Bartlett and others, including the Central London Senior Area Team and HR from 2013 onwards. This related to what she describes as false allegations as to her ability to perform her job properly, her inability to manage her time, that she spent all of her time in a second floor meeting room and that she neglected her duties in favour of her Equality and Diversity and NGSU duties. This is set out somewhat vaguely in the Claimant's witness statement at paragraphs 54 to 56 albeit stated to be from 2014 to early August 2015 and covering a variety of events.

122. The First Respondent's position is that he denies making allegations that the Claimant was unable to perform her job properly and needed help with time management or that she spent all of her time in the meeting room, lacked concentration and avoided the banking hall and that she neglected to carry her work duties out in order to carry out her Equality Inclusion and Diversity work. However, he did state in evidence that he would have had conversations with Ms Bartlett which would have centred around how they could strike a balance between her Equality Inclusion and Diversity work and her day-to-day role.

123. This was echoed by Ms Bartlett in her evidence on the occasion in 2015 that the First Respondent explained to her that the Claimant had provided him with the list of dates that she would be unable to perform her work duties because of engagements with NGSU and in relation to her Equality Inclusion and Diversity work. Her evidence is that the First Respondent was concerned because his Branch would be without PBM cover and he asked whether there was cover available elsewhere in the region. Indeed, in her evidence to Ms Rice in her interview as part of the Claimant's first grievance, Ms Bartlett stated that part of her discussions with the Claimant was as to seeking a balance with careful planning and support from her manager between her work duties and her Equality Diversity & Inclusion and NGSU activities (at B1694).

124. Ms Bartlett also dealt with the issue of the Claimant allegedly spending all of her time in the second floor Branch meeting room in her interview with Ms Rice (at B1531. She explains the following. The Wandsworth Branch has one room upstairs and two rooms downstairs and one private room downstairs as well as upstairs. When she visited the Branch, quite frequently she would find the Claimant in the upstairs room and that the other PBM, Abbas, was downstairs. The difference between the two rooms was that you could see the banking hall queue downstairs and could interact with customers when you were in downtime. She spoke to the First Respondent in the first instance about noticing that the Claimant was upstairs a lot and that this would unbalance how much time the Claimant was exposed to banking and that Abbas was doing most of the queue walking. The First Respondent stated that he could not get the Claimant out of that room, she sees it as her room. Ms Bartlett had a conversation with the Claimant about the need to be fair, to share the upstairs room for administration, but in a customer facing environment both she and Abbas should use the downstairs room equally so that they would be available to customers.

125. The Claimant alleges that on 15 January 2015, the First Respondent alleged to Ms Bartlett that she had not completed product tests and therefore failed the Branch Audit controls. This appears to have arisen from Ms Bartlett telling the Claimant, in response to her appeal against her January 2015 rating, that there were outstanding product tests from October 2014 and saying that as a result of her non-compliance the branch KCI, which she describes also as audit, was impacted that month. The Claimant's position is that this is clearly untrue and that her 1:1 from October 2014 indicates that she had completed the product tests (B527). She attributes this allegation as arising from the First Respondent. Ms Bartlett's evidence was that there was a failed audit test and that the First Respondent indicated this failure was caused by the Claimant not updating them correctly. She further states that she did not believe that this was a false allegation. The First Respondent's evidence was that whilst he could not remember the full details of this, he would need to keep Ms Bartlett apprised of all product test fails. We struggled to see the link between failed product tests and a failed Branch Audit.

126. On 6 January 2015 the Claimant received a Behaviour Rating from the First Respondent of Met. This is at B569-575. Whilst this does contain positive comments about the Claimant, it does make the point that because of a combination of her

being off to recover from surgery, time off for holidays, catching up on TOIL and attending the PBM course (although noting she has to redo the Flex Plus part of the course), she had not been in the Branch for much of the time. It concludes with the following paragraph (at B571):

"We have a difference of opinion here where Dawn feels that she is an exceeded because of what she has done for the diversity team and I feel that as PBM although she was not trading did not exceed in her role and the only justifiable alternative is to give her a MET. Dawn was not in the branch much throughout the last quarter and as such there is no real justification to be give (sic) someone an Exceeded rating when they have not done much in terms of anything done within the branch. I believe a fair rating is to give her a MET as this takes into account what has been done outside of her role."

127. In response the document records that the Claimant said the following (at B572):

"I strongly disagree with Kay's comments - to allege that I did not make an Exceeding contribution in the last quarter is insulting and demeaning. I am a driven person and work continuously outside my 17 hours per week, which is proven in my Diversity and Citizenship work."

128. Following this is the Claimant's detailed justification as to why she believed she should have got an Exceeding rating (at B572-575).

129. The Claimant sent an email to Ms Bartlett on 6 January 2015 raising concerns as to her rating and in response Ms Bartlett referred her to the protocol for appealing detailed on the intranet (at B568).

130. The Claimant subsequently appealed against her rating (at B579-581). In essence, her appeal was on the grounds that the rating should be higher on the basis of her Equality Diversity & Inclusion work and not as the First Respondent had rated it on just her duties in the Branch. On appeal, the rating was subsequently increased to Exceeding, although the only document that supports this is the Agreed Chronology. Her later grievance on this issue was only partly upheld and the outcome does not mention that the rating was upgraded. We found it very difficult to ascertain the position from the evidence before us.

131. The Claimant alleges that at a meeting on 14 January 2015, Ms Bartlett was aggressive towards her about her raising her concerns with Ms Nelson. This was raised as part of the Claimant's later grievance against Ms Bartlett and was not upheld (at B1693). The Claimant had made other allegations relating to that meeting. But in respect of this allegation, Ms Rice, who conducted the grievance found that Ms Bartlett had been asked by Ms Nelson to meet with the Claimant following matters of concern that she had raised directly with Ms Nelson and that Ms Bartlett viewed the meeting as positive and was not aggressive towards the Claimant during the meeting. Ms Rice found that the meeting was one to one and there were no witnesses, and she was satisfied with Ms Bartlett's responses that she addressed the Claimant's concerns appropriately.

132. The Claimant alleges that on 1 April 2015 she checked her Work Smart records and found that the First Respondent had "double pinned" her March 1:1 the day before without her authorisation and deleted her comments. We were referred to an example of a double pinned document at B337. Double pinned means that the First Respondent signed the 1:1 himself and then for the Claimant, but in this case without her permission.

133. Doing the best we can, we believe that the March 2015 1:1 is at B638. The First Respondent does not deny double pinning the 1:1, but states that this was with HR approval so that the Claimant would get her bonus. We could not find anything in this 1:1 which reflected badly on the Claimant but indeed we could not find any comments made by the Claimant. However, in the circumstances we accept that it is likely that the Claimant would have made comments because she was given a

rating of not-met rather than an exceeds rating, which she expected to receive. Moreover, the Claimant made a complaint to the First Respondent the very next day that he double-pinned her March 1:1 and had deleted her comments (at B677). The matter was subsequently dealt with as part of her grievance during her interview with Ms Rice and Ms Musgrave on 24 October 2016, at B1338, and in the outcome letter at B1702 and 1703. Ms Rice accepted that the First Respondent had double pinned the document but to ensure that the Claimant got her bonus. Ms Rice was unable to conclude if the Claimant's comments were deleted though she expressed her concern from the absence of any commentary within this document compared with previous months.

134. The Claimant further alleges that the First Respondent became aggressive during their 1:1 meeting on 31 March 2015 after refusing to allow her to record her comments within the 1:1. The First Respondent denies this. We heard very little evidence on this other than the Claimant's assertion and the First Respondent's denial. The Claimant did email the First Respondent the day after the meeting and complain about his deletion of her comments, but she makes no reference to him refusing to allow her to record the comments and becoming aggressive. The issue was not raised in the Claimant subsequent grievance.

135. The Claimant did not refer us to what was deleted other than the reference at paragraphs 102-103 of her witness statement and in additional document 1.2 (which is part of Ms Bartlett's notes of a meeting with the Claimant). She said in oral evidence that she kept her comments in a separate Word document so that the First Respondent could not delete this. However, she has not produced this document.

136. The Claimant alleges that around 2015, the First Respondent encouraged staff not to book PBM appointments for her on the basis that she took too long in interviews. The Claimant acknowledges that she took longer due to her slowness in typing as a result of her disability. Paragraph 89 of the Claimant's witness statement states that she was aware of this allegation from her colleague, Ms Neal. Ms Neal's witness statement at paragraph 4 does not attribute the allegation to anyone and following oral evidence she said that it came from either her or from others. Both Respondents deny the allegation and their position is that appointments were booked for Abbas first because he worked full-time and that it would be nonsensical to not book the Claimant any appointments. The Claimant did not raise the lack of appointments within any of her 1:1s or elsewhere. It only became an issue when she is told about it by Ms Neal. It is not something that the Claimant herself ever noticed. In addition, in oral evidence, Ms Neal stated that it was not something that she mentioned during her interview in respect of the Claimant's grievance.

137. On 7 October 2015, the Claimant received a Behaviour Rating for the second quarter of 2015/2016 of part met. This is at B944-948. The Claimant disagreed with this rating and its impact upon her receiving her bonus. She alleges that the First Respondent had rated the number of appointments that she had made, without taking into account that she only had worked for 22 days that quarter and that he had told the members of the Branch team not to book appointments for her. She also alleges that he claimed that she had not met the Second Respondent's behavioural ratings but without providing examples and that there was nothing supporting this in her 1:1s feedback. The Claimant also alleges that Ms Bartlett influenced the First Respondent to reduce her appraisal rating.

138. In evidence the First Respondent stated that the Claimant had not been in the Branch the full quarter due to an operation she had on her spine and her work in relation to Equality and Diversity. He explained that the appraisal system requires a rating to be awarded based on the employee's performance in their role. He further explained whilst he was extremely proud of the diversity work that the Claimant was undertaking, he did not feel that the Claimant had exceeded expectations in her PBM

role. He denied that the rating was influenced by Ms Bartlett.

139. The Claimant wrote to Ms Bartlett on 8 October 2015 requesting to appeal against the rating (at B949). It appears that the grounds of appeal are contained within the Quarterly Behaviour Rating Review at B956-961. Ms Bartlett passed the appeal to HR to deal with because the grounds of appeal contained a number of complaints about her. Subsequently, Mr Gooding advised the Claimant in a letter to her dated 29 October 2015 that given the serious nature of her allegations the matter would be investigated through the formal grievance route and that her bonus rating appeal would be withheld until the completion of the formal grievance investigation (at B1006).

140. The Claimant was absent from work between December 2015 and March 2016 whilst she underwent surgery on her spine.

141. The Claimant raised a grievance against the First Respondent, Ms Bartlett and Ms Sokhey on 1 August 2016 in a grievance form which can be found at B1136-1137. This is set out in strident terms within box B of the form but is essentially complaining of their misconduct towards her and their making of false allegations as to her performance at work.

142. In particular, at box C, the Claimant's grievance sets out complaints that she was treated differently from the full-time PBM in that the First Respondent would not allow customer appointments in her diary; she was not allowed to take breaks; she was treated differently and maligned when she raised issues that would bring the Second Respondent into disrepute; she was not allowed to slightly vary her hours by 15 minutes to take her daughter to Summer Camp for 9 days, but others were allowed to do so to suit their childcare needs; she was called negative and unprofessional names for whistleblowing, notwithstanding the Second Respondent using her image to promote diversity; she was treated differently because she was a Union representative and made to feel guilty for supporting Diversity Inclusion & Culture in her own time, notwithstanding that they were corporate objectives; barriers were put in her way so that she was unable to become a successful PBM; her TOIL was withheld for nearly a year; and she was barred from sitting in a certain part of the Branch.

143. The Claimant also stated in her grievance that as a BAME employee with a disability she felt that she had been discriminated against by certain members of the Central London Senior Area Team and the South Division. By way of resolution, she requested that the Second Respondent engage an external company to investigate her extremely serious concerns.

144. The Second Respondent declined the Claimant's request that the matter be dealt with externally and offered its reassurances that her grievance would be dealt with by an impartial and independent senior manager. In response the Claimant expressed her doubts at this (at B1153-1156).

145. Ahead of the meeting, the Claimant prepared an 80 page document entitled "Unfair Treatment in the Workplace" setting out her grievance in detail (at B1196-1276). This document again contains photographs, extracts from emails, letters and other documents, and as with other documents that we have seen which have been prepared by the Claimant contains her life history by way of introduction and sets out her work history with the Second Respondent. The grievance itself, whilst focusing on the allegations against the First Respondent, Ms Bartlett and Ms Sokhey, also raises the Claimant's concerns against a number of other managers. These are Ms Nelson, Mr Halliday, Mr Gooding, Mr Connelly and Mr Smee. In addition, the document contains sections on the Claimant's disability and the TOIL issue, as well as a lengthy conclusion.

146. The Claimant was invited to a grievance meeting conducted by Ms Amanda Rice, Head of Culture & Inclusion, which took place on 24 October 2016. The letter of invitation dated 26 September 2016 is at B1191-1192.

147. The Grievance Meeting took place on 24 October 2016 as scheduled. The meeting was conducted by Ms Rice with Ms Emma Musgrave, HR Manager, in attendance. The Claimant was accompanied by Mr Ray Ponsford from NGSU. The meeting was adjourned to allow investigations to take place. There is a transcript of the meeting at B1297-1405. It was clearly a long meeting of almost 3 hours including breaks.

148. Thereafter, Ms Rice conducted a series of investigatory interviews with the following members of the Second Respondent's staff: Ms Sokhey on 31 October 2010 (at B1410-1426 & 1427-1445 with the Claimant's annotations; the 1st Respondent on 7 November 2016 (at B1449-1472 & B1473-1521 with the Claimant's points of reply); Ms Bartlett on 7 November 2016 (at B1522-1538 & the 1539-1591 with the Claimant's points of reply); Mr Matt Brocklehurst, the First Respondent's line manager, replacing Ms Bartlett, on 9 November 2016 (at B1644-1656); Ms Roye on 14 November 2016 (at B1657-1663); Ms Hann 14 November 2016 (at B1664-1672); and Ms Persad on 14 November 2016 (at B1673-1679).

149. The Claimant subsequently sent Ms Rice an email on 8 November 2016 which set out some additional information and contained a copy of the transcript of the investigation meeting with the First Respondent with her points of reply (at B1592-1642).

150. The Claimant's grievance meeting reconvened on 28 November 2016 and Ms Rice provided the Claimant with her investigation outcome. This was confirmed in writing on the same date which is at B1693-1699 (a copy containing the Claimant's handwritten annotations is at B1700-1707).

151. The letter sets out the various allegations identified from the Claimant's original grievance and her subsequent email of 8 November 2016 and indicates that the Claimant had agreed that the aggrieved events took place during 2015 and that the additional information that she had provided was by way of background. In essence, the allegations and findings are as follows:

    a. Allegation 1. The meeting on 14 January 2015, Ms Bartlett challenging the Claimant in an aggressive manner for raising concerns directly with Ms Nelson. Allegation not upheld. Being told by Ms Bartlett that she could not do the PBM role on a part-time basis, that Ms Bartlett stated she could alter her annual appraisal scores from previous years and should cease her Equality Diversity & Inclusion and Union activities. Allegation not upheld. In respect of the latter allegation, Ms Rice found that Ms Bartlett only advised the Claimant to carefully plan her time between work and work-related activities, not to cease them.

    b. Allegation 2. Prevented from progressing through PBM sign off due to absence of appointments in her diary, all appointments having been given to the full-time PBM, which resulted in the Claimant travelling to neighbouring branches to achieve sign off. Allegation not upheld;

    c. Allegation 3. That the First Respondent's management style had been unprofessional and underhand with regard to 360 feedback, the branch morale barometer, amending Worksmart documentation and contact during annual leave. Allegation partially upheld on the following basis:

    "Kay Chinambu's poor management of EDS items has led to work impacting on your private time which is not acceptable. I am unable to conclude if your comments were deleted but I am concerned by the absence of any commentary from you as this is present in previous months."

d. Allegation 4. Treated differently to the full-time PBM as he worked from a private room but the Claimant was unable to do so as the remaining room was reserved for MC and FPM appointments. Being referred to as "no expert" by Ms Bartlett was offensive. Allegation not upheld;

e. Allegation 5. Being treated differently to other part-time members of team with regard to flexibility to arrange childcare and being referred to as being AWOL on two occasions had caused the Claimant offence. Allegation not upheld. The outcome letter recorded by way of reassurance that any miscommunication was historic and that there had been no formal record on the Second Respondent's HR systems which referred to the Claimant as being absent without leave;

f. Allegation 6. That Ms Sokhey prevented the Claimant from acquiring information from Security Incidents in August 2015 which she wanted to evidence her working hours. Allegation not upheld;

g. Allegation 7. That the First Respondent prevented the Claimant from working Saturdays during 2015 due to a buildup of TOIL which she offered to take, which was denied. The issue of TOIL was not resolved until October 2015. The allegation was partially upheld in relation to TOIL being poorly managed by the First Respondent. The volume of hours accrued was in excess of the Second Respondent's guidelines and the situation was allowed to continue for an unacceptable length of time;

h. Allegation 8. That the Claimant was prevented from taking a short break in her working day because she works less than six hours following HR advice from Ms Sokhey. The Claimant believed that she was being treated differently to other employees who work less than six hours and are allowed a break. Allegation not upheld;

i. Allegation 9. That the First Respondent instigated an investigation based on false and misleading information regarding the Claimant going AWOL in 2015. Allegation not upheld;

j. Allegation 10. That Ms Sokhey failed to acknowledge how the Claimant felt in a facilitated meeting on 21 September 2015 and her manner was nonchalant. Allegation not upheld;

k. Allegation 11. That Ms Sokhey made a derogatory comment to the Claimant's NGSU representative about the Claimant having an operation on a Saturday. Allegation not upheld.

152. The letter ended by acknowledging that having reviewed the evidence, from the Claimant's perspective, she has had difficulties with numerous individuals over recent years. The letter stated that the Second Respondent wants to ensure that all its employees feel valued in the workplace that they enjoy coming to work. To enable the Claimant to move forward, the letter recommended that the Claimant consider individual mediation sessions with both the First Respondent and Ms Bartlett. The letter further recommended that the Claimant reconnect with Mr Brocklehurst and Ms Hann to ensure that she understood what was required of her as a PBM and what she required in return. The letter also notified the Claimant of her right of appeal.

153. By an email dated 8 December 2016, the Claimant appealed against the grievance outcome on the basis of new evidence that had become available to her. This email is at B1708-1709.

154. A grievance appeal hearing was held on 13 January 2017 conducted by Ms Tracy Conwell, Head of Employee Engagement, accompanied by Mr Rao, an HR representative. The Claimant was again accompanied by Mr Ponsford. Non-verbatim notes of the meeting are at B1724-1733. Notes of the meeting containing the Claimant's typed amendments in red font are at B1734-1743. In addition, the Claimant provided her points of reply which are at B1744-1751 & 1752-1765.

155. The meeting was reconvened on 23 February 2017 at which the Claimant was advised by Ms Conwell of the outcome of her investigation. This was confirmed in a letter to the Claimant from Ms Conwell of the same date (at B1908-1914). In essence, Ms Conwell, reached the following conclusions:

    a. Allegations 5 & 9 of the grievance outcome letter. On the basis of a handwritten note that the Claimant had found on her personnel file with the words "18 September AWOL" (the notes we have referred to above at B335-336), Ms Conwell accepted on balance that a conversation may have taken place between unidentified members of management and HR referencing the Claimant as AWOL, although this had no impact on her absence record. Ms Conwell accepted that this may have caused the Claimant offence on learning of it and so she overturned the decision for allegation 5 to find it partially upheld. In relation to allegation 9, Ms Conwell found no evidence to suggest that this AWOL allegation resulted in an investigation or that any conversation was in anyway motivated by or connected to the Claimant's part time working status and could not conclude it was motivated by discrimination;

    b. That the Claimant believed that a number of issues of mistreatment stem from her raising concerns in November 2014. Ms Conway indicated that after discussions with the Claimant's permission with Sally Gaudion, Senior Manager Whistleblowing, the Claimant's claim of detriment would be considered separately by the whistleblowing team on conclusion of the grievance appeal;

    c. Allegation 7. That the Claimant believed that the First Respondent was not solely to blame for the issues relating to her TOIL. Ms Conway upheld the finding from the original grievance outcome letter. Whilst she accepted that Ms Bartlett and to a lesser extent Mr Smee were involved in discussions with the First Respondent regarding the Claimant's accumulated TOIL, she did not accept that he was improperly pressurised or instructed in anyway by Ms Bartlett and as Branch Manager was responsible for the way in which TOIL is managed;

    d. Allegation 8. That the Claimant believed that it was unreasonable to remove her break which had been implemented two years previously as a reasonable adjustment. Ms Conway found no evidence to support the Claimant's claim that a specially agreed break during her working day was first agreed and then removed. She did not accept that Ms Bartlett's email of 19 May 2015 (which we have dealt with above and is at B702) amounted to evidence of her removing the break, but merely confirmed the agreed terms and conditions around breaks and makes no mention of any special dispensation because of the Claimant's disability or indicate that there had been any previous discussion of special adjustments leading to the sending of the email. Further, whilst the Claimant's working day was below the threshold to qualify for a 20 minute unpaid break, the First Respondent refuted denying the Claimant a break and in the light of the Claimant's disability it would be reasonable of any manager to allow her a short break during working hours. Ms Conway suggested that the Claimant consider a short unpaid break going forward with her manager and that this should be recorded on TracSmart. She indicated that she would refer this to the Claimant's Case Management Consultant to review with her and her manager to facilitate this discussion. She further stated that this may mean revisiting previous OH advice and reports or sourcing new reports where appropriate;

e. That the Claimant believed that the alleged mistreatment (responded to by Ms Rice in the grievance outcome letter) amounted to discrimination. Ms Conway acknowledged that at their meeting on 13 January 2017, the Claimant stated that she felt that she had been treated differently resulting in her raising her original grievance as a direct result of discrimination on the basis of her ethnicity, her disability and her part-time working status. However, Ms Conway concluded that the Claimant had not been the subject of any discrimination, and that what she observed throughout many of the witness statements were a number of clumsy conversations and interactions, which in her view, were driven by personalities and the situation, rather than ethnicity, disability or her part-time working status;

f. Witness statements. Ms Conway thanked the Claimant for her comments on the witness statements and that whilst they are noted and she appreciates that the Claimant has a different view to how those witnesses may have conveyed or articulated their responses, it was expected that information provided in interviews was done in good faith and that individuals may rightly have different perspectives on incidents, situations and their role in them. Ms Conway said that she had no reason to doubt Ms Rice's approach to assessing the witness information and that having reviewed the statements, the Claimant's comments and Ms Rice's findings, she saw no reason to amend the outcomes other than her additional findings in respect of the individual allegations (above);

g. Additional witnesses. The Claimant had suggested that a number of witnesses she had originally requested to be interviewed were not approached, and that one particular witness should be reinterviewed, and that in fact Ms Conway should reinterview all of the witnesses interviewed by Ms Rice. Ms Conway did not accept that it was appropriate to do so and did not accept the Claimant's review of the witness statements and her disagreements with their version of events amounted to additional evidence automatically requiring further interviews. In addition, Ms Conway confirmed that she had approached the two further witnesses and the original witness identified by the Claimant, but they had not been able to provide her with any new information of any significance to change her findings set out in the letter. She did indicate that at the time of writing, one witness was yet to respond and that should any information come to light which would affect her findings, she would let the Claimant know.

156. The letter then went on to deal with a number of new allegations raised by the Claimant, although Ms Conway made it clear that this was not the purpose of an appeal hearing, but in the spirit of openness and fairness she had responded to each. These are set out at B1911-1913 of the outcome letter. In essence, Ms Conway did not agree with the Claimant's allegations.

157. In conclusion, the letter stated that Ms Conway had found no evidence of discrimination or different treatment, as a result of the Claimant's ethnicity, disability or part-time working hours. The letter further stated that it was clear that some interactions had been clumsy on occasion and poorly judged and that it was not possible to disclose what action has or may be taken against other individuals as a result of the grievance investigation. The letter made the following observations about the Claimant (at B1913):

"From my interactions with you, it's clear you have strong and admirable family values. I see a confident, bright, strong, experienced, diligent, and incredibly customer focused employee; someone who has the capacity to make a great contribution to Nationwide. I also note that other individuals can, on occasions, find you somewhat intimidating. Several of the witnesses talk about your forthright style and confidence and I do see throughout this case, evidence of clashes that inevitably prevail when managers and strong minded individuals such as yourself come together. Where development has been identified for individuals, this has been taken forward. I would encourage you to think about using some of the development tools available to you on the Collaborative intranet site, such as the Effective

Communication Techniques, Emotional Intelligence and Personal Impact workbooks."

158. The letter recorded that the Claimant had agreed to Ms Conway liaising with her CMC to facilitate mediation with the First Respondent, subject to his consent to participate. The letter also recorded that the Claimant had indicated that she did not consider that there was a need for mediation with Ms Bartlett as she no longer worked with her. The letter ended by stating that the Claimant had now exercised her right of appeal under the Grievance Policy and that the decision was now final. We note that nevertheless the Claimant did respond to the grievance appeal outcome letter in an undated letter at B1916-1924.

159. We note that there is a letter to the Claimant from Debbie White, HR Case Management Consultant, dated 28 March 2017 setting out the arrangements for a mediation session between the Claimant and the First Respondent (at B1929-1932).

160. This appears to have taken place on 4 April 2017. We were referred to what appears to be the sole official note of the mediation session at B1945. This indicates that the mediation was unsuccessful and contains the following description:

"Dawn made some very inappropriate comments, taken by the other party to be racist comments. As a result the mediation was halted and both parties left the building. I have heard from Kay's union rep today that he may raise a grievance against Dawn. I've advise Marion as Dawn is a local union rep."

161. On 13 April 2017, the First Respondent raised a grievance against the Claimant in relation to what she had said during the mediation session. This is at B1961-1963. The gist of his complaint is that during the session, the Claimant made an allegation that he was racist, in that she stated that he treated African female staff members more favourably than other female staff members, and which he found deeply offensive. The Claimant confirmed what she had said when asked by the mediator to clarify her statement. The First Respondent stated that following the grievance that the Claimant had made against him, it has been very difficult to work with the Claimant in the same branch and that this allegation and the failure of the mediation has really made it impossible for him to do so.

162. A grievance meeting was held with the First Respondent on 16 May 2016, chaired by Maritsa Michael. A transcript of the meeting with the First Respondent, Ms Michael and Mr Kieran Fox, Local Director London & South East Region, is at B 2079-2091.

163. The Claimant alleges that on 17 May 2017, Mr Fox advised her that she would be removed from the Wandsworth Branch, that there was no role for her, and she would be dismissed. Mr Fox denied this, although he did say that he was aware that the Claimant's adjusted role was causing operational difficulties for the Branch. We were referred to the Claimant's contemporaneous note at B2166, which we were told in submissions indicated that there was a conversation regarding the removal of the Claimant because she was a "disruption". This is a handwritten note by the Claimant containing a number of doodles and very few words. However, what it does say is "more disruption that way".

164. From 22 May 2017, the Claimant was absent from work due to ill-health. Whilst we could not find a medical certificate for this period, reference is made to this date in an email from Amanda Newton to the Claimant dated 5 June 2018 at B2835.

165. On 12 June 2017 a meeting took place between the Claimant, accompanied by her NGSU representative, Diana Allen, Ms White and Mr Fox regarding her disability needs. A transcript of this meeting is at B2092-2114.

166. The Second Respondent received an OH Capability Report from its OH providers on 13 June 2017. This is at B2115-2116.

167. On 27 June 2017, a further meeting took place between the Claimant and Ms Allen, and Mr Fox and an HR Case Management Consultant. A transcript of this meeting is at B2134-2156.

168. By a letter dated 18 July 2017, the Second Respondent wrote to the Claimant requesting her to attend an investigation meeting in respect of the First Respondent's grievance (at B2158-2159). It would appear the meeting took place on 24 July 2017 although we were not provided with and could find within the bundle any notes of the meeting.

169. By a letter dated 21 July 2017, Mr Fox wrote to the Claimant setting out the discussion points of their meeting on 27 June 2017, what options he had been investigating and the next steps. This letter is at B2163-2164. The letter essentially set out the following:

    a. Whilst a medical opinion as to the Claimant's capabilities to undertake branch-based roles was undertaken, the light duties that she had been temporarily carrying out for the last six months were not possible in the longer term. This was because there was no long-term business need for the role with these light duties, which were stated to be "in broad terms… limited to meeting and greeting in the banking hall from time to time and answering the telephone from time to time";

    b. The Claimant's clear position in the light of the OH report dated 7 February 2017, was that she was unable to carry out the PBM and Customer Representative role due to her long-term and complex health needs. The report concluded that the Claimant was fit, with specified adjustments, which were those already in place, to undertake the role that she presently worked i.e. the light duties that she been carrying out since her return from medical absence in 2016;

    c. The only role that the Claimant considered she was capable of doing was the Host type role. There was no Host role in the majority of the Second Respondent's Branches. They only exist in their larger Branches;

    d. The Claimant's position was that she was unable to travel to any Branches within a 30 minute commute because they (or the commute itself) would carry higher pollution levels than Wandsworth and this would put her health at risk owing to her Sickle Cell anaemia. The Second Respondent's research confirmed that higher pollution may adversely affect health and that they should research pollution levels, but their own research was inconclusive. However, in the light of the Claimant's decision not to commute to these other branches, the Second Respondent had not explored what Host vacancies might exist at them;

    e. Accordingly, the Second Respondent had carefully considered the possibility of employing the Claimant in a Host type role at the Wandsworth Branch. Whilst the Second Respondent was not legally obligated to create a vacancy when none exists, they had looked into the matter because the Claimant was a valued and long serving employee. Regrettably the data as to Wandsworth's footfall, ATM and till transactions, did not support the requirement for a Host type role;

    f. Removing the Claimant from counter duties had an operational impact on the Branch and the service provided particularly during periods of absence. Over the last six months, the Claimant had temporarily been removed from counter till work and this had been covered by the Branch Manager and the Customer Service Manager. However, this was not sustainable or appropriate in the long-term.

170. The letter ended by advising that the next step would be to follow the Ill Health Capability Policy and to invite the Claimant to a stage III ill-health employment review

meeting.

171. On 4 August 2017, the Second Respondent wrote to the First Respondent notifying him of the outcome of his grievance against the Claimant. This is at B2191-2192. In essence, Ms Michael found that the Claimant had suggested during the mediation meeting that the First Respondent treated African female staff members more favourably than other members of staff. However, Ms Michael found that there was insufficient evidence to reach a decision that during the same mediation session the Claimant had said that she felt that the First Respondent was racist. This was on the basis that it was the mediator who suggested that the Claimant had called the First Respondent racist, but the Claimant denied that she agreed that she had done so. Ms Michael stated that the mediator had since left the business and she was unable to speak to her to corroborate her version of the event and she did not feel she had sufficient evidence to make a conclusive decision either way. The First Respondent was notified of his right of appeal, although it appears he did not appeal.

172. On 4 August 2017, the Second Respondent also wrote to the Claimant notifying her of the outcome of the First Respondent's grievance against her in much the same terms. This is at B2190.

173. On 9 August 2017, the Claimant raised what she stated to be "a counter-suit grievance" against the First Respondent. This is at B2193-2213. In essence, her grievance complains about the First Respondent's alleged continued harassment and malicious conduct towards her during the past four years, including, she said, his most recent false and unfounded allegation that she had called him racist. The grievance document raises allegations going back to the AWOL incident in 2013 which had been part of her original grievance against the First Respondent and others and matters relating to her disability and adjustments to her role, as well as matters arising after her original grievance.

174. The Claimant raises allegations as to the accuracy of a Case Summary Document produced for the stage III ill health review meeting to be held on 20 September 2017.

175. It was not clear whether the Claimant was referring to the Case Summary dated 25 August 2017 at B2215 or a heavily redacted version of this at B2979 (redacted save for two short paragraphs). The unredacted version relates to the Claimant and the First Respondent and sets out the Claimant's background, a summary of the current concerns, a summary of the support offered to her and ends with recommendations. It appears that this has been created for use by the Second respondent as part of the employment review process.

176. In addition, there are other Case Summary Documents referred to within a document headed "Private and Confidential Dawn Gibbons" at B3095, which at B3096 contains a contents page which refers to two documents, one dated 26 June 2018 with an uncredited author (which is at B3097-3098) and one dated 25 August 2017 crediting the First Respondent as author.

177. However, it was not clear who had actually written it. Whilst the First Respondent is named as the author of the document at B3096, he could not recall in evidence whether he had written it or not. Similarly, Mr Fox was asked whether he wrote the document, but he could not recall.

178. The Claimant alleges that the Case Summary document is inaccurate, and this affected the way in which the review process was dealt with. We assume that the Claimant must be referring to the document at B2215, which contains a number of handwritten annotations made by her indicating where it is correct and incorrect and also sets outs some very brief amendments.

179. On 8 September 2017, the Second Respondent wrote to the Claimant requesting her to attend a stage III employment review meeting (at B2220-2221). This meeting was to consider her ongoing employment because:

"Nationwide cannot reasonably make adjustments that would enable you to return to work or continue to carry out your role".

180. On 15 September 2017 the Claimant's First Claim was presented to the Employment Tribunal.

181. The employment review meeting took place on 20 September 2017 between the Claimant and Ms Allen, her NGSU representative and Mr Dan Still, the Deputy Area Director, and an HR representative. A record of the hearing is at B2222-2246.

182. On 21 September 2017, Mr Still wrote to the Claimant confirming the outcome of the meeting, which had been verbally communicated to her that day following an adjournment of the meeting. This letter is at B2247-2248. The letter records that during the meeting the Claimant stated that she was to have an operation on her knee on 25 September 2017 to enable consultants to explore the issue further. The letter further stated that the Claimant wanted to return to her role as PBM on a phased basis following this period of absence, which she believed would to be between six to eight weeks. In addition, the letter stated that there was a discussion of a reasonable adjustment for the Claimant to stand up when required, making the customer aware of this prior to the start of the appointment. The letter ended by stating that having considered all the available evidence, Mr Still decided that no formal action would be taken.

183. The Claimant was invited to a meeting with regard to her counter grievance against the First Respondent. This was conducted by Miss Clare Hogge, the Second Respondent's District Manager (at B2249-2250).

184. The Claimant and Ms Allen attended the meeting with Miss Hogge and a representative from HR on 12 October 2017. A transcript of the meeting is at B2266-2304. The Claimant's annotated version of the transcript is at 2305-2343. During the meeting, the Claimant clarified that her concerns were that the First Respondent's behaviour towards her left her feeling harassed and discriminated against. These allegations related to a number of incidents: that she was asked to leave a room she was working in so that a colleague could conduct her personal business in it; that she was told to move her handbag because it was said to be causing an obstruction to the fire door; and that prior to return to work in August 2016, the First Respondent failed to ensure that her workstation was assessed for her. The Claimant and Miss Hogge agreed a list of relevant witnesses for Miss Hogg to interview as part of her investigation.

185. On 27 October 2017, Miss Hogge wrote to the Claimant setting out the allegations which were to be investigated and the witnesses which both parties had agreed were relevant. This is at B2384-2385.

186. By an email dated 6 November 2017, the Claimant in effect confirmed that she agreed the scope of Miss Hogge's grievance investigation as set out in her letter in as far as she attached her replies to the questions it contained (at B2537). The attached replies would appear to be those in the further copy of this letter containing the Claimant's annotations at B2386-2410.

187. There is a further OH report dated 8 November 2017 at B2602-2604. This report set out details relating to the Claimant's knees and stress at work and indicated that she remained unfit to return to work in respect of these issues. The report further stated that the Claimant was in recovery from surgery to her right knee and that once

her current symptoms improved, and in turn her mobility, she would be fit to return to the workplace on a phased basis in her role as PBM. The report recommended an on-site workplace risk assessment and also workplace adjustments assessment (formerly called "Bodycare"). The report also indicated that the return to work is dependent not just on her response to treatment in regard to her knees but also the ongoing work-related issue.

188. On 18 December 2017, the Claimant was visited at her home by Mr Fox and Ms White to check on her health. At that meeting the Claimant requested what she refers to as a reasonable adjustment, namely, workplace mediation, as a way of helping her back into work and helping her colleagues to understand her disabilities. In her witness statement she explains that her rationale for this was that she felt she had been portrayed as "moaning" about everything and she wanted her colleagues to understand why she needed some adjustments, and that mediation would give her colleagues the opportunity to air any issues in a safe space and if they were inappropriate, through lack of understanding or awareness, they could be steered to understand.

189. By a letter dated 9 January 2018, Ms White confirmed to the Claimant that she had requested mediation from the Second Respondent's employee care providers, Validium, and was awaiting a date (at B2638).

190. At a further meeting on 24 January 2018, Miss Hogge informed the Claimant that her grievance was not upheld. This was confirmed in a letter of even date at B2644-2651.

191. By an email dated 30 January 2018, the Claimant appealed the grievance outcome. This is at B2687-2688.

192. Following a meeting with Ms White, the Claimant saw her GP who signed her off sick from work for the period January to February 2018. This statement of fitness for work certificate was sent to Ms White with a covering email dated 4 February 2018 which is at B2689. This email states as follows:

"I have enclosed my up-to-date Fitness for Work Certificate. This cert. covers me until 25 February 2018.

From 26th February 2018, my GP has recommended that I am phased back into work, on reduced hours of 10 am until 1 pm.

I took a massive step backwards in the latter part of 2017, as the physiotherapy sessions were not suited for me.

Are you able to arrange Validium any day commencing 20th February 2018?"

193. We were not referred to that statement of fitness for work certificate and could not find it in the bundle. However, there is one for the period 23 February 2018 to 16 March 2018 which was provided to us in place of the incomplete copy at B3320. This certificate states that the Claimant is unfit for work because of the following condition (sic):

"mediation from work to take place, not advised to return until this has taken place as per HR (Debbie White)"

194. On 20 February 2018, the Claimant had a meeting at her home with Ms Morag Slater, a mediator from an organisation called CMP Resolutions, who appears to have been appointed by Validium to undertake the mediation. Whilst the Claimant raised concerns as to the credentials of Ms Slater, as to who she was employed by and as to the bona fides of the meeting, having seen the additional mediation disclosure (at B2692a-o and 3315-3429) we are satisfied that there was nothing

untoward about Ms Slater's credentials, capacity or the conduct of the meeting.

195. On 12 April 2018, the Employment Tribunal received the Claimant's Second Claim.

196. There is much email correspondence in the bundle in which the Claimant is chasing Ms White as to the next stage of the mediation and also to arrange for the stress test which had been recommended by OH. We refer to the email dated 15 April 2018 as an example of this (at B2707-2708).

197. By letter dated 12 April 2018 (at B2741-2742), the Claimant was requested to attend a grievance appeal hearing. This took place on 1 May 2018 between the Claimant and Ms Allen, and Julie Nurse, Deputy Area Director for the East of England, and an HR representative. A transcript of the meeting is at B2781-2825.

198. On 2 May 2018, Ms Slater of CMP Resolutions issued her Report of Team Facilitation (the mediation report) to Ms White. This is at B2826-2834, and in addition we were provided with a further copy during the hearing.

199. In the Report, Ms Slater sets out the background and context of the matter under consideration and identified that the key issue was that Party A (the Claimant) was to return to work following a number of complaints and legal claims that she had raised and there were concerns raised by both Party A and the team members about their ongoing relationships.

200. The Report states that team mediation had initially been proposed, but not all the members of the team considered this to be a viable palatable option, given historical issues and experiences. As a result, Ms Slater agreed to take a staged approach, where at stage 1, each member of the team would meet with her for one-to-one sessions, the aim being to understand each person's perspective on the situation and their ability and willingness to have some form of facilitated session with Party A (which would be stage 2). Party A agreed this approach. Whilst some members of the team did agree to meet with Ms Slater, the majority of them declined to participate any further than stage 1.

201. Ms Slater conducted five one-to-one meetings over a five-week period due to the availability of parties. At section 3 of the Report, Ms Slater sets out a summary of the situation as a result of the individual meetings and her observations (at B2830-2832).

202. From this, Ms Slater concluded that relationships had broken down irretrievably, that the majority of individuals refused to participate in mediation and indicated that they did not wish to work with Party A as they felt stressed and threatened. Whilst Party A was more optimistic of what one-to-one meetings between her and others might achieve, this was not a view shared by the majority and the rest of the team felt too vulnerable for Ms Slater to suggest it as a way forward.

203. Ms Slater recommended that Party A receives a copy of her report and had the opportunity to discuss it and share feedback with Ms White, in HR, and Mr Fox, in the business.

204. On 7 June 2018, Ms White wrote to the Claimant by email inviting her to a formal meeting to discuss her ongoing employment. This is at B2844 and states as follows:

> *"Further to our call on Tuesday I wanted to follow up with an email to clarify next steps.*
>
> *As discussed following the review of your mediation with Validium and their subsequent report which states that the process has highlighted how a stressful and hostile environment was created and relationships have broken down irretrievably and that the majority of individuals have refused to participate in mediation. The business have (sic) decided that it would now be appropriate to arrange*

a formal meeting to discuss your ongoing employment and explore possible alternatives.

This meeting with (sic) be held by an impartial chair separate to your business area and an invite letter will be sent to you shortly with all the details.

If you have any further queries please contact me via email or on the telephone number below."

205. The Claimant responded later that afternoon in an email at B2845-2846. It is clear from her response that she was, to say the least, not happy with what Ms White had said and believed that the contents of the report were further examples of the way in which she had been mistreated by the First Respondent and others, and she disputed that any of the individuals in the Branch would in effect have anything untoward to say about her apart from Ms Omotayo Kolowole, a Customer Representative,

206. On the following day, 8 June 2018, the Claimant was signed off work with stress.

207. In response to an email from George Fisher on 15 June 2018 as to a number of other matters, the Claimant enlarged upon her concerns about Ms White's email, the mediation outcome and the formal meeting (at B2848-2850)

208. On 27 June 2018, the Claimant was invited to a formal meeting to take place on 2 July 2018. The invite is at B2861-2863. The invitation makes clear at B2862 what is under consideration (printed in bold):

"The meeting is being held to consider whether it is tenable for your employment with Nationwide to continue. This is following a review, completed by CMP resolutions on 2 May 2018, into the possibility of mediation to repair relationships prior to your return to work after a period of sickness absence. The investigation concluded that the criteria for effective mediation had not been met. Alternative branches have been discussed and explored however at the time this was not deemed as a viable option due to a number of medical conditions. It therefore appears that you are unable to return to work at Nationwide."

209. Further at B2863 the letter states (also printed in bold):

"If it is considered untenable to continue your employment with Nationwide you may be dismissed with contractual notice."

210. Whilst the letter states that a copy of the information that will be considered during the meeting is enclosed it does not identify what this is. However, we assume that this must have included a copy of the mediation report.

211. In June 2018, the Second Respondent referred the Claimant to OH for a further assessment. The referral form is at B2868-2873. The Claimant alleges that the referral which resulted was inaccurate because it did not indicate that she was required to attend the meeting at which the dismissal would be under consideration and it wrongly indicated that she was not experiencing stress, depression and anxiety. At B2870 she points out that the answer "no", to the question where an employee has been injured through a workplace accident or incident, is incorrect. The Second Respondent's position is that this was the correct answer because the Claimant had not had an accident or incident at work.

212. On 9 July 2018, the resultant OH report was provided. This is at B2874-2876. It is clear that there are supposed to be four pages to this report. However, B2877 does not appear to be the fourth page. It appears that someone has pasted the properties page of a Word document onto that page. We do not know whether the fourth page contains anything material, given that the third page (at B2876) ends with a summary. The OH advice is that the Claimant is fit to discuss the work related issues with management but notes that the Claimant is not ready to engage in a formal meeting process at this time, and that her GP has stated she is not fit to attend the

meeting process. But the report points out that this is a management decision as to the next steps in this case. We note that the points numbered 1 to 5 are applicable once the meeting process commences.

213. On 26 and 27 July 2018, a number of members of staff were interviewed by the Second Respondent in respect of the Claimant's second grievance appeal. Namely, Ms Kolowade, interviewed on 26 July 2018, the notes of the transcript of her meeting being at B2899-2908; Ms Nadia Persad, previously a CSM at Wandsworth Branch, interviewed on 27 July 2018 (transcript at B2909-2914); Mr Brocklehurst, interviewed on 27 July 2018 (transcript at B2915-2921); Mr Fox, interviewed on 27 Juursulaly 2018 (transcript atB2922-2926); and Miss Hogge, interviewed on 27 July 2018 (transcript at B2927-2933).

214. On 13 August 2018, the Claimant was informed of the rescheduled date for the formal meeting to be held on 17 August, at B2935-2936. The first sentence of that letter is garbled and having heard evidence from Ms Reid, a Case Management Consultant, and the author of the letter, whilst the Claimant believes that it is of some significance, we do not believe that there is anything untoward in it. The second paragraph, printed in bold, is differently worded and toned down from the previous invite letter:

"The meeting being held to consider (in light of the occupational health report received by Nationwide on 9 August 2018) how it may be possible for your employment with nationwide to continue. As you know, workplace conflict resolution specialists CMP considered the possibility of mediation to repair relationships prior to your return to work after a period of sickness absence. Their investigation concluded that the criteria for effective mediation had not been met and therefore no resolution was likely to be possible."

215. However, the letter does again warn as to one possible outcome of the meeting being dismissal with notice. There is a list of enclosures and this does include the mediation report. The letter was sent by email and by recorded delivery signed for.

216. On 16 August 2018, the Claimant responded that she is unfit to attend and raises her concerns about the wording of the letter, that the attached case summary document is inaccurate, that the mediation process was not mediation but a disciplinary process, that it relies on concocted evidence from Ms Reid, the author of the letter and asks why she has been treated this way. This is at B2938-40. We note that there are no references within the email to any specific documents that the Claimant is asking the Second Respondent to look at, although clearly the Claimant now knows what the Second Respondent is considering.

217. On 20 August 2018, the Second Respondent wrote to the Claimant by letter in which it notified her that the formal meeting was rescheduled for 10 September 2018, for one final time. This letter is at B2941. We note that the letter expresses the hope, in line with the OH report, that a resolution to the Claimant's working relationships or a suitable alternative can be found. In addition, the letter refers to the OH report stating that the Claimant was fit to attend a meeting with management to discuss the matters preventing her from returning and she was encouraged to attend. The letter also offered the Claimant options to attending in person: providing a written statement; instructing a representative of NGSU or another trade union to attend and make representations on her behalf and/or bring a written statement to the meeting; or joining the meeting by telephone.

218. The letter states in bold at B2942:

"If no appropriate resolution, or revised role that meets your health requirements, can be found then it may not be possible to continue your employment with Nationwide. In these circumstances, one possible outcome of the meeting is that you may be dismissed with contractual notice."

219. The letter was sent by recorded delivery signed for only.

220. On 3 September 2018, the Second Respondent sent the Claimant a letter informing her of the grievance appeal outcome (at B2959-2967). Of the eight allegations considered, one was found to be inconclusive, one was partly upheld, and all the others were not upheld.

221. The disciplinary meeting took place on 10 September 2018, but the Claimant did not attend. The meeting was conducted in her absence by Mr Daniel Crouch, Area Manager East of England, accompanied by Ms Reid. His letter notifying the Claimant of the outcome of the meeting was sent on 20 September 2018. That letter is at B2982.

222. The letter states that having considered the available medical advice and evidence, Mr Crouch had concluded from the letter to the Claimant dated 21 July 2017 and the Case Summary document dated 20 September 2017, that the Claimant was unable to work from any Nationwide location other than Wandsworth, because of the negative impact on her health, namely the impact of pollution levels on her sickle-cell anaemia. Mr Crouch also concluded from the CMP Resolutions report dated 2 May 2018 and the supporting Case Summary document dated 26 June 2018, that as a result of the outcome of the report it appeared that the Claimant's working relationship with the other members of the Wandsworth Branch had reached a point of seemingly irretrievable breakdown. Mr Crouch noted that the Claimant had not attended the formal meeting or made any suggestions as to repairing relationships, which suggested to him that the Claimant also felt that those relationships cannot be repaired. Mr Crouch indicated that he made enquiries in the hope that the other members of the Wandsworth Branch had moved to different Branches, but these confirmed that the majority of those involved was still working within the Branch. Mr Crouch further indicated that he was keen to explore whether there were any suitable alternative roles for the Claimant, but she did not attend the meeting or submit any written statement, and no one had made representations on her behalf. He therefore reached a decision on the basis of the evidence that was available and concluded that the Claimant was unable to work from any other location than the Wandsworth Branch and that it was not tenable for her to return to work at that Branch due to the significant negative impact on the other individuals working there. He therefore concluded that it was untenable for the Claimant to continue her employment with Nationwide and so she was dismissed with contractual notice with effect from 18 September 2018.

223. It was clear from the evidence that we heard that no attempts were made to contact the Claimant on 10 September 2018 once it was apparent that she had not attended. Mr Crouch said in oral evidence that he waited about 20 minutes for the Claimant to attend and agreed that he did not telephone her but could not recall whether he made any attempts to get her contact details to find out where she was. He could not recall if he was aware the Claimant was off sick, but he was aware that the meeting had been rescheduled on two occasions and he said it was not unusual for a person not to turn up on the third occasion. In his witness statement Mr Crouch stated that the Claimant had requested the meeting to be rescheduled, was therefore expecting an invitation to a rescheduled meeting and moreover he understood that she had received it and sign for it at B2937. However, his witness statement goes on to state that he was subsequently informed that this was not in fact her signature. It would appear that this only became apparent after the Claimant queried it.

224. We were referred to the notes of the meeting at B2974-2978. It was put to Mr Crouch and Ms Reid in cross examination that Ms Reid was leading the meeting and taking

Mr Crouch through the process and to the decision. Both witnesses denied this.

225. We heard oral evidence that during an adjournment to the hearing, Ms Reid made telephone enquiries as to whether any or all of the staff members who had taken part in the mediation still worked at the Wandsworth Branch. She was told and advised Mr Crouch that three of the four members of staff still worked there. However, neither Mr Crouch nor Ms Reid knew by name which member of staff these were.

226. The evidence as to which members of staff worked at the Wandsworth Branch at the material time, those who had participated in the mediation process and those who remained by the time of the dismissal meeting was not clear.

227. We were referred to an email dated 26 February 2018 at B3342 which indicates, but not by name, that there were then seven employees at the Branch plus the Claimant. This email was sent in the context of the Second Respondent's HR advisers exploring the possibility of mediation.

228. We were also referred to an email from Mr Fox to the Second Respondent's HR adviser dated 6 March 2018 at B3393, which indicates that he had spoken to five members of staff, who had all indicated a willingness to participate. These are named as Vinita Srivastava, Margaret Hirsch, Adele Ramotar, Ursula Cumberbatch and Ms Kolowade. Mr Fox also states that he was not able to speak to Mr Maqsood, who was off sick at the time, but had previously indicated his willingness to take part.

229. This only accounts for six employees at the Branch. However, there is a reference to Toyin Adekambi in an email from Mr Fox dated 15 January 2018 at B3322, although this indicates that she was possibly transferring to another Branch over the course of the next week or two.

230. Only four members of staff spoke to the mediator and they have not been named in the mediation report.

231. In evidence we heard that Mr Maqsood left the Branch in 2018, Ms Hirsh retired later in 2018, Ms Kolowole left the Branch later in 2018, Ms Srivastava was new and had not worked with the Claimant in the Branch, Ms Kolowole had worked with the Claimant's for many years and Ms Cumberbatch was a friend of the Claimant's. Ms Cumberbatch refused to take part in the mediation. Ms Kolowole was off sick at the time of the mediation.

232. Doing the best we can, it would appear more probable than not that it was Ms Srivastava, Ms Ramotar, Ms Kolowade and Ms Hirsch who took part in the mediation.

233. In oral evidence, it was put to Mr Crouch that he had been provided with a version of the mediation report which contained a number of redactions. The redacted version of the report starts at B2683e and the unredacted version starts at B2683r. Mr Crouch was taken through a number of the redactions and it was put to him that the unredacted report provided him with information that would have affected his decision. Mr Crouch did not accept this or that the passages which redacted the views of the other members of staff taking part were made in bad faith or by way of victimisation. He said that he entered the meeting with an open mind and whilst there was more information within the unredacted version, he would ideally have liked to have spoken to the Claimant and explored these matters with her.

234. After receiving the letter of dismissal, the Claimant contacted Mr Crouch requesting a copy of the letter inviting her to the meeting (at B2982). After receiving the invite

letter, the Claimant wrote by email to Mr Crouch on 24 September 2018 requesting a new first meeting date with another Chair as she had received no invitation from him or anyone else to attend the meeting on 10 September 2018 which "was held covertly in (her) absence". The email included a full response to the letter of dismissal, including photographs and extracts from other documents, in which the Claimant challenged the grounds of dismissal, doubted the bona fides of any alleged attempt to contact her in advance of the meeting and complained of victimisation as a result of her previous complaints and formal grievances regarding the way she had been treated as one of the Second Respondent's vulnerable disabled, female, part time and Black employees. This email is at B2989-3001.

235. On 25 September 2018 the Claimant presented her Third Claim to the Employment Tribunal (at B112-129).

236. It was in response to the Claimant's above letter that Mr Crouch sent a letter dated 27 September 2018, erroneously alleging that the Claimant had signed for the invite letter which was sent by recorded delivery to her address. However, the letter went on to state that Mr Crouch had reconsidered his decision in the light of the Claimant's letter and the points that she made and set out his findings. In essence, he reaffirmed his original decision, but apologised that the dismissal letter referred to a date of dismissal which predated the date of his letter, which arose from a delay in sending out the letter. His letter is at B3002-3004.

237. It would appear that the Second Respondent took the Claimant's letter at B2991-3001 as a letter of appeal. The Claimant was invited to attend an appeal meeting by letter dated 10 October 2018 to be chaired by Julie Fairfield, the Second Respondent's Chief Manager, Commercial Lending. This letter is at B3004-3006.

238. The dismissal appeal meeting ultimately took place after being rescheduled on two occasions at the Claimant's behest on 16 November 2018 and was reconvened on 27 November 2018. The Claimant attended with Ms Allen and was conducted by Ms Fairfield and Lynn Hodgson, Senior HR Case Management Consultant. A transcript of the first meeting is at B3013-3045 and a transcript of the second meeting is at B3046-3075.

239. The meeting reconvened on 17 December 2018 at which the Claimant was notified of the outcome of her appeal. The same persons attended this meeting and a transcript of the meeting is at B3078-3091. The outcome was confirmed in a letter of even date which is at B3092-3094.

240. Ms Fairfield's decision was to uphold Mr Crouch's decision made in his letter dated 14 September and reaffirmed in his letter dated 22 September 2018.

241. Ms Fairfield's letter acknowledged that there had been procedural/administrative errors, but she did not believe that these altered anything substantial in Mr Crouch's decision. She noted that the Claimant was unaware of the meeting scheduled for 10 September, but she found it surprising that given that the Claimant had received two previous invites, she did not take ownership in confirming a new date, given that she describes herself as a proactive person. Ms Fairfield stated that she concluded it was reasonable for Mr Crouch to assume that the Claimant was not planning to attend the meeting and to progress in her absence. Whilst Mr Crouch could have telephoned the Claimant, she accepted his belief at the time was that the Claimant had chosen not to attend.

242. The letter then turned to address Mr Crouch's findings that she was unable to work at any Branch other than the Wandsworth Branch due to her ongoing health and a return to the Wandsworth Branch was not possible due to the irretrievable

breakdown of the Claimant's relationships with those still at the Branch.

243. The letter indicated that given that the Claimant did not attend the dismissal meeting, Ms Fairfield took into account points that the Claimant said that Mr Crouch had not been aware of. Further, the letter stated that Ms Fairfield was hoping that the Claimant would put forward some suggested solutions to enable her to have a working environment which would be productive for her and her colleagues, but regrettably she did not do so.

244. The letter recorded that during their meeting, the Claimant confirmed that her health situation had not changed and that she can only work at the Wandsworth Branch based on both the medical evidence previously provided as well as the Claimant's own view. The letter further recorded that the CMP Resolutions report had concluded that relationships at the Wandsworth Branch were beyond repair and that any professional intervention would be cosmetic and at most achieve only a temporary resolution.

245. The letter indicated that the Claimant had asked Ms Fairfield to speak to Ms Cumberbatch, given she felt she had a better working relationship with her than some of her other colleagues. The letter noted that Ms Fairfield understood that Ms Cumberbatch had previously indicated that she did not wish to discuss her relationship with the Claimant. With this in mind, Ms Fairfield initially approached Mr Fox as the District Manager to understand whether Ms Cumberbatch might speak to her, but he confirmed that she was not prepared to engage in any further discussion in relation to the Claimant because she was distressed by her previous involvement in the Claimant's grievances. Ms Fairfield stated in the letter that she has not done any further investigation regarding Ms Cumberbatch because even if she could repair her relationship with the Claimant, there was still more than one other person in the Branch who stated categorically they do not want to work with her.

246. The letter also stated that Ms Fairfield considered whether each team member could genuinely put the matters behind them but concluded they could not. CMP Resolutions had contacted five employees. One of these was still working at the Branch and refused to even attempt mediation while three of the other four were still working at the Branch. All of the three still working at the Branch stated that they could not work with the Claimant and could not see any way to resolve their working relationships with her. Ms Fairfield therefore concluded that a return to the Branch was not a viable option and not in the best interests of all of the parties involved.

247. The letter further stated that the Claimant had not provided any further information or any suggestions that her employment with the Second Respondent could be continued.

248. The letter therefore concluded that because the Claimant could only work in the Wandsworth Branch, she was upholding Mr Crouch's original decision because she simply could not find a viable option for her employment with the Second Respondent to be reinstated.

249. Turning back to the issue of the invitation to the dismissal meeting. Ms Fairfield's evidence in cross-examination established that the dismissal meeting invite letter was sent out by the HR Admin Support Team on 23 August 2018 and returned to the Wandsworth Sorting Office on 25 August 2018 (which we took to be a reference to the Royal Mail's Sorting Office given the close proximity of the dates). This would mean that the Royal Mail attempted to deliver the letter to the Claimant on 24 August, but it was returned because delivery was unsuccessful. However, the letter was not returned to the Second Respondent until after the decision to dismiss the Claimant

had been taken by Mr Crouch. The letter was received back from the Royal Mail to the Second Respondent on 21 September 2018 (as apparent from the transcript of the dismissal appeal meeting at B3051), but Ms Reid said in oral evidence not to its HR Department. This evidence was not challenged by the Claimant in cross-examination.

250. So certainly, the Second Respondent had received the letter back undelivered by the time of the Claimant's appeal meeting on 16 November 2018.

251. Having considered the evidence that we heard we find that there was nothing untoward in how the letter was sent and as to why it was not received. We accept that the Second Respondent sent the letter by post only and it was not received by the Claimant. However, we accept that the Claimant had a reasonable expectation that the letter would also be sent by email.

252. We were referred to a separate document provided to us during the course of the hearing which sets out a series of alleged examples of false and demeaning comments made by Ms Bartlett, Ms Sokhey and the First Respondent. These are extracted from the transcripts of the investigatory interviews conducted by the Second Respondent as part of this investigation into the Claimant's grievances. We would refer to that document for the detail of these comments and do not propose to set them out here.

253. We were provided with detailed written submissions by both Counsel. Ms Boorer's written submissions ran to 24 pages. Ms Scarborough's written submissions ran to 51 pages. They both amplified their submissions orally. We were most grateful to them and have considered their submissions and taken them into account where appropriate.

Relevant Law

254. Section 26 of the Equality Act 2010:

"(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

255. Section 15 Equality Act 2010:

"(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

256. Section 21 Equality Act 2010:

"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

257. Section 19 Equality Act 2010:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim…"

258. Section 27 Equality Act 2010:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith…"

259. Section 98 (1), (2) and (4) Employment Rights Act 1996:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—
(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case."

260. Section 123 Equality Act 2010 governs time limits:

"(1) [Subject to sections 140A and 140B,] proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable…

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

261. An act of discrimination which *"extends over a period"* shall be treated as done at the end of that period under section 123(3) Equality Act 2010. In some situations, discrimination continues over a period of time, sometimes up to the date of leaving employment. If so the time limit in which to present a Claim Form to the Employment Tribunal runs from the end of that period. The common, although technically inaccurate, name for this is 'continuing discrimination'.

262. In Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96, the Court of Appeal held that a worker need not be restricted to proving a discriminatory policy, rule, regime or practice, if s/he could show that a sequence of individual incidents were evidence of a *"continuing discriminatory state of affairs"*.

263. An Employment Tribunal may allow a claim outside the time limit if it is just and equitable to do so. This is a wider and therefore more commonly granted discretion than for unfair dismissal claims. This is a process of weighing up the reasons for and against extending time and setting out the rationale. Case law has suggested that a Tribunal ought to consider the checklist under section 33 of The Limitation Act 1980, suitably modified for tribunal cases.

264. The factors to take into account (as modified) are these:

a. the length of, and reasons for, the worker's delay;
b. the extent to which the strength of the evidence of either party might be affected by the delay;
c. the employer's conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;
d. the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case;
e. the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker's legal adviser should not be held against the worker and appears to be a valid excuse.

265. The Tribunal should consider whether the employer is prejudiced by the

lateness, ie whether the employer was already aware of the allegation and so not caught by surprise, and whether any harm is done to the employer or to the chances of a fair hearing by the element of lateness.

266. Where the delay is because the worker first tried to resolve the matter through use of an internal grievance procedure, this is just one factor for the Tribunal to take into account (Apelogun-Gabriels v Lambeth LBC and another [2002] IRLR 116, CA).

267. If the delay was because the worker tried to pursue the matter in correspondence before rushing to Tribunal, this should also be considered (Osaje v Camden LBC UKEAT/317/96.

268. Where a claim is outside the time limit because a material fact emerges much later a tribunal should consider whether it was reasonable of the worker not to realise s/he had a prima facie case until this happened (Clarke v Hampshire Electro-Plating Co Ltd [1991] IRLR 490, EAT).

269. Under section 136 Equality Act 2010, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

270. The Employment Tribunal can take into account the Respondents' explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

271. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondents' explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

272. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts where we felt it appropriate to do so.

Conclusions

273. We propose to deal with our conclusions by reference to the final list of issues appended to this Judgment. The paragraph numbers cited are those within that document.

Harassment

274. Harassment is defined under section 26 of the Equality Act 2010. A person "A" harasses another "B", if "A" engages in unwanted conduct related to a protected characteristic, which has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the unwanted conduct has such purpose or effect, the Tribunal must consider the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

275. We took into account that where conduct complained of does not have that purpose, i.e. where it is unintentional in that sense, it is not necessarily unlawful just because the worker feels her dignity is violated etc. We also took into account, as required, the other circumstances of the case and whether it is reasonable for the

conduct to have that effect as well as the perception of the worker bringing the complaint. The starting point is whether the worker did in fact feel that her dignity was violated or that there was an adverse environment as defined in the section and that it is only unlawful if it was reasonable for the worker to have that feeling or perception. But not forgetting that nevertheless the very fact that the worker genuinely had that feeling should be kept firmly in mind (**Richmond Pharmacology v Dhaliwal** [2009] ICR 724).

276. We were also guided by ECHR Employment Statutory Code of Practice at paragraph 7.18:

"In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

277. At paragraph 3 of the list of issues we are asked to determine whether a number of matters set out within the sub-paragraphs occurred as a matter of fact. Paragraphs 4 to 8 then deal with in the context of the definition of harassment.

278. In the following paragraphs, we will deal with each allegation in turn within paragraph 3 and each of the considerations where appropriate within paragraphs 4 to 8 of the list of issues as well as time limits.

Paragraph 3.1

279. At paragraph 3.1, the Claimant alleges that her adjusted Customer Representative role was removed from her and/or threatened to be removed from her between September-December 2013 on the basis that the First and Second Respondent considered that she could not do her role properly as a result of her spinal injury. The meetings that the Claimant relies upon in support of this allegation are the September 2013 meeting, the 29 October 2013 meeting and the meeting on 9 December 2013.

280. Based on our above findings we have reached the following conclusions.

281. It was legitimate for the First Respondent, as a manager new to the Wandsworth Branch, on commencing employment in that role, to review staffing issues and to refer the Claimant given her ill-health absence to Occupational Health, particularly as there had been no previous referral (certainly we were not presented with any evidence of any previous referrals).

282. The OH referral at B345-347 does not place a negative slant on the Claimant's health condition or her position as she alleges. It raises legitimate concerns of an employer arising from her circumstances. The Claimant takes issue with the 90% of her duties comment, which whilst perhaps insensitively worded we did not feel went as far as harassment in the legal sense. But in any event, we did not find the allegation made out in respect of this meeting.

283. The meeting in September 2013 is based on limited recollections of what occurred as well as unclear evidence. Moreover, the Claimant did not receive the note of the meeting until a much later date and would appear to have placed an interpretation on the note in the light of later events.

284. The reference to her allegedly being AWOL, on balance of probability, came from the First Respondent as this line manager and is unsupported by any evidence. There is no indication that the Claimant was off sick at that time or as to why. Further, it was accepted that no action was taken against the Claimant in respect of this allegation.

285. From what we have seen in evidence as to the Claimant's position with regard to anything that she does not agree with, the words used in the note and the lack of any legal action being taken at that time, we think it more probable than not that the words relating to disability and further Employment Tribunal if dismiss, is a shorthand note of what the Claimant said at the meeting.

286. There was no evidence to indicate that at this meeting the Claimant's Customer Representative role was removed from her and/or threatened to be removed from her. This was an exploration of the health position and its impact on her job role. Indeed, it would appear to have been followed up by the OH referral. We therefore do not find the allegation made out in respect of this meeting.

287. The meeting in October 2013 was held to consider the OH report and there is nothing there to indicate that the Claimant's Customer Representative role was removed from her and/or threatened to be removed from her. There was a discussion. The Claimant's email indicates that there was some dispute as to the extent of the discussion. But what is evident is that the Claimant believes that her role is much more extensive than the Second Respondent believes it to be and she puts a large emphasis on her need to work within the Wandsworth Branch because that is where she lives. But at the end of the meeting Ms Sokhey states that the Claimant could continue her role on a temporary basis and that the First Respondent would review the situation at the next meeting. We therefore do not find the allegation made out in respect of this meeting.

288. Turning then to the meeting in December 2013. At B396 there is a discussion of the Host role and the Second Respondent's position is based on a business case that there is no role in the Wandsworth Branch. We would accept that the Second Respondent was taking a narrow view of what it could do to support the Claimant and that clearly there was a threat to remove her from her role by this stage.

289. In respect of the December 2013 meeting, we then turn to paragraph 4 of the List of Issues: did the conduct relate to the Claimant's spinal injury. The answer to this has to be yes given that her inability to carry out all of her duties was as a result of her spinal injury.

290. In respect of the December 2013 meeting, turning then to paragraph 5 of the List of Issues. We could find no evidence of any intent for this conduct to have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Looking at paragraphs 6 and 7 of the List of Issues in the alternative, whilst the occurrence we found may have had the effect of doing so, we do not find that it was reasonable for the conduct to have that effect with regard to the perception of the Claimant and the other circumstances of the case.

291. We also considered whether this incident was in time or not and reached the conclusion that it was a one-off incident that ended when the Claimant subsequently

accepted the PBM role. It is therefore out of time on the face of it. However, as we have indicated we did not find that it amounted to harassment in any event.

292. We find that the allegations in paragraph 3.1 fail and are dismissed.

Paragraph 3.2

293. At paragraph 3.2, the Claimant alleges that the First Respondent falsely accused her of being AWOL to Ms Sokhey and Mr Halliday in September 2013. We have already dealt with this in the context of the September 2013 meeting between the First Respondent and Ms Sokhey.

294. We did find it troubling, given the First Respondent's contradictory evidence in not remembering the incident, Ms Sokhey evidence of this information coming from him, and his written evidence emphatically stating that it resulted from the Claimant's absence without following sickness reporting procedures. Further, the lack of any records of such an absence or the reason for the absence or of any action being taken. However, what was apparent in a number of the matters which we refer to, is that the Second Respondent had cause for concern as to the First Respondent's competence as a manager.

295. We did consider whether this incident was in time or not. Again, we found it to be a one-off incident and so it is out of time on the face of it.

296. However, when considering paragraph 4, we could not find that the conduct complained of related to the Claimant's spinal injury on the scant evidence provided to us.

297. We therefore find that the allegation at paragraph 3.2 fails and is dismissed.

Paragraph 3.3

298. At paragraph 3.3, the Claimant alleges that the First Respondent falsely accused her of being AWOL on specified dates set out within the sub paragraphs.

299. Sub paragraphs 3.3.1 and 3.3.2 refer to 2 March 2019, in respect of the Claimant working to 7 pm and 31 March 2015 and working to 9 pm respectively.

300. These references are to the figures of TOIL that the Claimant was seeking from the Second Respondent. They are not references to her being AWOL. Indeed, at B613 which is part of the Claimant's 1:1 from February 2015, there is a reference to the Claimant seeking TOIL based on the finish time of 9 pm when it should be 5 pm and the First Respondent asking her to revise and resubmit the figures. We could not find that this amounted to a false accusation. At its highest the First Respondent states that her stated finish time was incorrect. The Manager's Summary within the 1:1 dated 2 March 2015 at B638 does not contain anything more than an instruction to ensure that her tracker is up-to-date and to finalise her TOIL by close of business. Further, the Claimant's TOIL figures as set out in the 1:1 of 29 January 2015 at B600 are clearly incorrect (working 9-5 is 8 hours not 9 as stated) and we can see that there has been general confusion in the past and that the Claimant revised her TOIL figures for 2014 and 2015 at B713.

301. We again considered whether these incidents were in time or not and came to the conclusion that it was a one-off act and as such it was out of time.

302. But in any event, we find that they are not accusations of fraud, the First Respondent was discussing the hours that the Claimant had claimed and some of the hours had been miscalculated. It was simply going through and understanding the hours

claimed as TOIL.

303. Sub paragraphs 3.3.3 and 3.3.4 refer to 10 August 2015, although as we have already said we think that more correctly this should be a reference to 5 August 2015, in respect of the Claimant working in the afternoon rather than the morning, and 10 August 2015, in respect of the Claimant's adjusted hours due to taking her daughter to Summer Camp.

304. Strictly speaking these are not allegations of being AWOL (in the sickness sense of the use of the term as used before) but about not being at work when the Respondents believed the Claimant was meant to be. However, they have been characterised as AWOL allegations by the parties.

305. On 5 August 2015, the Claimant worked the afternoon instead of the morning as she was required to do and on 10 August 2015, she started work at 9.30 am instead of 9.15 am having changed hours because of her daughter's attendance at Summer Camp.

306. The Claimant was subsequently required to attend a misconduct hearing. However, this came about because the Claimant did not respond to Mr Smee's emails asking for an explanation. These AWOL allegations came up during that hearing. However, no disciplinary action was taken against the Claimant in respect of them.

307. At the time the Claimant referred to part of this being down to the First Respondent being very forgetful (and this was one of a number of general criticisms made by the Second Respondent of the First Respondent). We were of the view that had there been a proper formal request to adjust hours, there would be an email chain in support, although a request to vary hours for one day could of course have just been a verbal request, but the longer change to hours, one would expect to have been evidenced in writing.

308. We have no evidence that the First Respondent was aware and forgot or deliberately denied the arrangement. We only have the Claimant's evidence that the First Respondent was aware and this does appear to be supported by the fact that the Second Respondent took no action and put it down to miscommunication and not malicious (at B1698 of the first grievance outcome letter). There is nothing to indicate that the First Respondent was involved in the misconduct action that took place, it was the issues with Mr Smee that initiated this action.

309. We therefore find that these specific incidents are not made out and so the allegations at paragraph 3.3 fail and are dismissed.

Paragraph 3.4

310. At paragraph 3.4, the Claimant alleges that the First Respondent made false allegations to Ms Bartlett and others, including the Central London Senior Area Team and HR, from 2013 onwards as set out in a number of sub-paragraphs.

311. Dealing with sub paragraph 3.4.1, that the Claimant was unable to perform a role properly. We were not sure what this referred to and Ms Boorer did not address it in her submissions. We thought that perhaps it was a reference to the OH referral in September 2013 and the comment by the First Respondent that the Claimant's role was 90% counter work. Ms Scarborough at paragraph 62 of her submissions believed that it might be a reference to the part-met rating within the Claimant's 1:1 (more correctly her Behaviour Rating in October 2015 at B944-948). We struggled with this and we found it a very vague allegation, we did not know what role it was referring to that it was alleged that the Claimant was not performing properly. We

reached the conclusion that we could not make any findings and so the allegation is not made out.

312. Dealing with sub paragraphs 3.4.2 and 3.4.4 together, that the Claimant needed help with time management and that the Claimant neglected her duties in favour of Equality & Diversity and Union duties, respectively. The First Respondent had raised issues regarding the Equality & Diversity and Union duties, but there was no obvious indication that he escalated this upwards as a time management issue.

313. In evidence it was clear that the Claimant carried out these duties by and large outside her days working at the branch and it was authorised by higher management. However, by her own admission the Claimant did carry out some of these duties within the Branch. But if the Respondents did not specify to her how much time she could spend on these duties, we could not see how it was the Claimant's fault.

314. The Claimant alleges that the time management issue was raised by Ms Bartlett by stating that she had a lot going on and that she needed to manage her time. She also makes reference to the letter at B1694 which indicates as much.

315. However, it is clear that these concerns were coming from the First Respondent as to the amount of time that the Claimant was spending on these activities. But there was no clear evidence that it was a disproportionate amount of time. Therefore, in the absence of evidence to the contrary, on balance of probability, it must be false.

316. But we then asked the question: does this have anything to do with her disability? One could say that if someone who cannot do all of their duties and is taking on other duties and that impacts on the Branch's resources, then that is what causes the First Respondent to raise the matter. Nevertheless, we considered this matter after considering the totality of the evidence at the end of our deliberations and we concluded that the allegation was to do with the Claimant neglecting her Branch duties in favour of her other duties; it impacted unfavourably upon her, but this was not to do with her disability. We therefore find that these allegations are not made out.

317. Dealing then with paragraph 3.4.3, that the Claimant spent all of her time in a second-floor meeting room. From the evidence we heard we find that this was something that Ms Bartlett observed first-hand and was quite frequent. The First Respondent wanted the Claimant to work more in the downstairs of the Branch and that she was often upstairs, not always upstairs. However, his evidence was contradictory. Ms Bartlett said that the First Respondent stated that he cannot get the Claimant out of that room. But this evidence does not really hang together. The Claimant does not state directly how much time if any she spent upstairs. But it seems unlikely that she would confine herself to the upstairs room given her clear love of carrying out forward facing work. The way that the allegation is put in submissions is that it is the First Claimant that is making the allegation to Ms Bartlett. However, Ms Bartlett sees this herself on her evidence. Her concern is that the Claimant is not sharing the room with Mr Maqsood and if she is in that room, she is not doing her meeting and greeting work. The Claimant has based her allegation on one comment in an interview with Ms Bartlett and she accepts that the upstairs room was where she was doing her PBM training. We find this to be a really insubstantial basis to reach this conclusion. Of course, we can appreciate that the Claimant sees adverse comments by the First Respondent as almost like a dripping tap, dripping a series of false allegations as to her performance. However, it does appear no more than the First Respondent finding it difficult to manage the Branch and the Claimant and being perhaps frustrated by these matters and having to seek

management and HR advice all the time.

318. On balance of probability, we find that this allegation is not made out and in any event it arises from the Claimant's interpretation of comments attributed to the First Respondent in the notes of the grievance interview from something that Ms Bartlett also observed. No one has alleged that the Claimant spent all of her time on the second floor.

319. Therefore the allegations within the whole of paragraph 3.4 are dismissed

Paragraph 3.5

320. In paragraph 3.5, the Claimant alleges that the First Respondent alleged to Ms Bartlett on 15 January 2015 that she had not completed product tests and therefore failed Branch Audit controls.

321. We cannot find anywhere where such an allegation is made linking the failure to complete product tests to the failed Branch Audit. The email at B584 refers to the Branch KCI not the failed Audit. The Claimant is stating at B585 that this matter was not discussed or approved with her in any of her 1:1s. At paragraph 80 of her witness statement, she states that the First Respondent made the false allegation "in a Branch KCI report which I did not get to see and went straight to Beverley Bartlett". But we have not been taken to this report. However, Ms Bartlett states at paragraph 11 of her witness statement that the First Respondent told her that the Claimant had not updated "them" correctly and this led to the failed audit test. Within the 1:1s at B527 and 533 there are references which indicate on the face of it that the Claimant had completed the audit, there is also reference made to incomplete tests. We found it impossible to reach a conclusion that there was a failed Branch Audit or the link to the Claimant's product tests.

322. We therefore find that the allegation is not made out.

Paragraph 3.6

323. At paragraph 3.6, the Claimant alleges that around 2015, the First Respondent encouraged staff not to book PBM appointments for her on the basis that she took too long in interviews. From our findings we reach the following conclusions. This matter only becomes an issue when the Claimant is told about it by Ms Neal. It is not something that the Claimant herself ever noticed and has not raised in her 1:1s or anywhere else. Ms Neal stated that it was not something that she mentioned during her interview in respect of the Claimant's grievance.

324. On balance of probability we find that this allegation is not made out.

Paragraph 3.7

325. At paragraph 3.7, the Claimant alleges that the First Respondent deleted comments that she had made on 30 March 2015 in her digital file so as to rebut allegations that she had made. We refer to our findings above and on balance of probability have reached the following conclusions. The Claimant made comments in her 1:1 and these were deleted. She has not told us with any particularity what the comments were that were deleted and what specific allegations the comments were made to rebut. We do note that there is nothing derogatory in the 1:1 although it is a rating of met rather than exceed. Whilst we find that this allegation is made out, we cannot conclude it amounts to harassment for the above reasons.

Paragraph 3.8

326. At paragraph 3.8, the Claimant alleges that the First Respondent became aggressive during the 1:1 meeting on 31 March 2015 after refusing to allow her to record her comments in her digital file. We refer to our above findings and reach the following conclusion. If the First Respondent did refuse to allow the Claimant to make comments within the 1:1 and became aggressive, there would have been raised voices which would have been heard in the office and there would have been a reaction to what happened. We have no evidence that the First Respondent had behaved in an aggressive manner on any other occasion. This would appear to be a one-off event of which no details have been provided. In her email to the First Respondent the next day and during the subsequent first grievance interview the Claimant does not mention the First respondent becoming aggressive. But she does at one point state that it is his 1:1 and he can do what he likes.

327. On balance of probability we therefore conclude that this allegation is not made out. It therefore fails and is dismissed.

Paragraph 3.9

328. At paragraph 3.9, the Claimant alleges that Ms Bartlett accused the Claimant of being a liar and malicious in a meeting on 13 July 2015 (at B797-807) and again in a meeting on 21 September 2015 (at B912). There is no evidence beyond assertion to support this allegation. In any event it would appear to arise from the Claimant's subjective recollection of the meeting. We therefore find that the allegation is not made out. It therefore fails and is dismissed.

Paragraph 3.10

329. At paragraph 3.10, the Claimant alleges that the First Respondent unfairly rated her appraisal as met on 6 January 2015. This is a reference to the Claimant's January 2015 Behaviour Rating at B569-575.

330. Although it is not our role to get involved in deciding what rating should have been given, it is our role to judge the justification for the rating that was given.

331. We were most concerned about the First respondent's comments at B571 because this indicates that the rating had been given on the basis of the Claimant's lack of attendance at work which was at least partly for disability-related reasons. We do not know if the Claimant would have got a met rating anyway. Given the attendance issue we do not believe it likely that she would have got an exceed rating due to the lack of time she was actually in the branch. The reference to Flex Plus (at B571) does not seem to be enough to justify one, given that it is not given much more importance in the comments and it is unclear why the Claimant failed it. The opening comment in any event sets the tone and the importance placed upon her lack of attendance. The Claimant subsequently appealed against her rating (at B579-581). As we have referred to in our findings, the Claimant's appeal was essentially on the grounds that the rating should be higher on the basis of her Equality Diversity & Inclusion work and not as the First Respondent had rated it on just her duties in the Branch. We are led to believe that on appeal, the rating was subsequently increased to Exceeding, although the only document that supports this is the Agreed Chronology. The Claimant's later grievance on this issue is only partly upheld and the outcome does not mention that the rating was upgraded.

332. However, we find that this allegation as pleaded is made out factually.

333. Turning then to paragraph 4 of the List of Issues, the conduct complained of is

related to the Claimant spinal injury.

334. With regard to paragraph 5, we could find no intent, but under paragraph 6 we find that the Claimant clearly believes that this had the effect of violating her dignity, creating an intimidating, degrading, humiliating or offensive environment for her.

335. Turning to paragraph 7, was it reasonable for the conduct to have that effect with regard to her perception and the other circumstances of the case? The Claimant had an expectation of receiving Exceeding ratings based on her previous performance. Further, her challenge to the rating at the time was on the basis of her Equality Diversity & Inclusion work and that the First Respondent had rated duties in the Branch, neither of which are matters to do with disability. There is also some force in the Respondents' submission that the provision of a rating indicates competent performance in a role cannot objectively be regarded as harassment.

336. The Claimant had just been promoted to the PBM role in September 2014 and so we did not see how reasonable it was for her to expect to get another exceed rating in her next appraisal, when she had only got a Met rating for September 2014 because of the product test issues.

337. It is difficult for us to conclude that it was reasonable for her to believe that this had the effect of violating her dignity, creating an intimidating, degrading humiliating or offensive environment. She was in a new role different to what she was before. She had been rated as competent in her performance although not at the level she expected. However, it was not reasonable in the circumstances for her to believe she would get better than a Met. So we find it was not reasonable for this conduct to have had the effect attributed to it.

338. The allegation at paragraph 3.10 therefore fails and is dismissed.

Paragraph 3.11

339. At paragraph 3.11, the Claimant alleges that the First Respondent unfairly rated her as a poor performer in her quarterly review meeting on 7 October 2015. This is a reference to the Behaviour Rating at B944-9484 in which she received a rating of Part-Met. The significance of a Part-Met rating is that the Claimant would not receive a bonus. The First Respondent sets out his justification for this rating at paragraph 43 of his witness statement.

340. A reading of the Behaviour Rating document does not on the face of it support a rating of Part-Met. However, on appeal, the Second Respondent overturned the rating and substituted one of Met. We could not find a reference to this in the bundle, oral evidence, submissions or within the chronology. We therefore did not know why it was overturned. There is evidence on the face of it to support the performance by the Claimant, as opposed to the January 2015 rating which was marked down due to the lack of attendance. On balance of probability we reach the conclusion that this allegation is not made out because whilst it was overturned, which indicates that there was in issue, we have no idea why and so we cannot make any finding on it.

341. As a result, the allegation fails and is dismissed.

Paragraph 3.12

342. At paragraph 3.12, the Claimant alleges that the Second Respondent withheld her bonus from October 2015 pending the outcome of her perceived grievance. Whilst it is true that the Second Respondent did withhold her bonus pending the outcome of her grievance, it is clear that whilst the Claimant had appealed against her rating,

it was reasonable and fair company practice to treat what she had raised by way of complaint as a grievance and to investigate what had been alleged. In any event, it is hard to see in what way the allegation is connected to disability. We find that the interpretation placed upon this allegation is not made out. The allegation therefore fails and is dismissed.

Paragraph 3.13

343. At paragraph 3.13, the Claimant alleges that the First Respondent and others made false and demeaning comments about her, in their various interviews conducted by the Second Respondent. These allegations were set out in a separate document entitled Examples of False and Demeaning Comments. This sets out various comments made by Ms Bartlett, Ms Sokhey and the First Respondent during their investigatory interviews into the Claimant's grievances.

344. It is within that context that they have to be viewed. In particular Ms Bartlett and the First Respondent were responding to grievances that had been brought against them by the Claimant. Whilst the Claimant views them as false and demeaning comments, in context they are reasonable remarks. They are those individuals' opinions relating to the Claimant's interpersonal style rather than her disability. We concluded that whilst those comments were made, they were not related to the Claimant's spinal injury. In any event, whilst the Claimant perceives them to be false and demeaning, we do not believe in the circumstances that it is reasonable to place this interpretation on them because they arise not from any issues to do with her disability but are to do with those individuals' opinions as to her own conduct which we acknowledge that the Claimant does not accept.

345. We therefore find the allegation fails and is dismissed.

Paragraph 3.14

346. At paragraph 3.14, the Claimant alleges that on 17 May 2017, Mr Fox advised her that she would be removed from the Wandsworth Branch, that there was no role for her and she would be dismissed. Mr Fox denied this, although he did say that he was aware that the Claimant's adjusted role was causing operational difficulties for the Branch. We were referred to the Claimant's contemporaneous note at B2166, which we were told in submissions indicated that there was a conversation regarding the removal of the Claimant because she was a "disruption". This is a handwritten note by the Claimant containing a number of doodles and very few words. However, what it does say is "more disruption that way". We cannot place the submitted gloss upon these words. On balance of probability, we find that this allegation is not made out.

347. The allegation is therefore dismissed.

Paragraph 3.15

348. At paragraph 3.15, the Claimant alleges that the First and/or Second Respondent suggested that she had only carried out light duties on her return from absence in 2016, limited to meeting and greeting and answering the telephone. The Claimant relies upon the letter of 21 July 2017 in support of this, at B2163-2164. Whilst it is true that the letter does contain the words "light duties", it defines these "in broad terms (as) limited to meeting and greeting in the banking hall from time to time and answering the telephone from time to time". The Claimant takes offence from the use of these words in the definition. However, in evidence it was clear that her role was limited to meeting and greeting customers, answering telephones and

miscellaneous other duties. The phrase "light duties" is not a derogatory term, it is an industry-wide term. We therefore do not accept that the Claimant's interpretation of this as a derogatory term is made out. It seems to us that her real concern is that she thinks her role is minimised by use of the term and the definition given to her duties she clearly disagrees with. We struggled with whether this allegation in any event was related to her spinal injury as it seemed more to do with a disputed interpretation of what her revised duties were. In the event, we could not find that it was reasonable for the Claimant to view this as having the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

349. We therefore find the allegation fails and is dismissed.

Paragraph 3.16

350. At paragraph 3.16, the Claimant alleges that both Respondents produced an inaccurate and misleading Case Summary in respect of her sickness absence on 20 September 2017.

351. As we have found it was unclear from the evidence who was the author of the Case Summary Document. As we have also found it was unclear which document the Claimant was referring to.

352. Assuming, that this allegation is about the Case Summary Document dated 25 August 2017, whilst the Claimant has corrected a number of matters shown in green handwriting within the document, we do not agree that these have resulted in an inaccurate and misleading Case Summary being presented as to her sickness absence. The things she points out are not substantial. They might be sloppy errors, but they are not prejudicial to the degree that the Claimant alleges. In any event we struggled to see how the inaccuracies had the purpose or indeed the effect of amounting to harassment within the definition.

353. We therefore find that the allegation fails and is dismissed.

Paragraph 3.17

354. At paragraph 3.17, the Claimant alleges that in June 2018 OH were falsely told by the Second Respondent that the proposed meetings were being held to determine support measures to facilitate her return to work rather than a formal dismissal hearing. The Claimant relies upon the OH referral at B2868-2873 which resulted in the OH report at B2874. She submits that the referral was inaccurate because it did not indicate she had to attend a meeting contemplating her dismissal and it wrongly indicated that she was not experiencing stress, depression and anxiety.

355. At this stage certainly the Second Respondent was not contemplating holding a formal disciplinary meeting. It was looking at the matter in terms of a capability review. Even in broad terms, as a meeting that could end in dismissal being one of the options, we do not believe that an OH practitioner would need it to be spelt out. OH practitioners are well aware that a capability review meeting can end up in dismissal. The referral form is at B2868 and at B2873 OH has all the information it requires. OH practitioners are professionals and they know what these meetings involve.

356. The Claimant also points to inaccuracies on the referral form. At B2870 she states that the answer "no" to the question where an employee has been injured through a workplace accident or incident is incorrect. The Second Respondent's position is that the Claimant had not had an accident or incident at work. The Claimant also

states that the answer "no" to the question at B2870 when an employee is experiencing mental health problems, i.e. stress, depression and anxiety, is incorrect. This is so, but clearly OH pick up on this and this is why they recommend a further stress assessment.

357. In conclusion, we conclude that this allegation is not made out and is dismissed.

Paragraph 3.18

358. At paragraph 3.18, the Claimant alleges that the Second Respondent dismissed her and/or instead of taking actions against the First Respondent and others. We were concerned about this allegation and we did consider it after we had made our findings as to the Claimant's subsequent dismissal. We do not agree that, given our findings as to this point, that it was fair or reasonable to expect the Second Respondent to have taken action against the First Respondent. Further, it is not clear in what way and we are not even clear who the others are, given that many of the people that the Claimant has complained about and other members of staff in the Branch had left at various points. The allegation is vague and indeterminate. So we are not clear if we can actually make a finding on it in respect of others.

359. Having considered the Claimant's dismissal, we have determined that she was not dismissed because of her disability. She was dismissed because of the irretrievable breakdown in the relationship with the other members of the Wandsworth Branch.

360. Paragraph 3.18 It therefore fails under paragraph 4 of the List of Issues because it does not relate to the Claimant's spinal injury.

Paragraph 3.19

361. At paragraph 3.19, the Claimant alleges that Ms White emailed her on 7 June 2018 advising that the Second Respondent wanted to arrange a formal meeting to discuss the Claimant's ongoing employment. This email is at B2844.

362. As a matter of fact it is true to say that Ms White did email the Claimant advising her of such a meeting to discuss her ongoing employment as alleged, this being in the context of the unsuccessful outcome of the mediation process. The Claimant submits that the email was triggered by her own email of 5 June 2018 to Mr Fisher at B2837 which essentially repeats her ongoing concerns.

363. However, we could not reach the same conclusion as the Claimant. Whilst we find the allegation is correct, we do not place the same emphasis upon it that the Claimant does. It appears quite reasonable of the Second Respondent to wish to hold a meeting to discuss the outcome of the unsuccessful mediation and the Claimant's ongoing employment. This does not presuppose that the outcome would necessarily be to end the Claimant's employment.

364. So we find the allegation is factual and in as far as it is made in the context of capability review process it would appear related to her spinal injury.

365. But we did not conclude it had the intent of amounting to harassment. We looked at whether it had the effect of amounting to harassment. We found that it was not reasonable for the conduct to have had that effect with regard to the perception of the Claimant and the circumstances of the case.

366. We therefore find that this allegation fails and is dismissed.

Paragraph 3.20

367. At paragraph 3.20, the Claimant alleges that the Second Respondent excluded her from the business while she was on extended leave between 2017-2018. We can see that in the email to Ms Newton dated 5 June 2018 at B2839, the Claimant refers to being *"told to stay off work for nearly four months on £355, which is not my choice"* and in the response from Mr Fisher dated 15 June 2018 he explains the position, at B2851,

368. However, from our above findings, the Second Respondent told the Claimant to get herself signed off by her doctor pending the conclusion of the mediation process, the Claimant did this and so in consequence she was off work on half company sick pay. The Second Respondent therefore did not exclude her from the business. The Claimant went to her doctor and she submitted a fitness for work certificate. So in effect she agreed to her own exclusion.

369. We therefore conclude that this allegation is not made out and is dismissed.

Discrimination because of something arising in consequence of disability

370. A complaint of discrimination arising from a disability is essentially where a claimant alleges that she has been treated unfavourably as a result of something arising from her disability. It is a defence to such a complaint if the respondent can prove the unfavourable treatment was a proportionate means of achieving a legitimate aim.

371. Paragraph 9 of the List of Issues indicates that the allegations at 3.1 to 3.20 are repeated as allegations of unfavourable treatment as something arising in consequence of the Claimant's spinal injury disability. We are asked to consider the elements required for such a complaint to succeed within paragraphs 10 to 14 of the list of issues. Without repeating our findings above we will go through each of the sub-paragraphs of paragraph 3 below in this context.

Paragraph 3.1

372. Whilst this matter arises from her disability, we do not accept that it amounts to unfavourable treatment. Whilst there is the possibility of removal from her role, in any event, it is resolved by promoting her to PBM. As we have indicated, whilst there is a reference in the September 2013 meeting to the AWOL allegation, again we did not conclude that this in itself amounted to unfavourable treatment linked to disability or any obvious unfavourable treatment as a result of her disability. The only link to disability is her being in the meeting in the first place.

373. We therefore find that this complaint is not made out and is dismissed.

Paragraph 3.2

374. As we have indicated above, we could not find the link to disability from the allegation of the Claimant being AWOL on 18 September 2013. In any event the allegation was incorrect, not supported by any evidence and no action was taken against the Claimant in respect of it.

375. We therefore find that this complaint is not made out and is dismissed.

Paragraph 3.3

376. As we have indicated above, we did not find this allegation made out and so the complaint fails and is dismissed.

Paragraph 3.4

377. As we have indicated above, the only part of the allegation that was made out was not linked to disability. Therefore, the complaint fails and is dismissed.

Paragraphs 3.5-3.9

378. As we have indicated above, we did not find this allegation made out and so the complaints fails and are dismissed.

Paragraph 3.10

379. Applying paragraph 9 of the List of Issues. As we have indicated above, we found that this allegation was factually made out and was linked to the Claimant's disability. But we then asked ourselves, is it unfavourable treatment? Just because the Claimant has got an Exceeded rating in the past does not mean she would have got an Exceeded rating on this occasion. All we can say is that she got a rating of Met taking into account her disability absence from the Branch, which was one of a number of reasons cited, the others being holidays, the TOIL and training. We do not have an apportionment between these matters.

380. In respect of paragraph 10, this was not pleaded against the Second Respondent. In respect of paragraph 11 we find that the matters alleged constitute unfavourable treatment, although we are of the view that it is de minimus. In respect of paragraph 12 we find that the Respondents treated the Claimant in this way because of something arising in consequence of her disability, this being her partial absence from work as a result of her spinal injury. In respect of paragraph 13 we did not accept that the Respondents had shown that the treatment was a proportionate means of achieving a legitimate aim because we simply could not find that there was any justification of taking into account disability-related absences as part of the performance review. Paragraph 14 was not applicable here.

381. However, this allegation is out of time, it is a one off act and the Claimant put forward no circumstances to which we could engage our discretion to extend the time limit.

Paragraphs 3.11-3.17

382. As we have indicated above, we did not find this allegation made out and so the complaints fail and are dismissed.

Paragraph 3.18

383. We considered this matter after reaching our findings in relation to the dismissal. As we have indicated above, we did not find on a later consideration of those matters relating to the dismissal, that the Claimant's dismissal was because of her disability and further we would say that she was not dismissed because of something arising from disability. The Claimant was dismissed because of the irretrievable breakdown in the relationship with the other members of the Wandsworth Branch. Paragraph 12 of the List of Issues is therefore not met, the complaint fails and is dismissed.

Paragraphs 3.19 & 3.20

384. As we have indicated above, we did not find this allegation made out and so the complaints fail and are dismissed.

Indirect discrimination

385. Indirect discrimination is defined in section 19 of the Equality Act 2010. In essence indirect discrimination occurs where there is apparently equal treatment of all workers, but the effect of certain requirements and practices imposed by the employer puts workers with a certain protected characteristic at a particular disadvantage. If the Claimant is able to show that indirect discrimination has occurred, then a defence is available. If the employer can prove that requirements and practices imposed are justifiable then the treatment complained of will not be unlawful.

386. The Claimant's complaint of indirect discrimination is made against the Second Respondent and is set out at paragraphs 15 to 18 of the List of Issues.

387. At paragraph 15, the Claimant sets out the Provision, Criterion or Practices (PCPs) which she alleges that the Second respondent applied.

388. The Court of Appeal in Ishola v Transport for London [2020] EWCA Civ 112 7 February 2020, emphasised that in both indirect discrimination and reasonable adjustment complaints, the function of a PCP is to identify precisely what it is about the employer's management of the employee that causes a substantial disadvantage to that employee. A one-off act relating to an individual employee will not be a PCP unless there is an element of repetition.

389. We will consider each PCP in turn.

390. Paragraph 15.1, requiring employees to move workspace/workstations. We find that there was no general PCP as pleaded. There was a PCP of requiring employees to move workstations if they were required for a customer interaction. There was only one occasion on which the Claimant alleged that she was required to move rooms and one occasion on which the Claimant alleged her chair had been moved upstairs. We therefore find no such PCP was applied.

391. Paragraph 15.2, setting targets for employees to meeting their appraisal and rating employees in accordance to those targets. The Second Respondent submits that it would appear entirely uncontroversial that employers will need to have a means of monitoring the performance of their staff and that setting of targets would be part of that process. With this in mind, it seems self-evident then that such a PCP existed and was applied to the Claimant.

392. Paragraph 15.3, employees only being allowed the minimum statutory work breaks. This PCP is linked to the Claimant's Haemoglobin CC Blood Condition. The Second Respondent allowed its employees to take statutory work breaks. We could not find any evidence of any policy in place indicating that longer or more frequent work breaks were not permitted as required. For example, the OH Report in April 2017 made a clear recommendation for the Claimant to this effect at B1947. We did not find that the evidence supported the Claimant's allegation that she was not permitted longer breaks or that she suffered any detriment as a result. Whereas the evidence from the Second Respondent's managers including the First Respondent indicated that the general position was that all workers were able to take breaks as required. The Claimant relies upon the email at B702 as evidence that she was not permitted to take a work break. However, this email should be seen in context. It purely sets out the statutory entitlement of a 20 minute break after six hours of work. It does not say that other or longer breaks were not permitted. We therefore find that no such

PCP was applied.

393. Paragraph 15.4, requiring employees to fulfil all aspects of their job role without adjustment. We do not accept that such a PCP was applied. There is clear evidence in the case of the Claimant that the Second Respondent had provided adjustments to the Claimant's role. We were assisted by Ms Scarborough's submissions in this regard at paragraph 112 of her closing arguments. As she indicated, such a PCP is tautological in nature and amounts to a generic allegation that the Respondent failed to make reasonable adjustments without identifying the relevant PCP. In other words, it presumes a PCP to which those reasonable adjustments may apply.

394. Paragraph 15.5, refusing to postpone formal meetings until such time as an employee is fit to engage. It is clear from the correspondence within the bundle that the Second Respondent did postpone meetings. Nevertheless, there has to be some curb or cut off point whereby meetings have to take place. We also found nothing to indicate that the Claimant requested a postponement that was refused. We therefore find that no such PCP was applied.

395. Paragraph 15.6, dismissing employees in their absence. We were not provided with the disciplinary procedure. Whilst we were not taken to it, we could see that the Fair Treatment at Work Policy at B281-287 touches upon sickness absence and disciplinary and grievance procedures, it does not go into any detail of the actual procedures involved. We were taken in part to the Sickness Absence Policy. But essentially we could only go on what happened to the Claimant and the submissions made. This can only relate to the meeting on 10 September 2018 at which the Claimant was dismissed in her absence. As far as the Second Respondent was aware the Claimant was fit to attend the meeting but did not do so. We have no evidence to indicate beyond this incident that there was a practice of dismissing employees in their absence. We therefore find that no such PCP was applied.

396. Paragraph 15.7, refusing to re-hear dismissal hearings where an employee did not attend. As we have said in relation to paragraph 15.6, we can only go on what happened to the Claimant and the submissions made. An appeal is usually by way of review rather than re-hearing. In any event we accept that the Second Respondent's decision not to re-hear the Claimant's dismissal hearing was taken on the basis of her individual circumstances. There was no evidence of any policy or practice in respect of whether or not to rehear the hearing which an employee does not attend. We therefore find that no such PCP was applied.

397. With regard to paragraph 16 of the List of Issues we have in effect dealt with this when considering each individual PCP above.

398. With regard to paragraphs 17 and 18 of the List of Issues, respectively, do the applications of the PCPs put disabled people at a particular disadvantage when compared with persons who are not disabled, and did the application of the PCPs put the Claimant at that disadvantage.

399. We only found that the PCP at paragraph 15.2 was made out.

400. The Second Respondent has submitted that this PCP is not one that would place the majority of disabled employees at a substantial disadvantage and it is likely that the vast majority of disabled employees would be able to perform at a level that is substantially similar to a non-disabled person and therefore no adjustment to any targets would be required. The Second Respondent further submitted that it is not

a PCP that would generally disadvantage the disabled.

401. We accept this, but more to the point there was a lack of evidence of particular disadvantage beyond the circumstances of the Claimant's own case. This was not something that was within our own knowledge and experience. We have no evidence as to how to measure the disadvantage either nationally within the Second Respondent's workforce or within the Wandsworth branch. We had regard to the EHRC's Employment Code of Practice on indirect discrimination and disadvantage. We did feel that this was a case where the disadvantage was not sufficiently self-evident for us to identify and that it would have been beneficial to the Claimant to have provided some evidence be it statistical or otherwise in support of her complaint. We were unclear in what respects the PCP put disabled persons to a particular disadvantage when compared to those were not disabled and in what way the PCP put the Claimant at that disadvantage.

402. From our above findings it was clear that the Claimant found her appraisal ratings to be unfairly assessed because her expectation was that she should receive higher ratings than Met or Part-Met, as she had done in the past. However, she is not alleging that her ratings were lower because of her inability to perform but rather that they have been incorrectly recorded that she did not perform to the standard. But, in the context of indirect discrimination it was unclear what targets she was referring to, and how these impacted upon disabled people generally and to her specifically because of her disability. Targets includes a wide variety of matters. There was only one Behaviour Rating which the Claimant challenged which was affected by her various absences from work, one of which was disability related. Beyond this, there was no evidence to suggest that disability related absence was not generally properly taken into account in assessing performance. This one instance alone does not indicate that it was a PCP applied by the Second Respondent.

403. In any event, whilst we acknowledge that the Second Respondent has denied that it took into account the Claimant's disability related absences and reducing her rating on the basis of this and there is no evidence beyond one single occasion that the Second Respondent did this, we accept that taking into account absences from the Branch as part of the setting of targets and rating employees in accordance with those targets was a proportionate means of achieving a legitimate aim. The legitimate aim being the maintenance of performance standards by ensuring an operationally effective workforce with up-to-date knowledge and all compliance requirements.

404. We therefore find that the complaint of indirect discrimination fails in its entirety.

Failure to make reasonable adjustments

405. Under sections 20 and 21 of the Equality Act 2010, there is a duty upon employers to make reasonable adjustments for a disabled person. Failure to do so constitutes unlawful discrimination. Where an employer applies a provision, criterion or practice ("PCP") which puts a disabled person at a substantial disadvantage compared with people who are not disabled, the employer must take such steps as are reasonable to avoid the disadvantage. The purpose of the adjustment is to address the disadvantage.

406. The adjustment has to be reasonable. In considering whether an employer has met the duty to make reasonable adjustments, the Tribunal must apply an objective test. Although we should look closely at the employer's explanation, we must reach

our own decision on what steps were reasonable and what was objectively justified. Relevant factors can include the extent to which the adjustment would prevent the disadvantage, the practicality of the employer making the adjustment, the employer's financial and other resources, and the cost and disruption entailed.

407. There is no duty to make reasonable adjustments if the employer does not know and cannot reasonably be expected to know that the worker has a disability and does not know or cannot reasonably be expected to know that the worker is likely to be placed at a substantial disadvantage as a result.

408. The Claimant's complaints in this regard are set out at paragraphs 19 to 34 of the List of Issues. The Claimant relies upon her spinal injury in respect of the PCPs set out at paragraphs 15.1 to 15.7 of the List of Issues and her Haemoglobin CC Blood Condition in respect of the PCP at 15.3.

409. With regard to paragraph 19, the PCPs relied upon are thus the same as those relied upon for the complaint of indirect discrimination. As we indicated above, we only found the PCP at paragraph 15.2 to have been applied by the Second Respondent. As a result, the only applicable paragraphs within this section of the List of Issues are those in relation to that PCP at paragraphs 22 and 23.

410. Paragraph 22, states: did the application of the PCP at paragraph 15.2 put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, in that her appraisal rating was reduced due to disability-related absences? Having considered this matter from our findings we answer no. It does not follow that the rating of Met was given purely because of the Claimant's disability-related absences because it was one of four reasons given. Further, the Claimant was new to the PBM role and her previous appraisal was also rated Met. So there was no evidence that it was reduced because of this. Given our conclusion, it is not applicable for us to answer paragraph 23 of the list of issues.

411. As a result, we find that the complaint of failure to make reasonable adjustments fails in its entirety.

<u>Victimisation</u>

412. It is unlawful to victimise a worker because she has done *a "protected act".* In other words, a worker must not be punished because she has complained about discrimination in one or other of the ways identified under section 27 of the Equality Act 2010.

413. The Claimant's complaint of victimisation is set out at paragraphs 35 to 41 of the List of Issues.

414. The Claimant relies upon a number of protected acts listed at paragraph 35. Dealing with these each in turn: her grievance dated 1 August 2016; her grievance dated 9 August 2017; her email to Ms Newton and others dated 5 June 2018 timed at 15:34 hours or parts of that email; the ACAS conciliation and bringing claims against the First and Second Respondent on 15 September 2017, 12 April 2018 and 3 September 2018, with the Respondent becoming aware of the third conciliation on or before 19 September 2018. We find that all of these matters are protected acts within section 27(2) EQA.

415. With reference to paragraph 36, we heard no evidence or submissions to indicate

that the Second Respondent disputed that the Claimant had done these acts.

416. Paragraph 37 identifies the alleged detrimental treatment because the Claimant had done either or all of the alleged protected acts as those set out in paragraphs 3.1 to 3.20 of the list of issues.

417. We found that only paragraph 3.10 was made out factually. This allegation took place in January 2015 and the earliest protected act took place on 1 August 2016. It therefore follows that it simply cannot be detrimental treatment because of any or all of the alleged protected acts.

418. However, paragraph 38 of the List of Issues and Ms Boorer's written submissions at paragraph 80 also go on to set out in more detail the detrimental treatment alleged to be as a result of the protected acts.

419. Dealing with those set out at paragraph 38 first of all.

420. At paragraph 38.1, that the Second Respondent failed to uphold the Claimant's grievances. We would note that this is not completely correct. The first grievance was partially upheld on 28 November 2016 and on appeal on 23 February 2017. The second grievance was rejected on 24 January 2018 and on appeal on 3 September 2018.

421. With regard to paragraph 38.2, that the Second Respondent subjected the Claimant to an investigation instead of mediation with a disingenuous process with a pre-determined outcome. This is set out in a number of sub-paragraphs. In respect of sub-paragraphs 38.2.1 to 38.2.3, that confidential meeting notes had been shared by the mediator, employees had refused to engage with the mediation process, malicious comments had been made by employees about the Claimant to the investigator, respectively, we find no evidence that these incidents happened. With regard to sub-paragraph 3.8.2.4, the holding of the meeting on 10 September 2018 without inviting the Claimant, we find that this was not the case. The Claimant was invited to the meeting but unfortunately she did not receive the letter of invitation.

422. With regard to those matters at sub-paragraphs 38.2.5 to 38.2.10, these matters all relate to matters of dismissal and we came back to them after considering the unfair dismissal aspect in as far as it might impact upon our findings here.

423. With regard to sub-paragraph 38.2.5, we accept that the Second Respondent had at the point of dismissal relied on out of date evidence, although attempts were made to update it during the disciplinary hearing and later during the appeal stage.

424. With regard to sub-paragraph 38.2.6, we were unclear what redacted documents the Claimant was referring to (it could possibly be the Case Summary document or the redacted version of the Mediation Report we were referred to at B2683e), but we have found that the extent of any inaccuracies in the case management summary were unsubstantial and we do not accept that incorrect advice regarding an awareness of the number of employees working in the Branch was given to the decision-maker.

425. With regard to sub-paragraph 38.2.7, we concluded this most likely to be a reference to the email that the Claimant sent to Ms White, but she deemed inappropriate to pass onto Mr Crouch (which we deal with at paragraph 454 below).

426. With regard to sub-paragraph 38.2.8, whilst the Second Respondent refused to re-hear the dismissal hearing when aware that the Claimant had not received the invitation to the dismissal hearing, Mr Crouch reviewed his decision in the light of the information provided by the Claimant and the Claimant appealed and the matter was considered at an appeal hearing by way of review.

427. With regard to sub-paragraph 38.2.9, we do not accept that the Second Respondent conducted a sham appeal and there is no evidence in support of this assertion.

428. With regard to sub-paragraph 38.2.10, it is true to say that the Claimant's employment was terminated whilst she was off sick.

429. However, taking each of the above matters together and considering paragraphs 39, 40 and 41 of the list of issues, in as far as any of these events may have taken place after the alleged protected acts there is simply no evidence to support any causal link beyond their temporal closeness.

430. The complaint of victimisation therefore fails and is dismissed.

Unfair dismissal

431. Section 98 of the Employment Rights Act 1996 sets out how an Employment Tribunal should decide whether a dismissal is unfair. There are two basic stages. Firstly, the employer must show what was the reason, or if more than one, the principal reason, for the dismissal. The reason must be one of the four potentially fair reasons set out in section 98(2) or some other substantial reason of a kind such as to justify dismissal. Secondly, the Employment Tribunal must then decide in accordance with section 98(4) whether it was fair to dismiss the employee for that reason.

432. We first considered whether the Second Respondent had shown a potentially fair reason for the Claimant's dismissal within section 98(1) and (2) ERA 1996.

433. We then turned to consider whether this was a sufficient reason for the Claimant's dismissal within section 98(4) ERA 1996. This involves an examination of both the way in which the Respondent dismissed the Claimant (the process followed) and the reason for the dismissal (the substance).

434. We also had regard to the test contained within BHS v Burchell [1979] IRLR 379, EAT relating to conduct dismissals. This requires us to consider the following:

(a) Whether the employer believed that the employee was guilty of misconduct;

(b) Whether the employer had in mind reasonable grounds upon which to sustain that belief; and

(c) At the stage at which the employer formed that belief on those grounds, whether s/he had carried out as much investigation into the matter as was reasonable in the circumstances.

435. When assessing whether the Burchell test has been met, the Tribunal must ask itself whether what occurred fell within the 'band of reasonable responses' of a reasonable employer. This has been held to apply in a conduct case to both the decision to dismiss and to the procedure by which the decision was reached. (Sainsbury's Supermarkets v Hitt [2003] IRLR 23, CA).

436. In addition, we remind ourselves that we must be careful not to substitute our own decision for that of the employer when applying the test of reasonableness.

437. The Claimant's complaints of unfair dismissal is set out at paragraphs 42 and 43 of the list of issues.

438. The list of issues asks us to approach this matter slightly differently.

439. At paragraph 42 we are asked to determine the principal reason for dismissal and whether it was a potentially fair reason in accordance with section 98 ERA.

440. Dealing with the principal reason for dismissal first of all. It seems clear that the reasons for dismissal were that the Claimant was not able to work in the Wandsworth Branch because of the breakdown in work relationships with the other members of staff there which emerged from the mediation process and she was not able to work outside the Wandsworth Branch because of her disability. We likened it to the chicken and egg. Which came first?

441. We considered the parties submissions at paragraphs 142 and 143 of Ms Scarborough's closing arguments and paragraph 83 and 84 of Ms Boorer's submissions as amplified orally.

442. Ms Scarborough submitted that the principal reason for dismissal was some other substantial reason, namely that the Second Respondent was unable to provide the Claimant with work outside the Wandsworth Branch because of its duty of care to her and it was unable to provide her with work inside the Wandsworth Branch because of its duty of care to the other staff there. She further submitted that it was incorrect to argue that the Claimant was dismissed because of her disability in that she could not work anywhere else other than Wandsworth. It was not that she could not work in Wandsworth because of her disability, it was because of the breakdown in the relationship with her colleagues. In the event, that we found that the Claimant was dismissed because of her disability, she submitted that it was a proportionate means of achieving a legitimate aim in exercising the duty of care to the Claimant and the other employees and there being no other alternatives (which to us appeared to be addressing both the unfair dismissal and the dismissal elements of the disability discrimination complaints).

443. Ms Boorer submitted that this was not a capability dismissal and it was not a dismissal for some other substantial reason based on the irretrievable breakdown of working relationship on the basis that given the limited numbers of staff expressing negative views of the Claimant still in employment at the Wandsworth Branch. Our view was that this submission appeared to conflate the issue of identifying the potentially fair reason with whether it was a substantial reason.

444. To be clear, a capability dismissal is one which relates to an employee's skill, aptitude, health or any other physical or mental quality. Whilst the process leading to the Claimant's dismissal may have started as a capability review in terms of her ability to undertake her full role or otherwise, given her health issues, it moved onto a process of mediation between the Claimant and the other staff members which was not really anything to do with capability. We therefore do not see this as purely a capability dismissal.

445. Equally to be clear, some other substantial reason has to be of a kind such as to justify the dismissal of an employee holding the position which the employee held.

We see this as more of an SOSR dismissal. The Second Respondent's position is that following the outcome of the mediation report and further enquiries, it identified that the Claimant could not be accommodated in a role within the Wandsworth Branch because of the irretrievable breakdown in working relationships and further it was not possible to accommodate the Claimant in a role outside the Wandsworth Branch because of her health reasons, which limited the scope to accommodation to a role within the Wandsworth Branch. Whilst we accept that the Claimant disputes the issue of irretrievable breakdown, at this stage we only have to determine whether the Second Respondent has shown a potentially fair reason for dismissal, and if more than one, the principal one, and not whether the reason identified is fair or not. We do not find that the Claimant was dismissed because of her disability or from something arising from her disability.

446. Case law has identified that the reason for dismissal will be a set of facts known to the employer at the time of dismissal or a genuine belief held on reasonable grounds by the employer which led to the dismissal (<u>Abernethy v Mott, Hay & Anderson</u> [1974] IRLR, 213, CA). We would add that an employer is not prohibited from giving one reason for dismissal at the time or immediately afterwards and another once Employment Tribunal proceedings have been started, although it might affect the employer's credibility. To be fair, this has not been raised by the Claimant and we do not see that it is a relevant consideration here. But the issue is that it is the true reason for dismissal at the time of dismissal which is relevant and whatever label is given to this does not necessarily affect a respondent's credibility.

447. We therefore find the potentially fair reason for dismissal is as set out at paragraph 42.2 of the list of issues: that the Claimant was dismissed because of the irretrievable breakdown of the working relationship between her and her former colleagues within the Second Respondent's business.

448. Paragraph 43 asks us to address the reasonableness test within section 98(4) ERA and the band of reasonable responses test. The particulars relied upon are set out at paragraph 43.1. We will deal with these each in turn below.

449. Paragraph 43.1.1, failing to properly investigate if the Claimant was able to return to work. We were unclear of the specifics of this. We did not understand on what basis this is pleaded, whether it is to do with the Claimant's fitness to return in the circumstances to the Wandsworth Branch or whether it was because the mediation process had finished or over what period of time the failure had taken place. It is an extremely vague allegation and is very difficult to determine without being clear what it meant.

450. Paragraph 43.1.2, that the Second Respondent relied on information that was by the time of dismissal seven months out of date. We know that the mediation report was issued in May 2018, based on interviews conducted in March 2018 and the formal meeting at which the dismissal decision was made took place on 10 September 2018.

451. We considered what steps if any the Second Respondent took at the time to address this? At his hearing, Mr Crouch recognised that the matter had been going on for some time and wondered how many of the people interviewed were still working at the Branch, albeit in the context of not suggesting that the Claimant could go back to work there and that he did not feel it would probably change the outcome (at B2972). In response, Ms Reid stated that it was something that they could explore during an adjournment and that hopefully it would help Mr Crouch form his decision.

452. From our findings, we conclude that it was reasonable for the Second Respondent to have sought to update the position regarding the other members of staff and whether they were still in the Branch or not as Mr Crouch did. He could have made better enquiries and, rather than relying on HR, made those enquiries himself, but we do not find that what he did was unreasonable.

453. Paragraph 43.1.3, that the Second Respondent relied on information related to 4 unknown employees despite more than 50% subsequent staff turnover. We have covered this in the above paragraphs on 43.1.2. We have indicated our concerns that evidence as to numbers of staff working at the material time, those who participated in the mediation process and those who remained by the time of dismissal was not clear. Indeed, we had to undertake an almost forensic process to even determine this on balance of probability. Whilst someone was due to retire towards the end of the year, we do not find it reasonable to have expected Mr Crouch to have made this enquiry in September 2018. As far as we could determine there was only one new employee who joined the Branch in March 2018 and so it was not a 50% turnover as alleged.

454. Paragraph 43.1.4, that the Second Respondent failed to address the unacceptable conduct highlighted within the mediation report, i.e. staff resentment based on "indirect experience" and perception. We find that it was not reasonable to expect the Second Respondent to start delving or digging into the findings of the mediation report to the degree suggested. The Second Respondent hired an independent organisation to interview staff in the confines of mediation and to seek a resolution. It is not reasonable as the Claimant suggests to expect the Second Respondent to cross-examine each person over what they think and why, and to come forward to a formal meeting. That would be a far more destructive process to undertake. At this stage, the Second Respondent was looking to place the Claimant back into work, if possible, and if it was, then it would have been more a case of holding a welfare meeting with staff to discuss how to achieve that.

455. Paragraph 43.1.5, that the Second Respondent entered the process with a closed mind. The original invite letter at B2862 states in bold that the purpose of the formal meeting originally scheduled for 2 July 2018 was to consider whether it was tenable for the Claimant's employment with the Second Respondent to continue given the findings made by the mediation report and the Claimant's inability to move to an alternative branch. In the subsequent invite letters following the rescheduling of the meeting, this is softened (at B2935). The letters were drafted by the HR representative who was at the final meeting, namely Ms Reid. But Mr Crouch made the decision to dismiss (which from the evidence was carefully considered) and there is no evidence that he had a closed mind or was led by Ms Reid. Although, we acknowledge that we could understand why the Claimant thought from the first letter that the matter was done and dusted and afterwards given that the meeting was held in her absence.

456. Paragraph 43.1.6, that the Second Respondent failed to obtain proper medical/OH advice and ignored the Claimant's GP's advice as to whether the Claimant was fit for the dismissal hearing. The Second Respondent did obtain proper medical/OH advice. Whilst it is true that they ignored the GP's advice, it was reasonable of them to follow the advice given by their OH specialists. Further, they did offer the adjustments recommended by OH. It was at their discretion to decide whether to go ahead or not. Whilst they did not carry out the stress assessment, the OH report did not say this needed to be done before the meeting. We do not find that the Second

Respondent acted unreasonably.

457. Paragraph 43.1.7, the Second Respondent failed to carry out a thorough investigation. This is a very wide allegation and goes further than what is expected under Burchill. The Second Respondent commissioned and obtained a mediation report, it invited the Claimant to a meeting to discuss the outcome of that report, there were several delays in arranging the meeting, there was an OH report and finally the meeting took place on 10 September 2018. The Claimant did not attend because she did not receive the invitation. By then the mediation report was out of date and the Second Respondent made enquiries to seek an update. At that stage should the Second Respondent have then carried out its own investigation? We find it was not reasonable to expect the Second Respondent to carry out a further investigation beyond checking that nothing had changed within the mediation report and specifically whether the employees involved were still working there.

458. Paragraph 43.1.8, the Second Respondent failed to provide the Claimant with details of the complaints made against her by the other employees. It should be remembered that these were matters that came up during a confidential mediation process. Is it reasonable to proceed on this report without putting the details of the complaints made against the Claimant to her? We considered paragraph 9 of the ACAS Code of Practice which is analogous to this process and also the principles of natural justice.

459. The mediation was held with the Claimant and other members of staff in confidence. The four members of staff involved raised concerns about working with the Claimant but it was not sufficiently clear what they were and moreover who said what. Having got this report was it reasonable for the Second Respondent to proceed on it alone or move to a structured process? The Claimant had insufficient information to answer the concerns whether she attended the meeting or not. She was in effect having to defend herself against insufficient information.

460. Was the reasonable step to adjourn and move to a disciplinary investigation into the concerns of the other staff and whether there was a sufficient basis on which to take disciplinary action against the Claimant? The mediation report was never meant for this purpose. However, the process followed by the Second Respondent jumped to the consideration of conduct/ability for her to return to Wandsworth given these issues. There was nothing that the Claimant could have done or said to change the outcome of the hearing on the basis of the mediation report alone. It was a unique situation created by what appears to have been an unchallenged contention by the Claimant that she could only work in the Wandsworth Branch. We have to acknowledge that this was a difficult situation for the Second Respondent.

461. However, there was no attempt to raise the possibility that if the Claimant faced dismissal, she could have been more flexible about working elsewhere or enquire into whether her working hours coincided with those who had problems with her or vice versa. We were not even told whether the other members of staff worked part-time or full-time. But there were other possibilities that could reasonably have been explored without jumping to dismissal. These were reasonable considerations.

462. Of course the Second Respondent had concerns about breaching the confidentiality of those interviewed as part of the mediation process. However, the situation had reached a stage where someone was facing dismissal because of the report and it cannot be reasonable to do so on the basis of anonymous and unspecified concerns which the accused person cannot address. An employer reasonably should have

gone back to those participants and explained to them that this is moving to an official process and you need to come forward and raise your concerns formally. In crude terms it became a “put up or shut up” process.

463. We therefore find that the answer to paragraph 43.1.8 is yes and that this in turn impacts upon paragraph 43.1.7 as to a thorough or fair investigation.

464. Paragraph 43.1.9, that the Second Respondent failed to provide the Claimant with the right to be accompanied. There was no failure to provide the Claimant with the right of accompaniment. The Claimant did not request the right of accompaniment and did not attend the meeting although she was notified of her right of accompaniment within the invite letters. The statutory right was never breached and in any event is not a complaint that has been brought.

465. Paragraph 43.1.10, that the Second Respondent failed to provide the Claimant with the evidence, including as to the numbers or identity of the staff still at the branch who had given negative feedback. This in effect raises the same matter which we have already dealt with at paragraph 43.1.8.

466. Paragraph 43.1.11, that the Second Respondent failed to offer the Claimant the opportunity to engage and present her case. We find that the answer to this is yes in as far as we have found that there were lack of attempts by the Second Respondent to contact her before proceeding to hold the meeting on 10 September 2018. It was not unreasonable to expect that enquires as to her lack of attendance could have been made, particularly given her previous attempts to attend the meeting, her ill-health and her previous behaviour with regards to any issue at work.

467. At paragraph 43.1.12, that the Second Respondent deliberately ignored points put forward by the Claimant and failing to consider the Claimant’s written submission. We do not know what points the Second Respondent deliberately ignored or what written submissions were being referred to. Perhaps it is a reference to B2938? This is an email dated 16 August 2018 from the Claimant to Ms White raising concerns about the invite letter and which Ms White did not pass to Mr Crouch for consideration because she did not believe it appropriate to do so. If that is the case, then given that it clearly contained representations from the Claimant she should reasonably have done so.

468. At paragraph 43.1.13, that the Second Respondent based the decision to dismiss on heavily redacted documents with information removed which assisted the Claimant. There were comments removed from a document at the Claimant’s behest. There is also the redacted version of the mediation report which was presented to Mr Crouch. If this is a reference to the latter, we have made the point that Mr Crouch’s evidence was that he was not affected by the redactions and would have ideally liked to have spoken to the Claimant at the meeting. We do not know the reason for the redactions, but it must be right that if the final version of the report was the unredacted version it should have been presented to Mr Crouch for consideration.

469. We also find that it was not reasonable to expect the Second Respondent to provide the Claimant with the details of the complaints made by the other members of staff and their names without their permission because this would have been in violation of the confidentiality of the mediation process. In any event, Mr Crouch did not know any more than the Claimant did as to the names and details of the complaints. That is not to say that the Second Respondent should not have moved to a formal process

and even got the staff concerned to put their complaints forward in writing or if they were not willing to do so then take the view that they were abandoned, the “put up or shut up” that we referred to above.

470. At paragraph 43.1.14, the Second Respondent relied on an inaccurate Case Summary. We are not sure what case summary is being referred to. If it is the one at B2217, the Claimant does not state beyond it being incorrect what the inaccuracies are and they are not in any way material inaccuracies. We think it most likely that the reference is to the case summary at B3095. However, the Claimant relies on the same inaccuracies in this document without further specifying what they are as she does in the Case Summary at B2217 - reference the Claimant’s email of 16 August 2018 at paragraph 4 of B2938.

471. Paragraph 43.1.5, the Second Respondent failed to have the decision to dismiss taken by an independent person. There is nothing to indicate that the decision was taken by someone who was not an independent person within the organisation. It was reasonable of the Second Respondent to appoint Mr Crouch to conduct the meeting. It is not reasonable to expect the Second Respondent to go outside the organisation.

472. Paragraph 43.1.16, the Second Respondent reached a conclusion which the decision-maker was only “fairly comfortable with”. This was an isolated comment made during the meeting on 10 September 2018 in which Mr Crouch was asked by Ms Reid whether he is “fairly comfortable” with the evidence (at B2891). We accept Ms Scarborough’s submission that this appears to be conversational rather than formal language and Mr Crouch’s affirmative response cannot reasonably be regarded as expressing any genuine degree of uncertainty in the context of the recorded agreement. We further accept that it would not necessarily be outside the band of reasonable responses to make a decision on the basis of fair certainty which is arguably consistent with the balance of probabilities test. In any event we did think that no manager should be anything but fairly comfortable with dismissing an employee.

473. Mr Crouch reconsidered his decision in the light of the Claimant’s letter dated 24 September 2018 at B2991 and responded at B3002 although in essence he endorsed his decision based on the mediation report.

474. Turning to the appeal process. Whilst the Second Respondent did everything it reasonably could in conducting the appeal process, this continued on the same flawed basis which had led to the original decision. It was a thorough and reasonable process in as far as it went but it followed a flawed basis.

475. We therefore find that the dismissal was both procedurally and substantively unfair.

476. We then considered whether a reduction in compensation should be applied following the case of <u>Polkey v A E Dayton Services Ltd</u> [1987] IRLR 503, in which the House of Lords held that a dismissal may be unfair purely because the employer failed to follow fair procedures in carrying out the dismissal.

477. In the circumstances, we do not find it appropriate to make any <u>Polkey</u> reduction.

478. Under section 123(6) of the Employment Rights Act 1996, if the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the Claimant, it can reduce the compensatory award proportionally as it thinks fit. This is known

as “contributory fault” and Tribunals usually make a percentage reduction, eg 25 per cent or 50 per cent, but in very rare cases, it can deduct 100 per cent.

479. There are two separate questions: (1) did the Claimant’s conduct cause or contribute to the dismissal? and (2) if so, by how much would it be “just and equitable” to reduce any compensatory award made?

480. In the circumstances, without knowing anything more about the issues arising from the mediation report how can we assess any degree of contributory fault. It was also not the Claimant’s fault that she could only work at Wandsworth, it was based on health considerations and the Second Respondent accepted this.

Further disposal

481. There will be a one-day remedy hearing to be listed after allowing for a period of time in which the parties are encouraged to reach an amicable resolution. The parties should let the Employment Tribunal know whether a remedy hearing is required or not by 31 May 2021. If one is required, a date will be listed in liaison with the parties.

Employment Judge Tsamados
Date: **31 March 2021**

Appendix: final list of issues and further particulars of false and demeaning comments.

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE