EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**
Respondent	
Miss Nilofar Hossain	Cabinet Office

Heard at: London Central Employment Tribunal (by video CVP)

On: 1, 2, 3, 4, 5, 8 March 2021 (9, 11 March 2021 in chambers)

Before: Employment Judge Adkin
Ms C I Ihnatowicz
Mr S Hearn

Representations

For the Claimant: Mr P O'Callaghan, Counsel
For the Respondent: Ms J Thelen, Counsel

JUDGMENT

All claims of disability discrimination brought under sections 13, 15, 19, 20-21, 26 and 27 of the Equality Act 2010 not well founded and are dismissed.

REASONS

Procedural matters

1. This hearing was a fully remote hearing conducted using the CVP video platform. It was open to the public and indeed there was at least one observer who was not connected to either of the parties.

2. The Tribunal granted applications from each side to rely upon two further witness statements each on the first day of the hearing. Our reasons for this were given orally.

3. At the outset of the Claimant's evidence, Ms Thelen for the Respondent invited the Claimant to give evidence in the event that she wished to rely upon a "just and equitable" argument to extend time in respect of three allegations of discrimination that were on the face of it out of time. That invitation was declined. At the conclusion of the evidence, after Counsel had exchanged skeleton arguments, and after Mr O'Callaghan had read the submissions of Ms Thelen dealing with time/jurisdiction, he applied to recall the Claimant to deal with extension of time. For reasons given orally, that application was refused.

4. The parties should apply within 14 days of the date that this document is sent out should they wish to have written reasons.

The Claim

5. The Claimant presented her claim on 8 August 2019.

6. An agreed list of issues is attached as an appendix to this claim.

Evidence

7. The Tribunal received an agreed bundle of documents of approximately 1,500 pages.

8. Written and oral evidence was heard from:

   8.1. the Claimant (including two supplementary statements);

   8.2. Mr D O'Gorman;

   8.3. Mr J Hughes.

9. For the Respondent written and oral evidence was heard from:

   9.1. Mr R Walker, the Claimant's line manager (including one supplementary statement);

   9.2. Ms L Aldous, the Claimant's second line manager until May 2019 and acting line manager thereafter;

9.3. Ms D Taylor;

9.4. Ms S Sanghvi;

9.5. Ms K Evans.

9.6. A written statement was received from Ms S Begum, Respondent's solicitor, though she was not called to give evidence.

10. References below thus [95] are to page numbers in the agreed bundle. References in this format [KE12] are to the paragraph in a particular witness's witness statement.

Findings of fact

Disability

11. The Claimant and Respondent agree and the Tribunal accepts that the Claimant is a disabled person within the meaning of s.6 Equality Act 2010 by virtue of her diagnosis of limited cutaneous systemic sclerosis Scleroderma and Secondary Raynaud's phenomenon.

12. The Claimant was diagnosed with Raynaud's phenomenon in July 2018. This is condition which results in poor blood supply to the fingers. This condition can be aggravated by stress. Medication can help to relieve symptoms rather than cure it.

13. The Claimant was diagnosed with Scleroderma, limited cutaneous systemic sclerosis in September 2018. This is a serious chronic autoimmune condition which causes pain and inflammation and sometimes blistering in the skin and of particular relevance to this claim hands and fingers. It can be exacerbated by stress. It is treated by steroids, which can mitigate but not cure the symptoms.

14. The Tribunal has not had the benefit of a detailed expert report relating to the Claimant's conditions from a Consultant Rheumatologist, but there is some correspondence and in particular a letter of 30 October 2019 from the Claimant's GP. The Claimant herself (assisted by Mr O'Gorman) prepared a 14 page occupational health referral in November 2018 which contains some details of her conditions and their symptoms.

Employment history

15. On 2 April 2013 Miss Nilofar Hossain ("the Claimant") started work at the Cabinet Office at 70 Whitehall in Westminster.

16. On 16 January 2017 the Claimant started her role as a B2 grade policy advisor at the Cabinet Office focusing on Cyber Security.

17. In May 2017 Dr Emma Wharram ceased being the Claimant's line manager and Ms Krisztina Katona temporarily became her line manager.

18. In July 2017 the Claimant obtained Developed Vetting ("DV"), a level of security clearance for confidential government business.

19. On 7 November 2017 Robert Walker, a Senior Policy Advisor was introduced to the Claimant via email as her new line manager. He says at the time he took over line management he was told by Ms Katona that the Claimant had been absent from work since around September 2017 with a stress-related condition connected with the DV security clearance procedure. He also says that he was told at that time that a decision had been made not to formally record absences as sick leave because the Claimant would be very likely to be difficult about it. The Tribunal has no reason to doubt Mr Walker's evidence on these points.

20. On 16 November 2017 Mr Walker offered the Claimant an Occupational Health referral at that time or on her return to the office.

21. On 21 November 2017 the Claimant suggested that an Occupational Health referral should wait until she had seen her specialist at Guy's and St Thomas' NHS Trust. This approach was agreed by Mr Walker.

22. On 6 December 2017 the Claimant returned to work then went on annual leave from 18 December 2017.

2018

23. On 8 January 2018 the Claimant returned to the office from annual leave.

24. On 13 February 2018 the Claimant commenced a period of sick leave until 21 February 2018 on the advice of her GP due to shoulder pain.

25. On 14 February 2018 Mr Walker emailed the Claimant and said that if she agreed, on his return from leave, he would make an Occupational Health referral.

26. On 15 February 2018 the Claimant sent an email to Mr Walker and Ms Katona (Mr Walker's then line manager) explaining that she had been advised that the best time for an Occupational Health referral would be when a specialist investigation, and outcome of treatments, had been completed. Mr Walker agreed this.

27. On 18 June 2018 the Claimant was awarded a "met" performance rating, which was the middle grading on the 3 point scale then in place, for the year ending 31 March 2018.

28. On 25 June 2018 a further period of sick leave for the Claimant commenced which lasted until 16 July 2018. This was precipitated by the Claimant's skin becoming sunburnt and very painful, resulting in her needing to attend a specialist on 11 July.

29. There was regular email communication between the Claimant and Mr Walker during this time. His approach was sympathetic and appropriate. He asked her to set up an out of office and asked her to forward him a document, but only if she was well enough to do so. He granted a request for her to work from

home later on when she was recovering. He suggested that if she wished to speak to a female manager rather than a male manager then that could be arranged.

30. In July 2018 the Claimant was diagnosed with Scleroderma and Secondary Raynaud's disease.

Rooms

31. Part of the Claimant's claim is that she was excluded from working with members of the team in room 335, due to the lack of ability to use dictation software in that room.

32. We find that the Claimant worked in two main locations at 70 Whitehall, room 335 and 343, which were next door to each other.

33. Room 335 is an accredited higher classification secure space (accommodating around 75 people at any one time). There is no WiFi connection in this room itself. At the material time there were a variety of different systems offering access to material of different security classifications, specifically, Apollo (an operating system) secure OFFICIAL laptops, OFFICIAL Cabinet Office desktop terminals, Rosa desktop terminals for work classified at SECRET or below; and i-Cdesk, which is a desktop IT solution for operating up to TOP SECRET.

34. Room 343, the smaller of the two rooms, accommodated around 20 people and is a regular office space (i.e. not an accredited higher classification secure space) with access to Rosa terminals and Government WiFi to use OFFICIAL laptops. The workstations in this room allow staff to connect their laptops to desktop terminals in some instances. We heard evidence which we accept that DV clearance was not required before this room could be used.

35. Both rooms operated a "hot-desking" policy, in which desks could be taken by employees on a first come basis.

36. On 18 July 2018 the Claimant wrote to Mr Walker "just let you know I am in room 343 for the morning".

Workstation assessment

37. On 27 July 2018 the Claimant agreed to complete a workstation assessment and sent the completed Workstation Questionnaire to the departmental Health and Safety Team.

38. The Claimant was on annual leave for three weeks during this period between 30 July 2018 – 17 August 2018.

Workplace assessment & keyboard incident – September 2018

39. On 5 September 2018 Mr Mukesh Jethwa (Health and Safety Advisor), met with the Claimant to conduct a workplace assessment. His detailed recommendations following that assessment are contained in an email dated 12 September which take up two pages of close type [95-96]. That includes

ordering various items of equipment and also a recommendation that the Claimant should not use the ROSA keyboard (in room 335) until a more suitable replacement was found.

40. On 6 September 2018 at 16:41 the Claimant wrote an email to Mr Walker

> "Hello Rob
>
> As instructed by you, I used the large keyboard on Rosa today and this has caused me to suffer pain in my hand.
>
> As discussed with you yesterday Mukesh [Jethwa] is looking at alternative keyboards as his opinion as Cabinet Office Health and Safety Adviser is that the large keyboard is likely to cause pain for someone suffering Raynauld.
>
> I think it is best if I use the old system on Apollo and/or work from home until a suitable keyboard is in place to allow me to use the new system on Rosa pain-free"

41. The Claimant's oral evidence was that she used this keyboard for three hours. We have not heard evidence suggesting that the Claimant raised a problem at the time that she was using the keyboard.

42. The Claimant was an experienced employee not in an especially junior role. We do not detect that she had a difficulty raising problems with Mr Walker nor that she was intimidated by him. We infer that the effect of the keyboard causing a problem was not particularly troubling at the time but perhaps became clear later on. We note that she appears to have had no difficulty in suggesting what should happen to avoid using this particular keyboard.

43. On 10 September 2018 Mr David Rowland (HR Caseworker) emailed to ask Mr Walker if an Occupational Health referral had been made. Mr Walker responded that one had not been made as consent had been refused by the Claimant as her diagnosis had not been completed.

44. Mr Walker replied

> "Sorry to hear you're finding it stressful. I don't want it to be that way at all! Mukesh and Andrew seem to be working hard to get a fix for the keyboard, so hopefully it shouldn't be too long until the equipment (and anything else required) can be in 335."

45. On 12 September 2018 Mr Jethwa sent the Claimant an email setting out the outcome of the workplace assessment which had taken place on 5 September 2018.

46. He requested a smaller chair for the Claimant, with a suggestion that another second chair would be ordered for the ROSA workstation, which would need to be permanently allocated to the Claimant. He recommended using a separate keyboard and one which works with the faintest of touches. He noted the

Claimant's experience that the Apple MacBook, as issued to her by the Respondent to use at home, enabled her to do that. She was working "flexibly" at home using this. He had managed to order two Mini Apple keyboards, despite the fact that he had initially told her that it might not be possible to do this.

47. He suggested three possible "mice" – the Penguin mouse, which is a vertical mouse, the handshoe mouse and an Anir joystick mouse. In fact he ordered all three so that she could try them.

48. He also approved a second Apple laptop. Both laptops issued to the Claimant were to be loaded with dragon dictate software.

49. For use with the ROSA terminal, a Goldtouch GO2 split keyboard was suggested as the mini keyboard was not available on an approved product list for this system.

Deadline allegation

50. On 14 September 2018 Mr Walker sent an email to six members of his team at 18:21 regarding assignments while he was on annual leave. This email was copied to the entire team, including the Claimant. There were four bullet points relevant to the Claimant. The material one for present purposes was "complete a draft of [roles and responsibilities] doc and letter for Lucy to sign off before going to Tom. Please get a draft to Lucy by midweek." [103.2]

51. Mr Walker wrote about this incident much later as part of the internal investigation on 5 July 2019:

> "even though I had asked for something to be completed by a certain date in my handover I would expect an experienced B2 like [the claimant] to be able to have a conversation with the DD (who knew about her medical conditions already) in my absence and to revise this if needed, which is exactly what happened. To note I was building in extra allowances for the completion of work before this period of A/L and if I put the incorrect date down in the handover email it was not malicious, more an oversight from trying to run out the door on A/L" [880.40]

52. The Claimant's second line manager by this stage Ms Lucy Aldous confirms that she was requested to provide an extension to the deadline in Mr Walker's absence and that she did do so.

53. On 17 September 2018 the Claimant emailed Lucy Aldous to confirm that she would send her tasks outlined in the email of 14 September 2018 by the end of that week and copied Mr Walker.

54. On 21 September 2018 the Claimant emailed final drafts of the above work to Ms Aldous. She also emailed Mr Walker stating that she had previously asked

for a longer deadline than he had given her, to allow some time to help mitigate against suffering pain in reference to her disability. She said that she was very disheartened when he set the deadline in his email.

55. On 28 September 2018 Mr Walker sent the Claimant an email apologising for the confusion regarding the deadline for work set on 14 September 2018.

> "I hope you're feeling better after resting this week. My apologies about the misunderstanding from the deadline I set – I certainly didn't intend for this to cause you any pain. We can certainly discuss on your return the way we set deadlines for your work."

Further medical advice

56. On 21 September 2018 the Claimant had an appointment at Guy's hospital where she was informed of her diagnosis of Scleroderma and Raynaud's disease. Two days later the Claimant sent Ms Aldous an email, with Mr Walker copied in, with an update following her diagnosis.

57. On 24 September 2018 the Claimant was advised by her doctor not to work the week of 24 September 2018.

Workplace equipment implementation

58. Mr Jethwa sent Mr Walker an email highlighting that all three IT environments where the Claimant worked needed to be considered for a workplace assessment, namely room 335 and room 343 in 70 Whitehall, and her home. The keyboards had been supplied. He confirmed that the request for a second Apple laptop and for Dragon dictate to be installed had not yet been completed but would be completed now.

59. On 26 September 2018 a second laptop was requested for use at home as well as two headsets for Dragon Dictation. Mr Walker emailed Mr Jethwa expressing concern that the request for further equipment was only just then being made, and requested a meeting to understand what needed to be put in place.

60. On 30 September 2018 the Claimant confirmed to Mr Walker in an email that the break from work had reduced pain in her hands and fingers. Pending the adjustments, it was agreed that she would work from home, check her emails, dial into meetings and work with reduced typing.

61. On 1 October 2018 at the suggestion of Cabinet Office Health and Safety Mr Walker requested a further workstation assessment from the Civil Service Workplace Adjustments Team (CSWAT). Ms Cath Bailey (CSWAT) was allocated to deal with the referral. A completed enquiry form was submitted to CSWAT.

62. On 1 October 2018 Mr Walker wrote an email to the Claimant, saying that he was happy for her to work from home. He informed her that a new laptop would

be available the following day. He asked the Claimant to make enquiries of the Dragon software training provider.

63. The Claimant replied "If you would kindly let me know the time and room, if available please due to the sensitiveness of the discussion."

64. In an email dated 2 October 2018 Mr Walker confirmed that the Claimant now had the following:

> "2 x Official laptops with Dragon software loaded
>
> 2 x Mouse
>
> 2 x Keyboard
>
> 1 x Specialist chair
>
> 1 x foot rest"

65. Other equipment that was still outstanding were headsets for Dragon software, 2 keyboard wrist rests and software training, which she reiterated that the Claimant had been requested to look into and arrange. The Claimant was expected back in the office on 8 October.

66. Mr Walker emailed David Rowland, HR case manager (copying Susan Kirk HRBP) regarding a welcome chat that he had had with the Claimant that morning. He said [135]

> "It was going relatively well until I mentioned to her that I was advised by HR that she needed to take sick leave last week as we couldn't offer disability leave as the recommendations had not come from an occupational health professional, and that she was off with the pain in her hands, so she could provide a self cert or fit note.
>
> Nilofar became very upset after this saying she feels unsupported and undervalued. She feels that the pain in her hands was made worse by having to meet unreasonable deadlines at work and we haven't put all the reasonable adjustments in place – leaving Cabinet Office liable. She then started to talk about our duty of care and the Employment Act. I restated this is what I've been advised and my hands are tied.
>
> She also said that her previous line manager and DD [deputy director] when in the same role offered her special leave one off with stress after her DV interview in mid 2017. She questioned why there is now double standards.
>
> I want to be 100% sure I'm saying the right thing and not leaving myself the business liable for anything, and making sure I don't make Nilofar feel any worse. This was very

> difficult and uncomfortable and I want to make sure I'm doing the right thing here in a complicated HR area…
>
> …
>
> I think this will become a big issue and I'd like HR support when talking to Nilofar"

67. Mr Walker was plainly in doubt about the HR advice he was receiving. Mr Rowland of HR on 5 October confirmed that special leave would be applicable after all.

68. On 5 October 2018 Mr Walker emailed the Claimant with an update on the provision of equipment. This email went into a significant amount of detail anticipating problems such as cold or snowy weather, sorting out the working environments for "official" and "Rosa", working together on deadlines, getting set up in room 343 and 335 ((working from home and 343 as a temporary measure), he chased up about Dragon training, and with regard to special leave, agreeing that the previous week will be special leave because she had been waiting for equipment. Mr Walker also said in that email that an Occupational Health referral would be sensible.

69. Also on 5 October 2018 Mr Walker entered the C's mid-year 1 April 2018 to 30 September 2018 performance marking on the Respondents IT system for the 1 April 2018 to 31 March 2019 reporting year, as "Achieved".

70. On 8 October 2018 the Claimant responded to Mr Walker's email of 5 October line by line, agreeing in the main with his suggestions but expressing disappointment that some items had not yet been sourced. On this day she was provided with wrist rests.

71. On 8 October 2018 Ms Cath Bailey (CSWAT) emailed Mr Walker and explained they were unable to make an Occupational Health referral without the consent of the member of staff.

Canteen conversation – 10 October 2018

72. On 10 October 2018 a conversation took place in the staff canteen between Mr Walker and the Claimant. There were other people nearby in the canteen. The conversation apparently took place there because of a dearth of other meeting rooms.

73. There is a dispute between the Claimant and Mr Walker about the extent to which the conversation on 10 October covered the Claimant's disability and longer term prognosis.

74. The Claimant sent a follow-up email at 17:50 that day entitled "Mid-Year Mark - Nilofar", in which she said the following:

> "I was very surprised that you announced my mid-year mark in the canteen today before our mid-year review discussion and I have not had the opportunity to provide you with evidence of delivery, which surely should be taken into consideration before any mark is decided. It would also be appropriate to take into consideration the very challenging and difficult circumstances I have delivered my work."

75. Although critical of Mr Walker in this email, the Claimant did not raise any concern about the topic of her disability or health or life expectancy being discussed in an inappropriate way or at all.

76. The Claimant submitted a 35 page "Formal Complaint" dated 23 June 2019. Section 3 of this document contained "my line manager's highly inappropriate communications to me". It is significant that this alleged highly inappropriate communication, i.e. talking to the Claimant about her death, does not feature in this document at all.

77. The Tribunal has had the benefit of reading later interviews as part of the internal investigation into this discussion, the witness statements prepared for this Tribunal hearing and the oral evidence given by both Mr Walker and the Claimant. We have also seen an email complaining about Mr Walker sent to Ms Aldous by the Claimant on 11 October 2018 [199.9] in which she says he has not managed her in a sensitive manner and delivers messages in a very functional way with no sympathy and in inappropriate environments. We have also seen an email sent to Mr Walker on 11 October 2018:

> "I am likely to cancel next Wednesday's 1:1 meeting because it is really unfair to put me in a position to discuss my diagnosis, disability, and reasonable adjustments in the canteen"

78. In the internal investigation, Mr Walker gave an account on 3.7.19 interview:

> "can't confirm exactly what happened but thinks they had a 121 in the canteen which might have crept into discussing her condition. Nilofar at the time said that she felt uncomfortable and Mr Walker did stop the meeting at the point. After that point rooms have been booked for each 121 after that. The meeting was a long time ago so can't remember the key points.

79. Mr Walker's evidence to us is that he does not recall the Claimant crying.

80. By contrast in the internal investigation the Claimant's version is that

> "he asked about the diagnosis and condition, and when it would affect her heart and lungs and become fatal. [she] was reduced to tears by [Mr Walker] in a public place due to highly inappropriate way [he] had spoken to her."

81. We find that the conversation did involve a discussion of the Claimant's disability in an area that was not private. We find that the Claimant did reach a point where she did not want to continue the conversation in this environment.

82. We do not accept the Claimant's evidence that Mr Walker went on to ask when and if it may result in serious health issues in the future for her including possible lung and heart failure and fatality. This is for four reasons. First, it is quite clear that her principal concern about the conversation at the time was that the mid-year Mark had been mentioned in the canteen rather than there had been an inappropriate discussion about her health. Second, although the Claimant complained both to Mr Walker and Ms Aldus in writing, she did not suggest that Mr Walker had gone as far as she now alleges. Third, we find that there is evidence of the Claimant exaggerating (for example the male assessor allegation discussed below), whereas we have found Mr Walker to be a reliable witness.

83. Moreover, we find it inherently unlikely that Mr Walker who throughout the correspondence with the Claimant is plainly sensitive to her difficult diagnosis and health matters generally, would in a face-to-face conversation be so crass as to initiate a discussion about the Claimant's possible death. As well as being insensitive, it is difficult to see how that could possibly have been relevant to the conversation at that stage which was about the workplace.

84. We find that when she wished to stop talking about matters relating to her health that is what happened.

More equipment & assessment

85. In an email dated 11 October, Mr Walker updated the Claimant that the new Penguin mouse and two Dragon headsets were ready to collect, and a further Penguin mouse was being obtained for Rosa. He clarified regarding the mid-year's Mark that he had simply said that there was an indicative Mark of "achieved", but this would be discussed together next week when the objectives and any further evidence would be brought by the Claimant. He suggests a meeting the following week with Ms Aldous to "make sure we are doing everything possible to support you and for you to speak freely about everything". Regarding adjustments, CSWAT suggests that the Claimant should trial the adjustments made for a couple of weeks, and then if she is still encountering problems then an OH referral should be made. Toward the end of this email he says "I'm certainly trying my best to support you."

86. On 10 October 2018 Mr Jethwa conducted an additional assessment on the Rosa and Apollo equipment and set up the Claimant's new chair and foot stool in room 335 (the secure area).

87. On 11 October a quote for the Dragon software training was sent to the Claimant, with Mr Walker copied in and so he requested the purchase order, via a colleague.

88. On 12 October 2018 a specialist mouse (penguin mouse) was provided for room 335.

89. On 15 October 2018 there was an email from M Jethwa referring to a further workplace assessment for the Claimant. By this point, each of the three IT platforms used (Rosa, Apollo and Official) had a keyboard and chair. A difficulty had been raised regarding the Rosa keyboard, and Mr Jethwa recommended the Claimant await the further OH assessment for advice. A penguin mouse was to be ordered for the Rosa terminal. A further mini keyboard was recommended for the Apollo.

90. An adapted Rosa keyboard was provided for room 335.

91. In an email dated 15 October 2018 the Claimant asked for special leave to be put in place pending receipt of dragon software training or that she only work for one hour a day. She indicates that she will not give consent until she has seen the referral form for CSWAT. Mr Walker emailed HR asking for advice as to whether to agree.

92. Mr Walker responded to the Claimant asking her to book rooms for their 1:1s; informing her that the purchase order had been raised with the finance team for the Dragon training; and attaching the consent form for the CSWAT-OH Assist/DSE assessment referral.

93. On 15 October 2018 Ms Aldous approved the Claimant's Dragon software training.

94. On 16 October 2019 the Claimant emailed Ms Aldous stating she does not feel comfortable meeting with her and Mr Walker, as this "does not feel like a level playing field particularly as the discussion involves sensitive issues concerning health, diagnosis and reasonable adjustments"

95. On 17 October 2018 the Claimant sent Mr Walker an email attaching advice from her doctor saying she was fit for work but could not undertake any work that involved typing or a mouse as this would worsen her condition. The Claimant's GP recommended a workstation assessment undertaken by someone with expertise in the conditions of Scleroderma and Raynaud's disease. It seems to the Tribunal that this GP note may have encouraged unrealistic expectations in the Claimant about a level of specific expertise that an Occupational Health assessor should have.

96. Later that day Mr Walker sought HR advice given limitations this posed on her work. He wrote

> "She's "fit to work" but shouldn't type use a mouse until after her consultant' appointment on 30/10 – I genuinely don't know what to do as there's not much (if anything) she can do that doesn't involve either one"

97. On 26 October 2018 the Claimant emailed Cath Bailey (HR) seeking confirmation that her consent is for arranging the: "Specialist Workplace Adjustments Assessment" and that the assessor will have: "expertise in the medical conditions of Scleroderma and Raynaud's". Ms Bailey responded on

29 October stating that she couldn't confirm the assessors would have expertise in specific medical conditions.

98. On 30 October 2018 the Claimant attended an appointment at Guy's and St Thomas' Foundation Trust. She informed the Respondent that the Consultant agreed with her GP that there should be workplace adjustments, and that she should refrain from typing or using a mouse until adjustments had been put in place.

99. On 31 October 2018 the Speech Centre Ltd emailed the Claimant confirming that they had received the purchase order and that training dates could be booked. The Claimant was asked to confirm her availability. It seems that she did not respond to this, and therefore on 6 and 7 November 2018 the Speech Centre Ltd emailed the Claimant to follow up. Also on 7 November 2018 a representative of the Speech Centre Ltd called the Claimant by telephone. This company offered five dates in the period 27 November 2018 – 12 December 2018. Ultimately the Claimant attended training on the last one available. This was a total of six hours of training on 12 December 2018.

100. On 7 November 2018 the Claimant's doctor provided a statement of fitness for work, stating that it was not advisable for the Claimant to type or use a mouse as this would worsen her conditions.

Workstation Assessment Referral

101. The Claimant had the assistance of David O'Gorman, who is part of the Respondent's disability network ABLE. They worked together on a Workstation Assessment form. On 8 November 2018 they provided a draft Workstation Assessment Referral Form to Mr Walker.

102. On 11 November 2018 the Claimant emailed Mr Walker stating that she understood the decision that she may not use the Dragon software with Rosa within the secure area, (due to a concern about the microphone) but she asked that this workstation be assessed in any event, as it would be "really good to be able to sit with the team to access these IT systems for a proportion of the day and then I can look to use the Dragon Software in room 343".

103. Mr Walker signed the OH PAM referral on 20 November. PAM stands for People Asset Management the new Occupational Health provider who started working for the Respondent on 1 November 2018.

104. On 27 November 2018 the Claimant approved and signed the OH (PAM) referral, which was submitted the following day.

105. Mr O'Gorman clarified on the Claimant's behalf in an email dated 29 November that "3 separate assessments will need to be undertaken by the same female assessor with expertise in the conditions of Scleroderma and Secondary Raynaud's".

Air conditioning

106. The OH PAM form contained details of the symptoms of Claimant's medical conditions including "very sensitive to the cold". For the first time in this form the question of air conditioning is raised: "Nilofar would benefit from a desk not too close to air conditioning as this will trigger vasospasm".

107. The Claimant sent Mr Walker a text: "I hope you will kindly prioritise the engineer's visit to assess the air conditioning, as without this I do not have the allocation of a workstation at 70 WH for both room 343 and room 335 ahead of an assessors visit". She reiterated that there should be an appropriate specialist who should be female.

108. From this point onward, although it not been recommended by a doctor or assessor and was not based on any particular documented instance of the cold of the air-conditioning actually causing her a problem, the Claimant made an air conditioning assessment a precondition before any workplace assessment could take place. This added a further layer of complexity preventing the Claimant from returning to work.

Text messages

109. On 11 December 2018 Mr Walker wrote a short text to the Claimant, asking if everything is okay, in which he acknowledged that she was due to see her GP. He mentioned that a meeting on "off shoring" is due to take place on Thursday.

110. The Claimant responded with five very lengthy texts, which are more or less a stream of consciousness she tries to lobby Mr Walker on allocation of work. She says "I'm very, very capable person. In case you didn't know I am a Barrister-at-Law from an top Honourable Inn of Society known as Lincolns Inn having passed rigorous exams and worked in Chambers."

111. Another text says "I have done the Barrister at Law degree from Lincolns Inn and interpreted legal documents for the Cabinet Office as well as written speeches for Minister within Constitution Group. I have a very strong network across CO and I have worked at Private Office of number 10 managing sensitive military diaries. So I am deeply trusted and so if I am being phased out here then there are other places I may like to have me."

112. Mr Walker responded in sympathetic, reassuring and professional way "it's no bother you texting me, don't feel you have to apologise. Appreciate the effort it takes on your side to dictate through these messages. I think it would be better to have a chat through this face-to-face either on Thursday or tomorrow after your training? I really appreciate you telling me this…."

113. Mr Walker also copied Ms Aldous with the content of these text messages in an email dated 11 December.

114. On 18 December 2018 in a further text message the Claimant wrote to Mr Walker "Thanks for everything you are doing. I am very grateful to you Rob".

Dictation software training (Dragon)

115. On 12 December 2018 the Claimant received Dragon software training completed between 10am-1pm & 2pm-5pm. This contrasts with what Claimant said, reducing this in her oral evidence to merely an afternoon.

116. The Claimant told us that during this training the trainer did all of the movements of the mouse, and she did practise dictating to the software.

117. On 17 December 2018 the Speech Centre emailed confirming that training had been received by the Claimant in Dragon software use. Mr Cook wrote to advise Mr Walker that Dragon dictate software for Mac was being discontinued, although not immediately. In light of this he suggested that it might be advisable to use Dragon for a Windows PC which was in any event a more "mature and stable" product and likely to be more compatible with the Respondent's Systems. He suggested that it was also easier to reduce the use of manual input with it. Having said this he recognised that she had a MacBook with a lighter touch keyboard and said it will be possible to load windows onto that device, which would require a new licence. He went on:

> "The training that we have done so far will be useful in that the fundamental techniques of speech recognition remain the same between the two products. I have taken care to train Nilofar such that the majority of what she has learnt is applicable to both platforms. However before going much further it may be wise to make a decision as to which path we go by before undertaking further training. With that said, regardless of the path chosen further training will be advisable if Nilofar is to minimise the use of her hands.

118. In fact both Macs being used by the Claimant had already been uploaded with Dragon on 2 October 2018 [893].

119. On 4 January 2019 a monitor for laptop use in room 343 was put in place.

Male assessor

120. Following the PAM referral, on 20 December 2018 Mr John Mina, a male assessor from Vergo UK sent an email to the Claimant. He suggested that the assessment could start at the Claimant's home address then move over to her work address later in the afternoon on a day in the week commencing 21 January. The email is concise and professional in tone.

121. There being no response to this email, Mr Mina sent a follow-up on 4 January 2019. That email was responded to a few hours later by an unnamed family member of the Claimant, using her email address, copying Mr Walker, raising that a female assessor had been requested, that the request was for assessment on different days, and querying his expertise in the Claimant's specific medical conditions.

122. Within a couple of hours Mr Walker contacted HR for the issue to be escalated.

123. On 7 January 2019 Mr Walker emailed the Claimant apologising and suggesting a discussion. Later on, on 22 January he chased up with the Claimant to confirm that PAM/Vergo (the contractor) had been in contact with the Claimant to apologise.

Claimant's reaction to male assessor

124. It is clear that the Claimant was very upset by Mr Mina's email.

125. Her correspondence on the matter was in somewhat extreme terms given that the initial approach by Mr Mina was by email and entirely professional, albeit that it was not in line with what had been requested. She wrote on 6 January:

> "Having taken advice, this denotes a man who wants to have a high level of control of an unknown female placed in a vulnerable situation, and is also very worrying in the current climate of ME TOO with the Cabinet Office being perceived as imposing male assessors to visit female members of staff in their bedrooms".

126. By 14 January 2019 this had escalated further into the following description in a text to Mr Walker:

> "You will appreciate we must therefore have a very cautious approach because of what has happened and how we have been treated (with bad handling by CSWAT and a man just turning up to my home against my consent, as provided in the PAM form)."

127. No man had just turned up to the Claimant's home. The Claimant's reaction was extreme to the point of factually misrepresenting what actually occurred.

Special leave

128. By agreement with the Claimant she was put on paid special leave from 7 January to 8 February 2019. This was to ameliorate stress and due to the length of time the assessment process was taking.

Specialist assessor

129. On 10 January 2019 Ms Bailey wrote to Mr Walker with an update from the National Accounts Manager at PAM explaining that it would be unlikely that they would find someone with specialist knowledge of the Claimant's medical condition but they were looking for someone who would be best placed to have a reasonable understanding of the condition. This had been raised with their Medical Director. She followed up with an email on 14 January in which she said it would not be possible to ask PAM to let them know the assessor's experience/qualification or membership. She said this is not something we can ask them.

130. Mr Walker disagreed and wrote to Ms Bailey on 14 January, insisting that there should be details of the assessor provided. He wrote "as a line manager it is becoming increasingly hard to manage the bad news".

131. On 20 January 2019 the Claimant sent Mr Walker and Ms Aldous an email titled 'Career Progression' in which she outlined that she felt her career progression had suffered because of the amount of time she was waiting for reasonable adjustments. She alleged there had been a discussion with Dr Emma Wharram, her line manager between January and May 2017, in which it was suggested by Dr Wharram that she should be ready for promotion to Band A within 2 years' time. She suggested that the lack of reasonable adjustments had negatively affected her career progression.

132. A number of emails were sent on 25 January 2019. Mr Walker sent Ms Diane Taylor in HR an email stating that the Claimant wanted the current CSWAT case manager (Ms Bailey) to be replaced. Ms Taylor sent an email to Mr Walker explaining that the update from the Head Clinician was that they had been working to engage a vocational rehabilitation specialist who would be able to undertake all the assessments in London and was female. Mr Walker responded to Ms Taylor and explained that the focus should be on getting the name of the assessor and some detail on why the assessor had been picked; this detail should then be relayed to the Claimant.

133. On 27 January 2019 the Claimant sent Mr Walker another email asking for a change of CSWAT caseworker. She argued that there had been discriminatory conduct, falling under the Equality Act 2010 and that she had been subject to bullying.

134. On 29 January 2019 Mr Walker received an email from Ms Bailey explaining that she had had an email from PAM to say that someone at PAM had spoken with the Claimant who had said she would not consent to the assessments taking place until there was confirmation that the assessor had expert knowledge in her condition.

135. As from 5 February 2019 caseworker ownership was transferred from Ms Bailey to Kathy Dawson as per the Claimant's request for a change in CSWAT case manager.

Replacement laptops

136. On 29 January 2019 two Windows laptops were provided following the suggestion of the Dragon software trainer.

137. Mr Walker wrote to the Claimant to notify her that the laptops were ready for collection on 8 February 2019. He wrote

> "you need to be there to set up your Apollo profile but they are ready to be swapped for your Macs. You might want to do this on 22/02 conscious I don't want you to be typing on them to get your profiles completed, so let you decide when."

138. As at the time of the hearing in March 2021 over 25 months later these had not been collected by the Claimant.

Female assessor

139. On 7 February 2019 an email was sent from Ms Dawson, who had taken over as CSWAT case manager following the Claimant's request for such a change, to the Claimant explaining that a female assessor had been sourced who was able to undertake the assessments. As to the expertise of this assessor, she explained:

> "In relation to your request for a 'specialist in your conditions' to undertake the assessment, PAM's Clinical Director has advised this is not possible but have reiterated the assessors they work with our excellent vocational rehabilitation specialists with an Occupational Therapy background and they are confident that assessor will be fully competent and capable of undertaking the assessments."

Meeting on 7 February 2019

140. On 7 February 2019 a meeting took place at which the Claimant, Mr O'Gorman, Mr Walker and Ms Aldous attended. The Claimant contends that at this meeting Mr Walker agreed that she was now ready and suitable for promotion to senior Band A grade and that he would nominate her for a bonus regarding her corporate contribution.

141. The Claimant's father Dr Hossain emailed Mr Walker. He wrote

> "I know as a medical doctor I know how important it is for Nilofar to be assessed by someone who has expertise in her medical conditions, which is a point supported by Nilofar's own doctor as well as Nilofar's Rheumatology Consultant otherwise an assessment/recommended reasonable adjustments may cause harm to Nilofar."

142. As to discussion of career prospects, where it differs from the recollection of both the Claimant and the strikingly similar statement from Mr O'Gorman, we accept Mr Walker's account. We find that Mr Walker's email of 7 February sent 18:24 [360] is the best contemporaneous evidence of what was said. Mr Walker responded to the Claimant, Mr O'Gorman and Ms Aldous:

> "Dr Hossain, thank you for below email. I completely agree with what you set out below.
>
> Nilofar, it was good to see you and earlier with Lucy. I'm very conscious that this process has not been anywhere near ideal and we were in agreement that there has been

> some serious failings in HR on the case referral; including the male assessor making contact before Christmas, CSWAT consistently not contacting you directly (from the start) and now CSWAT/PAM not sourcing an assessor with a background in your conditions. I've pushed CSWAT and HR to sort this it seems like we've reached an impasse. As agreed Lucy has written to Carol Bernard (HR Director) to push for a resolution, something akin to what David (and your father) outlined where an outside assessor is sourced and we can also contribute local budget if necessary. I'll continue to monitor this and make sure a positive outcome is possible. I also welcome David's support in pushing this with HR and any other routes to market [sic] we can explore to resolve.
>
> We also covered the points that David emailed through about air-con (which Mukesh is looking into), your new laptops (these are downstairs but waiting on an Apollo upload) and Dragon used in 335 (this is something we need to take forward with the STRAPSO because of the security issue of having a microphone in a secure area, so it will take a bit longer to sort). We also talked about how we'll flag with you any roles that are coming up in GSG at a higher grade and confirm that somebody helping you complete an application (EOI or otherwise) is fine but also me, Lucy or any other manager in the policy team could take a look over any application competencies/behaviours. Here's some further information on success profiles: [hypertext link]"

143. He also extended special leave until 8 March 2019, but to be kept under review. The objective of granting special leave was to mitigate stress caused by the referral process and limit any cause of pain.

144. On 7 February 2019 Mukesh Jethwa Cabinet Office Health and Safety Advisor wrote by email regarding the Claimant's disability being negatively impacted by the air conditioning in rooms 335 and 343 to Interserve, the Respondent's 70 Whitehall facilities building managers

> "I have an employee that is based in room 335 and 343 at 70 Whitehall, who due to their disability is finding it difficult to sit anywhere in the room where there is a draught or movement of air from the air conditioning system".

145. Ms Aldous wrote on 7 February 2019 in quite strong terms to Carol Bernard, HR Director for Cabinet Office, copying in the Claimant, Mr O'Gorman and Mr Walker flagging some of the issues experienced in the workplace assessment referral system, including the contact made by the male assessor. She wrote:

> "Since this initial referral there has been consistent miss management of the case…

> "…Very obviously Nilofar has lost trust in the process, especially when the male assessor made contact in December…
>
> .. PAM have been unable to source an assessor with experience of her conditions and that we should accept the vocational qualifications of the assessor selected. This is certainly not a positive outcome. We've been advised by the Cabinet Office ABLE Network that this is indeed a reasonable request and there are plenty of examples where it has been actioned in the past (David O'Gorman is advising on this).
>
> I think to get a positive resolution we need HR and CSWAT to source a female OH therapist with a background in Nilofar's conditions that can conduct the multiple site visits and who meet the CEO standards. I am happy to authorise payments from local budget to facilitate this if required. "

146. On 16 February 2019 the Claimant emailed Mr Walker explaining that she had attended a consultant's appointment on 15 December 2019 and that her medical condition was worsening as a result of work related stress.

147. By an email dated 21 February 2019 Diane Taylor reported to Mr Walker regarding meeting with PAM, and the arrangements to be put in place for vocational rehabilitation assessments, including the assessor conducting research, and liaison with other experts.

Further search for assessor

148. Ms Taylor sent an email to the Claimant, copying Mr Walker on 26 February 2019, in which she apologised for the male assessor making contact in December 2018. In that email Ms Taylor also provided an update on vocational rehabilitation assessments, and explained that she had contacted Scleroderma & Raynaud's UK, a charity dedicated to these conditions. The charity explained that they had had this question before and were not aware of an assessor with knowledge and experience of this disease.

149. On 3 March 2019 the Claimant emailed Ms Taylor stating she was "very distressed to find out that the CO has moved from the position of providing a female assessor with expertise in my medical conditions/disability, to someone who has no expertise or even experience and knowledge." She went on

> "Can you please set out the actions that will now be taken to find a female assessor that has expertise in my medical conditions/disability – with a list of other organisations to be contacted [set out fully]"

150. On 7 March 2019 Mr Walker extended the Claimant's paid special leave, with her consent, to the end of March 2019.

151. On 17 March 2019 Ms Taylor sent an email to Mr Walker informing him that PAM had confirmed the name of an assessor, Ms Lunar Summers from Jigsaw Occupational Therapy.

152. On 18 March 2019 the workplace adjustments team at the Cabinet Office contacted the following organisations to see if they could perform vocational rehabilitation assessments (with a specialism in rheumatology, in particular Scleroderma and Raynaud's): (i) Rheumatology.org; (ii) National Rheumatoid Arthritis Society (NRAS); (iii) Versus Arthritis; (iv) Microlink UK; (v) the Royal British Legion Industries (RBLI) and (vi) several other government departments.

153. On 18 March 2019 Mr Siabi of Microlink emailed the Respondent's workplace adjustments team suggesting "I have checked and we can conduct this assessment in London for you". On 27 March 2019 Microlink's Head of Training Mr Carl Ward followed up a little more cautiously asking about the assessment was being sought. He wrote

> "can I just ask what sort of assessment you are looking for? All our assessors are holistic in the disabilities that they cover with regards to workplace assessments and are all qualified and trained to do so. If you are looking for a more medical based assessment then it's not our area of expertise. We are however experienced and familiar with the conditions and numerous solutions and adjustments that can be made to help someone."

154. In view of this very clear clarification by Mr Ward as to what Microlink would actually be able to offer, the Tribunal found it surprising both the Claimant, and her counsel Mr O'Callaghan, presumably on her instruction, continued to put her case to the Respondent's witness on the basis throughout the Tribunal hearing that Microlink actually had a suitable female assessor with particular expertise in the Claimant's condition which had been deliberately concealed from her. The contemporaneous correspondence plainly demonstrates that this was not the case. This is one of a number of examples of the Claimant perpetuating a point of dispute rather than acknowledging the reality of constraints facing the Respondent.

155. On 22 March 2019 Mr Joshua Bolton, wrote to Ms Taylor setting out an extensive list of places he had tried to try to find a vocational rehabilitation assessor with specialist knowledge/experience of scleroderma and Raynaud's, including five government departments, Royal British Legion Industries, the British Society for Rheumatology and two charities dedicated to rheumatology.

156. On 25 March 2019 Mr Walker emailed the Claimant to request that an appointment be made with Ms Summers for a Workplace Assessment. Mr Walker explained the steps taken to date and that, as a specialist had not been identified, Ms Summers provided a reasonable way forward. He wrote:

> "PAM have confirmed with HR that Lunar is not a specialist in your conditions, however she is a trained and qualified professional OHT [occupational health therapist] who stands ready to make herself better read up on your conditions and speak with further medical specialists, such as your GP and consultant. Lunar is also the initial stepping off point for the assessment process and she can, if necessary, reach out for further advice and feedback from others. HR have followed up on your further routes for advice on this matter and found that an OHT with specialism in your condition cannot be found. That said there are still questions out with the Royal British Legion Industries, the British Society for Rheumatology and to rheumatological charities. We feel we are doing everything reasonably possibly with this.
>
> How do you feel about having an assessment organised with lunar? Happy for you to come in and have a chat about this as well and RC if I can get HR to come and speak about what they've been able to do. Happy for David to come to this too."

157. We find that in the absence of a female assessor having particular specialism in the Claimant's condition, the approach of Mr Walker was reasonable, and his way of communicating this to the Claimant was appropriate, sympathetic and professional.

Air-conditioning referral closed

158. On 25 March 2019 Mr Jethwa emailed Mr Walker to explain that specialist contractors would be needed to undertake an air-conditioning survey, which would require a formal recommendation following an assessment. In the absence of such a recommendation at that stage he agreed for the survey "job" to be closed. This was recorded by Mr Walker in a table produced as part of an internal investigation "CO H&S advised because of the cost this should only be conducted on the advice of an OHT (25/03/2019)".

159. On 31 March 2019 Mr Walker and the Claimant agreed special leave should continue.

160. The Claimant in her response to Mr Walker of 2 April 2019 wrote stating that she was "very disappointed and hurt" that she had been asked to agree to an assessment undertaken by an assessor whom she knew very little about. She made reference to the National Stress Awareness Month. She continued to complain about the male assessor who had made contact in December and January. She went on

> "it is hugely disappointing that friends and family are now having to undertake research to find a more suitable assessor – indeed there are Occupational Health

> Therapists who have specialism in undertaking assessments for people with autoimmune and musculoskeletal conditions (Secondary Raynaud's and Scleroderma are autoimmune and musculoskeletal conditions) – so why are details of these assessors not been provided to me to consider, given the associated level of knowledge and experience they have"

161. The Claimant has not identified either to the Respondent or the Tribunal the identity of more suitable assessors than Ms Summers.

162. On 2 April 2019 Mr Walker replied to the Claimant in terms we find to be sympathetic and measured:

> "we certainly don't want to cause any further stress and the special leave has been put in place to alleviate this, and the rectifying an apology from PAM of the stress caused by the December incident of the male assessor getting in contact. Equally, HR have continued to look for alternative options to try to find a female specialist and have looked at expertise in autoimmune and musculoskeletal conditions. I will brief your views into them, however I know we have been previously mindful of your request of a specific specialist in your diagnosed conditions.
>
> I think we need to move this forward where we are in a position to get the assessment in the diary and the focus is on your return to work. So that we can resolve this could you please confirm what further information you would like from HR on Lunar Summers to see if they can offer any answers to any questions you have of her before you make a decision. In addition, as you've suggested below, are you okay to help and ask your GP/consultant for their advice, or the names of any specialists they could offer to HR to take something forward. I'm concerned that HR are running out of options and to find a way forward we need to know what you're happy to do or if your medical team can offer some guidance. Please let me know by the end of the week and want to progress and any questions you have on Lunar"

163. In a further email reply to Mr Walker, with Ms Aldous copied in, the Claimant wrote saying that she felt "forced and bullied into accepting an assessor that she was not comfortable with". She went on that the matter may be better dealt with by an Employment Tribunal [558].

164. On 3 April 2019 there was an email update from Ms Taylor to Mr Walker attaching a copy of the female assessor's CV, which Ms Taylor confirmed could be shared with the Claimant. That CV, which is 2½ pages of close type, shows

that Ms Summers had over 20 years of clinical rehabilitation experience, specialising in assessments, case management and vocational rehabilitation.

165. On 5 April 2019 the Claimant requested by email that she be provided with comprehensive information on Ms Summers including her CV and a written summary of the actions taken by HR to find an appropriate female assessor.

166. On 8 April 2019 Mr Walker sent the Claimant Ms Summers' CV as provided to him by Ms Taylor. He advised that he was open to input from her medical team as to advice on an appropriate expert. He suggests that stress management advice be added to this referral.

167. At this time Ms Taylor advised Mr Walker that Ms Summers had been in a car accident and had broken her foot, so she would not be able to undertake assessments for a couple of weeks.

168. On 14 April 2019 Ms Taylor sent Mr Walker an email to say that further to a call with Rehab Jigsaw's Director, they had spoken with Ms Summers and she was fine with the Claimant, and Mr Walker as line manager, contacting her directly.

169. On 16 April 2019 Mr Walker sent two emails to the Claimant. First he confirmed by email with the Claimant that she could contact Lunar Summers directly and that as Lunar Summers had broken her foot an assessment could not be booked before 22 April 2019.

170. Second, Mr Walker sent an update email regarding the steps that HR had taken to try and find a workplace assessor who was also an expert in Scleroderma and Raynaud's. This included approaches to following organisations: PAM, VergoUK, Sclerodema & Raynaud's UK (a charity), Access to Work, Health & Safety Advisor, Microlink, RBLI, Royal College of Occupational Therapists, Royal British Legion Industries, Duradiamon (OH provider for DEFRA, HMRC & CPS), NRAS (rheumatological charity), Versus Arthritis (charity), Royal Free Hospital, British Society for Rheumatology and Rehab Jigsaw (which suggested Ms Lunar Summers).

171. This email explains the contact with Microlink and that it would be a holistic assessment rather than a medical based assessment. One of the features of the case brought before the Tribunal is that the Claimant denied knowing about this, but it is plainly referenced in the email dated 16 April.

172. We find that the complete set of actions taken by the Respondent to attempt to source an assessor meeting the Claimant's criteria goes beyond by some margin what a reasonable employer in the circumstances might be expected to do.

End of year performance assessment

173. On 2 April 2019 Mr Walker sought advice from HR on whether he should award an end of year performance marking to the Claimant and asked whether there

was guidance on writing a performance summary in the Claimant's circumstances.

174. He specifically flagged up that there is guidance on the situation where an employee has had a significant amount of sickness absence, but points out that this situation isn't sickness. He pointed out that the policy is "vague" in that it says that a rating will normally be awarded if the employee has completed 60 days or more in the reporting year. He asked for questions for some detailed guidance. He also flagged up at this stage

> "Are the timelines the same in the circumstances e.g. does an end of year marking need to be submitted by COP 11/04? I really don't think it will be possible to do this if I have to engage with the individual and mutually agreed the mark as previously discussed the mid-year indicative mark did not go down well and the priority here is to get the individual back into work."

175. On 5 April 2019 a notice to staff was published on the intranet in which the deadline of 11 April 2019 was confirmed by the Cabinet Office for uploading End of Year performance markings for Band A-C staff on to the HR system (SOP).

176. On 8 April 2019 Mr Walker chased up David Rowland from whom he had still not received guidance in response to his email dated 2 April 2019.

177. On 9 April 2019 Mr Walker again chased Mr Rowland for guidance on the End of Year Review. He told him "I think I'm going to struggle with getting anything done this week on this."

178. At some stage HR plainly advised Mr Walker. We have not seen this advice on the basis that the Respondent has asserted privilege, and this has not been

179. On 10 April 2019, having confirmed with Ms Aldous, Mr Walker informed the Claimant by email that her performance marking awarded was 'Achieved'. A summary of performance was communicated to the Claimant by email by Mr Walker on 17:46, i.e. around close of business hours the day before the deadline of 11 April. This performance review to both work and personal email accounts begins

> "As I am sure you've seen and are aware its end of year appraisal time. On the advice of HR, and in accordance with the [respondent] EYR. I have provided this email is a summary of your performance in the reporting year 2018/19"

180. Mr Walker acknowledged the "frustrating" absence of "reasonable adjustments" since September 2018, meaning that the Claimant was suffering pain. He says that the summary is based on tangible pieces of work that have been worked on and from indicative marking discussed previously. This included the "roles

and responsibilities" policy document and the establishment of the cyber policy working group. The review concludes:

> "You have restated your aspiration to achieve Band A promotion this calendar year, which you spoke with your previous [line manager] about when you started in this role in early 2017. I think to work towards this and be able to achieve a higher performance marking in the future, once you have returned to work, you need to take more robust ownership of your portfolio, independently increase your stakeholder network and seek out ways to expand and improve your own learning on the topics you lead on. Equally, I would like to see you drive forward your own areas of work with more independence and confidence, coming up with new ideas and approaches to problems on the horizon and have less reliance on your manager to set your work and career direction."

181. The date of 11 April 2019 was the deadline set by the Cabinet Office for uploading End of Year performance markings for Band A-C staff on to the HR system (SOP).

182. On 13 April 2019 the Claimant emailed Ms Aldous stating that she felt her End-of-Year Performance review had been badly handled as she was not provided a reasonable amount of time to write back to provide input into her end of year review.

183. On 18 April 2019 Ms Aldous invited the Claimant in for an in person conversation regarding her end of year review. The Claimant did not follow this up.

Assessment

184. On 25 April 2019, despite the extraordinary lengths that had already been gone to find an assessor, Mr O'Gorman emailed Mr Walker setting out further actions he suggested that HR could take to identify a suitable assessor, asserting "it is for Nilofar to decide who undertakes the workstation assessments". We find this surprising and do not consider it is normal for employees to seek to dictate who carries out occupational health assessment in this way. In our experience this would squarely fall within management responsibility.

185. On 7 May 2019 Mr Walker sent an email to the Claimant, with Ms Aldous copied in, explaining that attempts have been made to contact other departments to find an assessor meeting Claimant's requirement,

> "We feel they have done everything reasonable to try and source someone as requested, however they can't find someone whose sole focus is your condition. Lunar Summers from Jigsaw Occupational Therapy is a qualified assessor and we feel offers the best starting point on

> completing an assessment in order for you to return to work."

186. He asked her to confirm her availability from 16 May 2019 onwards.

187. On 8 May 2019 Mr O'Gorman wrote to MR Walker, on the Claimant's behalf, questioning the steps that had been taken, complaining about the "poor handling of Nilofar's personal data" and asking for details of who Ms Summers was going to "reach out to ".

188. On 9 May 2019 Mr Walker replied to the email above from Mr O'Gorman, in which he provided Diane Taylor's name and contact details, stated that as Ms Summers had not been provided with the Claimant's details a list of those to be contacted would be difficult to produce at that time; and asked that the Claimant confirm she was content with an assessment to be booked by HR/CSWAT.

189. On 13 May 2019 Ms Taylor emailed Mr Walker to confirm that Ms Summers was not a specialist in the Claimant's conditions and that based on everyone they had contacted they had not been able to identify an appropriate specialist in the Claimant's conditions.

190. On 15 May 2019 Mr Walker sent two emails to Mr O'Gorman and the Claimant. The first was asking if the Claimant was content for an initial assessment to be booked with Ms Summers and whether she had any suggestions from her medical team for an alternative assessor. A subsequent email reattached Ms Summer's CV and also gave some further background information regarding Ms Summers, which had been supplied by her:

> "In terms of my experience, I have been an OT for over 20 years and worked within mental-health, specifically anxiety disorders. I then specialised in physical disability and worked within neurology and rheumatology. ….
>
> As you can imagine, I have such a wide variety of people with complex needs so there are many conditions that I have had to research in order to assess a person's function and plan rehabilitation correctly. The approach is generally the same: I will read the referral notes and if unfamiliar with a condition, I will undertake research which includes liaising with disease-specific support organisations, reading published papers and looking at evidence-based information on NICE. With a person's consent, I may speak to their GP or consultant.
>
> In addition to research, the person is at the centre of the assessment because conditions affect people differently. I therefore make a holistic assessment, looking at their function in all areas of their life and together we examine their specific aims and objectives."

ACAS

191. On 15 May 2019 the Claimant initiated ACAS Early Conciliation.

192. On 24 May 2019 Mr Walker sent a further email in which he said

> "We are satisfied HR have done everything reasonable to source you an appropriate assessor and we consider Lunar Summers is qualified to provide the initial assessment, which is the first step in the process for putting measures in place for you to return to work. Please can you make contact with CSWAT/HR (with me in CC) to arrange a suitable time to meet Lunar to discuss your needs. If you are unwilling to take part in the normal assessment process or suggest any alternative, the business can only base the reasonable adjustments it puts in place on the advice of the CO health and safety adviser and our own best judgement – neither is based on the advice of medical professionals.
>
> Moving forwards you will appreciate that the business cannot continue to support an indefinite period of discretionary 'special leave' If you are unwilling to engage with the assessor we have identified, or suggest an alternative. If you feel you are unfit to attend work due to the current working arrangements not being suitable then your absence from work moving forwards will need to be classified as sickness absence and the situation managed under the Department's attendance management procedures which are designed to support attendance at work.…
>
> I should inform you that from Monday 3rd June your absence will be classified as sick absence rather than paid special leave and your case will be managed under the Department's attendance management procedure."

193. The Claimant responded the same day, seeking the air conditioning assessment and dragon assessment, and asking "are you forcing me now to have an assessor who does not have expertise of my medical conditions/disability which was agreed and signed by you in November 2018"? She stated "I really hope that I can have a new manager going forward who is able to have empathy and understanding towards a disabled member of staff".

Grievance

194. On 25 May 2019 the Claimant sent an email to Ms Aldous stating that she wished to raise a grievance concerning her treatment by Mr Walker. She wrote "I have taken advice and the language you have used towards me in your email below is discriminatory and is clearly designed to be intimidating towards me – a disabled person." She also made reference to being the first woman from a Muslim background to work within the group who has a disability. She signed

off her her email "there is nothing more powerful than a story of mistreatment and being bullied and force out of Government Security Group."

195. On 27 May 2019 Dr Hossain, the Claimant's father, sent an email to Sir John Manzoni (then Permanent Secretary for Cabinet Office) raising a complaint as to how the Claimant had been treated.

196. On 28 May 2019 Ms Taylor requested to meet Mr O'Gorman.

197. Also on 28 May 2019 Ms Aldous wrote to Ms Taylor

> "As Rob's line manager I am terribly concerned about the events of the last few days. Rob has done his absolute utmost to manage the situation with Nilofar but it is proving unmanageable within our team. Is there anything more that HR can be doing to help? I really appreciate your efforts Diane but fear that this is turning personal now and Nilofar needs to speak with someone from the professional services side rather than levelling her objections at the team directly.
>
> I can't stress enough how much time, effort and emotional resilience this is taken from Rob over the past year. It cannot be right that it is purely for line managers to shoulder this burden on their own in the civil service in this day and age"

198. It seems to the Tribunal that this communication did not overstate the toll that attempting to manage the Claimant was taking on Mr Walker. In her oral evidence to the Tribunal Ms Aldous explained that Mr Walker, in addition to attempting to manage this very difficult situation, was having to do much of the work that would otherwise have been done by the Claimant.

199. On 3 June 2019 the Head of HR, Carol Bernard, directed that the Claimant should remain on special leave until the investigation and the decision relating to her grievance was completed.

200. The Claimant was informed that for the duration of her complaint Ms Aldous would be her line manager.

201. On 12 June 2019 Ms Aldous emailed the Claimant informing her that she is her line manager, and that an investigator (Saloni Sanghvi) and decision manager (Kristina Evans) had been appointed. She wrote:

> "If you have any questions at this stage, don't hesitate to get in touch"

202. On 15 June 2019 an Early Conciliation certificate was issued to the Respondent.

203. On 19 June 2019 Ms Saloni Sanghvi sent the Claimant an email explaining that she had been asked to act as investigating officer and invited the Claimant to a dispute investigation meeting.

204. On 20 June 2019 the Claimant emailed Ms Sanghvi stating that she will be submitting additional information and will be accompanied. Ms Sanghvi responds inviting the Claimant to submit further information and be accompanied.

205. On 23 June 2019 the Claimant confirmed her attendance at the dispute investigation meeting and says she will be accompanied by Jeremy Hughes. She also submitted an 'additional information' document containing 35 page pages of close type. This complaint refers to Mr Walker's "highly inappropriate communications". It is not necessary for us to do a detailed analysis, but we consider that this criticism of Mr Walker is unmerited and in hyperbolic terms.

206. On 27 June 2019 the Claimant attended an investigation meeting with Ms Sanghvi. Mr Hughes (who accompanied the Claimant) and Joshua Boulton (note taker), were also in attendance. At this meeting Mr Hughes raised the question of a stress risk assessment. Ms Sanghvi replied that if the Claimant was feeling stressed then they could stop at any point and have a break. She said she did not have any advice on what could or could not be done because of stress. Later in the meeting she stated

> "I want to make this as non-stressful as possible. If at any stage it is too stressful, then NH [the claimant] should let SS[Ms Sanghvi] know"

207. Later on she said

> "SS: Will look at how this can be managed to avoid any more stress. Confirms that everyone is content to finish.
>
> NH: Agrees
>
> SS: If there is a need to talk again, let SS know whether in person or over the phone."

208. On 1 July 2019 the Claimant provided Ms Sanghvi with proposed amended terms of reference with added lines in maroon [878-880].

209. On 16 July 2019 Ms Sanghvi interviewed Ms Taylor. Ms Taylor stated that "during the 07.06.19 meeting, ABLE advised they were going to ask within their network [about an appropriate vocational rehabilitation assessor] but to date, Ms Taylor has not heard back from them."

210. Ms Sanghvi interviewed Ms Aldous. The notes of this interview record Ms Aldous saying the following:

> "No leave recorded with previous line manager. Difficult year which had escalated when PAM assessment fell through. NH cooperation turned into deliberate slowing

> down things. NH started being more formal at this stage, so did RW. NH needs to engage with process.
>
> Affect [sic] Mr Walker throughout the process. Upwards bullying. Is not his confidence. NH someone who has been on the books but hasn't done anything for a year"

211. Ms Aldous conceded in her oral evidence that doing nothing for a year was something of an overstatement, but nevertheless stood behind her comments.

212. At the conclusion of her investigation, on 19 July 2019 Ms Sanghvi sent the nominated decision manager, Ms Kristina Evans, an email with the investigation report into the complaint of bullying and annexes labelled A-E attached [881-896].

Dragon dictate in room 335

213. From June/July 2019 Mr Walker believes, and we accept, that Dragon Dictation software was able to be used in room 335 from this point onwards, based on his observation.

214. That Dragon could be used in room 335 was communicated to the Claimant in March 2020.

Claim

215. On 8 August 2019 the Claimant presented a claim to the Employment Tribunal.

216. The Respondent received a Notice of Claim on 8 October 2019.

Complaint outcome

217. Ms Evans was on holiday for 12-27 August 2019.

218. On 30 August 2019 Ms Evans sent the Claimant an email introducing herself as the decision manager for her formal complaint.

219. Ms Evans provided the grievance investigation report to the Claimant on 4 September 2019 and invited the Claimant to a meeting to discuss it.

220. On 6 September 2019 the Claimant responded to Ms Evans stating that she disagreed with the contents of the investigation report.

221. By an email dated 12 September 2019 Ms Evans asked the Claimant whether she would be content for an HR case worker who was shadowing the HR case manager, Sharon Airey, to sit in on the forthcoming meeting between Ms Evans and the Claimant. The Claimant responded later that day that she would find this distressing.

222. On 13 September 2019 Ms Evans confirmed to the Claimant, in response to the above, that Ms Airey's colleague would not be in attendance (and she was not).

223. On 16 September 2019 the Claimant sent Ms Evans an email to say she was too unwell to meet in person. Ms Evans responded to acknowledge this and asked the Claimant for her availability to meet with her on a future date.

224. On 26 September 2019 Ms Evans emailed the Claimant again having not heard from her to ask whether the Claimant would be meet on "another date in the next few weeks."

225. On 27 September 2019 Ms Aldous emailed the Claimant in order to check in, to update the Claimant and to raise the fact that they had reached the mid-year review season. She mentioned that the Claimant's team would now formally sit under Will Harvey.

226. On 3 October 2019 the Claimant provided a letter to Ms Evans from her GP, which said that the Claimant was: "experiencing work related depression and an associated worsening of her Scleroderma disability". This letter contained the following:

> "To help improve her mental and physical health I would recommend that in consultation with her, she be provided with the opportunity to undertake a new role at the same grade outside of her current Business Group but within the security field at 70 Whitehall. This fresh start would help reduce the severity of her depression and the associated physical pain she is experiencing as a Scleroderma sufferer"

227. The Claimant asked as a reasonable adjustment that she be emailed questions to respond to in writing. Following on from this request on 11 October 2019 a list of written questions sent from Ms Evans to the Claimant. The Claimant alleges that these were closed and leading questions, contrary to the policy at [984].

228. On 13 October 2019 the Claimant responded to Ms Evans saying that she would send her answers by 23 October 2019, which she did.

229. An outcome to the Claimant's complaint was provided in a decision letter dated 31 October 2019. Ms Evans adopted the findings of the investigator Ms Sanghvi and did not uphold the complaint.

GP report

230. In 30 October 2019 the Claimant's GP Dr Neil Rousseau provided a detailed 8 page letter headed "To whom it may concern". This was shared with Ms Aldous on 4 November 2019.

Appeal against complaint & subsequent events

231. On 1 November 2019 the Claimant asked Ms Evans how to pursue an appeal against the decision sent on 31 October 2019.

232. On 4 November 2019 the Claimant was informed by Ms Evans that if she wished to appeal the decision, Gavin Barlow as a Director in the National Security Secretariat in the Cabinet Office was the relevant appeal manager.

233. On 14 November 2019 Mr Barlow was appointed to hear the Claimant's appeal against Kristina Evans' decision, and acknowledged receipt of the Claimant's appeal.

Further communication between Claimant and Ms Aldous

234. On 4 November 2019 an additional email sent from Ms Aldous to the Claimant to check how she was.

235. On 6 November 2019 the Claimant emailed Ms Aldous stating that she wanted a move out of the Government Security Group in order to assist her with the depression she was suffering and the consequent physical pain caused by her Scleroderma.

236. Ms Aldous was supportive and wrote back the same day "I will happily support you in any way that would be useful to understand opportunities beyond GSG".

237. On 20 November 2019 Ms Aldous emailed the Claimant to let her know that following pay settlement negotiations with HM Treasury, HR colleagues had agreed a 6% increase in basic pay which meant that her pay would be increased from £32,123 to £34,139 gross per annum.

238. In a letter dated 23 November 2019 a letter from Begona Lopez, Consultant Rheumatologist contained the following "Unfortunately it seems like her employer decided not to provide her with the adjustments that she was hoping for, including an air-conditioning assessment and a dictation software to lessen the pain in her fingertips caused by typing. This decision was communicated to her on 31st October". This suggests a likelihood that the situation had been materially misrepresented by the Claimant to her Consultant, certainly in respect of the dictation software, given our findings of fact above.

Progress of appeal complaint

239. On 4 December 2019 Ms Evans emailed Mr Barlow explaining that she had not shared the investigation interview records with the Claimant as she understood Ms Sanghvi had already done so.

240. With regard to the terms of reference, and the Respondent's decision not to expand the terms of reference at the Claimant's request, on 5 December 2019 Charles Roper of HR explained to Mr Barlow as follows: "Whilst Nilofar's suggested amendments added further detail, they did not raise any substantive new issues that were not already covered. It was therefore considered that the existing ToR adequately captured the key points."

241. The Respondent did not expand the Terms of Reference as requested by the Claimant.

242. Together with an invitation to the appeal hearing sent on 6 December 2019 the Claimant was provided with copies of the interview records of Ms Sanghvi's investigation and a summary from the Respondent's HR of the reasons for not amending the ToR for the investigation.

243. On 13 December 2019 the Claimant informed Mr Barlow that she would be unable to attend an appeal meeting on 18 December 2019 owing to a pre-existing medical appointment, and suggested an alternative date of 27 December 2019. Mr Barlow responds to say that he is unable to meet on 27 December 2019 owing to pre-booked annual leave, and suggested the appeal meeting be rescheduled to the week commencing 6 January 2020.

244. On 19 December 2020 the Claimant confirmed her availability to attend an appeal meeting with Mr Barlow on 10 January 2020. Mr Barlow in turn confirmed this date.

245. On 9 January 2020 the Claimant informed Mr Barlow that she is unable to attend the appeal meeting rescheduled for the following day as she is not well. The Claimant then asked that her appeal be determined on the basis of her written submissions made to date.

246. On 16 January 2020 the Claimant provided further written representations in respect of her appeal. On 18 January 2019 the Claimant emailed Mr Barlow with further written representations in support of her appeal and requested a new Band B2 role outside of the Government Security Group.

Appeal outcome

247. On 27 January 2020 Mr Barlow provides his decision on the Claimant's appeal. Mr Barlow partly upheld the appeal, on the basis that some parts of the original grievance complaint were not correctly handled in accordance with the Department's process. He concluded however that would have made no difference. He said:

> "I entirely accept that you are suffering considerable stress and anxiety at present, and you have provided evidence that this has exacerbated your underlying medical conditions. It is obvious that the process of making and following through on this complaint has been stressful and difficult for you, and I would like to apologise on behalf of the Department for the fact that the process failings I have identified in considering your appeal have contributed to this."

248. On [1137.103] he wrote:

> "workstation assessments. I recommend that a workstation assessment is carried out and that an air conditioning assessment is included in that. The Department has made extensive efforts to find a workplace assessor with specialist knowledge of your conditions, but none has been found. In the circumstances it is reasonable

> for the Department to offer you an assessor with the normal skill set. They are accustomed to taking account of individual requirements and medical conditions and no reason why you would not be able to explain in detail to them what these are. I understand that Dragon dictation software is still not cleared for use in STRAP areas. The Department should seek clarification from the STRAP authorities of whether this position is likely to change. If it is not, any role you are offered should be clearly compatible with being carried out in a non-STRAP office environment."

249. When asked in his oral evidence Mr Walker was of the belief that Mr Barlow was wrong to conclude that Dragon was not cleared for use in these particular areas – he remains of the belief, based on his own direct observation that another colleague using this Dragon software was able to do so from June/July 2019 onward. We did not hear from Mr Barlow, and have no reason not to accept Mr Walker's evidence on this point.

250. On 10 March 2020 Ms Aldous communicated to the Claimant that Dragon was available in 335.

THE LAW

Reasonable adjustments

251. The purpose of reasonable adjustments is to enable a disabled employee to work by making adjustments to their work practices or by providing auxiliary aids. The reasonable adjustments legislation does not require an employer to pay someone to sit at home doing nothing. On the contrary, the focus of the legislation is on enabling work.

PCPs

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

Time limits

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

> 123 Time limits
>
> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or

> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) then P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

254. In *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, the Court of Appeal held that when employment tribunals consider exercising the discretion under [what is now] S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.'

255. *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 EqA ('such other period as the employment tribunal thinks just and equitable') that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision.

256. *Time limits for omissions* - in the absence of a deliberate failure to act or an act inconsistent with the failure to do something so as to engage section 123(4)(a), section 123(4)(b) requires a Tribunal to consider when the act not done might reasonably be expected to be done (*Kingston upon Hull City Council v Matuszowicz* 2009 ICR 1170, CA).

Direct Disability Discrimination

257. The "but for" test is not always the appropriate approach to causation in direct relation cases (*James v Eastleigh Borough Council* [1990] 2 AC 751).

258. *Burden of proof* – we have considered guidance on the burden of proof in discrimination cases, in particular as referred to by the Claimant *Nagarajan v London Regional Transport* [1999] IRLR 572, *Madarassy v Nomura International plc* [2007] IRLR 246 CA, *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. In *Hewage v Grampian Health Board* [2012] ICR 1054, SC in which Lord

Hope endorsed the following guidance given by Underhill P in *Martin v Devonshires Solicitors* 2011 ICR 352, EAT:

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

Section 15

259. Discrimination arising in consequence of disability contrary to s.15 Equality Act 2020.

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

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

Harassment

261. Harassment contrary to s.26 of the Equality Act 2010. *Harassment* - in *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 the EAT (Underhill, P) emphasised both the subjective and objective elements of a claim of harassment under section 26. There is a minimum threshold and following guidance was given at paragraph 22:

> "it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase"

CONCLUSIONS

TIME

262. Three allegations were on the face of it out of time and not obviously part of a continuing act.

262.1. keyboard 6.9.18

262.2. deadline 14.9.18

262.3. male assessor 20.12.18

263. The onus is on the Claimant to show why time should be extended under the "just and equitable" jurisdiction.

264. The Claimant has not called any witness evidence in support of time being extended. (See procedural matters above). This is not a situation in which the Claimant has become aware of matters in respect of these three allegations at a later stage. On the contrary she was aware of them at the time. This is not a situation either in which the Claimant lacked understanding of her legal right to bring a claim.

265. We do not find that the Claimant has shown why time should be extended.

266. If we are wrong about this time points and the exercise of jurisdiction to extend, we have gone on to deal with these allegations in the alternative on their merits.

DIRECT DISABILITY DISCRIMINATION

Issue 3. Comparators

267. The Claimant relies on the comparators A, B, C, D, E, F and G. Comparators A-F were all invited to end of year assessments, by contrast with the Claimant. We do not have any evidence that any of them was on special leave. It seems therefore that their circumstances were materially different. Comparator G was absent for a number of months with depression and not subjected to the attendance management procedure. We have not received sufficient evidence or submissions from either party to lead us to consider that comparison of the Claimant's treatment to the treatment received by these individuals is of assistance in deciding the discrimination claim.

268. As to a hypothetical comparator the Tribunal, in order for this to be an individual in not materially different circumstances we considered that the following circumstances would need to apply. First, being on a lengthy period special leave. Second, a shortage of data for performance assessment purposes. Third, a strained management relationship. We have considered whether this third element is simply a manifestation of the Claimant's disability. We do not consider that it is. The Claimant's disability was a constant during the period of management by Mr Walker. The relationship had become under strain. We

find that Mr Walker found it difficult to deal with the Claimant. It was perhaps unhelpful that she had been handed over to him by previous manager as a "difficult" case, but by the time of the events material to the direct disability discrimination comparison he had plainly formed his own view. We also find that Mr Walker felt somewhat out of his depth dealing with the Claimant and appears not to have been provided with adequate and timely HR support.

Issue 4a failure to invite Claimant to End of Year Performance appraisal meeting –

269. The Tribunal finds that this was detrimental treatment. We accept the Claimant's submission that the policy governing performance expressed the requirement for a conversation around end of year performance assessment to be mandatory. The treatment received by the Claimant was a deviation from the policy.

270. The Tribunal is surprised that the Claimant was not offered the opportunity of meeting with Mr Walker, nor an indication that the assessment was provisional or the very least the opportunity to respond in writing. Mr Walker's email of 10 April 2019 did not contain such an offer. It was suggested by the Respondent that this right to respond was implied, which we do not accept.

271. Furthermore, given that the Respondent has asserted privilege in respect of the advice received by Mr Walker from HR before he sent his email, there is a gap in the evidence.

272. Given this, we consider that this treatment calls for an explanation. A Tribunal might reasonably find the reason to be direct discrimination. We find therefore that the Claimant has satisfied the initial burden of proof on her under section 136 of the Equality Act 2010.

273. We have reminded ourselves regarding causation in direct discrimination that simple "but for" causation may be the wrong way to approach the matter (*James v Eastleigh Borough Council* [1990] 2 AC 751). In this case had the Claimant not had the disability she had, she would not have found herself in the situation of receiving an assessment without the benefit of a meeting. That might lead the Tribunal however to the wrong conclusion. We have to consider the operative reason for the treatment.

274. Notwithstanding the absence of the HR advice, the Tribunal has had the benefit of the correspondence from Mr Walker leading up to the assessment of 10 April. We find that his email of 2 April 2019 gives a clear insight into what was on his mind. He was concerned about the lengthy leave, but which is not sickness leave. He was concerned about engaging with the Claimant and attempting to mutually agree a mark based on what had happened at the mid-year indicative mark and he is also concerned that the priority is to get her back to work. He was plainly anticipating and seeking to avoid conflict. We bear in mind that he was minded to award "achieving" rather than a lower grade which would designate poor performance.

275. We find that it was because of these reasons rather than because of the Claimant's disability that Mr Walker did not invite the Claimant to an appraisal meeting.

Issue 4b termination of special leave

276. The alleged treatment is "Informing the Claimant on 24 May 2019 that if she did not return to work nor take steps to move forward an assessment with the assessor identified as suitable by the Respondent (in the absence of a assessor with expertise in her medical conditions), she would be classified on sick leave and managed under the Respondent's attendance management procedure"

277. We have set out the whole of Mr Walker's email of 24 May 2019 above.

278. The tone of this email was appropriate. He summarised the position and explained the Claimant's options. She either has to engage with the assessor, Lunar Summers, or suggest an alternative assessor. Otherwise, going forward her absence would be set down as sick absence.

279. We do not find that this is detrimental or less favourable treatment. On the contrary, we find that Mr Walker's approach is reasonable. He has been extremely patient in accommodating the Claimant's various concerns. It is clear by this stage that matters have to come to a head. There needs to be an assessment in order that she can return to work. This is not a situation in which there is an assessor with the appropriate skills, but the Respondent is refusing to use them. Neither the Respondent through a fairly exhaustive search, nor the Claimant, using her friends and family and the resources of the ABLE network has been able to identify an occupational health assessor more appropriate than Lunar Summers. This is not surprising to the Tribunal. In our experience as an industrial tribunal, occupational health is an applied field of medicine in the workplace. Individuals in that field are experts in making adjustments across a whole range of different medical conditions to enable employees with health problems to continue or resume working. Both Microlink and Rehab Jigsaw are examples.

280. Such practitioners in our experience will defer to the particular expertise of medical practitioners who deal with different specialisms. In this case that would probably be consultant rheumatologists or dermatologists. It is quite common in our experience for an occupational health assessor or physician to consider any reports produced by specialist practitioners in other disciplines, or in complex cases to request input from those practitioners. This is exactly what Ms Summers indicated that she might do.

281. In this case Lunar Summers had 20 years clinical experience and experience in rheumatology, which was communicated to the Claimant on 15 May 2019 [693].

282. While it is not necessary for our determination of discrimination, the Tribunal would expect someone in the Claimant's position, acting reasonably, given the history that had gone before, to engage with an assessor. Neither she nor the

Respondent could identify an alternative. Had she engaged with an assessor in May 2019, we think it highly likely that she would have been back in productive work, rather than the current situation which is totally unsatisfactory for both her, the development of her career, and the Respondent, which is paying her full salary to do very little. Given that the Claimant wished to have separate assessments for her to workstations in Whitehall and at home, we cannot see any reason at all why she should not at least engage with a workplace assessment at home.

283. In the alternative, if we are wrong about this not being detrimental treatment, we do not find it was because of her disability. The Respondent, through the actions of Mr Walker, was reasonably trying to resolve matters. The Claimant had by this stage done little or no productive work for six months on full pay. We accept the Respondent's evidence that special leave was for short-term temporary exceptional situations. By May 2019, this was plainly not that. We cannot think that many organisations would tolerate having someone on special leave for such a long period of time with no resolution in sight and without taking action to try to resolve it.

284. This allegation fails.

Issue 4c Failing to provide an assessor with expertise

285. The Claimant contends that the Respondent failed to provide the Claimant with an assessor with expertise in the Claimant's medical conditions to undertake workstation assessments, in breach of the Occupational Health PAM referral form.

286. We do not accept the premise of this claim, for the reasons given in Issue 4b above. Ms Summers had relevant experience. There is no evidence before this tribunal that there was someone better placed to carry out this assessment.

287. We simply do not accept the Claimant's argument that Microlink had an expert that met her requirement (i.e. a female assessor, who was an occupational health specialist and a specialist in the Claimant's conditions). It is absolutely evident from the email of Carl Ward dating 27 March 2019 that there was no such person available. He wrote "if you are looking for a more medical based assessment then it's not our area of expertise". This may have been a U-turn from the more "sales minded" approach of his colleague in an earlier email. Nevertheless we conclude it was perfectly reasonable for the Respondent to regard this as a dead end.

288. This allegation fails.

DISCRIMINATION ARISING IN CONSEQUENCE OF DISABILITY contrary to s.15 Equality act 2010

Issue 5 – something arising

289. The "something arising" in this case was an inability of the Claimant to use the mouse and keyboard.

290. We accept that the Claimant did suffer pain from using mouse and keyboard for extended periods, and furthermore that this was arising from her disability.

Unfavourable treatment

291. The alleged unfavourable treatment is terminating the Claimant's paid special leave without recommended reasonable adjustments to enable her to work.

292. There was in this case no termination of special leave. As framed in the list of issues therefore this claim would fail.

293. We have interpreted this claim to be about Mr Walker's email of 24 May 2019 i.e. what has been characterised by the Claimant as a "threat" to terminate special leave. For precisely the same reasons as set out above in the direct disability discrimination claim, we do not find that this was unfavourable treatment. We find that Mr Walker was, reasonably, trying to progress matters so that the Claimant could receive an assessment to facilitate her return to gainful work. Allowing the matter to drift through an indefinite extension of special leave in our view was not in the Claimant's interest and not unfavourable treatment.

Justification

294. Was the treatment a proportionate means of achieving a legitimate aim, namely the effective management of staff and/or business efficacy?

295. If we are wrong, and there was unfavourable treatment because of something arising from disability, we find that this was justified. It is a legitimate aim to effectively manage staff to ensure that they are working if being paid.

296. We find that offering the Claimant the choice, either to identify her own assessor, engage with the Respondent's proposed assessor, or go on sick leave, was proportionate.

INDIRECT DISCRIMINATION on the grounds of disability contrary to s.19 Equality Act 2010

[Issue 7] PCP's

297. Were the following acts provisions, criterions or practices (or "PCP") which were applied to the Claimant, and which put her at a particular disadvantage because of her disability:

298. [Issue 7a] Excluding her from the End of Year Performance Appraisal on 11 April 2019 the Respondent apparently knowing she could not respond at short notice due to her disability and her family were typing for her.

299. Following *Ishola* we find that this was merely a one-off event in somewhat unusual circumstances and not a PCP nor something that should be regarded as a PCP.

300. [Issue 7b] Requiring the Claimant to use a standard keyboard on 6 September 2018.

301. This was an event that took place for 3 hours on a single day. Following *Ishola* we find that this was merely a one-off event and not a PCP nor something that should be regarded as a PCP.

302. If so, was the PCP a proportionate means of achieving a legitimate aim, namely the effective management of staff and/or business efficacy?

303. We have not needed to consider justification.

FAILURE TO MAKE REASONABLE ADJUSTMENTS contrary to ss.20-21 Equality Act 2010.

304. The exercise to be carried out by a Tribunal is not to look at what adjustments have been made, but to identify whether there was a substantial disadvantage caused by a PCP which the Respondent failed to make an identified adjustment which had a reasonable prospect of ameliorating that disadvantage. That is the exercise that we carry out below.

305. It is important context however to understand what had been done by way of adjustment in this case. Paragraph 22 of the Particulars of Claim attached to the ET1 dated 8 August 2019 says:

> "I believe that the lack of aids, including auxiliary aids such as appropriate chair, desk, for all work locations and dictation software for all IT system locations I would use, as set out in the OH PAM form, put me at a substantial disadvantage at work compared to those not suffering my disability because in the absence of these I could not undertake my job role without causing me disability-related pain and discomfort."

306. We do not find that this accurately or fairly represents the reality. The following adjustments had been put in place:

307. A chair, footrest, two keyboards for Apple Mac laptops, two specialist (Penguin) mouses, two Apple Macs (one to keep in the office and one for use at home) with Dragon Dictate software uploaded were put in place on 2 October 2018.

308. Wrist rests were provided on 8 October 2018.

309. A specialist mouse (penguin mouse) was provided for room 335 on 12 October 2018.

310. Two headsets for Dragon Dictate software were provided on 11 October 2018.

311. An adapted Rosa keyboard was provided for room 335 on 15 October 2018.

312. Day long individual Dragon Dictate software training was provided on 12 December 2018.

313. A monitor for laptop use in room 343 was put in place on 4 January 2019. This was a separate screen that can be used in conjunction with an official laptop e.g. Apple Mac.

314. Two Windows laptops were provided on 28 January 2019 at the request of the Dragon Dictate software trainer due to their opinion of a better user experience with Windows vs Mac OS. These were still to be picked up at the 70 Whitehall Tech Bar at the date of this hearing.

315. There has been a substantial investment in equipment, software and training for the benefit of the Claimant. Based on the evidence we have received the Claimant appears to have made a limited attempt to engage with it or use this equipment and software. Given that the principal problem seems to be the discomfort caused by the use of the keyboard and the mouse, the Tribunal has been surprised by the Claimant's reluctance to attempt to use the Dragon Dictate software, which would seem to be likely to be part of a solution to the difficulties that she faces. The contemporaneous documents show that she received a whole days' training in the use of this software on 12 December 2018. The Claimant represented this as merely an afternoon's training in her oral evidence. At the period material to this claim she has had Dragon Dictate software on a MacBook at home.

316. From 17 October 2018 onward the Claimant, purportedly following the advice of her General Practitioner would not do any work involving typing or using mouse until a workplace assessment had taken place. There were delays in identifying a suitable female assessor, which was unfortunate and the reasons for which are set out above. Our finding is that there was such a suitable assessor identified by 17 March 2019.

317. The Claimant told the Tribunal during her oral evidence that she had been given a light touch keyboard by family "during the Covid-19 period", which we presume from the context was some time in 2020. When asked whether she could use this to help with work her answer was that it was a gift and so she would not wish to use it for work. She has not drawn this keyboard to the attention of the Respondent as a potential solution. This does not suggest an employee who is strongly motivated to return to work.

PCP

318. Counsel agreed the PCP during submissions as "the requirement of the Claimant's job to sit and use a workstation, including a computer with a keyboard and mouse, at 70 Whitehall and home, and manage her workload." We accept this formulation. These were PCPs applied by the Respondent.

Substantial disadvantage

319. *Keyboard/mouse* - we find that the requirement to use a workstation and use a keyboard and mouse at 70 Whitehall and at home did cause the Claimant a substantial disadvantage compared to others who were not disabled. Lengthy use of keyboard and mouse caused her pain. It limited her ability to carry out

the work that she would ordinarily be expected to produce during the course of the normal working day.

320. *Air-conditioning* – as to air-conditioning in 70 Whitehall, based on the evidence that we have received we have not found that this caused a substantial disadvantage in the period material to the claim.

321. The Claimant has not produced evidence that the air-conditioning actually did cause her difficulties at work. Based on the evidence we have seen, she has identified that air-conditioning might potentially cause a problem for people with her conditions, which we accept (paragraph 9 of her witness statement). She has not given any specific examples of when this actually happened to her either in her witness statement, in the medical evidence relied upon or any of the contemporaneous documents we have been referred to. If it had in actual fact been causing her difficulties, we would expect to see that in the evidence. The first time it arises is in the OH PAM referral form in November 2018, and this does not reference a symptom that has occurred as a result of air-conditioning, but rather an assertion "Nilofar would benefit from a desk not too close to air conditioning as this will trigger vasospasm."

322. The reason that the Claimant was not at work and on special leave was because there was initially a delay in identifying a suitable assessor. From March 2019 onward however the Claimant refused to engage with the suitable assessor. In any event throughout the material period the Claimant could work at home where the air-conditioning was not a factor. She did not work at home for most of this period. Any disadvantage alleged relating to air conditioning because was purely hypothetical, not an actual disadvantage.

323. We find that the Respondent's approach of awaiting a recommendation from assessor as to whether a survey is required was a reasonable approach.

ADJUSTMENTS CONTENDED FOR

Expert in autoimmune conditions

324. [Issue 9a] The Claimant alleges failure to provide an appropriate expert of the Claimant's autoimmune medical conditions to undertake the workplace assessments made her unable to return to work without such an appropriate expert's assessment due to the risk of further exposure to pain and discomfort in the workplace.

325. There was no such failure.

326. By 17 March 2019, the Respondent had identified an assessor, Lunar Summers, from Jigsaw Occupational Therapy. For the reasons given above, we consider that she had sufficient expertise to carry out at least an initial workplace assessment. We do not find that it would be normal practice or a requirement for this person to have a high level of specific understanding of the particular condition. We would expect that specialist input to come if necessary

from the Claimant's treating practitioners, if in the opinion of the assessor, further input was required. We bear in mind that in any assessment the Claimant herself would be expected to explain practical constraints caused by her conditions.

Female assessor

327. [Issue 9b] Failure to appoint a female assessor with appropriate expertise into the Claimant's medical conditions as the Claimant felt apprehensive and uncomfortable with a male who wanted to undertake all 3 assessments, including one in her home, in one day which would expose her to disability related pain;

328. The Tribunal's assessment is that the approach made by Mr Mina arose because of an unfortunate miscommunication. Plainly it would have been better had this not happened. We do not see this is the basis for a failure to make reasonable adjustments claim. It was quite clear by 7 January 2019 that the Claimant's immediate managers accepted that there needed to be a female assessor. Ms Summers was female, had appropriate expertise, and was identified by the Respondent by 17 March 2019.

329. We find on the balance of probabilities that even had Ms Summers been identified earlier, given the Claimant's attitude to her expertise, it is highly unlikely that the assessment would have taken place. We do not find therefore that the delay in identifying Ms Summers caused a substantial disadvantage.

Air conditioning

330. [**Issue 9c**] Failure to assess the risks of the ventilation and air conditioning systems within the vicinity of the Claimant's workspace to prevent her suffering vasospasm as identified in the OH PAM referral form and correspondence

331. As set out above, we do not find that there was a substantial disadvantage.

332. If we are wrong about that, we go on to deal with failure to make reasonable adjustments.

333. Following the decision of the EAT in the case of *Rider v Leeds City Council* (UKEAT/0243/11/LA) the making of an assessment in itself is not capable of amounting to a reasonable adjustments.

334. The approach of the Respondent was to deal with air-conditioning after a workplace assessment, if the assessor recommended it. The sticking point was that the Claimant was refusing to participate in this assessment.

335. Given that the Claimant failed to engage with an assessor, and was not present at work in order to identify if there were areas where the air-conditioning caused a particular problem, we do not think on any view that this could amount to a failure.

336. It is not necessary to our finding, but contrary to the position of both parties expressed during the hearing, the Tribunal has some doubt as to whether a

particularly elaborate assessment would be required at all. Taking the Claimant's original request of 20 November 2018 at face value – all she was asking for was a desk not too close to air-conditioning. As a matter of common sense it seems to us that this could be achieved in the first instance by simply identifying a desk that was not in immediate draught from air-conditioning unit or vent. We have not seen any medical evidence that would suggest that the Claimant was unable to enter the building to assist in the carrying out of such an assessment.

Dictation software in the secure area

337. [**Issue 9d**] Failure to provide dictation software in the secure area of 70 Whitehall thereby preventing her from sitting with her team;

338. There was a delay in providing dictation software in the secure area until June/July 2019. It seems that this may not have been communicated to the Claimant until May 2020. That was plainly unfortunate.

339. We accept that the particular circumstances of a highly secure area provide an explanation why this adjustment took some time. Given that the Claimant has not been at work having not engaged with the assessor, she has not suffered any disadvantage in relation to the secure area over and above that general disadvantage caused by use of keyboard and mouse. The Claimant has had this software on a MacBook at home but has chosen not to use it.

Auxiliary aids

340. [**Issue 9e**] Failure to provide sufficient auxiliary aids at work stations which exposed her to pain and discomfort;

341. It cannot be said that there was a failure to provide auxiliary aids. Our finding is that substantial investment was made in aids and software, which were put in place in early October 2018.

342. On 16 October 2018 the Claimant reported that her index finger was painful as a result of the Penguin mouse. Mr Walker responded within minutes to say do not continue to work if you're in pain. On 17 October 2018, the Claimant followed medical advice to cease typing or using a mouse altogether.

343. It was quite clear in this case that the Respondent offered her a variety of different "mice" on 12 September, the idea being that she should try and see which one was the best.

344. In order for the Tribunal to find that there was an auxiliary aid which the Respondent did not provide, a specific aid which might reasonably be expected to ameliorate the Claimant's problems needs to be identified. The Claimant has not identified a particular alternative to the Penguin mouse that would be better. We infer from the circumstances that this was the best of the three she was offered.

345. The impediment to resolving the situation was the lack of assessment. A delay was initially caused by the unfortunate provision of the wrong assessor, but

from March 2019 onward (and to date) by the Claimant's refusal to engage with suitable assessor.

346. We do not find that the Respondent failed to provide a suitable auxiliary aid.

Proposed termination of special leave

347. [**Issue 9f**] Proposed termination of paid special leave and imposition of an attendance management procedure;

348. On the basis of the way that the case has been put forward to us, this part of the reasonable adjustment claim falls foul of *Ishola*. The proposed termination of special leave, and move onto sick pay and performance management, was a specific circumstance which arose in the quite exceptional case, rather than a PCP.

349. We have considered, in the alternative, whether the special leave policy itself might be the PCP. We received evidence that special leave was only paid for short periods and in limited circumstances. It might be argued that this put the Claimant at a substantial disadvantage.

350. We do not find that in fact the Claimant was placed at a substantial disadvantage for two reasons. First, she was never actually taken off special leave. Second, for reasons similar to those considered above under other heads of claim, we do not find that allowing the Claimant to remain on special leave for a lengthy period has been to her advantage. It has allowed the problem to remain unresolved. The Claimant, whom we accept was by this stage showing signs of being depressed, has simply sat at home. That is plainly not been to her advantage, and is a very troubling aspect of this case, but we must determine the claim that has been put before us.

Keyboard incident 6 September 2018

351. [**Issue 9g**] Failure to provide an appropriate computer keyboard on 6 September 2018 which exposed her to disability related pain;

352. Given that this is an incident that occurred on a one-off basis on 6 September, we do not consider that this is a PCP (Ishola), nor that section 20(5) is engaged. As we have found above, we do not accept that Mr Walker or the Respondent generally was aware at the time it happened on 6 September that there was a problem. Understanding that there was a problem would be a necessary precondition of taking steps to remedy.

Work deadlines September 2018

353. [**Issue 9h**] Failure to adjust the Claimant's work deadlines which exposed her to suffer disability related pain;

354. Again, following *Ishola*, we find that this is something that simply happened in this case rather than something that should be characterised as a PCP.

355. In any event we do not find that there was a substantial disadvantage caused. Our finding is that the Claimant spoke to Ms Aldous and rearranged the deadline.

Stress risk assessment

356. [**Issue 9h**] Failure to undertake a Stress Risk Assessment as psychological conditions including stress are known to aggravate the symptoms of her medical conditions.

357. Following *Ishola*, this is not a PCP but something that simply happened in this case. We accept the Respondent's case that various steps were taken to attempt to ameliorate stress, e.g. the payment of special leave, since being on a dwindling amount of remaining sick pay might be a cause of stress.

Adjustments made

358. [**Issue 10**] Did the Respondent make reasonable adjustments, i.e. did the Respondent take such steps as it is reasonable to have to take to avoid the disadvantage?

359. We find that the Respondent did make adjustments, as we have dealt with above. As has been emphasised above, the Respondent in this case has been hampered in its ability to tailor or modify adjustments to the Claimant's specific condition by the lack of assessment. The lack of assessment was initially caused by the instruction of a male assessor, contrary to what had been specified. Thereafter the lack of assessment was due to the Claimant's refusal to engage with Ms Summers.

HARASSMENT contrary to s.26 Equality Act 2010

360. Did the Respondent engage in unwanted conduct related to disability which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her by:

361. [**Issue 11a**] Requiring the Claimant to use a standard keyboard on 6 September 2018;

362. The Tribunal does not accept the Claimant's version of this situation to the extent that it conflicts with Mr Walker's. As we have set out above, it was unclear to us that he understood that this was causing a substantial problem.

363. We do not find that the circumstances, judged objectively, are capable of amount to harassment.

364. [**Issue 11b**] Asking the Claimant when her medical condition would become fatal in the public staff canteen on 10 October 2018;

365. The Tribunal does not accept the Claimant's version of this situation to the extent that it conflicts with Mr Walker's. He has acknowledged that the conversation included discussion of her disability. The discussion was in a public place, the canteen and there were others nearby.

366. We do not accept that Mr Walker entered into a conversation about the Claimant's condition becoming fatal. We accept that as soon as the Claimant indicated that she did not want to continue this conversation in this environment, the conversation stopped.

367. The Respondent's witnesses were surprisingly blasé about use of the canteen for important discussions about personal health conditions and performance appraisal. It seems to be simply accepted that there are not enough meeting rooms and this is what happens. In the view of the Tribunal this is unsatisfactory. It has in the circumstances of this case, we find, contributed to the Claimant's discomfort at a time when she was attempting to come to terms with the diagnosis of medical conditions which must have been extraordinarily difficult for her.

368. We do find that there was conduct related to the Claimant's disability that was unwanted by her. Based on our findings of fact however, we do not find, judged objectively, that this conduct amounted to harassment. It was a legitimate topic for discussion between a manager and an employee, it was merely the location of this discussion that was inappropriate.

369. [**Issue 11c**] Imposing an unreasonable deadline on 14 September 2018;

370. This allegation fails comprehensively.

371. We do not find that it related to the Claimant's disability. We do not find that objectively it was capable of amounting to harassment. We find that the circumstances of this deadline being imposed were unsurprising and ordinary management activity on the part of Mr Walker in the run-up to his going on annual leave. To the extent to which the deadline was too tight, this did not cause a problem to the Claimant who was able to rearrange it by conversation with Ms Aldous.

372. [**Issue 11d**] Failing to provide any of the reasonable adjustments identified at paragraph 9 above.

373. We have considered each of these allegations carefully as part of our scrutiny in particular under the failure to make reasonable adjustments head claim. We do not find that, viewed objectively, these amounted to harassment.

VICTIMISATION contrary to s.27 Equality Act 2010

Protected acts

374. It is accepted that the Claimant did the following protected acts:

374.1. Informing Mr Walker on 2 April 2019 that matters would now be better resolved in an Employment Tribunal;

374.2. Raising a grievance on 25 May 2019; and

374.3. Notifying ACAS of her prospective claims on 15 May 2019.

375. In respect of the third protected act, there was a total absence of evidence demonstrating that the alleged victimisers were aware that ACAS had been notified. Ordinarily, the Tribunal understand that ACAS makes contact by telephone. However we have not seen any evidence about this, nor any internal communication reaching the witnesses.

Alleged detriments

376. Did the Respondent subject the Claimant to the following detriments because she did the above protected acts:

377. [**Issue 13a**] Excluding her from the End of Year Performance Appraisal on 11 April 2019;

378. [**Issue 13b**] Not inviting her to the End of Year Performance Appraisal meeting;

379. We have dealt with these allegations together as they are substantially similar.

380. We find that the failure to have an end of year performance appraisal was itself detrimental treatment. We find that the matter was poorly handled and that it amounted to a deviation from the Respondent's policy [1210.10], in which the end of year conversation about performance is expressed to be mandatory. The email sent by Mr Walker on 10 April 2019 right at the end of the day before the deadline of 11 April was sent only eight days after the email in which the Claimant had raised the possibility that she might have to take treatment to an Employment Tribunal.

381. The HR advice supplied to Mr Walker before he deviated from the Respondent's policy, has not been disclosed to the Claimant or provided to the Tribunal on the basis of privilege. Given that both parties are represented we have not gone behind this. Evidentially however this means that there is an absence of evidence regarding precisely what advice was given to Mr Walker before he sent his email on 10 April.

382. It was surprising and in our view poor management practice not to enable the Claimant to participate in some way in the assessment of her performance. She could and should have at least been given the option to offer comments by email, or have a conversation with Mr Walker. We did not accept the Respondent's suggestion that it was implicit in Mr Walker's appraisal email that the Claimant could offer her comments. Indeed the tone and content of this email suggested that it was the final word.

383. In respect of this allegation the Tribunal finds that the Claimant did satisfy the initial burden of proof on her. We find that a Tribunal could, absent an explanation, reasonably conclude that an act of victimisation had occurred.

384. What the Tribunal does have in this case are emails sent by Mr Walker to the HR function in which he sets out his particular concerns about the appraisal. These at least, we find, gave a clear indication as to what was in Mr Walker's mind when he was raising that a face-to-face meeting was not practicable.

385. Mr Walker expressed his concern that he would not be able to mutually agree the mark and engage with the individual at 09:42 on 2 April 2019. The first reference to employment tribunal appears that evening 21:38 [558]. In other words Mr Walker had already set out his concerns about seeking mutual agreement and engaging with the Claimant before the first protected act.

386. We find that in the circumstances of this case Mr Walker was genuinely concerned about meeting the deadline if he had to mutually agree the mark. He was evidently struggling to deal with the Claimant and anticipated that this was going to be a difficult conversation, in part based on what had happened in a discussion about the mid-year indicative mark. We infer that Mr Walker did not feel particularly well supported by HR.

387. By early April 2019 the Claimant had essentially been out of the workplace and doing a limited amount of work for six months. This posed a difficulty for Mr Walker given that there was a paucity of evidence on which to make an assessment of performance.

388. We find, based on the circumstances and in particular on the concerns expressed by Mr Walker before the protected act, each of which we find were genuine, that the decision not to have a face-to-face appraisal was not because of the protected act.

389. [**Issue 13c**] Subjecting the Claimant to the Attendance Management and Sickness Absence policy and threatening her with removal of paid special leave;

390. This is an allegation in respect of which the Tribunal finds that we do not need to consider the operation of the burden of proof. We are able to make a positive finding.

391. We find the reason Mr Walker notified the Claimant of potential removal of paid special leave is that she was refusing to engage with the appointed assessor and it was simply unsupportable in the view of Mr Walker for her to continue to remain on special leave. The email to the Claimant we do not find to be "threatening", but rather a reasoned description of the matter as it stood at that time, explaining what the Claimant needed to do. She either needed to engage with the assessor, or suggest her own assessor. She was being given options. The tone of the email was appropriate and professional. We find that was an entirely reasonable position to take.

392. Unlike the allegations relating to the end of year assessment, the timing of this step on 24 May 2019 was not in our view suggestive. It had been 6 weeks or so since the email of the Claimant's mentioning the Employment Tribunal.

393. For these reasons we reject this part of the claim.

394. [**Issue 13d**] The investigator of the grievance, Saloni Sanghvi, inviting her to a grievance meeting on 27 June 2019 without specifically informing her of her right to be accompanied on 19 June 2019;

395. We do not find that this amounted to a detriment. This was an investigation meeting rather than a grievance meeting. This approach was entirely consistent with the Respondent policy, and the ACAS Code, which state that individuals should be informed that they can be accompanied when invited to a grievance decision meeting.

396. In any event the Claimant was represented at this meeting.

397. If we are wrong about that, we have considered causation. In this situation it is not causation should not be approached on a “but for” basis which might easily be made out in the context of events within a grievance process that had necessarily been caused by the protected act.

398. Based on the evidence that the Tribunal heard, and the written and oral evidence of Ms Sanghvi, we do not find that the lack of reference to a right to be accompanied was because of a protected act.

399. [**Issue 13e**] A lack of correspondence, communication and engagement from her appointed line manager Lucy Aldous between 12 June 2019 and 27 September 2019;

400. Ms Aldous’ evidence at paragraph 71 of her witness statement is that she held off communication because the investigation was ongoing and she didn't want to "overwhelm" the Claimant. She also made the point that Claimant had her contact details.

401. The last communication from Ms Aldous to the Claimant was "don't hesitate to get in touch".

402. It might have been advisable for Ms Aldous to make more frequent contact, given especially that the Claimant was at home. This however is a counsel of perfection. We do not find the frequency of contact in this matter amounted to a detriment. It was open to the Claimant to make contact at any time.

403. We accept Ms Aldous’ account of her reasons. We do not find that the protected acts were the reason for the infrequent contact in this case.

404. We do not find this allegation is made out.

405. [**Issue 13f**] Lucy Aldous apparently disregarding the Claimant's doctor's letter of 2 October 2019 on 4 November 2019 which recommended she be transferred from the Government Security Group to another group within the security field;

406. [**Issue 13g**] Lucy Aldous apparently disregarding the Claimant's doctor's letter of 2 October 2019 by emailing the Claimant, cc'ing Will Harvey, to integrate the Claimant into the Government Security Group, contrary to the doctor's recommendation.

407. It has been convenient to deal with these two allegations together which overlap, given that they are both based on the same misunderstanding.

408. We accept Ms Aldous' evidence that she did not disregard the medical advice but rather that she initially misunderstood it. She was confused by the terminology "business group", since this is not used within the Respondent. We find that this misunderstanding was understandable in the circumstances.

409. By her email of 6 November 2019 she reassured the Claimant that she would help support her in looking at opportunities elsewhere within the Cabinet Office. As is detailed at paragraph 73 of her witness statement, she actively took steps following on from this. We do not consider that this amounted to a detriment.

410. We accept Ms Aldous' evidence that the reference to Will Harvey was motivated by a desire to keep the Claimant up-to-date with movements within the team. We cannot see how this is a detriment.

411. [**Issue 13h**] Kristina Evans, the decision maker of her grievance, delaying in providing the Investigator's Report conclusions of her grievance on 4 September 2019 following its completion on 19 July 2019;

412. We accepted Ms Evans evidence that this was the first grievance outcome that she had ever dealt with and that she wanted to read into the case before setting up the meeting, which took some time because there was a lot to read. We accept that she delayed sending the report until she was in a position to set up the meeting. This did not happen until after she had returned from holiday on 27 August 2019.

413. We accept from the Claimant's point of view that she would have preferred to have had the completed report earlier rather than later. We do not however find that this delay amounted to a detriment, particularly when considering the process as a whole. This was not a situation for example where there was then a very short period of time before the grievance outcome meeting. In fact there were further delays caused by the Claimant and ultimately the meeting was replaced by an exchange of questions and answers at the Claimant's request.

414. We accept Ms Evan' explanation for the reasons for the delay. We do not find that the delay was because of any of the protected acts.

415. [**Issue 13i**] The decision maker Kristina Evans asking the Claimant if a 12 September 2019 grievance meeting could be attended by a HR caseworker for training purposes;

416. Ms Evans acknowledge that she had doubts about having a caseworker attend for training purposes, which is why she referred back to HR.

417. The experience of the tribunal is that work shadowing or observing by junior members of staff is quite a normal occurrence in the workplace. Essentially, this is an important way for junior employees to learn. It is unfortunate that in the Claimant's fragile mental state this contributed to an increased feeling of stress. We note however that she was able to express that she didn't want this to take place. This position was accepted by the Respondent without argument. We consider it would have been different if they had tried to impose

this on the Claimant after she had expressed misgivings, but this is not what occurred.

418. We do not find this was a detriment, and do not find that it was because she had raised a protected act.

419. [**Issue 13j**] The manner in which written questions were asked of the Claimant by the decision maker Kristina Evans in relation to the grievance on 11 October 2019 without being provided with the witness statements that were obtained during the grievance investigation;

420. There are two elements to this.

421. *Questions* - first is the nature of the questions. Ms Evans had been given guidance by Rebecca Cooke, an HR Case Manager to use open questions to encourage more information to be shared. We find that the questions asked on 11 October 2019 were a mixture of closed and open questions [1014-5]. Some were leading questions, others were not.

422. We acknowledge that in the context of a grievance meeting attended by an employee in person, the effect of closed and leading questions might be to limit the evidence that they give, or lead them down a particular path to the exclusion of evidence that might otherwise have been useful. In the pressure of meeting some individuals, though not all, may feel constrained in their ability to answer questions.

423. In the context of an investigation, there are some points that an investigator needs answers to. In those circumstances it may be reasonable to ask closed questions to establish evidence clearly on a particular point.

424. In this case these questions were given in a written format. The Claimant had time to reflect on the questions and the answers outside of the immediate pressure of the meeting. Indeed she did so giving answers which ran to 63 pages.

425. In the circumstances of this case, we do not find that the format of the questions was a detriment.

426. *Witness statements* - the second element is the failure to provide witness statements. The Respondent's Dispute Resolution Policy [1248] provides that witness statements should be shared "where appropriate". The Respondent is not suggesting that in this case it was inappropriate to show share witness statements. The failure to do so seems simply to have been a mistake and misunderstanding. The investigator Ms Sanghvi says that the witness statements were appended to the report and she assumed that the decision-maker Ms Evans would have shared them.

427. Ms Evans says that she had seen a track changes version with the Claimant's changes as a result of which she believed that the Claimant had already seen the witness statements.

428. The Claimant did not receive the witness statements until the appeal.

429. We take account of the fact that both Ms Sanghvi and Ms Evans were carrying out these roles for the first time in a grievance investigation. Neither of these individuals was being personally criticised by the grievance that have been raised. Their role was independent investigator and decision-maker respectively. We accept their evidence that this failure to follow the policy in respect of witness statements was no more than a genuine error.

430. We do not find that this was detrimental treatment because of the protected acts.

431. [**Issue 13k**] The Investigating Officer Saloni Sanghvi pressurising the Claimant to agree to the terms of reference of the investigation into her grievance on 27 June 2019 with victimisation specifically excluded;

432. The Tribunal does not find it surprising that the Claimant was asked to agree the terms of reference at the investigation meeting. This would seem to us to be good practice. The Claimant was accompanied by Mr Hughes. He suggested that the terms of reference be taken away for consideration.

433. We do not consider that the Claimant has established that she was "pressurised". We do not find that there is any detriment in this respect.

434. [**Issue 13l**] The scope of the investigation of the Claimant's grievance with victimisation excluded, being discovered on 4 September 2019;

435. The original terms of reference appear at 873. There are eight bullet points. The proposed amended terms of reference at 874 contain 12 questions. Eight questions are substantially similar to the original terms of reference, with some extra detail given on a couple of them. Questions 7, 8, 11 and 12 are new. Of these 7, 11 & 12 are essentially in "legal" rather than factual terms, and are designed to invite the Respondent to find that the Claimant had been victimised and that there a breach of duty leading to personal injury.

436. Ms Sanghvi's evidence is that she was advised by HR to stick to the original terms of reference.

437. Given the content of this additional material, we are not surprised that the Respondent did not expand the terms of reference in these terms. The onus was on the Respondent to investigate the factual matters that had been raised as the subject of the grievance. In our experience it would be unusual and unexpected for a grievance process to go on to essentially admit legal liability as part of the same process.

438. We do not find that this was a detriment.

439. [**Issue 13m**] the Claimant discovered on 4 September 2019 that the decision not to undertake the air conditioning [assessment] within the vicinity of the Claimant's workspace of the Respondent's office premises at 70 Whitehall had apparently been (i) deliberately withheld from her by the Respondent and (ii) that it had not been undertaken on the basis of cost;

440. Dealing with (i) first, the Claimant's case that this is a detriment is based on the premise that she was entitled to receive copies of communication relating to the way that the assessment and related matters in her case will be managed. The Tribunal does not accept this starting premise. However, we have considered whether the absence of this knowledge on the part of the Claimant made any difference to her. The Claimant became aware on 4 September 2019 that the air-conditioning assessment would not take place unless this was recommended by the workplace assessment. She did not at this stage, as far we can establish, do anything different from 4 September 2019 onward. Indeed she continued to remain at home and refused to participate with the assessment. We cannot see that there is any detriment.

441. If we are wrong about that, we do not in any event find that there was a "deliberate" decision to conceal this from her because of the protected act. The communication from Mr Jethwa on 25 March 2019 predated any of the protected acts. Mr Jethwa had in all other respects carefully analysed the Claimant's requirements. Mr Walker, the recipient of this email provided emails to the Claimant in great detail in the voluminous email correspondence precipitated by the Claimant's various concerns. We do not detect a reticence on the part of either individual to provide information to the Claimant. If there is an explanation for this specific information not being provided to the Claimant, the Tribunal considers that it was inadvertent and nothing more.

442. Dealing with (ii) that the decision was taken on the basis of cost – the Tribunal does not find this amounted to a detriment. It was not that the Respondent was refusing to carry out an assessment, but merely that, given that this assessment would have a cost, the process that they wish to follow was that this would only be done if recommended by the workplace assessor. We consider that this was an appropriate process. It does not preclude an air-conditioning assessment being carried out, but merely requires the workplace assessment to happen first.

443. This decision relating to cost was taken before any of the protected acts. It follows that it cannot have been caused by the protected acts.

444. [**Issue 13n**] the Claimant discovered on 4 September 2019 that the decision not to provide dictation software within the secure area of the Respondent's office premises at 70 Whitehall had apparently been deliberately withheld from her by the Respondent and had not been undertaken;

445. We do not consider that the Claimant has established that "relevant and pertinent information was deliberately withheld" from her. We adopt similar reasoning to 13m.

446. We have dealt with delays in the security clearance for the use of Dragon dictate in the secure area in claims above [REFERENCE]. In short we accept that some delay was inevitable due to the security concerns raised.

447. We cannot see how the Claimant was placed at any disadvantage, given that she was not working due to the lack of assessment, not the initial bar on using DragonDictate in the secure area.

448. We do not find that this was a detriment.

449. [**Issue 13o**] On 27th June 2019 the Claimant apparently discovered that the investigator, Saloni Sanghvi, had not taken any advice regarding the stress management issue raised within the grievance meeting insofar as she (Ms Sanghvi) apparently informed the Claimant that the Respondent had not taken any advice or made an assessment of how stress would impact on the Claimant's disability during her participation in the grievance process.

450. The Claimant's submission is that the absence of a stress risk assessment would have benefited the Claimant's involvement in the process.

451. The point of a risk assessment is principally to take steps to avoid where practicable risks (e.g. of injury) that might be anticipated. In this case it seems that the Claimant was feeling stressed. It seems to the Tribunal that, having identified that the Claimant was finding the grievance process stressful, Ms Sanghvi did not take any advice about stress management specifically, but dealt with this in a common sense way, in particular by allowing the Claimant to have any breaks that were required.

452. We do not find that this was a detriment.

453. In any event we do not find that this was because of raising a protected disclosure. Ms Sanghvi managed the process regarding stress as best she was able.

454. [**Issue 13p**] The investigator Saloni Sanghvi subsequently failing to respond to questions raised by the Claimant during the 27th June 2019 meeting regarding how the investigation would be handled.

455. It is clear that in the conclusion of the investigation meeting, there were a number of questions in the Claimant's mind about how the remainder of the investigation would play out and when the report could be expected. It would have been better had Ms Sanghvi made some attempts to address these concerns, as it was clear that the Claimant was finding this stressful.

456. We bear in mind that this was Ms Sanghvi's first investigation. We reiterate that she managed this investigation as best she was able. We do not accept that because of the Claimant raising protected disclosures she treated the Claimant in any different way.

457. [**Issue 13q**] Since 27 June 2019 the Investigation Officer, Saloni Sanghvi, refusing to interview the Claimant's witness, David O'Gorman, thereby denying the Claimant supporting evidence;

458. We accepted Ms Sanghvi's evidence at paragraph 23 of her witness statement that she treated everything the Claimant said in her interview regarding workplace adjustments/OH referral to be true and did not feel anything Mr O'Gorman could say would have any bearing on the points in the terms of reference.

459. One area on which Mr O'Gorman was questioned in the Tribunal proceedings, namely the 7 February 2019 meeting, was not an issue considered in particular detail in the Claimant's grievance complaint.

460. We find that an investigator is entitled to exercise their discretion as to who they consider will assist the investigation. We do not find that the Claimant suffered a detriment in this respect.

461. In any event we do not find that the decision not to interview Mr O'Gorman was because of the protected acts.

462. [**Issue 13r**] The Investigating Officer, Saloni Sanghvi, referring to the Claimant as increasingly hostile in the investigation report of the grievance thereby justifying Robert Walker's communications to the Claimant to be "appropriate at all times";

463. Ms Sanghvi concluded:

> "having reviewed correspondence between Robert [Walker] and Nilofar [the Claimant] (sent to me by both parties), considering the increasingly hostile tone of Nilofar's emails, I am satisfied that the language used by Robert was appropriate at all times."

464. The allegation has been framed in a way which is slightly misleading. The conclusion of Ms Sanghvi refers to the increasingly hostile tone of the emails rather than the Claimant herself. We consider that there is a distinction between the tone of an email and someone being described as hostile.

465. It might have been advisable for Ms Sanghvi to use words "upset" or "negative" rather than hostile. We conclude however that it was a legitimate conclusion that notwithstanding the deteriorating tone of the Claimant's emails, Mr Walker continued to use appropriate language. We find that this was the investigator's genuine conclusion. We do not find it was a detriment.

466. [**Issue 13s**] On 31 October 2019 the finding, by Kristina Evans the decision maker, as to the Claimant's grievance, in particular the finding regarding air conditioning.

467. The grievance outcome was provided to the Claimant in a letter dated 31 October 2019 [1097.25–27]. This concise letter appended the investigation report. The grievance outcome acknowledged the Claimant's distress and that

> "obtaining the right support and guidance has taken longer and was more challenging than expected. However there is significant evidence that your line manager took appropriate actions in line with Cabinet Office Policy and guidance to put in place the steps needed to provide you with reasonable adjustments to return to work."

468. In respect of the air-conditioning question, Ms Evans said:

> [1097.26] "There is evidence that was workplace adjustment recommendations were acted upon in a timely manner, with a small number of outstanding areas including the air-conditioning which required the advice from a specialist that was being sought"

469. The Claimant's counsel submits that the cost and/or practical difficulty in conducting an air conditioning assessment remains unclarified. It is submitted that Miss Evans' decision in this regard was an act of victimisation. The Claimant requested Ms Evans on 8 September 2019 to provide her with the cost of conducting an air conditioning assessment [page 988], which was not provided.

470. We do not find that either the outcome of the grievance, nor the specific finding relating to air-conditioning amounted to a detriment. In our assessment these were legitimate and genuine conclusions based on the evidence.

471. We do not find that the failure to engage in a discussion about the cost of conducting an air-conditioning assessment amounted to a detriment. We do not consider it was a requirement to provide detail of costing to the Claimant. In any event we reiterate our conclusion that the reason why the air-conditioning assessment has not taken place was to do with the Claimant's failure to engage with the assessment, not any default on the part of the Respondent.

472. [**Issue 13t**] Kristina Evans, the decision maker, unfairly downplaying that the Claimant had suffered extreme distress which had been exacerbated over a period of time.

473. As set out above, Ms Evans did acknowledge that the Claimant had suffered distress, although perhaps in slightly more muted terms than the conclusion of the appeal manager Mr Barlow.

474. In our assessment Ms Evans' conclusion in this respect was legitimate and a genuine conclusion based on the evidence. We did not find it amounted to a detriment.

475. [**Issue 13u**] The finding, by Kristina Evans the decision maker, as to the Claimant's grievance regarding her paid special leave;

476. In our assessment Ms Evans' conclusion in this respect was legitimate and a genuine conclusion based on the evidence. We did not find it amounted to a detriment.

477. [**Issue 13v**] The conduct of the Claimant's grievance process and the appeal, namely ignoring evidence, withholding evidence from her, failing to interview relevant witnesses, placing too much weight on its own employees' evidence and pre-judging issues, and referencing the opinion of senior staff who had not been formally interviewed.

478. Much of the content of this allegation (e.g. withholding witness statements) is a recapitulation of matters already dealt with above. Accordingly we are not going to make further findings in respect of matters already dealt with.

479. One distinct allegation is that Ms Aldous was not formally interviewed. It seems to be admitted by the Respondent that this is the case. At page [1137.49 – 1137.50] is a two-page note of Ms Sanghvi's interview with Ms Aldous. Although this has been characterised as an informal interview, and there is no notetaker present, a note has nevertheless been taken. This is apparently referenced on page [967] where it is suggested that Mr Walker's position that he was adamant that he would not force anyone to use equipment against their will was backed up by his line manager. It would plainly have been better had Ms Aldous been interviewed in the same way as others.

480. Notwithstanding the various criticisms made by the Claimant of the grievance and the appeal process, we do not find based on the evidence that the grievance process or appeal were carried out in a way that was detrimental to the Claimant because of the protected act.

Comment: extended special leave

481. The Tribunal has been troubled in this case by the expenditure of public money represented by the Claimant remaining at home on full pay and not producing any meaningful work for over two years. We acknowledge that the exceptional circumstances of the Covid-19 pandemic are a contributing factor to the situation. We also acknowledge that the Claimant was diagnosed with a debilitating disease in 2018 which inevitably she is having to come to terms with and work out how to live with.

482. As to the impasse which has led to the Claimant not working, it seems to us both parties would benefit from reconsidering their positions for their mutual benefit and in the light of hindsight. The Claimant has been intransigent in response to requests to engage with Ms Summers in the absence of an assessor meeting all of the requirements that she has laid out. In our judgment she would have been well advised to have agreed to engage with an assessor by the very latest in May 2019 once it was clear that no assessor fulfilling all her criteria was available. If specialist medical input is required, that can be obtained, as Ms Summer's comments indicate. In our judicial and industrial experience Occupational Health is its own discipline. OH assessors routinely take on board advice from treating practitioners who are specialists in particular areas.

483. The Claimant has been reluctant to try to make the best of the resources that she had been provided with, omitting for example even to pick up the PCs that have been purchased for her, and to even attempt to develop her expertise in using Dragon Dictate and being unwilling to use a keyboard that she owns personally to enable her to carry on doing some work, or at least draw the existence of this keyboard to the attention of those managing her.

484. The Respondent on the other hand has acquiesced in long-term payment of special leave, which we understand is not the purpose of this policy, essentially

because they have found the Claimant too difficult to manage. This is plainly unsatisfactory. If the Claimant is truly too unwell to work or refusing to engage with assessment the Respondent has appropriate policies for such situations. The purpose of the reasonable adjustments legislation is to enable employees to work, not for them to be paid to sit at home and do nothing. Ultimately the responsibility for actively managing the situation is the Respondent's. It appears to the Tribunal that Mr Walker's efforts to manage the situation have been appropriate, but have not been particularly well supported either by HR or by senior management.

Employment Judge -Adkin

Date 15.4.2021

WRITTEN REASONS SENT TO THE PARTIES ON

16/04/2021..

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

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

Appendix – List of issues

Summary

1. The Claimant pursues the following complaints against the Respondent:
    a. Direct discrimination on grounds of disability contrary to s.13 Equality Act 2020.
    b. Discrimination arising in consequence of disability contrary to s.15 Equality Act 2020.
    c. Indirect discrimination on grounds of disability contrary to s.19 Equality Act 2020.
    d. A failure to make reasonable adjustments contrary to ss.20-21 Equality Act 2010.
    e. Harassment contrary to s.26 of the Equality Act 2010.
    f. Victimisation contrary to s.27 of the Equality Act 2010.
2. The Claimant and Respondent agree that the Claimant is a disabled person within the meaning of s.6 Equality Act 2010 by virtue of her diagnosis of limited cutaneous systemic sclerosis Scleroderma and Secondary Raynaud's.

Direct discrimination on the grounds of disability contrary to s.13 Equality Act 2010

3. The Claimant relies on the following comparators: her non-disabled colleagues A, B, C, D, E, F and G.
4. Did the Respondent treat the Claimant less favourably because of her disability as follows:
    a. Not inviting her to the End of Year Performance appraisal meeting;

b. Informing the Claimant on 24 May 2019 that if she did not return to work nor take steps to move forward an assessment with the assessor identified as suitable by the Respondent (in the absence of a assessor with expertise in her medical conditions), she would be classified on sick leave and managed under the Respondent's attendance management procedure; or

c. Failing to provide the Claimant with an assessor with expertise in the Claimant's medical conditions to undertake workstation assessments, in breach of the Occupational Health PAM referral form.

Discrimination arising in consequence of disability contrary to s.15 Equality act 2010

5. Was the Claimant subjected to the following unfavourable treatment arising in consequence of her disability:

   Terminating the Claimant's paid special leave without recommended reasonable adjustments to enable her to work.

6. Was the treatment a proportionate means of achieving a legitimate aim, namely the effective management of staff and/or business efficacy?

Indirect discrimination on the grounds of disability contrary to s.19 Equality Act 2010

7. Were the following acts provisions, criterions or practices (or "**PCP**") which were applied to the Claimant, and which put her at a particular disadvantage because of her disability:

   a. Excluding her from the End of Year Performance Appraisal on 11 April 2019 the Respondent apparently knowing she could not respond at short notice due to her disability and family are typing for her; and

b. Requiring the Claimant to use a standard keyboard on 6 September 2018.

8. If so, was the PCP a proportionate means of achieving a legitimate aim, namely the effective management of staff and/or business efficacy?

Failure to make reasonable adjustments contrary to ss.20-21 Equality Act 2010.

9. Did the following acts amount to PCPs which gave rise to a general and particular disadvantage such that the Respondent was under a duty to make reasonable adjustments to avoid the disadvantage:

    a. Failure to provide an appropriate expert of the Claimant's autoimmune medical conditions to undertake the workplace assessments as the Claimant was unable to return to work without an appropriate expert's assessment due to the risk of further exposure to pain and discomfort in the workplace.

    b. Failure to appoint a female assessor with appropriate expertise into the Claimant's medical conditions as the Claimant felt apprehensive and uncomfortable with a male who wanted to undertake all 3 assessments in one day which would expose her to disability related pain;

    c. Failure to assess the risks of the ventilation and air conditioning systems within the vicinity of the Claimant's workspace to prevent her suffering vasospasm as identified in the OH PAM referral form and correspondence;

    d. Failure to provide dictation software in the secure area of 70 Whitehall thereby preventing her from sitting with her team;

    e. Failure to provide sufficient auxiliary aids at work stations which exposed her to pain and discomfort;

f. Proposed termination of paid special leave and imposition of a attendance management procedure;

g. Failure to provide an appropriate computer keyboard on 6 September 2018 which exposed her to disability related pain;

h. Failure to adjust the Claimant's work deadlines which exposed her to suffer disability related pain;

i. Failure to undertake a Stress Risk Assessment as psychological conditions including stress are known to aggravate the symptoms of her medical conditions.

10. Did the Respondent make reasonable adjustments, i.e. did the Respondent take such steps as it is reasonable to have to take to avoid the disadvantage?

Harassment contrary to s.26 Equality Act 2010

11. Did the Respondent engage in unwanted conduct related to disability which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her by:

a. Requiring the Claimant to use a standard keyboard on 6 September 2018;

b. Asking the Claimant when her medical condition would become fatal in the public staff canteen on 10 October 2018;

c. Imposing an unreasonable deadline on 14 September 2018; and

d. Failing to provide any of the reasonable adjustments identified at paragraph 9 above.

Victimisation contrary to s.27 Equality Act 2010

12. It is accepted that the Claimant did the following protected acts:

a. Informing Mr Walker on 2 April 2019 that matters would now be better resolved in an Employment Tribunal;

b. Raising a grievance on 25 May 2019; and

c. Notifying ACAS of her prospective claims on 15 May 2019.

13. Did the Respondent subject the Claimant to the following detriments because she did the above protected acts:

a. Excluding her from the End of Year Performance Apraisal on 11 April 2019;

b. Not inviting her to the End of Year Performance Appraisal meeting;

c. Subjecting the Claimant to the Attendance Management and Sickness Absence policy and threatening her with removal of paid special leave;

d. The investigator of the grievance, Saloni Sanghvi, inviting her to a grievance meeting on 27 June 2019 without specifically informing her of her right to be accompanied on 19 June 2019;

e. A lack of correspondence, communication and engagement from her appointed line manager Lucy Aldous between 12 June 2019 and 27 September 2019;

f. Lucy Aldous apparently disregarding the Claimant's doctor's letter of 2 October 2019 on 4 November 2019 which recommended she be transferred from the Government Security Group to another group within the security field;

g. Lucy Aldous apparently disregarding the Claimant's doctor's letter of 2 October 2019 by emailing the Claimant, cc'ing Will Harvey, to integrate the Claimant into the Government Security Group, contrary to the doctor's recommendation.

h. Kristina Evans, the decision maker of her grievance, delaying in providing the Investigator's Report conclusions of her grievance on 4 September 2019 following its completion on 19 July 2019;

i. The decision maker Kristina Evans asking the Claimant if a 12 September 2019 grievance meeting could be attended by a HR caseworker for training purposes;

j. The manner in which written questions were asked of the Claimant by the decison maker Kristina Evans in relation to the grievance on 11 October 2019 without being provided with the witness statements that were obtained during the grievance investigation;

k. The Investigating Officer Saloni Sanghvi pressurising the Claimant to agree to the terms of reference of the investigation into her grievance on 27 June 2019 with victimisation specifically excluded;

l. The scope of the investigation of the Claimant's grievance with victimisation excluded, being discovered on 4 September 2019;

m. The Claimant discovered on 4 September 2019 that the decision not to undertake the air conditioning within the vicinity of the Claimant's workspace of the Respondent's office premises at 70 Whitehall had apparently been deliberately withheld from her by the Respondent and that it had not been undertaken on the basis of cost;

n. The Claimant discovered on 4 September 2019 that the decision not to provide dictation software within the secure area of the Respondent's office premises at 70 Whitehall had apparently been deliberately withheld from her by the Respondent and had not been undertaken;

o. On 27th June 2019 the Claimant apparently discovered that the investigator, Saloni Sanghvi, had not taken any advice regarding the stress management issue raised within the grievance meeting insofar as she (Ms Sanghvi) apparently informed the Claimant that the Respondent had not taken any advice or made an assessment of how stress would impact on the Claimant's disability during her participation in the grievance process.

p. The investigator Saloni Sanghvi subsequently failing to respond to questions raised by the Claimant during the 27th June 2019 meeting regarding how the investigation would be handled.

q. Since 27 June 2019 the Investigator Officer, Saloni Sanghvi, refusing to interview the Claimant's witness, David O'Gorman, thereby denying the Claimant supporting evidence;

r. The Investigating Officer, Saloni Sanghvi, referring to the Claimant as increasingly hostile in the investigation report of the grievance thereby justifying Robert Walker's communications to the Claimant to be "appropriate at all times";

s. On 31 October 2019 the finding, by Kristina Evans the decision maker, as to the Claimant's grievance, in particular the finding regarding air conditioning.

t. Kristina Evans, the decision maker, unfairly downplaying that the Claimant had suffered extreme distress which had been exacerbated over a period of time.

u. The finding, by Kristina Evans the decision maker, as to the Claimant's grievance regarding her paid special leave;

v. The conduct of the Claimant's grievance process and the appeal namely ignoring evidence, withholding evidence from her, failing

to interview relevant witnesses, placing too much weight on its own employee's evidence and pre-judging issues, and referencing the opinion of senior staff who had not been formally interviewed.