EMPLOYMENT TRIBUNALS

Claimant: Miss T Howarth

Respondents: Dr Parker and Dr Chanda t/a Archwood Medical Practice

RESERVED JUDGMENT

Heard at: Manchester and by CVP **On:** **9 to 16 November 2020, 18 March 2021**

22 March 2021 & 6 April 2021 (In Chambers)

Before: Employment Judge Holmes
Mrs A Booth
Mr P Dobson

Representatives
For the claimant: Mr R Lassey (Counsel)
For the respondent: Mr J Gilbert (Consultant)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The claimant was unfairly dismissed.

2. The respondents did not discriminate against the claimant on the grounds of her association with a person with a disability, and these claims are dismissed.

3. The respondents did not victimise the claimant , and these claims are dismissed.

4. The claimant is entitled to a remedy. The parties are to seek to agree remedy, and, in default , to narrow and define the issues that the Tribunal will be required to determine on remedy. In the event that a remedy hearing is required, they are to notify the Tribunal by **27 August 2021** that a remedy hearing is required, what the issues to be determined will be, to provide an estimated length of hearing, and dates to avoid. They are also to make

suggested , and if possible agreed, case management orders for the remedy hearing.

REASONS

1.By a claim form presented on 16 October 2018 the claimant brings claims of unfair dismissal, and disability discrimination. The dismissal claim arises from the termination of the claimant's employment on 8 June 2018, on the grounds of medical capability. The disability discrimination claims take two forms. The first claims are based on the fact that the claimant has a daughter with a disability, and hence relies upon the associative disability provisions of the Equality Act 2010. At a previous preliminary hearing, the Tribunal determined that the claimant's daughter was a person with a disability for the purposes of these claims. The claimant's other claims are of victimisation, she alleging that she had done protected acts in raising issues relating to her daughter's disability, and its effect upon her ability to work.

2.At a preliminary hearing on 5 August 2020 the Tribunal identified the issues as follows:

1. Unfair dismissal – section 94 Employment Rights Act 1996

(a) was capability the reason for the claimant's dismissal?

(b) did the respondent act reasonably or unreasonably in treating capability as a sufficient reason for dismissing the claimant?

2. Direct disability discrimination – section 13 Equality Act 2010

(a) was the claimant subject to the following less favourable treatment because she has a disabled daughter:

(i) a derogatory comment made by Fraser Cherry on 15 November 2017;
(ii) refusal of flexible working request by Sara Mayer on 20 November 2017;
(iii) Dr Parker's failure to respond to grievance or request for flexible working on 4 December 2017;
(iv) invitation to disciplinary meeting and subject to further disciplinary allegation - Janine Needham and Dr Parker on 3 and 4 January 2018;
(v) a written warning from Dr Parker on 26 January 2018;
(vi) dismissal of appeal against warning by Dr Chanda on 1 March 2018;
(vii) failure to act on Occupational Health recommendations - Sara Mayer between 22 March 2018 – 8 June 2018;
(viii) failure to act upon workplace mediation and failure to appoint alternative mediator - Sara Mayer 27 April 2018;
(ix) a capability meeting with Sara Mayer and Dr Parker on 6 June 2018;
(x) failure to carry out a stress risk assessment - Sara Mayer on 6 June 2018;
(xi) dismissal by Sara Mayer 8 June 2018;
(xii) recording of absence in reference - Sara Mayer – 8 June 2018.

(b) was the claimant treated less favourably than an employee who did not have a disabled daughter?

(c) did the respondent know that the claimant had a disabled daughter?

3. Victimisation – section 27 Equality Act 2010

(a) do the following amount to protected acts:

(i) 19 October 2017 complaint to Dr Parker;
(ii) 29 November 2017 grievance;
(iii) 4 December 2017 complaint to Dr Parker;
(iv) 31 January 2018 appeal letter;
(v) 31 January 2018 grievance;
(vi) 9 March 2018 grievance
(vii) 21 March 2018 complaint to occupational health;
(viii) 15 May 2018 grievance appeal;
(ix) 6 June 2018 complaint to Dr Parker and Sara Myer;

(b) was the claimant subject to the detriments listed above (at paragraph 2(a) of list of issues) as a result of a protected act?

4. Time Limit – section 123 Equality Act 2010

(a) did the claimant bring her claim for direct discrimination and victimisation within three months of the last act of discrimination?

(b) if not, would it just and equitable to extend time?

5. Remedy

(a) what is the value of any injury to feelings award?

(b) is the claimant entitled to compensation for loss of wages?

(c) has the claimant mitigated her loss?

(d) is the claimant entitled to a basic award?

(e) is the claimant entitled to a compensatory award?

(f) if the dismissal was unfair would the claimant have been dismissed in any event had the respondent followed a fair procedure?

(g) did the claimant's conduct contribute to her dismissal?

(h) was there a failure by either party to comply with the ACAS code of Practice?

3.Whilst the issues relating to remedy were identified, the Tribunal has , with the agreement of the parties , only considered liability at this stage. The issue of any

Polkey reduction, however, has been considered as part of determination of the liability issues.

4.The hearing started on 9 November 2020. Evidence was heard over 6 days until 16 November 2020, but the hearing could not be concluded. It was accordingly postponed until 18 March 2021, when further evidence , and closing submissions were heard. The Tribunal convened in Chambers on 22 March 2021 to commence its deliberations, but could not conclude them within the day, so that further deliberations were held on 6 April 2021. Judgment is now given, with the Tribunal's apologies for the delay, occasioned in part by restricted access to judicial premises and resources, and, in part, more recently, by sickness absence of the Employment Judge.

5.The claimant was represented by Mr Robert Lassey of counsel, and the respondents by Mr James Gilbert, consultant. The claimant gave evidence and called no witnesses. For the respondent, Dr Graham Parker, Dr Monica Chanda, Sara Mayer, Janine Needham, Fraser Cherry and Paul Stevens gave evidence. There was an agreed bundle. As the evidence has touched upon the medical history of one of the claimant's daughters , whose identity is not germane to the issues in the case, the Tribunal will refer to her simply as "L".

6.Having heard the witnesses, read the documents and considered the submissions of both parties, the Tribunal unanimously finds the following relevant facts:

6.1 The claimant was employed as a receptionist at the respondent practice, which is run as a partnership between Dr Graham Parker and Dr Monica Chanda. Her employment began on 15 December 2014. She was contracted to work four days a week, a total of 34 hours.

6.2 The Practice Manager was, from 3 June 2015, Sara Mayer. In August 2016, following some absences and personal issues that the claimant was experiencing, the respondents agreed to reduce the claimant's hours to 30 hours per week. On 14 September 2016, however, the claimant reverted to working 34.5 hours per week.

6.3 The claimant was provided with an advance on her wages of £500 in September 2016, with repayment allowed over a period of months. Dr Graham Parker also around this time assisted the claimant in getting rehoused , by standing as guarantor for her.

6.4 In February 2017 the claimant requested a change to her hours to work 30 hours per week over three days. This was accepted by the respondents, and recorded in a letter to the claimant dated 10 February 2017 (page 90 of the bundle) . The claimant's working arrangement was accordingly three days, working 8.30 to 18.30 each day. This request was not related to any health issues with the claimant's daughter.

6.5 On 17 February 2017 , following the claimant being off work by reason of sickness Sara Mayer wrote to her (page 91 of the bundle) a "Letter of Concern re Level of Absence from Work". In this letter she pointed out the relevant trigger points over the last rolling 12 month period, and, made reference to issues that the claimant had been experiencing, and her health issues. The recent change in working hours

was noted, and Sara Mayer expressly stated that the letter was not intended to be a formal warning, and did not form part of the Practice's disciplinary procedure, but was confirmation that there had been discussion of her concerns at the claimant's levels of absence.

6.6 In April 2017 the claimant 's teenage daughter , "L" , began to suffer with seizures. These were unpredictable and had sudden onset. She was hospitalised from 23 to 26 April 2017. At the time no diagnosis of her condition was made, and she remained under investigation. The condition of L was such that the claimant was reluctant to leave her unattended or unsupervised. She was concerned about her being out on her own, as on one occasion she had suffered a seizure at a bus stop.

6.7 On 24 April 2017 (although there is some confusion in the papers as to whether this was 23 or 24 April, but nothing turns on it) the claimant informed Janine Needham by telephone that she would not be in work on 25 April 2017 because her daughter was in hospital. This led to Sara Mayer writing to her on 24 April 2017 (pages 92 and 93 of the bundle) . There had been a discussion between the claimant and Janine Needham as to whether the claimant's absence would be paid or unpaid, the latter being the case. The claimant was alleged by Janine Needham to have reacted angrily to this, which prompted Sara Mayer to write explaining the Practice's policy on time off for dependents. Sara Mayer expressed the Practice's continuing support, but pointed out the challenging nature of her absences. She sought the claimant's intentions in respect of prior absences on 11 and 13 and that of 25 April, in terms of taking those days as leave. No reply to that letter appears in the bundle. The claimant was also off work again on 26, 27 and 28 April 2017, and then again on 12 May 2017 , all because of her daughter's illness. (Whilst Janine Needham's witness statement says that she was employed as the Reception manager from 9 May 2017, this is either a mistake , or she was employed prior to the that date in some other capacity, as she was clearly employed by the respondents in April 2017

6.8 On 8 May 2017 Sara Mayer wrote to all staff confirming the Practice's dependency leave policy (page 94 of the bundle).

6.9 On 16 May 2017 Sara Mayer conducted a return to work meeting with the claimant , the notes of which are at pages 95 to 97 of the bundle. Janine Needham was also present. There was a discussion about L's condition, and her recent hospitalisation. The claimant reported that at that time her daughter's blood tests had come back clear, her CT scan had been clear, and her ECG was normal. She had undergone an MRI scan, and had been referred to Neurology. Janine Needham asked the claimant to provide hospital letters for L, which the claimant questioned, but which were not, she was told , being requested because the Practice did not believe that L was ill.

6.10 Sara Mayer wanted to discuss the amount of time that the claimant had taken as emergency holiday, or unpaid leave, to support her daughter. Janine Needham also raised the procedure for notification of absence, stressing that the claimant should speak to Sara Mayer or herself by telephone if she was unable to get into work.

6.11 There was a discussion about the claimant's working hours. It was agreed that the current hours – 30 hours over 3 days – were not working for either party. The

claimant therefore proposed that she would change her hours to 30 hours over 4 days. Sara Mayer agreed to look into that, and in the meantime some temporary reductions in the claimant's hours were agreed. The claimant's reaction on the telephone to Janine Needham on 24 (or 23) April about leave being unpaid was also discussed.

6.12 The claimant was off work from 23 May 2017 with stress. There was a meeting to discuss her absence , again with Sara Mayer and Janine Needham , on 14 June 2017 (the notes are at pages 98 to 100 of the bundle) . There was further discussion of L's condition, and tests that she was undergoing. She was still having seizures, fainting and fitting. All the tests had come back normal. No further appointments were booked, but a neurologist's opinion was being sought. The claimant was seeking a formal diagnosis, and mentioned that her father had had epilepsy. The claimant was keen to return to work, and there was a further discussion as to the hours that she would want to work. The claimant was not specific, and there was discussion about reducing her hours upon her return to work. A referral to occupational health was discussed, and Sara Mayer agreed to look into a temporary reduction in hours for the claimant .

6.13 The claimant returned to work on 20 June 2017. On 22 June 2017 Sara Mayer wrote to the claimant confirming agreement to changing her working hours to 16 hours per week over 4 days (page 101 of the bundle). She suggested that this arrangement be reviewed after 4 weeks , to see if the claimant could return to her contracted hours of 30 hours per week.

6.14 After 4 weeks, the claimant did seek to return to her 30 hours per week, and , by letter of 20 July 2017 , Sara Mayer wrote to the claimant confirming agreement to change her working hours to 30 hours per week over 5 days, working each day from either 12.00 or 12.30 to 18.00 or 18.30 (page 102 of the bundle).

6.15 On 30 August 2017 the claimant made a request by email (page 105 of the bundle) to change her hours back to 30 hours over three days, as working afternoons was not working due to the childcare issues around her daughter's illness.

6.16 On 31 August 2017 the claimant was again off work, this time by reason of her own sickness. She was off for two days 31 August and 1 September 2017.

6.18 On 4 September 2017 Sara Mayer , with Janine Needham, conducted a return to work interview with the claimant. The form in which this was recorded is at pages 110 to 113 of the bundle. Sara Mayer referred to the claimant's absences over the preceding 12 month period (not including those in April when the claimant had been off work because of her daughter) which amounted to 29 days in the rolling 12 month period. This document, a pro – forma, makes reference to the "Absence Management Procedure". This was discussed, and the claimant was told that this could lead to disciplinary action. The claimant expressed surprise that she could be disciplined for being off sick, and said she would be following this up with her union.

6.19 There was also discussion about the claimant's request of 30 August 2017 to work 30 hours over 3 days. There was also discussion about the contractual position, and the last agreed change to her hours. This was described as a flexible working

request, and Sara Mayer agreed to look into it. A further meeting for 11 September 2017 was arranged for this purpose.

6.20 This meeting took place on 11 September 2017, and again Sara Mayer and Janine Needham were present with the claimant. The notes are at page 114 of the bundle. The claimant's absences were discussed, and the claimant was told that no disciplinary action would be taken in respect of her recent absences. Janine Needham informed her, however, that any further absences in the rolling 12 month period could result in disciplinary action. There was also discussion about the Employee Handbook, and how it could be accessed. Turning to the claimant's request to change her hours, Sara Mayer informed her that the Practice could not accommodate her working 30 hours per week over 3 days. Sara Mayer suggested a later start time to allow the claimant more time to get into work, and reduce instances of lateness, but this would lead to a reduction in her hours. The claimant could not afford any reduction in her hours. 7.5 hours per day over 4 days would work for her. In relation to L's health, the claimant reported that her brain scan had come back as normal . Janine Needham agreed to review the proposal for 7.5 hours per day over 4 days.

6.21 Following the meeting Sara Mayer issued the claimant with a further Letter of Concern (page 115 of the bundle). In it she recorded the claimant's recent absences and how this had breached the Practice's trigger points over the last rolling 12 month period. She also explained where the Absence Management Procedure could be accessed, and what its provisions were.

6.22 On 18 September 2017 Sara Mayer sent the claimant an email confirming agreement to new working hours of 7.5 hours over 4 days, starting at 11.00 , to enable the claimant to fulfil her family responsibilities , and arrive at work on time each day (page 116 of the bundle) .This arrangement was to start on 2 October 2017.

6.23 Some time during the period from 9 August 2017 Janine Needham had begun to compile records of the claimant's lateness and absences. The details of these for the period from 9 August 2017 to 20 September 2017 are at pages 106 to 108 of the bundle. The details of these for the period from 2 October 2017 to 5 October 2017 are at page 109 of the bundle. In each of these documents Janine Needham has calculated the working time that the claimant "owed" the Practice as a result of instances of lateness, or absences.

6.24 On 4 October 2017 the claimant arrived late for her shift, and left early, with Janine Needham's agreement. This was to take her younger daughter (i.e not L) to the doctor's. On 5 October 2017 the claimant telephoned and spoke with Sara Mayer , to tell her that her younger daughter was ill with chest pain, and that she may have to take her to A & E. She was unsure whether she would be able to get into work. In fact she did get to work, but not until 12.50. The claimant was then late on 12 October 2017 and again on 13 October 2017.

6.25 As a result, on 16 October 2017 Sara Mayer and Janine Needham held an informal meeting with the claimant to discuss her recent absence and lateness. The claimant felt uncomfortable in this meeting, and that she was being bullied by Sara Mayer and Janine Needham , ganging up on her, and said so. She became emotional, and matters became heated, so Sara Mayer terminated the meeting.

6.26 Sara Mayer later that day sent an email to Fraser Cherry. He was the respondent's Business Manager. He was not directly employed directly by the respondent, but provided his services to it through Marple Medical Practice by which he was employed. In that email (pages 117 to 118 of the bundle) Sara Mayer explained to Fraser Cherry how the meeting on 16 October 2017 had ended when the claimant had alleged that she was being bullied. Sara Mayer attached to this email a number of documents, including the records that Janine Needham had been compiling of the claimant's lateness and absence. There was also a list of questions , which had apparently been agreed with Peninsula , the respondent's employer law advisers who had been consulted during this process. Fraser Cherry had agreed to hold the next meeting with the claimant , as she wanted someone other than Sara Mayer and Janine Needham to hold it. Sara Mayer explained in this email the claimant's recent history, and the 5 changes in her shift patterns that had been agreed since August 2016. She went on to explain how the claimant had been offered a permanent reduction in her hours, which she had been unable to accept.

6.27 Later that day Sara Mayer sent an email (page 121 of the bundle) to the claimant confirming that the meeting with Fraser Cherry would be held on 19 October 2017. She was told that Dr Parker would also be present , with one of them taking notes. She was told that the purpose of the meeting would be to allow the Practice to discuss her lateness record and to establish if there was anything that could be done to minimise her time off work. The claimant was told she could bring a colleague or a friend to this meeting. Sara Mayer expressed sympathy for the claimant's situation, but her lateness had had an impact on the Practice, so the reasons for it needed to be discussed to see what further action may be needed. The claimant was also warned that , as this was a meeting in working hours, the requirement for her attendance at it would be deemed a reasonable management instruction, non- compliance with which would be dealt with as a separate issue.

6.28 The claimant had insisted by email earlier that day that she be accompanied by a union representative at this meeting, but was told that a colleague or friend only could attend with her.

6.29 The meeting was duly held on 19 October 2017 with Fraser Cherry , and Dr Parker in attendance, and the claimant being supported by a colleague, Jenny Potts. The respondents' notes of that meeting are at pages 125 to 129 of the bundle. Dr Parker was an active participant in the meeting, and both he and Fraser Cherry spoke.

6.30 At the start of the meeting the claimant repeated her allegation that she had been bullied by Sara Mayer and Janine Needham in the meeting on 16 October 2017. (This is the first protected act that the claimant relies upon for her victimisation claims). The claimant also made reference to an earlier incident with Sara Mayer , in which the claimant alleged that Sara Mayer had breached her privacy in a staff meeting. She claimed she had tried to raise this with Dr Parker, but it had been ignored. She was advised to raise this formally as a grievance, that she should obtain statements from members of staff present, and that the grievance would then be considered under the published grievance procedure.

6.31 Written questions, in addition to those previously prepared, at numbers 1 to 7 , which were put in the course of the meeting to the claimant . Further questions numbered 8 to 12 were also added. The initial 7 related to the claimant's recent instances of lateness, and were put to her in the meeting . Two related to the reasons for the claimant's problems, and question 4 sought information about the condition of her daughter , L. The claimant explained how she was the subject of ongoing tests. Fraser Cherry asked what the working diagnosis was , and the claimant said epilepsy or stress epilepsy. The Consultant could not medicate or stabilise her until he was able to confirm the diagnosis. The Tribunal finds that it was at this point that the respondent had actual or constructive knowledge that the claimant's daughter's condition constituted a disability.

6.32 Fraser Cherry then asked the claimant for the A&E reports for the hospital attendance of the claimant's younger daughter on 5 October 2017, and for L on 11 October 2017. The questions then went on to cover the lateness provisions in the Handbook, and the claimant's changes of hours that had been agreed.

6.33 The discussion then ranged across the issues relating to the claimant's absences, and late notifications of taking time off as leave, and their effect upon the Practice. In summary , the way forward was considered, and the possibility of disciplinary action was mentioned. The respondents would be seeking further advice from Peninsula. The claimant expressed confidence in Janine Needham , but wanted to avoid any further confrontation with Sara Mayer.

6.34 Fraser Cherry concluded by setting 5 action points from the meeting (page 129 of the bundle) . Four were for the claimant to carry out. The first was for the claimant to seek advice from the CAB as to assistance that may be available for L. The second was for her to provide the A&E documentation in respect of the two hospital attendances for her daughters. The third was for the claimant to answer 5 more written questions , nos. 8 to 12 (page 130 of the bundle) . One of those (no. 9) was in relation to the health of her younger daughter.

6.35 The minutes of this meeting were circulated, but the claimant, after union advice, declined to sign them.

6.36 Sara Mayer prepared a response to the points that had been raised in this meeting (pages 131 to 138 of the bundle) . It is undated, but must post – date 20 October 2017, as it makes reference to events on that day. It is unclear what the purpose of this document was. Sara Mayer says she was asked to prepare it, and it is an internal document. What it does is to answer , in considerable detail, points discussed in the meeting, and in particular, it responds to allegations or points made by the claimant . Some 21 Appendices were attached to this document.

6.37 On the first page (page 131 of the bundle) Sara Mayer accepted that she found the claimant challenging to manage . She found her emotionally volatile, and said there had been occasions when the claimant had relayed distorted versions of events to her or to the Partners. In terms of the alleged instance of breaching privacy, she pointed out that this had allegedly occurred at a meeting on 10 August 2016, some 15 months previously. She suggested the she would respond to it, should a formal grievance be raised.

6.38 In the ensuing 5 pages Sara Mayer goes through each of the points made by the claimant on the third , fourth and fifth pages of the minutes of the meeting. Unfortunately Sara Mayer has then adopted a numbering system for her comments, whereas the claimant's points are unnumbered bullets points in the minutes. Nonetheless she responded and provided more information , backed up in the Appendices, in relation to all of the matters raised.

6.39 This document, for example, therefore includes (page 133 of the bundle) a table of the claimant's absences from 14 March 2017 to 16 June 2017, and a table of the shift changes that had been agreed between August and October 2017 (page 134 of the bundle). Further, Sara Mayer set out a list of some 9 items of documentary evidence that she claimed the claimant had failed to provide (page 135 of the bundle) , and evidence that the claimant was aware of the Employee Handbook.

6.40 Sara Mayer went on to address the two action points which related to her, in terms of identification of documents provided by the claimant, and how reasons for absences should in future be recorded to reflect the exact nature of the absence.

6.41 This document, and its appendices, was not provided to the claimant , at that time, nor, as far as the Tribunal can tell, until disclosure in these proceedings. It is unclear to whom it was sent, but it is likely to have been to Fraser Cherry and Dr Parker.

6.42 Similarly, Janine Needham made comments upon the minutes of the meeting on 19 October 2017 in an email to Fraser Cherry and Dr Parker on 23 October 2017 (page 140 of the bundle). She commented upon the claimant's contention that she had been bullied by Sara Mayer and Janine Needham at the meeting on 16 October 2017, which she refuted. The meeting had been an informal one, intended to find out the up to date position on her daughter's illness, and ask about her lateness over three working days. She went on to say how she did not want to be in another meeting with the claimant. Having been a manager for a very long time, and having worked with sone very difficult staff, she had never been accused of bullying, and took offence at this suggestion. She went on to discuss what fit notes had been received, and to add that three other colleagues had also made flexible working requests .

6.43 On 26 October 2017 Fraser Cherry prepared a document entitled "Practice Response to Fact Finding Meeting re Toni Howarth" (pages 142 to 144 of the bundle). In it Fraser Cherry reviews the actions from the meeting on 19 October 2017. Action Nos. 5 and 6, the management actions, had been completed, but, save for Action No. 1, the claimant's actions had not been completed. He then went on to record the refutations by Sara Mayer and Janine Needham of a number of points made by the claimant in the meeting, taking these from the documents and emails submitted by Sara Mayer and Janine Needham referred to above.

6.44 Fraser Cherry set out at para.5 (pages 143 and 144 of the bundle) the Practice's beliefs , which were that the claimant's continued level of absence from the practice, was unsustainable, that her behaviour had been disingenuous, and that the Practice had been very , perhaps too, lenient in dealing with the claimant's lateness and dependency requirements, citing some 8 examples of where the Practice, and

Sara Mayer and Janine Needham personally , had helped the claimant . This and the related documentation was to be sent to Peninsula for further advice as how to proceed.

6.45 The claimant was then absent from 30 October 2017 with acute viral laryngitis (her fit note is at page 352 of the bundle) .

6.46 The claimant obtained, and provided to the respondent, a letter dated 3 November 2017 from Dr Talbot, the Consultant Neurologist treating L. He wrote "to whom it may concern" confirming that L was under his care, and his understanding that the claimant had taken time off to care for her. He expressed gratitude for the respondents' support in the matter (page 148 of the bundle) .

6.47 On 10 November 2017 the claimant spoke to Fraser Cherry , and told him that whilst she was feeling better , she was not well enough to return to work, and would be seeking reduced hours , to 16 hours per week, when she did return. After a further fit note from 6 November 2017 (page 353 of the bundle) , on 14 November 2017 the claimant obtained a further fit note in which the GP advised that she was fit to return on the basis of reduced hours of 16 hours, ideally over 2 days (page 354 of the bundle). This fit note cites as the condition which was preventing the claimant from returning to work , unless reduced hours were accommodated , as her daughter's ongoing investigation by Neurology , and the need for constant supervision of her. That fit note covered the period from 14 November 2017 to 9 January 2018.

6.48 On 13 November 2017 Janine Needham sent an email to Fraser Cherry , in response to his of 10 November 2017 to Sara Mayer and herself, in which he flagged up the claimant's request for 16 hours per week. In her email Janine Needham explained how she would need to contact the claimant to sort out these hours , as the Practice had a number of staff off on annual leave, and would struggle to cover the shifts, and the claimant's reduced hours. She asked for an update on his meeting with the claimant. There was a further email from Janine Needham to Sara Mayer , copied to Fraser Cherry , on 14 November 2017 (pages 151 and 152 of the bundle). In that email she explained how another receptionist, Linda, was off on long term sickness absence. Her working pattern was half days on Mondays and Thursdays. She mentioned how it had been hard to cover certain shifts whilst the claimant was off sick, which, with annual leave, had made it more difficult to cover reception. She pointed out that a large number of staff were taking annual leave between 20 November and 22 December 2017. She said she was happy to accommodate the 16 hours that the claimant had requested , but said it would be very difficult to manage staffing levels if the claimant was to be given 16 hours over two days.

6.49 On 14 November 2017 Sara Mayer wrote by email (pages 153 and 154 of the bundle) to Mark O'Donnell, copied to Fraser Cherry , Janine Needham and Dr Parker. Marl O'Donnell was an adviser with Peninsula, the respondent's employment law advisers. This email is probably privileged, as it was sent in the course of seeking and receiving legal advice, but it has been disclosed, and the respondents have thereby waived any privilege that may have attached to it. In it Sara Mayer informs Mark O'Donnell of the up to date position in relation to the claimant. She attached the claimant's latest fit note, and the letter from Dr Talbot about her daughter. She advised how the claimant had informed the Practice that she was seeking that her GP amend

the fit note to say that the 16 hours reduced hours upon her return to work should be worked over 2 days.

6.50 Sara Mayer in this email went on to advise Mark O'Donnell of how the Practice had been more than accommodating to the claimant in helping her with a number of different home and family problems. She pointed out that the fit note did not relate to the claimant, the Consultant's letter did not confirm L's condition or state that there were ongoing care requirements, and the claimant had not produced any information as to why these reduced hours would only be required for 2 months. The claimant had previously raised the possibility of working 16 hours, and had been told to put in a flexible working request, but she had not done so. She went on to say that in the short term the Practice did not have the capacity to enable the claimant to work 16 hours over 2 days, as this would leave them short staffed on the remaining 2 days. She also expressed "concern" that the claimant's GP should now be requesting these hours when the claimant had verbally requested them before she went off sick. The proper process had not, she said, been followed.

6.51 In the concluding paragraphs of this email (page 154 of the bundle) Sara Mayer makes reference to the claimant having a telephone conversation with Janine Needham , in which she allegedly told Janine Needham that if the Practice did not change her hours in accordance with the fit note, she would have to take sick leave as she had no child care. Sara Mayer invited Mark O'Donnell to note that this was an ongoing pattern of behaviour. She advised how Fraser Cherry was in the process of submitting the outcome of the last informal meeting. Finally, she indicated that the Practice would consider how it could accommodate a reduction in the claimant's hours on a permanent basis once a flexible working request had been received.

6.52 Janine Needham's witness statement makes no mention of the conversation in which the claimant allegedly made the threat to take sick leave if her requested hours were not accommodated.

6.53 The claimant had returned to work on 15 November 2017. That day Fraser Cherry had a further meeting the claimant. No minutes were taken, but Fraser Cherry's record of the meeting is contained in his email of 15 November 2017 sent to the claimant after the meeting (pages 155 and 156 of the bundle). This is in contrast to his witness statement, where he deals with this meeting in one paragraph, para. 9.

6.54 At the outset of the meeting Fraser Cherry proposed to record it, and began to do so, until the claimant objected, whereupon he ceased the recording.

6.55 During the meeting, again at the beginning, Fraser Cherry made a comment about the claimant's previous employment in another practice. This was in the context of the claimant saying that she had worked in the NHS since age 16 and had never had such problems. Fraser Cherry had responded to this by saying that he had heard that a previous practice where the claimant had worked could not wait to get rid or her, or had been glad when she left, words to that effect. Fraser Cherry acknowledged in his email later that day that this was not relevant to their discussion, was not from a reliable source, and it had been unprofessional of him to raise it. He apologised, in his email, for doing so.

6.56 The meeting addressed the issues for which it had been convened . The claimant had not been provided with any material in advance of it, other than the minutes and action points from the meeting on 19 October 2017, and disputed some of the points arising from that meeting.

6.57 She disputed, in particular, that she did not adhere to the absence reporting procedures. She explained that she had an arrangement with Janine Needham that if she was running late she would just let her know, and she would adjust her hours accordingly. She claimed to have text messages on her phone to prove this, and, indeed has produced some of these in these proceedings (pages 316 to 339 of the bundle, largely, though not all these text exchanges relate to this matter) as examples of this arrangement. Janine Needham conceded in cross examination that there was such an arrangement. This is hardly surprising, as by nature of the very work the claimant , her colleagues, and Janine Needham were engaged upon, getting through to the Practice by telephone first thing in the morning was often very difficult.

6.58 The claimant also disputed that she had not provided the necessary documentation in relation to her daughters' hospital attendances. In response to late notification of holidays, the claimant explained that she was often forced into this position.

6.59 There was discussion as to why the claimant had not signed the minutes of the meeting of 19 October 2017. The discussion then moved onto the issue that the claimant had raised in relation to Sara Mayer's comment in a staff meeting in August 2016 which the claimant regarded as a breach of privacy. Sara Mayer had apologised to the claimant for this, and Fraser Cherry explored what more she wanted. The claimant had not put anything in writing, and there was discussion as to what Dr Parker should have done, or should now do. Fraser Cherry told the claimant that if she still wanted to pursue it as a grievance she should put it in writing.

6.60 The discussion then moved on to cover the illness from which the claimant's daughter was suffering, and the lack of a diagnosis , or any other relevant information, in the letter from Dr Talbot. Fraser Cherry referred to the ultimate issue being that , principally for family reasons, the claimant was unable to work her full contractual 30 hours. Whilst she could manage 16 hours , preferably over 2 days, the Practice needed cover across the whole of the week, and he explained the reasons why. He explained how the Practice needed to balance the claimant's needs with its own, but her absences were causing operational problems. Janine Needham had had to cancel her own appointments and holidays to cover the claimant's and other staff absences, and there remained a risk that reception was undermanned, and would have to be closed for periods unless the staffing situation could be resolved.

6.61 The claimant's domestic situation was discussed , and why L's sister could not now be relied upon for the necessary care. The claimant agreed that if the Practice could accommodate 16 hours per week over two days, she would commit to that working pattern permanently, enabling the Practice to recruit another member of staff to cover for the other hours that the claimant would thereby be giving up,

6.62 That was how the meeting ended, with Fraser Cherry agreeing to summarise all this, and to seek legal input from Peninsula as to what the Practice should seek to do next.

6.63 Finally, in his email, Fraser Cherry accepted that he had told the claimant that he considered she was difficult to deal with, and was beginning to distress him.

6.64 On 16 November 2017 Sara Mayer sent an email to Fraser Cherry (pages 157 to 158 of the bundle) . In it , having previously discussed the situation with Janine Needham and Fraser Cherry , firstly , she explained why the Practice could not accommodate the claimant's request to work 16 hours on Monday and Tuesday instead of 16 hours over 4 days. This could not be accommodated short - term for 4 reasons, in effect staffing issues with other staff absences , and the unavailability of colleagues to provide cover for other hours that were needed.

6.65 Longer term there remained an issue with Tuesdays. To reduce the claimant's hours to 16 per week on a permanent basis would require the recruitment of a replacement to cover the claimant's remaining hours. Sara Mayer went on to express her concerns about offering the claimant 8 hour days. The first of these was her high level of absence, for a variety of reasons, which would be exacerbated were she to work two 8 hour shifts, as 4 hour shifts were easier to cover. Secondly, permanent and temporary changes of shift to help the claimant had been agreed , with no improvement in her absence record.

6.66 She went on to add that Janine Needham had just received a request for a change of hours from another receptionist , to consolidate her hours into 2 days, instead of 3. Sara Mayer ended this email with this :

"Having discussed the situation with Graham and Monica this morning, they are now of the opinion that they may consider a settlement with Toni (pending a revised costing from Peninsula) due to the amount of direct management time that she is taking up, the additional costs to the business of covering sickness and absence and the broader impact in terms of the detrimental effect on the wider team."

6.67 Also on 16 November 2017 the claimant sent an email to Janine Needham , firstly , seeking confirmation of receipt of documents relating to L's hospital admission, and follow up. Secondly, she sought confirmation of the arrangement that they had whereby the claimant would let Janine Needham know if she was running late, by text message, and she would document the claimant's lateness at the end of the month, and then discuss whether the claimant owed the Practice hours, so that she would then either work them, or have those hours deducted from her salary.

6.68 Janine Needham did not reply to that email , but agreed in her evidence that this was indeed the arrangement that she had with the claimant .

6.69 On 20 November 2017 Fraser Cherry sent an email to the claimant (pages 162 to 163 of the bundle) in which he explained that her request to work 16 hours per week over two days could not be accommodated for operational reasons. He acknowledged that this would be disappointing for the claimant, but explained how staff sickness and other requests for flexible working meant that for the shifts that were required to be

covered to run reception effectively and safely, it had not been possible to accommodate her request. Whilst the Practice would support a 16 hour working week, this would have to be over her usual 4 days, at the times 14.30 to 18.30.

6.70 On or about 20 November 20217 2017 the claimant made a Subject Access Request ("SAR") for her personnel file, which was acknowledged by an email from Sara Mayer that day (page 161 of the bundle) .

6.71 On 24 November 2017 Fraser Cherry sent a further email to the claimant chasing a reply to his email of 20 November, asking if the claimant intended to continue with the arrangement for 16 hour per week only for the duration of her fit note, or whether she now regarded this as her permanent hours?

6.72 On 27 November 2017 the claimant's GP wrote a letter, addressed "to whom it may concern" (page 166 of the bundle) . In it reference is made to the investigations that L was undergoing, and the recent fit notes requesting reduced hours for the claimant to allow the claimant to supervise her daughter. It goes on to say how the claimant was struggling to deal with the stress associated with this illness, and asked that this be taken into consideration. It is unclear when this was presented to the respondents. It may have been attached to the email referred to below.

6.73 On 29 November 2017 the claimant wrote to the two partners, Dr Parker and Dr Chanda (pages 168 and 169 of the bundle) . The first part of this document is headed "Flexible Working Request", and in it the claimant formally requests flexible working hours to care for her daughter , L, and the pattern she requested was 16 hours over two days, Mondays and Tuesdays. The claimant went on to refer to her dealings with Fraser Cherry , and how he had offered this to her, saying that if she agreed to it permanently, he would recruit someone to do the other 14 hours. That offer, however, had been withdrawn, without explanation. She went on to say that this was causing her and her family a lot of stress, and asked that it could be dealt with urgently.

6.74 The second part of the document is headed "Grievance". In it the claimant stated that she wished to raise a grievance against Fraser Cherry . She referred to the meeting on 15 November 2017, and his attempt to record it. This is the only aspect of that meeting that the claimant sought to complain about, the claimant on union advice contending that this was a breach of her rights under Article 8 of the ECHR. She asked that her union representative be able to attend any meetings in relation to either of these issues. (This is relied upon by the claimant as her protected act no.2).

6.75 The respondent has a grievance procedure (page 393 of the bundle) . Dr Parker did not follow that, but responded to the claimant's grievance by letter of 4 December 2017 (pages 171 and 172 of the bundle) . No meeting was held with the claimant , Dr Parker dealt with her grievance , and her request for flexible working, simply by replying to both this letter.

6.76 In relation to request for flexible working, Dr Parker rehearsed the email communication between Fraser Cherry and the claimant from 15 November 2017, on 20 November 2017, and her return to work on 22 November 2017. He went on , at the end of this letter, to ask the claimant to clarify her intentions in respect of working , after which he would consider the need for a further meeting.

6.77 In relation to the grievance, Dr Parker said this:

*"**Grievance.***

I acknowledge you raising a grievance against Fraser Cherry Business Manager which the Partners have discussed with him."

He went on to draw the claimant's attention to a copy of Fraser Cherry's email summary of the return to work interview. In this Fraser Cherry had quite clearly stated that he commenced recording the interview , but had stopped when the claimant had objected. He had assured the claimant verbally , and then also in writing, that no further recording was made. Accordingly Dr Parker found that the claimant's allegation that Fraser Cherry recorded her without her consent , and thus breached her human rights , was *"completely unfounded / aggravated"*.

6.78 Dr Parker went on also to inform the claimant that henceforth all interviews with her would be conducted by two people either from the Practice and/or its HR advisors, and it would indeed be helpful for the claimant to bring her union representative as, the Practice had concerns about her recall of events .

6.79 On 4 December 2017 the claimant saw Dr Parker, and spoke to him after she had received his letter above. She took issue with some of the comments in his letter (e,g that Fraser Cherry had said she was shouting in the meeting on 15 November) and was shocked and upset at it. Dr Parker, however, was dismissive of the claimant's concerns , and would not change his mind. She wrote a short email to him expressing these sentiments, at page 172of the bundle. (This is protected act no. 3 relied upon by the claimant.)

6.80 On 4 December 2017 the claimant went off absent from work due to stress. Although covered by the fit note for a return to work on reduced hours, the claimant then obtained , on 6 December 2017 , a further fit note, for 4 weeks (page 355 of the bundle) for stress at work.

6.81 On 11 December 2017 the respondent sent the claimant an invitation to a disciplinary meeting on 15 December 2017 at 9.00 a.m. (pages 173 and 174 of the bundle) The claimant did not, however, see this letter , or open the attachment, until 14 December 2017 (it does not appear to have been sent by email, but by post, though the claimant's account on page 180 is somewhat confusing on this issue). In it the following matters of concern are set out:

"

1. *Alleged persistent lateness (see further details below)*

2. *Alleged failure to follow the company's procedures in respect of reporting an absence or lateness. The correct reporting procedure is to directly call Sara Mayer or Janine Needham prior to your shift. Examples of this failure are:*

a) On Thursday 14th September 2017 you were due to begin your shift at 12.00pm however you allegedly called Sara Mayer at 12.15pm, 15 minutes after you were due to start to report your lateness.

b) On Thursday 12th October 2017 you were 30 minutes late and both Janine Needham or Sara Mayer were not notified.

c) On Monday 20th November 2017 you were absent from work as you had a hospital appointment. It is alleged that Janine Needham was aware that you had a forthcoming hospital appointment but was not aware that it was that specific day because you allegedly did not notify her.

d) On Friday 24th November 2017 you were late for your shift and allegedly notified the practice by calling the reception team.

Further examples of the above conduct can be found in the document attached to the letter.

3. Allegedly failing to follow reasonable management requests.

a) Further particulars being that in a meeting on Thursday 19th October 2017, Fraser Cherry asked you to complete a number of actions (Actions 8-12 in Appendix A of the minutes) agreed in the meeting. Allegedly no response has been received.

b) Fraser sent you a further email on 24th November 2017 16:29 (attached also with evidence of delivery into your email box) asking that you respond to the above email to clarify your intentions regarding your working hours. Again, allegedly no response has been received.

4. Alleged threatening behaviour towards other member of staff

a) Further particulars being that you allegedly sent repeated emails saying you wanted cancel the meeting on Thursday 19th October unless you could bring a union representative, when you had been advised that the Practice was not under any obligation to allow you to bring a union representative, but had offered you the option to bring a friend or colleague.

b) In a phone call to Janine Needham on 6th December 2017 you allegedly advised that if nothing is resolved at work (we assume this means if we don't agree to you working 16 hours/ week over Mondays and Tuesdays only) you will be obtaining another sick note.

If these allegations are substantiated, we will regard them as serious misconduct.

I have made arrangements for an impartial 'HRFace2Face' Consultant from Peninsula to chair the hearing and conduct any further investigations, before providing recommendations. A note-taker will also be in attendance.

If you are unable to provide a satisfactory explanation for the matters of concern set out above, you may be given a warning, or a final written warning if deemed appropriate, in accordance with our disciplinary procedure. During your disciplinary hearing, the Consultant will listen carefully to what you have to say and ensure that if any further investigations are necessary, a note is made for these to be undertaken by them afterwards. The Consultant is impartial and has had no prior involvement in this matter. It is therefore important that you bring with you any paperwork or other evidence you would like the Consultant to consider."

6.82 The claimant was advised of her right to bring a trade union representative, or work colleague to the hearing. Attached to the letter was a document – "Compilation of Recent Absences/Failure to Follow Procedure & Reasonable Management Requests – T Howarth (Most recent listed first)". A copy of this document does not appear where it should do in the bundle, immediately after this letter to which it was attached, but is likely to be the document which begins at page 342 and runs to page 346 of the bundle. Whilst the first page of this document refers to instances when the claimant "has not followed practice procedure" that are highlighted in red, the respondents, in both the hard copy and electronic copy of the bundle, have only provided monochrome copies.

6.83 The claimant wanted union representation at this meeting, and on 14 December 2017 she contacted the respondents to inform them that she could not attend the meeting the next day as she could not secure that representation. Dr Parker agreed to postpone the hearing to 3 January 2018, and wrote to the claimant to this effect on 14 December 2017 (page 175 of the bundle). At the end of this letter Dr Parker informed the claimant that as she had already exercised her right to postpone the meeting , she should be aware that no further postponements would be granted. She was warned, firstly, that if she failed to attend the disciplinary hearing without good reason, this would be treated as a further act of misconduct, and that if she failed to attend a decision would be made in her absence.

6.84 The claimant had not secured union representation for 3 January 2018, a date which the respondents had selected. On 15 December 2017 she attempted to contact the respondents by telephone urgently to explain how she would not be able to attend the hearing on 3 January 2018 either. She tried to speak to Sara Mayer, but managed to speak to Janine Needham , who sent Sara Mayer an email that day (page 176 of the bundle) in which relayed the claimant's message.

6.85 The respondents did not respond to the claimant's message. Consequently the claimant was unsure of the position on 3 January 2018 in relation to the hearing scheduled for that day. She therefore tried to telephone the respondent. Being a busy medical practice, the claimant had difficulty getting through to Reception. There was a suggestion that the claimant had been sent an email about this hearing on 3 January 2018, and there is also reference in the evidence to a text exchange with Sara Mayer, but no copies (apart from later in the day , at pages 194 and 195) appear in the bundle.

6.86 The upshot of this was that the claimant called the Practice, and eventually spoke to Janine Needham . She was put on hold, however, for 13 minutes, as Janine

Needham tried to contact Sara Mayer. When Janine Needham and the claimant spoke again there was an argument about the claimant being put on hold for so long, and both the claimant and Janine Needham raised their voices.

6.87 Janine Needham documented this exchange in an email at 22.35 that night to Sara Mayer (page 177 of the bundle) . In that email she sets out her account of the telephone call with the claimant, and expresses concern at her conduct. She described the claimant's behaviour as unacceptable, and said it could not continue.

6.88 On 4 January 2018 Dr Parker invited the claimant to attend a disciplinary hearing on 11 January 2018 (pages 196 - 197 of the bundle). In the first paragraph Dr Parker set out the history of the disciplinary hearing. He noted that the claimant had informed the Practice that she could not attend the meeting on 14 December 2017, because of lack of union representation, and the Practice had agreed to reschedule the meeting for 3 January 2018. He noted how the claimant had then said she could not attend that either , as she was still awaiting allocation of a union representative. He referred to the warning that if she did not attend the Practice would proceed in her absence. He went on to say that they considered that 3 weeks was more than enough time to arrange to be accompanied by a union representative.

6.89 He then went on to say this:

"I am now writing to inform you that a further allegation has come to light. As per the letter of Monday 11th December 2017, the disciplinary hearing was to address four alleged matters of concern. The fourth allegation was alleged threatening behaviour towards other member of staff. It is now further alleged that:

> *a) On Wednesday 3" January 2018 you rang the surgery reception around 4.00pm and shouted and raised your voice at Janine Needham on several occasions because you allegedly wanted a call back from Sara Mayer."*

6.90 Dr Parker then also referred to 10 additional items of evidence that were included with the letter. Of these 8 related to the original allegations, and only 2 to the new allegation from 3 January 2018.

6.91 Dr Parker ended this letter with this :

"As you did not attend the disciplinary that was planned for Wednesday 3rd January 2018, in the interests of fairness we believe that it would be reasonable for you to provide written submissions directly to the HRFace2Face Consultant by Thursday 11"" January 2018 at 5.00 p.m."

6.92 The claimant duly did provide written submissions to the HR Consultant Lucy Crossley. These are handwritten, and are (as far as the Tribunal can tell) to be found at pages 180 to 193 of the bundle, with copies of text messages at pages 194 and 195.

6.93. Lucy Crossley completed her report on 22 January 2018. It runs to 12 pages (pages 199 to 211 of the bundle) . In addition to the documents submitted by the respondents and the claimant , she spoke with Janine Needham and Sara Mayer.

6.94 After comprehensively reviewing the documents and the allegations, Lucy Crossley ("LCR") concluded her report as follows (pages 210 to 211of the bundle, references to "TH" being to the claimant) :

"RECOMMENDATIONS

70. Having given full and thorough consideration to the information presented LCR recommends that allegations 2a, 2c, 2d, 3a, 3b, 4b and 4c are also all upheld as they are well founded.

71 LCR finds that in line with the Disciplinary procedure detailed on page 30 of the employee Handbook the allegations listed above be upheld and therefore the appropriate sanction is for TH to be issued with a written warning which will remain live on her file for a period of six months.

72. Should the partnership decide to accept LCR's recommendations in part or in full, then TH should be given the right of appeal.

73. Whilst LCR was instructed to conduct a disciplinary hearing LCR finds that there is a clear break down in the working relationship between TH and the Employer and that this is causing disturbance to the work place and therefore would recommend that they consider work place mediation in order to build a professional workable relationship between both parties.

74. LCR understands that TH is currently signed off work due to Work Related Stress, therefore LCR recommends that the Employer should investigate TH's absence. LCR would suggest that this is done by a stress intervention call or a welfare meeting. It may be necessary to address TH's concerns under the grievance procedure.

75. As part of managing TH's absence the Employer should consider conducting a stress risk assessment to assist TH in returning to work."

6.95 By letter of 25 January 2018 Dr Parker sent the claimant the report by Lucy Crossley, and confirmed that it represented his decision (page 212 of the bundle). He advised how the warning would be placed on her personnel file , but would be disregarded after 6 months, provided that her conduct/performance improved to a satisfactory level. He advised the claimant of her right of appeal, which had to be exercised within 5 days of receipt of his letter, and was to be sent to Sara Mayer.

6.96 On 29 January 2018 Sara Mayer wrote to the claimant (page 214 of the bundle) inviting her to a welfare meeting, as her fit note for stress at work was due to expire on 2 February 2018. She explained that the purpose of the meeting was to discuss the nature and extent of the claimant's illness, how long it would be before the claimant was likely to return to work, and what arrangements the Practice might need to make to ensure her safety. She advised that she and Dr Parker would be in attendance, and that the claimant may be accompanied by a friend , relative, or work colleague.

6.97 On 31 January 2018 the claimant responded to this letter, in a handwritten document (page 215 of the bundle) . She said she would be submitting a further sick note as she was still unwell. She was unable to attend a meeting on 2 February 2018, as she had a medical appointment. She said she was under a lot of stress and asked to be referred to occupational health, and that any further meetings were conducted with her trade union representative present.

6.98 The same day the claimant submitted her appeal against the disciplinary sanction imposed by Dr Parker (page 218 of the bundle). Se said in this appeal letter that the written warning was inappropriately severe , and felt that her full responses had not been fully considered. (This is protected act no. 4 relied upon by the claimant).

6.99 The same day the claimant also submitted a grievance (page 216 of the bundle) in which she referred to the previous grievance she had submitted on 27 October 2017 (erroneously, as it was in fact on 29 November 2017) , in respect of which she was yet to hear anything as to when her grievances would be fully investigated. (This is protected act no. 5 relied upon by the claimant).

6.100 On 2 February 2018 Dr Parker wrote to the claimant to invite her to attend an appeal hearing on 9 February 2018, which he would hear, accompanied by Sara Mayer . The appeal would be a review of the original decision. The claimant could be accompanied by a fellow employee or trade union official.

6.101 The claimant felt too unwell to attend the appeal, and her union representative, Janet Caulfield, so informed the respondents who postponed it to 9 February , and then 15 February 2018.

6.102 On 15 February 2018 Dr Parker wrote to the claimant (pages 220 to 221 of the bundle). He advised that this appeal hearing would now take place by written submissions, to be considered by Dr Chanda, on 23 February 2018. He went on to deal with the other two letters that the claimant had sent on 31 January 2018. In relation to the claimant's query about her previous grievance, he said that there was no record of a grievance on 27 October 2017, but there was in relation to 27 November 2017. This was, in fact an error , as it had been 29 November 2017. This had been dealt with in his letter of 4 December 2017.

6.103 In relation to the welfare meeting, Dr Parker advised that the claimant was not entitled to bring a union representative to this informal meeting. In respect of occupational health, whether such a referral was appropriate could be discussed at this meeting. Finally, he informed the claimant that if she was not able to attend this meeting, she could provide a written submission, for which purpose he attached a questionnaire for her to complete (which does not appear to be in the bundle).

6.104 On 21 February 2018 the claimant provided further documentation for the appeal. Again, the bundle, and Dr Chanda's very sparse witness statement, unfortunately do not assist in identifying precisely what further material was produced by the claimant for the appeal. It appears to be the (illegible, but that is of no consequence) copies of mobile telephone records at pages 313 to 315 of the bundle.

6.105 Dr Chanda's notes of the appeal she held on 23 February 2018, on paper, are at pages 222 to 223 (and for some reason, replicated at pages 226A to 226B, with no discernible differences). After the preamble, Dr Chanda ("MC") sets out her findings thus:

"***Summary of Allegations*** *(see original report for full allegations)*

1. Alleged persistent lateness (detailed below)

2. Alleged failure to follow the company's procedures in respect of reporting an absence or lateness.

a. ***Additional evidence:*** *Statement provided by TH gives a different explanation as to why she was late for work on 14th September 2017 to that originally given to Sara Mayer (SM) on the day and LCR in the original hearing. TH now states that it was her middle daughter [L] (15) who was in A&E, not her eldest daughter [S] (18). TH's original explanation was documented in an email to Janine Needham (JN) by SM at 15.14 on 14th September.*

b. ***Additional evidence****: Statement provided by TH. No additional evidence.*

c. ***Additional evidence:*** *Statement provided by TH. Additional evidence provided by TH is a Hospital appointment letter detailing the appointment on 20th November 2017. The letter is dated 10th January 2018.*

d. ***Additional evidence:*** *Statement provided by TH. No additional evidence.*

3. Allegedly failing to follow reasonable management requests.

a. ***Additional evidence:*** *Statement provided by TH. No additional evidence.*

b. ***Additional evidence:*** *Statement provided by TH. No additional evidence.*

4. Alleged threatening behaviour towards other members of staff.

a. ***Additional evidence:*** *Statement provided by TH. No additional evidence.*

b. ***Additional evidence:*** *Statement provided by TH. No additional evidence.*

c. ***Additional evidence:*** *Statement provided by TH. No additional evidence.*

Findings:

MC believes that no additional evidence has been submitted that would change the overall outcome of the hearing and therefore recommends that the original decision of a written warning is upheld."

6.106 On 28 February 2018 the claimant's GP wrote "to whom it may concern" (page 226 of the bundle) expressing his concern that the claimant's stress at work was being

exacerbated by meeting with the two people she considered had initiated the action against her. He asked if the respondents could look into changing the meeting so it was held with "the human resources department". He suggested this would be preferable for the claimant and also would alleviate some of her stress. The respondents did not have such a department, Dr Parker being the HR lead. It is unclear quite when and how this letter was communicated to the respondents, but it was accepted that it had been (page 226 of the bundle).

6.107 By letter of 1 March 2018 Dr Chanda informed the claimant that her appeal had been unsuccessful, and enclosed a copy of her notes as above (page 227 of the bundle). On 1 March 2018 the respondent also made a referral of the claimant to occupational health (pages 398 to 400 of the bundle). On 2 March 2018 the claimant was sent a letter (page 228 of the bundle) arranging an appointment for her on 21 March 2018.

6.108 On 9 March 2018 the claimant wrote to Sara Mayer (page 231 of the bundle). In that letter she raised a number of issues. She referred back to her earlier grievances of 27 October 2017 (again, probably an erroneous date) and her further letter of 31 January 2018 (not October 2018). She referred to her disciplinary hearing, and how she had been waiting for an outcome of the grievance. She identified three matters , the alleged breach of confidentiality, the return to work meeting with Fraser Cherry on 15 November 2017, and her working hours. She also went on to request a copy of a statement from another receptionist relating to the incident on 3 January 2018, and also to her appeal outcome, and what she had submitted, which she did not consider had been fairly evaluated or taken into consideration. (This is relied upon as protected act no. 6 by the claimant).

6.109 On 15 March 2018 Dr Parker wrote to the claimant (pages 232 to 233 of the bundle) to attend a grievance meeting on 28 March 2018, to consider the five matters raised in her letter of 9 March 2018. Again, this meeting was to be held by a Consultant from HRFace2Face , but a different one from Lucy Crossley. The claimant was informed she could have a trade union representative , or colleague , with her. The claimant was urged to attend this meeting in person. Dr Parker went on to say that he would also like to take the opportunity to discuss the conditions she felt would be needed to enable her to return to work.

6.110 The claimant attended the occupational health consultation on 21 March 2018. The ensuing report is at pages 234 to 235 of the bundle. In the first part of the report Dr Sen, who carried out the assessment, records what the claimant told him about the history of her daughter's illness, and her difficulties at work in adjusting her working hours to accommodate the caring needs that this situation presented. She did report to Dr Sen that she felt bullied, and had raised a grievance. She explained the position at work, and how she felt unable to return to work at all, even with adjustments, as she felt that everyone was against her. (What the claimant told Dr Sen is her protected act no. 7).

6.111 Dr Sen's opinion section of the report he says this:

"Opinion

In response to your questions:-

: In my opinion, Toni is currently unfit to return to her current workplace, including any alternative work here, due to her ongoing situational anxiety regarding her current place of work.

: After careful discussion with Toni, I feel that she is fit to attend meetings but with recommendations in place. She explains that she feels very anxious and panicky in the presence of four workplace colleagues and does not want to meet them at the meeting, but is happy to meet with any appropriate representative on their behalf e.g. HR.

Therefore, I feel that she would be fit to attend meetings with her Union Representative present, and with appropriate representation (for example by HR) for the individuals she does not want to meet.

: Guidance on absence management would be provided by HR to an employer. From the occupational health perspective I would advise that a stress risk assessment is considered that reviews and addresses her concerns, and considers feasible support measures and controls In order to minimise the stress she feels as best as reasonably practicable. Toni explains that any such stress risk assessment would need to be conducted by HR.

: From what Toni has reported to me, it is currently unlikely that the disability provisions of the Equality Act 2010 apply.

: In terms of potential adjustments, again as above, feasible controls and adjustments can be elicited through a stress risk assessment alongside HR. Mediation and resolution should be attempted.

: I am unable to predict a likely return to work date In her current role as this depends on any potential mediation and feasible measures being implemented in order to reduce her anxiety and stress felt. Toni herself explains that she feels unable to return to work in her current work environment even with adjustments."

6.112 On 28 March 2018 , after some email traffic as to whether the meeting should be recorded the claimant attended the grievance meeting with Rachel Waugh of HRFace2Face . She was accompanied by Janet Caulfield, her union representative. The report produced by Rachel Waugh , some 20 pages, is at pages 240 to 261 of the bundle. For the purposes of the report Rachel Waugh considered not only the documentation provided to her, but also, in addition to speaking with the claimant , spoke to Dr Parker, Sara Mayer , Fraser Cherry , and three receptionists.

6.113 Whilst Rachel Waugh did not uphold all but one of the claimant's grievances, in her Recommendations she said this (page 245 of the bundle) :

"***RECOMMENDATIONS***

43. Having given full and through consideration to the information presented I recommend that this Grievance be upheld in part as detailed above.

44. RW believes that there is a clear break down in the working relationship TH and other staff members and that this is causing disturbance to the work place and therefore would recommend that they consider work place mediation in order to build a professional workable relationship between both parties.

45. A copy of this report in its entirety should be made available to the Employee with the appropriate cover letter."

6.114 On either 13 or 16 April 2018 (there are two letters in the bundle at pages 261A and 262) Dr Parker wrote to the claimant with the outcome of the grievance . He proposed that a mediated meeting take place as recommended. He said he was in the process of sourcing a mediator to chair the meeting and would be in contact with the claimant again with a proposed date and time.

6.115 At some time prior to 23 April 2018 it was proposed that the mediator would be Kay Keane, a Practice Manager in another Practice, located in the same building. A date for the mediation was set for 4 May 2018 (pages 264 and 267 of the bundle). The claimant was concerned at this, as this lady knew the management of the respondent practice, and the claimant considered that she may not be independent. She voiced this concern to her trade union representative, Janet Caulfield. Some time around this period , Janet Caulfield wrote to the claimant , an undated document (page 263 of the bundle) . She had seen the report from Rachel Waugh, and discussed its contents with the claimant. She discussed victimisation with the claimant , and what it meant in the Equality Act. She said that she did not feel that this was the case. The claimant, whilst mediation had been recommended , had told Janet Caulfield that she felt a return to the workplace would be untenable. She did not wish to appear to be obstructive, her preference was for negotiation and a settlement agreement. She noted the claimant's concerns about the proposed mediator.

6.116 Janet Caulfield wrote to Sara Mayer on 25 April 2018 (page 266 of the bundle). In this email she initially voiced the claimant's concerns at the choice of proposed mediator. She stated that the claimant was grateful for the offer, and wanted to be seen to be engaging with the process. She then went on (in what should probably have been in a without prejudice communication) to say how the claimant had instructed her to propose a settlement agreement, as she felt that a return to the workplace was untenable, as she felt targeted.

6.117 Sara Mayer replied (to Janet Caulfield's colleague Rebecca Lumberg) on 27 April 2018 (page 265 of the bundle). She maintained confidence in Kay Keane's professionalism, and expressed her belief that she would conduct the mediation in a completely impartial way. She ruled out a settlement agreement , as her and the Partners' objective was to help the claimant return to work. She offered the claimant one more opportunity to attend a mediated meeting where she could be accompanied by a trade union representative.

6.118 Rebecca Lumberg replied on 30 April 2018 (page 265 of the bundle) to Sara Mayer confirming that the claimant did wish to engage in the mediation process, but remained concerned at the choice of proposed mediator, whilst not questioning her professionalism. The claimant suggested another Practice Manager , Paula, for this

role. The evidence before the Tribunal was that there were over 40 Practice Managers in the Group, any of whom could have been approached to act as mediator.

6.119 It is unclear precisely what happened next about the mediation, but it did not take place on 4 May 2018, and there appears to have been something of an impasse.

6.120 On 2 May 2018 (it appears, for there is no document in the bundle which shows this) the claimant , through an email from Rebecca Lumberg of her union, the claimant appealed the grievance outcome. The claimant sent the grounds of her appeal through to her union, and they were , it seems , forwarded to the respondent by email of 15 May 2018 (page 269 of the bundle). The claimant's grounds are set out in three handwritten documents, pages 270 to 272 of the bundle. In the second one of these documents , entitled "request to reduce my working hours" , the claimant makes reference again to the meeting with Fraser Cherry on 15 November 2017. She refers to his offer of 16 hours per week, and the subsequent withdrawal of that offer. She went on to mention her daughter still undergoing investigations, and how she had a duty of care to look after her and keep her safe whilst she (the claimant) was at work and her daughter was still under the age of 18. (This is protected act no. 8 relied upon by the claimant).

6.121 In this document , on the third page, under the heading "Recommendations", the claimant said she had spoken with ACAS who had advised that because the number of members of staff involved was more than 2 , in this case, 5, mediation may not work, and she therefore declined mediation, but asked if there was any other recommendation that could be made.

6.122 The claimant's grievance appeal was considered by Dr Chanda. As the claimant had not appealed within the requisite 5 days provided in its procedure, she did not hold an appeal meeting, but considered the appeal on the papers. She did so on 16 May 2018.

6.123 Dr Chanda's Grievance Appeal Hearing Notes are at pages 273 to 274 of the bundle. They reveal rather more than her witness statement does about what happened on the appeal , and , indeed, other matters which were not strictly within its ambit.

6.124 In terms of the three matters identified as matters under appeal, Dr Chanda rejected them, save for one which had been upheld anyway. One was historic, going back to 2016, and had been dealt with. In relation to the other two, she considered there was nothing new in what the claimant had produced which warranted allowing the appeal.

6.125 Addressing the recommendations document, Dr Chanda observed, in relation to the claimant declining mediation , that this was not part of the grievance outcome. The Practice would consider it further, and respond separately. The Notes go on to record (though there is no evidence of this in the bundle, or anyone's witness statement) that there had been a suggestion from the union that ACAS could chair a mediation meeting. This had been looked into, but the cost of £835 plus VAT per day was considered prohibitive. The rejection of any settlement agreement was noted as well. Dr Chanda decided that the appeal be rejected and the original decisions and

recommendations upheld. She wrote in those terms to the claimant on 18 May 2018, enclosing a copy of her Notes, or Grievance Appeal report, which the Tribunal presumes was the same thing (page 275 of the bundle) .

6.126 In her letter she makes reference to the mediation issue, as being outside the scope of the appeal, and noted her request for anything other than mediation which could be recommended . She said that the Practice would consider this request and respond separately.

6.127 On 18 May 2018 a discussion took place between Jim Moody of the claimant's union and Sara Mayer in which he said that the claimant did not wish to attend a mediation meeting.

6.128 The next action that the respondents then took was on 22 May 2018 when Sara Mayer wrote to the claimant requesting her to attend a medical capability meeting on 6 June 2018 (pages 276 and 277of the bundle) . The claimant was told this:

"The purpose of the meeting is to discuss:

- *your absence from work due to ill health;*
- *the enclosed copy of a medical report from your GP/Consultant/the Occupational Health Practitioner;*
- *the likelihood of you returning to your job/work in the near future;*
- *whether there are any reasonable adjustments that can be made to your job or in the workplace that would facilitate a return to work,-*
- *whether there is any alternative employment available that would be suitable for you.*

I have to inform you that if the meeting indicates that there is little likelihood of a return to work within a reasonable timescale and there are no reasonable adjustments that can be made or alternative employment available, then the outcome may be notice of the termination of your employment on the grounds of ill health. I sincerely hope that this will not prove to be the case, and for this reason if there is any relevant information which you believe we ought to consider, then it is in your own interests to make it available to us for the meeting.

You are entitled, if you so wish, to be accompanied by a fellow employee."

6.129 It is unclear what, other than the occupational health report, was enclosed with this letter. In a later version of this letter , 24 May 2018 (page 279 of the bundle) , the claimant was advised she could be accompanied by a trade union representative. It is unclear what , if any, documents were sent with either letter.

6.130 The meeting was held on 6 June 2018. The claimant was allowed union representation, and Paddy Clasby of Unison attended with the claimant. Sara Mayer

was present, as was Dr Parker. The letter convening the meeting had not mentioned that he would be present with Sara Mayer.

6. 131 The notes of the meeting are at pages 286 – 289 . In the first section, the following is recorded:

"SM confirmed the purpose of the meeting — to discuss TH's absence from work due to ill health and the likelihood of TH returning to your job/work in the near future.

SM explained that the Practice has been advised by Peninsula HR Services as to the structure of the meeting and questions to ask. Although some of the questions may seem to be asking for information that TH has already provided via email or through her union representative, any repetition is to give TH the opportunity to answer directly and/or provide further information/clarification on these points.

SM stated that TH has been off work for 6 months (since 4th December 2017) and her current sick note is to 27th July 2018. The sick notes states 'stress at work'

SM said that as part of the meeting it has been recommended that TH undertake a stress assessment and suggested that TH do this at the end. PC asked if TH could do this later and post it back to the practice. This was agreed. but at the end of the meeting TH decided to do it before she left."

6.132 Whilst Sara Mayer conducted most of the meeting, Dr Parker did also participate. It was he who at the end of the meeting said that the Practice would review the information provided , take legal advice and come back to the claimant and her representative with their decision within a week. The claimant in the course of the meeting told Dr Parker and Sara Mayer that her previous complaints and grievances had not been upheld, and she could not return to work until these issues had been addressed. (This is relied upon as protected act no. 9 by the claimant for her victimisation claims).

6.133 In response to specific questions, whilst the claimant agreed that the recommendations in the OH report had been met, she did not consider that the second one – that a representative of HR be present in meetings – had not been met. She also stated that she had not declined mediation, she felt that the proposed mediator would not be impartial. After discussion about the ACAS advice, and cost implications, the claimant in summary said she had not declined mediation, but did not think that the way it was being done was suitable. She went on to agree that it was not the job that was causing her stress, it was all the people involved in the case. She felt the trust had gone, and her grievance had not been dealt with appropriately. At that point she did not feel that she could come back to work. Whilst her daughter was still under investigation , the main issue now was what had happened since. Her GP would be providing a further letter confirming that her condition would be ongoing unless there was some resolution.

6.134 Some additional items were raised by the claimant's union representative as to the calculation of any notice pay, and the provision of a reference.

6.135 The "stress risk assessment" completed by the claimant after the meeting and provided to the respondent is at pages 395 to 396 of the bundle. It is in fact an HSE document entitled "Return to work questionnaire". It is a generic document, not directed to the claimant's work in particular. Whist the claimant filled in some boxes where she could, largely to the effect that she felt unable to care for her daughter, was bullied at work, felt unsupported, and relationships had broken down, no comments were completed in the column for management to provide them, and this document was not discussed any further with the claimant before she received the outcome letter. Sara Mayer made no enquiries, before issuing the outcome letter, of the feasibility at that stage of the claimant working 16 hours over the two days she had been seeking since December 2017.

6.136 On 6 June 2018 Sara Mayer sent an email at 17.47 to the claimant and her union representative (page 290 of the bundle) enclosing the minutes of the meeting, and acknowledging receipt of the Stress Assessment Questionnaire. The outcome letter dated 8 June 2018 (pages 291 to 292 of the bundle) was sent to the claimant , signed by Sara Mayer .

"During our meeting we discussed the occupational health report and took into account Dr Aloke Sen's opinion which was that you were absent due to work related issues and that you were unfit to return to work, including and alternative work, until the ongoing situational anxiety regarding your place of work was resolved. We also discussed your view of this and you said .the report was accurate and the situation has not changed. You were clear that the reason for your absence was due to your relationship with five colleagues.

Following the occupational health assessment, you attended a grievance meeting on Wednesday 28th March 2018 with a representative from HRFace2Face, an independent HR provider. Your grievance was partially upheld and the representative from HRFace2Face recommended a process of mediation to facilitate your return to work. This was offered and you stated in the meeting that you declined because you were dubious that the proposed chair was impartial.

We discussed whether there were any reasonable adjustments that could be made to your current post to facilitate a return to work but none were found. We also considered the possibility of suitable alternative employment, but you indicated this was not applicable.

We also discussed the operational needs of the organisation and came to the conclusion that there was no prospect of you returning to work within the foreseeable future.

Under these circumstances, I have regretfully been left with no alternative other than to terminate your employment on the grounds of capability.

This will take effect immediately and you will be paid three weeks' pay in lieu of notice. This will be based on you working 30 hours/week.

You have the right of appeal against my decision and should you wish to do so you should write to Dr Monica Chanda, GP Partner within 5 working days giving the full reasons as to the grounds of your appeal."

6.137 Sara Mayer also sent with this letter a reference , addressed "To Whom It may Concern" , in these terms:

"Toni worked for the practice from 13th January 2015 to 8th June 2018 as a Medical Receptionist. She was off work sick for 49 weeks during this period.

Toni is a hardworking and capable Medical Receptionist who was well liked by patients."

6.138 On 15 June 2018 the claimant wrote to the respondents to appeal the decision to dismiss her (page 293 of the bundle). She said this:

"I would like to appeal against the decision to terminate my employment made after a meeting on 8th June 2018 on the following grounds:

- *The hearing panel were not sufficiently impartial as both members were involved in my previous grievances.*
- *A recommendation by occupational health that I should not attend meetings in the company of those who I had difficulties with was not met, making it difficult for me to state my case as I felt inhibited and anxious.*
- *I did not decline mediation, but suggested that the mediator was not suitable due to a lack of impartiality, and no alternative mediator was offered.*
- *Alternative employment or reasonable adjustments do not seem to have been fully considered.*
- *The reason for my sickness absence (i.e. anxiety related to being bullied and victimised) was not considered, and I feel if these issues were adequately addressed I would not have been absent from work.*

As such I would be grateful if you would accept my appeal against termination of employment."

6.139 On 28 June 2018 Dr Chanda of the respondent wrote to the claimant to invite her to an appeal hearing (pages 294 – 295 of the bundle). She confirmed the dates and time of the appeal, and rehearsed the grounds for the appeal that the claimant had advanced. She went on to explain that she would be accompanied by Paul Stevens in his capacity as the Practice's representative on the Stockport Local Medical Committee. She did not explain what role he would have in the appeal. She went on to say that it was important that the claimant bring with her any paperwork or other evidence she would like Dr Chanda to consider, as she would only be able to base her decision on the information available to her. She ended by informing the claimant of her rights of representation and accompaniment at the appeal hearing.

6.140 On 25 July 2018 Paul Stevens conducted the appeal hearing with the claimant, with Dr Chanda in attendance, and Paddy Clasby as the claimant's union representative. Dr Chanda took an active role, and asked questions during the hearing.

6.141 Paul Stevens did not have sight of any documentation in respect of the claimant's case in advance of the appeal hearing. At the appeal hearing, he was provided only with copies of the disciplinary outcome letter , the claimant's grounds of appeal , the notes of the medical capability hearing , and Rachel Waugh's grievance report of 23 April 2018 . At no point throughout the appeal procedure did he have sight of any further documentation prior to reaching the decision.

6.142 The minutes of the meeting (pages 297 to 299 of the bundle) record the following (the claimant's grounds of appeal being underlined) :

"MC welcomed all parties to the meeting and each party introduced themselves.

MC requested the consent of TH for PS to view documents relating to the case.

Consent was given by TH and relevant documents were shared with P5

MC stated that parties were present to hear TH's appeal against the decision taken to terminate her employment following the Medical Capability meeting held at Woodley Health Centre on 6th June 2018.

MC stated that no decision would be forthcoming on the day of the meeting. PS and MC would listen to the information provided by TH during the meeting and then consider this information after the meeting TH asked how long it would take to for a decision to be made. MC stated a decision would be made as soon as possible.

MC asked TH to substantiate the grounds for appeal detailed in her letter dated 15th June 2018.

(a) The hearing panel were not sufficiently impartial as both members were involved in my previous grievances and

(b) A recommendation by occupational health that I should not attend meetings in the company of those who I had difficulties with was not met, making it difficult for me to state my case as I felt inhibited and anxious.

TH said that the presence of staff members who she had previously had grievances with made her anxious and therefore prevented her from getting her point across.

PS asked which staff members TH had had grievances with. TH stated Fraser Cherry, Graham Parker, Sara Meyer, Jennifer (Potts?) and Debbie Hurst. PS asked what the respective roles of the staff members were. MC stated that Fraser was Business Manager, Graham was a GP partner and owner of the business, Sara was the Practice Manager, Jenny the Reception Manager and Debbie Hurst a receptionist.

PS asked TH to clarify the nature of her grievance with Graham Parker. TH stated that the HRFace2Face report contained all the details of her grievances. TH confirmed that Graham Parker had acted as guarantor to her previous tenancy agreement. PS advised that he would need time to review the documentation .

PS asked TH about her grievance with Sara Meyer. TH stated it related to a comment made during an open staff meeting. TH stated that Sara Meyer had apologised to her after the meeting. TH confirmed that she had accepted the apology.

I did not decline mediation, but suggested that the mediator was not suitable due to a lack of impartiality, and no alternative mediator was offered.

TH stated that she was unhappy with the practice suggested mediator, KK a Practice Manager at another Medical Practice working from Woodley Health Centre because she had often seen staff members from Archwood talking to KK.

PC also stated that an email exchange between Sara Meyer and one of his colleagues had occurred indicating that TH would prefer the mediator not to be KK.

PC stated that he and hence TH had suggested ACAS but the practice considered their costs prohibitive. PC stated he did not believe the costs to be too high.

MC said that TH had received advice from ACAS indicating that ACAS thought mediation was unlikely to be successful due to the number and status of the employees involved in the grievances.

TH stated she was happy for mediation to take place just not with the mediator proposed by the practice. She said it did not have to be ACAS it could be another Practice Manager.

Alternative employment or reasonable adjustments do not seem to have been fully considered.

MC asked TH what alternative employment or additional adjustments did TH think could be offered.

MC asked TH how she could work with the same people in the same organisation.

TH said that the grievances upheld in the Face2Face report had not been addressed. PS asked for details. TH said that 3 of her grievances had been upheld. PS sated he would need some time to read the report.

The reason for my sickness absence (i. e. anxiety related to being bullied and victimised) was not considered, and I feel if these issues were adequately addressed I would not have been absent from work.

MC asked why TH felt she had been bullied and victimised.

TH said the information was in the Face2Face HR report. TH also stated that she did not understand why things had changed following her sickness absence. She said previously Graham Parker had acted as guarantor to her tenancy agreement, then she had some sickness leave and needed to look after her daughter and everything changed.

MC said she thought this was too simplistic a summary and that considerably more had taken place as detailed in correspondence held on file.

MC asked TH if she had anything further to add on any of the issues raised in her letter. TH said that she did not.

PS repeated his request for time to read the documentation.

TH stated that she did not want matters to take too long as she only had a limited time to claim unfair dismissal."

6.143 On 2 August 2018 the claimant received the outcome letter , bearing the signature of Paul Stevens, and apparently written by him (pages 300 to 303 of the bundle). In fact, Sara Mayer drafted the letter from (unseen by the Tribunal) material from Paul Stevens, and sent it to Peninsula for checking. Paul Stevens' signature was left on the document. Dr Parker, Dr Chanda and Sara Mayer jointly decided not to uphold the appeal.

6.144 The letter initially sets out the five grounds of appeal advanced by the claimant. It then sets out the conclusions of the respondents upon the grounds , as follows:

"1. The hearing panel were not sufficiently impartial as both members were involved in my previous grievances.

The Medical Capability panel comprised Graham Parker (GP Partner, Business Owner and HR lead) & Sara Mayer (Practice Manager) from the practice, TH and her union representative, Paddy Clasby.

During the meeting I sought clarification from TH as to the nature of her grievance with Graham Parker. I was advised that the independent HRFace2Face report contained the details of her grievances. I have reviewed this document and can find no details of A grievance with Graham Parker. Conversely, TH stated in the meeting on a number of occasions that Graham Parker had previously acted as guarantor to TH's tenancy agreement. The report does reference a grievance with Sara Mayer but this grievance was not upheld. Furthermore, the appeal against the grievance hearing findings was not upheld.

It is reasonable to expect the HR lead for the Practice, Graham Parker to have been involved in the grievance procedure but I find no evidence to support him not being sufficiently impartial. Whilst Sara Mayer was involved in a previous grievance this grievance was not upheld

I find no reason to overturn the dismissal decision on this ground.

2. A recommendation by occupational health that I should not attend meetings in the company of those who I had difficulties with was not met, making it difficult for me to state my case as I felt inhibited and anxious.

As stated previously I find no evidence to support previous difficulties with Graham Parker in the independent grievance report.

Furthermore the independent grievance report stated that difficulties with Sara Mayer were promptly addressed by the practice after the incident, an apology was given and accepted by TH. The independent grievance report found no reason for further grievance. I furthermore understand it was agreed that TH's union representative, Paddy Clasby, would speak on her behalf to mitigate any feeling of anxiety at the Medical Capacity Meeting.

In addition during the Termination of Employment appeal meeting chaired by Monica Chanda no further evidence was presented to suggest any further reason for difficulties with Graham Parker or Sara Mayer.

Whilst I understand the recommendation made by Occupational Health, it is made without a full understanding of the practice's organisation structure or the case in question. Occupational Health also recommended the presence of HR at any meeting. The practice's HR lead is Graham Parker.

Given that I have seen no evidence of reasons for difficulties between Graham Parker and TH and the independent report found no reason for grievance with Sara Mayer as well as the agreement for the union representative to speak on TH's behalf I do not consider the practice representation at the Medical Capability Meeting to be unreasonable.

I find no reason to overturn the dismissal decision on this ground.

3.I did not decline mediation, but suggested that the mediator was not suitable due to a lack of impartiality, and no alternative mediator was offered.

The Termination letter does not say that TH declined mediation it states that TH declined mediation on the basis proposed by the practice. This is consistent with the agreed minutes of the meeting.

At the Termination of Employment Appeal Meeting TH's advised her reasons for considering the proposed chair unsuitable. I do not believe the reasons given for the unsuitability of the proposed mediator were substantiated.

I understand TH's union representative had previously suggested ACAS to mediate which the practice declined on cost grounds. The minutes from the Medical Capability Meeting state that TH had been advised that ACAS did not feel mediation would work because her situation involved a number of her employers. Indeed I also understand TH's union representative stated that given the small size of the organisation her relationship with 5 members of the team would limit her ability to undertake other roles in the organisation. This statement would appear to support the ACAS view that mediation was unlikely to work.

Therefore I conclude that the practice did offer mediation which was declined by TH. The suggestion of mediation provided though ACAS was made but TH had been advised by ACAS that this was unlikely to be beneficial. The practice could have offered an alternative mediator however the advice from ACAS and the evident relationship issues between TH and a large proportion of key staff (including the business owner) within such a small organisation indicate to me that was unlikely to be beneficial.

I find no reason to overturn the dismissal decision on this ground.

4. Alternative employment or reasonable adjustments do not seem to have been fully considered.

The Minutes from the Medical Capability Meeting say that TH's union representative stated that as a small practice there are probably limitations with regard to other roles.

In addition the occupational health report suggests TH was unfit to return to work including any alternative work. The independent grievance report did not uphold TH's grievance in relation to requests to reduce her working hours stating that the employer has made all reasonable attempts possible to accommodate TH's working pattern and although the working pattern desired by TH could not be accommodated the employer offered an alternative. Furthermore, TH's appeal against the findings of this independent grievance report was not upheld.

No further evidence was provided to support this ground.

I find no reason to overturn the dismissal decision on this ground.

5. The reason for my sickness absence (i. e. anxiety related to being bullied and victimised) was not considered, and I feel if these issues were adequately addressed I would not have been absent from work.

On reviewing documentation I find an employer who has acted as guarantor to TH's tenancy agreement, an employer that has made all reasonable attempts possible to accommodate TH's requests to change her working pattern and an employer that has acted promptly and appropriately in response to the issue with Sara Mayer. I find no evidence to suggest TH has been treated in a manner different from that of any other staff member employed by the practice or in a manner that any reasonable employee could expect.

No further evidence was provided during the Termination of Employment Appeal Meeting to support this ground and I find the claim of being bullied or victimised unsubstantiated.

I find no reason to overturn the dismissal decision on this ground."

6.145 The claimant's appeal was accordingly rejected and on 16 October 2018 she commenced these proceedings. No complaint or grievance was raised about the

reference dated 8 June 2018 provided by Sara Mayer was made until these claims were presented.

6.146 At or around the same time , on 23 July 2018, that the claimant was dismissed, another Receptionist, who had been off work sick for a long period of time , and who did not have a disabled dependent, was also dismissed by Sara Mayer. No details of this person's dismissal have been provided.

6.147 There was little or no evidence before the Tribunal of how the respondents managed the claimant's absence from December 2017 to June 2018. Sara Mayer confirmed that there was no event which led to the Practice deciding to invite the claimant to the capability meeting when it did on 6 June 2018. No specific problems arose with staffing Reception in this period (as opposed to the period prior to 4 December 2017 , when the claimant's absences were more sporadic and shorter term, with little or no notice), during which the respondents adduced no evidence of any difficulties in covering their staffing requirements. Recruitment of further staff took place after the dismissal of the claimant , and the other staff member dismissed in July 2018.

7. Those then are the relevant material facts found by the Tribunal. The credibility of the witnesses was challenged , though the reliability of the evidence was probably equally critical. The Tribunal has found that the respondents' witnesses were not fully candid, and have been less than fully honest, in that the Tribunal has found, despite their denials, that the intention to end the claimant's employment as soon as they could was formed around November 2017. The Tribunal has been driven to that reluctant conclusion on the evidence, and the pattern of the respondents' behaviour towards the claimant from around November 2017. The Tribunal was influenced in those findings by a number of factors. A major one was that the respondents' witness statements were generally rather sparse in detail. Much of the evidence of what occurred in meetings, or the respondents' reasons for the decisions they took, comes from the notes of meetings, or the outcome letters, and not the witness statements, which is why the findings above quote extensively from them. Large parts of the evidence relating to crucial factual issues were glossed over in the respondents' witness statements , and were only extracted with in cross – examination. Significant elements of the respondents' case (e.g the allegation that the claimant had "threatened" Janine Needham that if she did not get the reduced hours she was seeking, she would go off sick – a matter which later formed one of the disciplinary allegations against her) were omitted from, for example, Janine Needham's witness statement, which was surprising given the importance the respondent attached to such matters in the action it took against the claimant. This is but one example of the general lack of important detail in all of the respondent's witness statements. That of Paul Stevens who conducted the appeal is particularly striking in its brevity (5 paragraphs, 2 of which merely identify him) and total lack of explanation of the reasons why he took the decision he did , and the process which he followed, on the appeal, for which the Tribunal had to search in the documents, and was only elicited in cross – examination.

The Submissions.

8. Both parties' representatives had prepared substantial closing submissions which they spoke to. It is not intended to rehearse them here, as they are available for examination on the Tribunal file. The respective submissions will be considered in context when the specific issues are examined below.

The Law.

9. The relevant statutory provisions are set out in the Annexe to this judgment. The applicable caselaw has been cited largely in the submissions of both parties, and will be further referred to, where necessary, in the course of this judgment, along with any other relevant authorities which the Tribunal considers germane .

Discussion and Findings.

10. Whilst not the order in which the Issues were set out in the Record of the Preliminary Hearing , we consider it most logical to address the issues in this order. Firstly, to consider, for the purposes of the victimisation claims, whether the claimant has established that she did any protected acts within the meaning of s.27 of the Equality Act 2010. If she cannot, those claims must fail. Then we propose to consider the treatment which is relied upon for both the victimisation and direct associative discrimination claims. If not relevant for the former, it may, of course, still ground liability if any of it is found to have been because of the claimant's association with a person with a disability, in this case, her daughter. Finally, as it is a separate head of claim , which raises different legal issues, we will consider whether the dismissal was fair, and related issues.

The Protected Acts relied upon.

11. There are 9 acts relied upon, namely:

(i) 19 October 2017 complaint to Dr Parker;
(ii) 29 November 2017 grievance;
(iii) 4 December 2017 complaint to Dr Parker;
(iv) 31 January 2018 appeal letter;
(v) 31 January 2018 grievance;
(vi) 9 March 2018 grievance
(vii) 21 March 2018 "complaint" to occupational health;
(viii) 15 May 2018 grievance appeal;
(ix) 6 June 2018 "complaint" to Dr Parker and Sara Myer;

12. Taking them in turn,

(i): 19 October 2017 complaint to Dr Parker

The claimant's case:

At the outset of the meeting on 19 October 2017, the claimant made accusations that Sara Mayer and Janine Needham were bullying her at the previous meeting held on 16 October 2017. The claimant submits this accusation is based on her perception that she was being treated unfairly by them due to reasons related to her daughter's disability.

The meeting on 19 October 2017 being a return to work meeting held by Dr Parker and Fraser Cherry , and designed to address concerns regarding the claimant's lateness and absenteeism. The reason she had been off work , or was late, at that time was related to daughter's disability, so the logical conclusion on the balance of probabilities is that bullying complaint on 19 October 2017 related to questions the claimant on 16 October 2017 in relation to those absences. It was submitted that the claimant was clearly making a complaint about unfair treatment related to her daughter's disability, regardless of whether or not those complaints are well-founded. Accordingly, such a complaint falls within the definition of a protected act within the meaning of section 27(2).

Finding:

This was not a protected act. It requires a reading of the complaint which it does not bear. Whilst the complaint has its roots in the claimant's lateness and absences, which were themselves consequences of her daughter's disability, it cannot sensibly and objectively be considered to be a complaint that the claimant herself was being treated in a manner which breached the Equality Act 2010, i.e that she was saying she was being directly discriminated against by association.

Protected Act (ii): 29 November 2017 grievance

The claimant's case:

The grievance (pages168 to 169 of the bundle) was addressed to both Dr Parker and Dr Chanda, and it related to Sara Mayer's refusal to grant the claimant's flexible working request. The complaint contained within the grievance therefore clearly related to an unfairness regarding the refusal of this request. The claimant made this request in order to care for her disabled daughter. The clear inference, when considered in light of the earlier allegations of bullying as detailed above, is that the claimant was making a complaint about unfair treatment in Sara Mayer's refusal of her flexible working request, in circumstances where such a request is made on the basis of the claimant's caring responsibilities in respect of her daughter's disability. In short, the claimant was complaining that by refusing her request, Sara Mayer has breached the provisions of the Equality Act 2010. Again, it is immaterial for the purposes of establishing a protected act, whether or not this complaint was well-founded. Accordingly, such a complaint falls within the definition of a protected act within the meaning of section 27(2).

Finding:

This was not a protected act. It requires a reading of the complaint which it does not bear. Whilst the complaint has its roots in the claimant's daughter's disability, it cannot sensibly and objectively be considered to be a complaint that the claimant herself was being treated in a manner which breached the Equality Act 2010, i.e. that she was saying she was being directly discriminated against by association.

Protected Act (iii): 4 December 2017 complaint to Dr Parker

The claimant's case:

The claimant submits that the complaint to Dr Parker (page 172 of the bundle) is clearly a complaint that Fraser Cherry treated her unfairly by viewing her as a troublemaker for raising a grievance on 19 October 2017. Accordingly, it was submitted that the claimant was complaining to Dr Parker that Fraser Cherry had committed an act of victimisation, thereby breaching the Equality Act 2010. Accordingly, such a complaint falls within the definition of a protected act within the meaning of section 27(2).

Finding:

This is not a protected act. It is an attempt to heap an allegation of victimisation upon an allegation of victimisation. The document itself is the claimant's response to Dr Parker's response (or lack of it) , to her grievance. All it says is that some of the matters that Dr Parker has said had occurred were not true events , and she was shocked and upset with his response that Fraser Cherry could say what he wanted to That cannot possibly be construed as an allegation that Fraser Cherry had breached the Equality Act 2010.

Protected Act (iv): 31 January 2018 appeal letter

The claimant's case:

The claimant submits that the reference to "*full responses not being fully considered*" in her appeal letter (page 218 of the bundle) in respect of the disciplinary outcome is a reference to her answers given in respect of the reasons for her lateness or absenteeism regarding her daughter's disability. Sara Mayer admitted that she was aware both of this appeal letter, and that part of this reference to responses not being fully considered related to responses given in respect of lateness that pertained to the claimant's daughter (pages 202 – 203 of the bundle), and Dr Parker also understood those to be the reasons given by the claimant for her lateness and absenteeism.

The claimant is complaining that the reasons given for her lateness / absenteeism at the disciplinary hearing were; a) related to her daughter's disability; and b) were not fully considered at that hearing - held on 11 January 2018 by Lucy Crossley. Again, it is immaterial whether or not such a complaint is well-founded.

Dr Chanda did not invite the claimant to a meeting in respect of this appeal, so could not offer any assistance on what the claimant meant by her full responses not being considered. The only evidence before the Tribunal on the meaning of that phrase comes from the claimant , as above. Accordingly, on the evidence before the Tribunal as to the content of this appeal, the claimant submits that this complaint falls within the definition of a protected act within the meaning of section 27(2).

Finding:

This is not a protected act. Again , it requires a contorted and convoluted reading of the words used by the claimant , as somehow amounting to an allegation that there has been a breach of the Equality Act 2010. The Tribunal cannot so read it.

Protected Act (v): 31 January 2018 grievance

The claimant's case:

The claimant submits that the complaint that her original grievance was not dealt with properly (page 216 of the bundle) is a protected act because the original grievance (protected act (iii) above) related in part to the refusal to grant her request for flexible working; a request which was made specifically in order to allow her to care for her disabled daughter. Accordingly, the claimant is complaining that Dr Parker's failure to deal with the initial refusal of the flexible working request, and/or his failure to engage with the substance of her request afresh as part of the grievance process, is unfair treatment related to her daughter's disability. She is again making a complaint about unfair treatment related to her daughter's disability, a complaint which falls within the definition of a protected act within the meaning of section 27(2).

Finding:

This is not a protected act. Again, it is an attempt to heap a grievance upon a grievance. As the Tribunal has found that the original grievance at protected act (iii) was not a protected act, it can see no basis for then finding that this grievance about the respondent not dealing with it then becomes one. There is nothing in it which brings it within s.27 of the Equality Act 2010.

Protected Act (vi): 9 March 2018 grievance

The claimant's case:

This relates to part of the grievance raised on 9 March 2018 (page 231 of the bundle) which relates to Sara Mayer's earlier refusal to accommodate the claimant 's request to work 16 hours on Monday – Tuesday each week. This request was clearly made in order to allow the claimant to provide a better standard of care for her daughter, by reason of her NEAD disability. The claimant references the earlier agreement with Fraser Cherry at the meeting of 15th November 2017, and is complaining within this grievance that the later decision by Sara Mayer to withdraw or refuse that shift pattern - which was requested specifically with her daughter's care needs in mind - was unfair. Accordingly, this grievance falls within the definition of a protected act within the meaning of section 27(2) .

Finding:

This is not a protected act. It confuses the context in which the claimant is raising these matters, and why she needed the variation in her working hours, with a complaint that the respondents were breaching the Equality Act 2010 in not agreeing to her request. Whilst the claimant , with the assistance of legal representation and argument may put her case of associative disability discrimination that way, and has done, the Tribunal cannot read this grievance as making such a complaint at the time it was made. In short, the claimant has not, in this, or indeed in any other allegedly protected act, made the allegation that she, the claimant, has been discriminated against because of her disabled daughter. She has not, for instance , said "someone with a non – disabled dependent relative has been or would be better treated". She has made a number of allegations, which when put together , form the basis of her own claims of direct associative discrimination in these claims, but the Tribunal doubts she was even aware that she could make such claims, and finds that this, along with

the other allegedly protected acts, falls a long way short of falling within s.27 of the Equality Act 2010.

Protected Act (vii): 21 March 2018 complaint to Occupational Health

The claimant's case:

This protected act is the history that the claimant gave to the OH practitioner for the purposes of the report (pages 234 to 235 of the bundle), which clearly references a complaint regarding the claimant's hours. As with previous protected acts , the claimant was requesting to work certain hours. Accordingly, this grievance falls within the definition of a protected act within the meaning of section 27(2).

Finding:

This is not a protected act. Firstly, it is not a complaint at all. It is history given to an OH practitioner as background for the referral and her health issues. Secondly, and again, it cannot sensibly be read as an allegation that the respondents had breached the Equality Act 2010. That requires, as with the other previous allegedly protected acts, a contorted and legalistic reading that the facts alleged by the claimant in this context may amount to an allegation of associative disability discrimination perpetrated against her. It cannot be so read, and is not a protected act.

Protected Act (viii): 15 May grievance appeal

The claimant's case:

The claimant submits that as this grievance appeal (pages 269 – 272 of the bundle) relates in part to Sara Mayer's decision to refuse her request for flexible working on 20th November 2017 , and GP's subsequent failure to engage with the same , and the reason for the requirement to work certain hours is once again clearly expressed as being related to the claimant's daughter's disability , the claimant is therefore again making an allegation that by initially agreeing to accommodate her request for flexible working , but then subsequently refusing to grant it , and failing to address it within earlier grievances , the respondent has breached the Equality Act 2010. Accordingly, this grievance also falls within the definition of a protected act within the meaning of section 27(2).

Finding:

This is not a protected act. Just as the earlier allegedly protected acts have been found not to be, so it must follow that the grievance appeal in relation to them also cannot be. There is nothing new in these grievance appeal documents which adds anything, they merely repeats the claimant's case in relation to these matters. The matters she raised were not originally protected acts, and do not become so by virtue of then becoming the subject of appeals.

Protected Act (ix): 6 June complaint to Dr Parker and Sara Mayer

The claimant's case:

This is a reference to matters raised in the course of the claimant's capability hearing. In it reference is made by the claimant to complaints or grievances not being upheld. The claimant was thereby in fact complaining that she had been discriminated against on the basis of her daughter's disability. Accordingly, it is submitted that the claimant is evidently once again complaining that she has been discriminated against on the basis of her daughter's disability, thereby constituting a protected cct within the meaning of section 27(2) EA.

Finding.

This is not a protected act. Again it is mere repetition of matters which have previously been found not to have amounted to any protected act, which again do not become protected acts by mere dint of repetition in the course of the claimant's capability hearing.

13. It will be appreciated that we have found that none of the allegedly protected acts relied upon by the claimant were in fact protected acts within the meaning of s.27 of the Equality Act 2010. The recurrent theme of the claimant's submissions has been that because the claimant was raising issues which related to her absences , and the hours that she could and could not work , and these issues arose out of her daughter's disability , that thereby means that the matters she was raising were protected acts. The provisions of s.27 of the Equality Act 2010 are simple and clear. They have application usually when a person takes proceedings under the Act, or threatens to do so. The section, of course, is also cast in wider terms, and is engaged by the claimant

(a) bringing proceedings under the Act;

(b) giving evidence or information in connection with proceedings under the Act;

(c) doing any other thing for the purposes of or in connection with the Act;

(d) making an allegation (whether or not express) that the respondent or another person has contravened the Act.

The claimant clearly did not do anything which falls within (a) or (b), so must therefore bring her claims on the basis of (c) or (d). The former is not engaged. Nothing that the claimant said or did in the alleged protected acts could be said to be "for the purposes of or in connection with" the Equality Act. That leaves (d), which is where the claimant appears to base her case.

14. The problem for the claimant is that in none of the allegedly protected acts does the claimant make any allegation that the respondent has discriminated against her on the grounds of her daughter's disability. The Tribunal doubts that she was , as a lay person, even aware of the concept of associative discrimination, so it is not surprising that she did make such an allegation. The Tribunal appreciates, of course, that , in order to amount to a protected act , the act in question does not have to make specific reference to the Equality Act 2010 at all. A woman who brings a grievance that a male employee has been pestering her with lewd suggestions does not need expressly make any reference to this being harassment under s.26 of the Equality Act 2010 for her grievance to amount to a protected act. Context therefore is highly relevant , but it has its limits.

15. Some of the claimant's protected acts are little more than allegations that the respondent has not responded to or dealt with previous grievances which are themselves claimed to protected acts. The argument is that complaints about these failures then themselves become further protected acts.

16. The Tribunal's conclusions are that none of the allegedly protected acts amount to protected acts. They cannot be read as making allegations of associative disability discrimination. Mr Lassey's argument is that they in fact were, but that is based upon a construction which requires the reader to understand that, whilst apparently grievances about the claimant's absences and refusal of changes to her hours and other matters, because all these matters arose out of the claimant's daughter disability, they were in fact allegations that the respondent had been guilty of associative discrimination. The common theme in Mr Lassey's submissions is that because everything of which the claimant complained in the allegedly protected acts had its roots in, and was occasioned by, her daughter's disability, all these acts fall within s.27. That is, with respect , far too a nuanced, and lawyerly, construction, which the actual acts themselves will not bear. It is redolent of the claimant trying to complain of matters that would be s.15 claims , but in respect of her daughter's , and not her own , disability. Such claims cannot , of course, be made, but more relevantly, none of the protected acts can be considered to amount to allegations that the respondent had breached the Equality Act. An illustration of the limits of victimisation claims, requiring the protected act to amount to an allegation of what would be a breach of the Equality Act, is to be found in ***Waters v. Metropolitan Police Commissioner [1997] IRLR 589***, where the facts alleged by the claimant would not have founded liability under the Sex Discrimination Act 1975. The facts alleged by the claimant here could not amount to a breach of the Equality Act 2010 in respect of her daughter, as the respondents had no duties under the Act towards her. To the extent that they may have been allegations of breach of the Act in respect of the claimant , as associative disability discrimination, we have made it clear that we cannot so construe them. These claims fail at that first hurdle.

17. If, however, the Tribunal were wrong on that , it would then be necessary to consider causation. In order for the respondents to victimise the claimant for having done a protected act, it is of course necessary for them to know, and understand , that the claimant has in fact done so. Even if these acts, or any of them, were in fact protected acts within s.27 of the Equality Act 2010, the Tribunal is quite satisfied that the respondents did not see them as such. Like the claimant , the respondents too were probably unaware of the concept of associative disability discrimination until these proceedings, and there is no evidence that the respondents took any of the allegedly protected acts as amounting to any allegation of any form of disability discrimination. If the respondents do not appreciate that the claimant has done a protected act, they can hardly then treat her unfavourably because of that act. The claims would, in the alternative , therefore fail upon causation.

Direct Associative Discrimination.

18. The Tribunal now, therefore turns to the claims of direct associative discrimination. The instances of less favourable treatment or detriments are set out at paragraph 8(2)(a)(i) – (xii) at pp.63 – 64 of the Case Management Order of 5 August

2020. The claimant submits that each are capable of constituting a detriment or less favourable treatment within the meaning of section 13(1) and section 39(4)(c) Equality Act 2010, a contention that has not been challenged. There are, it will be appreciated, overlaps with the victimisation claims, in that the same treatment is relied upon, in most instances , for both heads of claim.

19. In approaching these claims the Tribunal , as it would in claims of direct non – associative discrimination, must consider the position of a comparator, either real or hypothetical. The claimant cannot , and does not seek to, rely upon any real comparator, but instead relies upon a hypothetical one. Such a comparator therefore must be an employee whose circumstances were not materially different from the claimant's but who did not have a disabled daughter. The hypothetical comparator therefore must be some who took , or required, time off work, or made requests for adjustments to her working hours by reason of the requirements of a non – disabled dependent family member.

20. The Tribunal has accordingly had to consider whether there is any evidence that the respondents would have treated such a hypothetical comparator better than they treated the claimant . This is a two stage process, requiring the Tribunal to consider firstly, whether there is a prima facie case that the reason for the treatment was the claimant's association with a disabled person, and then, if so satisfied, so as to reverse the burden of proof, whether the respondents have shown that this was not the reason.

21. We now consider the particular claims individually.

(i) a derogatory comment made by Fraser Cherry on 15 November 2017

The claimant submits that the comment made by Fraser Cherry at the return to work meeting on 15 November 2017 (pages155 – 156 of the bundle) is clearly an expression of his frustration with her, an employee that he viewed as a troublemaker, looking for an excuse to complain. Accordingly, his opinion that the claimant was a troublemaker making baseless allegations, was born out of his view of the claimant's grievance of 19 October 2017. It was submitted there is a clear causal link between this negative view of the claimant's grievance and the making of the derogatory comments. Her grievance was therefore the reason for, or was at least a significant influence on, the derogatory comments at the meeting on 15 November 2017.Further or in the alternative, the claimant submits that Fraser Cherry's view that the claimant was a troublemaker was motivated by her daughter's disability, primarily on the basis of the claimant 's record of absenteeism and/or lateness.

22. All this may be so, but it ignores the fundamental issue of whether Fraser Cherry would not have made the same comments in relation to the hypothetical comparator. In our view there is no evidence that he would not have done. The underlying reasons for the comments were the claimant's absence history and her grievance. She may well have been seen as a troublemaker, but that would have been the same whether her daughter was not disabled. Indeed, Fraser Cherry's comment about his understanding that a previous employer had been glad to see the back of the claimant , however unfair it may have been to make it, reveals that this view of the claimant was not necessarily born solely out of her dealings with the respondents.

23. The claimant's case , in this as in other instances, confuses disability being a circumstance occasioning the claimant's conduct at work, with it then being a reason for the respondents' response to it. We are quite satisfied that the claimant's daughter's disability had nothing to do with his comments, and he would have made the same comment in respect of a hypothetical comparator whose daughter was not disabled. The claimant has failed to adduce any evidence from which we could find that disability was the reason for these comments being made.

(ii) Refusal of flexible working request by Sara Mayer on 20 November 2017

24. The claimant submitted that Sara Mayer could have accommodated her request for flexible working, but actively chose not to do so. She submits this choice was not because of any logistical difficulty and/or impossibility in accommodating her request, but because Sara Mayer was irritated by the complaint that had been made about her to the Partners on 19 October 2017, and/or her frustration regarding the claimant's (perceived) constant shift changes due to her daughter's disability in circumstances where she had previously gone to great effort to accommodate the claimant's requests. Specifically, the claimant relied upon the evidence set out in Mr Lassey' submissions that, for example, Sara Mayer refused the request without ever looking into whether or not it would have been feasible to grant this request on a permanent basis, and Janine Needham's failure to enquire as to whether or not the individual currently rostered to work on a Tuesday would have been willing to change shifts to accommodate the claimant 's request. Reliance was also placed upon the claimant's previous requests for flexible working in June 2017 , July 2017 , August 2017 and September 2017 , all of which had been accommodated. It is submitted that the only difference between these requests and the later request is the submission of the claimant's grievance on 19 October 2017, and/or the respondent's knowledge of the claimant's daughter's disability.

25. The Tribunal has considered these , and all the other points, made on behalf of the claimant . Sara Mayer's response may well not have been fair, and may betray an element of frustration, or resentment at the claimant's grievance. The Tribunal, however, has already rejected the contention that the grievance of 19 October 2017 was itself a protected act, as it lacked the necessary connection with the Equality Act. The claimant relies upon either this grievance , or the knowledge on the part of Sara Mayer that the claimant's daughter had a disability, as the reason for this treatment.

26. Again, the Tribunal cannot agree. As the claimant acknowledges , her requests were initially accommodated, but then the position changed. The Tribunal can see why. The claimant's latenesses, absences and requests for changes of hours were becoming increasingly difficult to manage. It is also not to be overlooked that not all of the claimant's absences were related to her disabled daughter. Some were her own sickness absences as well, and some in relation to her other, non – disabled, daughter. There were other staff issues to consider. There was another receptionist off sick, and others were making requests for flexible working. The Tribunal can see nothing from which it conclude that Sara Mayer would have treated a hypothetical comparator without a disabled daughter any differently . There is, in any event , a further relevant matter , assuming that the burden of proof did shift, which would explain Sara Mayer's change in attitude towards the claimant . She was clearly deeply

offended at the suggestion that the claimant made in October 2017 that she had bullied the claimant, and that she had , some time previously, broken her confidentiality in a staff meeting. If there were a need for the respondent to advance any other explanation for this breakdown in their relationship, there is clearly material there which would explain it. In essence, the claimant has failed to show why any other employee in her situation – with all the absences , lateness, short notice absences taken as holiday, and changing hours issues etc. – but with a non – disabled dependent relative, would have been treated any better. This claim fails.

(iii) Dr Parker's failure to respond to grievance or request for flexible working on 4 December 2017

27. The claimant submits that Dr Parker failed to respond to the substance of her grievance or request for flexible working in any meaningful way. Specifically, the claimant relies upon the failure of Dr Parker to follow the grievance procedure , and the inadequate manner in which he purported to deal with the claimant's grievance. The claimant submits that the Tribunal is bound to conclude that Dr Parker did not investigate her grievance or request for flexible working at all, and merely dismissed them out of hand. Accordingly, the Tribunal was invited to conclude that the reason for the treatment, absent any reason proffered by the respondents , was because Dr Parker perceived the claimant's high number of (in his mind baseless) grievances and flexible working requests were becoming an administrative inconvenience to the practice. The claimant , however, invites the Tribunal to go further , and hold that the fact that less favourable treatment from both Dr Parker and Fraser Cherry commences immediately after they acquire knowledge of the claimant's daughter's disability is more than mere co-incidence. It is submitted that the close proximity in time to both Dr Parker and Fraser Cherry acquiring knowledge of the claimant's daughter's disability and these instances of less favourable treatment demands an explanation.

28. The Tribunal disagrees. That the claimant's daughter's condition was a disability was, the Tribunal considers, quite irrelevant. There is nothing in the evidence from which the Tribunal could conclude that had the claimant not had a disabled daughter (but had one with a non – disabling condition) but had created the same problems that she did for the respondent , her treatment would have been any better. Dr Parker's (and others') frustration, resentment and irritation at the amount of management time that the claimant was taking up, and the practical staffing difficulties that she was causing for the Practice is, we consider, clear, and to some extent , understandable. What is lacking, however, is any evidence that the fact that the root cause of most (but not all, be it recalled) of the issues was L's condition being a disability, as opposed, say , to a non – disability , such as a broken leg from which a recovery within 12 months may be expected, had any bearing on the respondents' treatment. That the condition from mid October 2017 was, or ought reasonably to have been, considered to be a disability has, to us , no real significance. The issues that the respondents were having with the claimant had started before then, and did not suddenly just arise in mid – October 2017. They obviously became exacerbated then, but that was not , we consider, anything to do with L's condition being realised to be a disability. It was far more to do with the escalating deterioration in relationships , and the inability of the respondents to meet the claimant's requirements. The Tribunal

considers that all this will be highly relevant to the unfair dismissal claim , and that will be considered below. As a claim of direct associative discrimination , however, this fails.

(iv) Invitation to disciplinary meeting and subject to further disciplinary allegation – Janine Needham and Dr Parker on 3 and 4 January 2018

and

(v) A written warning from Dr Parker on 26 January 2018

29. These two claims are linked, and can be considered together. In relation to the first, (iv), the claimant submits that the disciplinary allegations are highly suspicious in nature, both in terms of their content and their timing, and were designed to act as a warning shot across the bow to an employee whose grievances and need to care for her disabled daughter were becoming an administrative burden on the practice.

30. The claimant was placed under investigation for suspected disciplinary offences only one week after Dr Parker's refusal to address her grievance and flexible working request . Dr Parker his witness statement at paragraph 9, explains that he saw the disciplinary process as a way to gain clarity from the claimant around the various issues she was experiencing around this time. This was an abuse of the disciplinary procedure, and evidence of misguided motivation in subjecting the claimant to disciplinary allegations. Mr Lassey goes on to cite more specific allegations, but the sum of his submissions is that this was a wholly unreasonable, and trumped up process.

31. Turning to the second of these (v), the claimant submits that the decision by Dr Parker to issue a written warning was similarly designed to act as a warning shot across the bows to an employee whose grievances and need to care for her disabled daughter were becoming an administrative burden on the practice. Mr Lassey's submissions detail a number of aspects about this process which are criticised as being unfair and unreasonable, in terms of the lack of investigation, the timing, the haste, the lack of opportunity to prepare or to attend a hearing in person, and the late addition of charges as compelling evidence of a desire on the part of the respondents to put the claimant under pressure. The submission is made that , absent any cogent explanation for the difference in treatment , the motivation for doing so was to provide a warning shot to the claimant, specifically designed to prevent her from submitting further, grievances and/or requests in respect of her need to care for her disabled daughter, which the respondents increasingly saw as becoming an administrative drain on their resources.

32. The Tribunal agrees that the respondents' treatment of the claimant in these aspects was unfair, but that is not the issue. Whilst Mr Lassey refers to a "difference in treatment", that begs the question "whose treatment?". No actual comparator is relied upon, so again the Tribunal has to consider whether there is any evidence upon which the claimant could conclude that a hypothetical comparator, in the same circumstances as the claimant , but without a disabled daughter, would have been treated any better. The addition of the charge relating to 3 January 2018 clearly arose from Janine Needham complaining about what happened. As the claimant submits,

she had reasons of her own to be annoyed at the claimant. Those had nothing to do with the claimant having a disabled daughter, they arose out Janine Needham's personal upset at the way the claimant spoke to her. Other than this having the ever – present background history of the claimant's problems in part relating to her need to look after her disabled daughter, there is no connection at all with that disability . There is simply no evidence from which the Tribunal could conclude that, all other circumstances being the same, but the claimant not having a disabled daughter, her treatment would have been any different. These two claims fail.

(vi) dismissal of appeal against warning by Dr Chanda on 1 March 2018

33. The claimant submits that the decision by Dr Chanda to dismiss her appeal against Dr Parker's decision to issue a written warning was similarly designed to act as a warning shot across the bow to an employee whose grievances and need to care for her disabled daughter were becoming an administrative burden on the practice. Specifically, the claimant the failure to carry out a rehearing, the lack of an opportunity to attend a hearing, the total inadequacy of her surface level paper-based review of the claimant's disciplinary case. Dr Chanda agreed that the first meeting appeal meeting was cancelled due to the unavailability of any Trade Union representative and conceded that the same reason could have been behind the second cancellation, albeit she did not recall. She had agreed that it would be unfair to deprive the claimant of the opportunity of attending an appeal hearing in those circumstances. She did not speak with either Laura Crossley or Dr Parker as part of her role as disciplinary officer to understand the rationale behind their decisions. Neither her decision, nor her witness statement, discloses any. She started her investigations from the assumption that the original decision of Dr Parker was correct, thus highlighting her clear motivation to uphold the same. Her reluctance to admit that her failure to properly investigate the appeal was illuminating. She gave evidence that the claimant had the opportunity to speak about those issues in her grievance meeting with Rachel Waugh (pages 240 – 260 of the bundle), thus obviating any failure to offer a meeting as part of the disciplinary appeal process. Notwithstanding that this meeting occurred over a month after her decision, and related to an entirely separate process, this evidence highlights the inadequacy and illogicality of the respondents' reasoning on this issue.

34. In the absence of any evidence from the respondents as to the reasons for these failings in the process that, if considered, the claimant submits would have resulted in a different outcome, the claimant submits that Dr Chanda too viewed the claimant's grievances as baseless, and wished to bolster the rationale in issuing the original disciplinary sanction by Dr Parker, i.e. acting as a warning shot to her, specifically designed to prevent her from submitting further, grievances and/or requests in respect of her need to care for her disabled daughter, which the respondents increasingly saw as becoming an administrative drain on their resources.

35. Again, the Tribunal would agree that all this was indeed unfair, and was not carried out as it ought to have been. Again, however, we come back to the "reason why" question, and whether there is any evidence that the same treatment would not have been meted out to the claimant in the same circumstances if she did not have a disabled daughter. There simply is none.

(vii) Failure to act on Occupational Health recommendations – Sara Mayer between 22 March 2018 – 8 June 2018

36. The claimant submits that despite clear recommendations as to the measures necessary to allow the claimant to return to work, the respondent actively and deliberately failed to take any of the steps necessary to facilitate the same. The claimant submits that this decision was motivated by its desire to oust an absent employee whose grievances and high number of requests pertaining to her caring responsibilities had become an intolerable administrative burden.

37. Specifically, she relies upon the OH report of 22 March 2018 (page 235 of the bundle) which contains three principal recommendations which Sara Mayer understood were necessary in order to facilitate C's return to work;

i) A stress risk assessment to be carried out by the respondents ;
ii) Mediation should be attempted; and
iii) Welfare meetings to be held with individuals unconnected to the claimant's grievances.

Both a stress risk assessment and mediation were previously recommended at the conclusion of the disciplinary hearing (p.211) on 13 January 2018, but neither were ever acted upon at any point prior to the claimant's dismissal. Sara Mayer accepted under that this was a failure, but was completely unable to explain why the same had not been acted upon at this time. Despite the recommendations contained within the OH report, the claimant is repeatedly invited to welfare meetings by Dr Parker, to be conducted by Sara Mayer up to and including 15 March 2018, following which the respondents do not seek to conduct a further welfare meeting with her at any point prior to her dismissal. None of the respondents' witnesses were able to offer any explanation for this failure, despite the claimant raising the same at her medical capability meeting on 6 June 2018.

38. The Tribunal again agrees that this was unfair, but again struggles to see any evidence that the respondents would have acted on these recommendations if the claimant did not have a disabled daughter. By late 2017 why the claimant was off work, seeking changes in her hours, and raising grievances did not matter. The fact she had become difficult to manage , and took up too much management time, did, and those factors , regardless of what lay behind them, were the reasons for her treatment. This claim fails.

(viii) Failure to act upon workplace mediation and failure to appoint alternative mediator – Sara Mayer 27 April 2018

39. The claimant submits that despite clear recommendations from both LC at the conclusion of the disciplinary hearing from OH in their report , and from Rachel Waugh at the conclusion of the claimant's grievance hearing that mediation would assist the claimant in returning to work, it is submitted that respondents actively failed to instigate this recommendation. The claimant submits that this decision was motivated by a desire to oust an absent employee whose grievances and high number of requests pertaining to her caring responsibilities had become an intolerable administrative burden.

40. The respondents did not make enquiries regarding mediation for more than three months following the initial recommendation, and was only initiated after it had been recommended or requested on a further two separate occasions. Sara Mayer accepted that she did not explain to the claimant why she considered her choice to be an impartial mediator, or to alleviate her concerns regarding her impartiality in any way, despite the Union representative requesting her to do so. Her General Practitioner confirmed (this is not, the Tribunal believes, documented, but was probably reported by the claimant) that changing the mediator would assist in reducing her anxiety, and therefore assist in the facilitation of her return to work**.** Sara Mayer accepted that there was no further communication with the claimant or her representative regarding the appointment of an alternative mediator after 30 April 2018. There would have been no disadvantage to the respondents in the appointment of an alternative mediator, but no attempt was made to do so. Whilst cost considerations were said to be relevant , no enquiries as to the acceptable level of cost that the respondents would be willing to bear in respect of any offer of mediation were made, nor were any other aspects of cost considered.

41. Again , the Tribunal agrees that the treatment of the claimant was unfair and unreasonable, at least to some extent. By late March there was some ambivalence on the part of the claimant as to whether she would or would not proceed to mediation, and the advice received that, it was unlikely to work if more than two persons were involved , obviously did not enhance the prospects of it occurring. The respondents did, however, at least start the process, albeit late in the day, but would not then change mediator. That may have been unfair, as well, and little more than going through the motions, but the Tribunal can see no evidence that she would have been any better treated if her daughter was not disabled. This claim fails.

(ix) A capability meeting with Sara Mayer and Dr Parker on 6 June 2018

and

(x) Failure to carry out a stress risk assessment – Sara Mayer on 6 June 2018

and

(xi) Dismissal by Sara Mayer 8 June 2018

42. These three acts of alleged discrimination are interlinked, and can be considered together. The claimant submits that the decision to hold a capability meeting , the failure to carry out the stress risk assessment , and the decision to dismiss her, were all the logical extension of the respondents' deliberate and calculated campaign to orchestrate her removal from the business due to their perception of her as a troublemaker, burdening them with costly, baseless, and unnecessary grievances, and equally costly disability-related requests.

43. In terms of (ix) the claimant contends that Sara Mayer and Dr Parker confirmed that it was their joint decision to invite the claimant to a capability meeting. There is no evidence of any such conversations. The claimant was invited to the capability meeting on 22 May 2018, less than one week after her grievance appeal is concluded

on 18 May 2018. The invitation letter contains a clear and unequivocal link between the claimant's (alleged) refusal to participate in mediation, and the subsequent invitation to the medical capability hearing. There had been no material change in circumstances at the practice that would have warranted immediate and decisive action in terms of the claimant 's employment. The possibility of acquiring the services of an alternative mediator had not yet been adequately explored , and no further consultations with OH , or welfare meetings had taken place.

44. In relation to (x) , but also relevant to (ix) ,the respondents had not at any point attempted to undertake a stress risk assessment, despite the same being specifically recommended by three separate professionals, including OH. Sara Mayer accepted that this should have been done before conducing a formal capability meeting. The document handed to the claimant at the meeting on 6 June 2018 is entitled 'return to work questionnaire', and cannot sensibly be relied upon as a risk assessment. The claimant submits that this document should have been used by the respondents as a tool in order to create a risk assessment in accordance with the recommendation from OH. It is clearly envisaged that the second column is intended to be completed by the respondents, but appears blank. Sara Mayer accepted that the respondents did not create a risk assessment using this document following completion of the same at the meeting on 6 June 2018, nor was any such document shown to the claimant or her representative at any point following the meeting. Both Sara Mayer and Dr Parker accepted that the risk assessment should have been conducted when it was first recommended in January 2018, or sooner than it was. Despite being discussed internally the assessment does not feature in in the dismissal letter, nor in Sara Mayer's witness statement. Accordingly, it is submitted that on balance, the respondents did not consider the requirements of a risk assessment prior to making the decision to dismiss the claimant , did not genuinely engage with the recommendation to conduct a risk assessment, and instead paid lip service to a requirement that may have assisted an employee return to work in circumstances where a decision to dismiss the claimant had already been made.

45. In relation to (xi) , the claimant submitted that the decision taken to terminate the claimant 's employment on 8 June 2018 was inextricably linked to the submission of her grievances and requests to care for her disabled daughter. In November 2017, Dr Parker's view was that her grievances were taking up too much of the Practice's time and resources, and that a settlement option should be considered. By April 2018 however settlement was no longer an option in the claimant's case. The claimant submits that the only material difference between the circumstances of her employment in November 2017 and April 2018 is the submission of her grievances and appeals as set out above, following which, she was subjected to a variety of less favourable treatment . The claimant submits that the logical inference to be drawn from the change in the respondents' position is that they had made the decision to terminate her employment.

46. The claimant relies upon Dr Parker's witness statement being completely silent as to his involvement in the medical capability hearing and subsequent decision to dismiss the claimant . He stated in evidence that part of his reasoning for dismissing the claimant was that he was keen to resolve the stress on service delivery, of which he saw her grievances as a part. Accordingly, it is submitted that a significant factor in the decision-maker's mind, at the time he took the decision to dismiss the claimant

was, by his own admission, the stress that the her grievances were placing on the respondents' service delivery.

47. The Tribunal has considered whether these three claims, in essence, amounting to a contention that the dismissal process , from start to finish, do indeed constitute acts of direct associative disability discrimination. Again, the Tribunal cannot so find. The claims founder on the absence of an actual comparator, or any basis upon which the Tribunal could conclude that a hypothetical comparator would not have been treated in this manner in the same circumstances. The Tribunal will expand upon this below, but these claims also fail.

(xii) Recording of absence in reference – Sara Mayer 8 June 2018

48. Finally, this claim is made in respect of the admitted fact that Sara Mayer provided a reference to the claimant which was detrimental to her, as it referred to her sickness absence. It is alleged that this was also in contravention of the respondents' policy. The respondents' usual practice was to issue factual references (see page 289 of the bundle), also referred to in the Amended Grounds of Resistance at para 59 . The reference provided to the claimant clearly goes beyond the scope of a basic factual reference (p.292A), Sara Mayer was unable to provide any explanation as to why she had not provided a basic factual reference in accordance with policy. The claimant submits that it would have been apparent to Sara Mayer as an experienced Practice Manager the effect that such a reference would have on the claimant's chances of securing future employment. In the absence of any cogent explanation for this clear departure from policy, the submits that the reason for the less favourable treatment or detriment is evidently Sara Mayer's continued desire to discriminate and/or victimise the claimant due to the irritation that her various employment-related issues had caused her.

49. The Tribunal accepts that this was an unnecessary , clumsy, and, frankly counter – productive (it will have indeed hindered the claimant's attempts to mitigate her losses) thing to have done, but can see no basis for finding that it was done because of the claimant's daughter's disability, or that Sara Mayer would not have written the same about another employee dismissed in the same circumstances, but without a disabled dependent relative. Indeed, the link to the claimant's daughter's disability becomes even more tenuous when one bears in mind that at the time of the claimant's dismissal, the bulk of her sickness absence had not been because of her daughter's disability, but was because of her own sickness. That was a long period, over 6 months, and not related to any aspect of her daughter's disability. It was her own, non – disability, medical condition which caused the bulk of her significant sickness absence. Sara Mayer felt compelled to mention this, and it was factually correct. This claim fails.

The direct associative disability discrimination claims generally.

50. In general terms, the Tribunal would add this. As the above findings demonstrate, the Tribunal has not found that any of the matters complained of amounted to direct associative disability discrimination. The claimant was not treated the way she was because of her disabled daughter, although her requests for time off, and other issues which irritated the respondents, (mostly, but not exclusively) arose

from her disabled daughter's condition. What the claimant has signally failed to do, in the absence of any actual comparator, is to adduce any evidence that a hypothetical comparator, whose circumstances were the same as the claimant's , save that they did not arise because of any disabled dependent, would have been treated any differently.

51. The test for causation in direct discrimination claims has been long established, and is encapsulated in the case of ***Madarassy v Nomura International plc* [2007] IRLR 246**. There is no caselaw of which the Tribunal is aware, or has been cited to it, that suggests that in a case of associative direct disability discrimination any different test is to be applied. That case is authority for the proposition that the Tribunal should apply a two – stage test, and decide whether the claimant has established facts from which the Tribunal could conclude that the reason for the treatment was the protected characteristic. The words "could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it (also restated in ***St Christopher's Fellowship v Walter-Ennis, [2010] EqLR 82***). That means that the claimant has to 'set up a prima facie case'. In ***Madarassy*** (paras. 54 to 57 of the judgment of Mummery LJ) it was held that a difference of status and a difference of treatment was not sufficient to reverse the burden of proof automatically. Underhill P in ***Hussain v Vision Security Ltd and Mitie Security Group Ltd* UKEAT/0439/10**, warned that this must not be given the status of being a rule of law. Whether the burden has shifted will be a matter of factual assessment and situation specific. The second stage, which only applies when the first is satisfied, requires the respondent to prove that he did not commit the unlawful act.

52. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the 'same, or not materially different' as those of the claimant, having regard to Equality Act 2010 s.23. The question of whether a comparator relied upon is in circumstances which are 'materially different' is a question of fact for the tribunal; and even if there are some material differences within s.23, the treatment of the purported comparator might be of relevance when considering a hypothetical comparator: ***CP Regents Park Two Ltd v Ilyas UKEAT/0366/14*** .

53. Two points arise. The first is that the claimant has, in the view of the Tribunal, done no more than point to the treatment she received, and her (associated) protected characteristic. She has produced no evidence that , had she been in the same circumstances , but without a daughter with a disability, she would have been treated any differently. The second is that in relation to the hypothetical comparator, that legally constructed person has to have had the same circumstances as the claimant. That means all the circumstances, which in this case would require them to have (at least, there may be more) :

a) Required time off , sometimes at short notice, to care for a non – disabled dependent child;
b) Been late at work because of a non – disabled dependent child;
c) Requested changes of working hours on several occasions because of a non – disabled dependent child;

d) Raised a grievance about not being permitted to change working hours to care for a non – disabled dependent child;
e) Raised a grievance about the conduct of a person conducting a meeting about changes in working hours to care for a non – disabled child;
f) At the date of dismissal, been absent from work for over 6 months.

54. That last requirement is highly relevant to claims (ix), (x) and (xi). Whilst the claimant's grievance, and need for shift changes were linked (though insufficiently for the purposes of these claims, the Tribunal has found) to her daughter's disability, by the time of her dismissal, a further, and far more tenuously connected factor had arisen, her sickness absence of over 6 months. That, it has to be borne in mind, was not because of her daughter's disability, it was because of her own medical condition. It is appreciated that the claimant , through Mr Lassey, has made valiant attempts to link everything back to the disability of the claimant's daughter, but by the time of the dismissal, this considerable additional circumstance, over 6 months sickness absence, would also have to have been applied to the hypothetical comparator. There was no evidence that such a person, with the claimant's additional prior circumstances as well, would not have been dismissed. In fact the contrary is the case, there is evidence that another person on long term sickness absence was also dismissed.

55. This case rather highlights the limits of associative discrimination claims. Were it possible for s.15 claims to be made in respect of associative discrimination, the position would perhaps be different , at least in terms of satisfying the first limb of s.15.If it had been her own disability - related absences which led to the grievances and issues with attendance and working hours, the claimant could easily have come within the wide ambit of showing treatment that was "because of something arising in consequence of" a disability. The claimant , however, cannot bring s.15 claims in respect of something arising in consequence of her daughter's disability, which is what these claims appear really to be. References in Mr Lassey's submissions to the claimant's treatment being "inextricably linked" to her absences, or her grievances, which were themselves so linked to her daughter's disability highlight how the chain of causation needs several links to be made, in order to reach the conclusion that the claimant's treatment was "because of" her daughter's disability. Section 15 claims, of course, require no comparator, and require less causal link between the protected characteristic of disability, and the treatment, one of the reasons for their introduction, uniquely, into disability discrimination.

56. The attempts to shoehorn these claims into direct associative discrimination claims, though ingenious, and , aside from victimisation, the only discrimination avenue open to the claimant , are misplaced. That it is often easy for a respondent to defeat direct disability discrimination claims by showing that a non – disabled comparator would have been treated just as badly is part of the reason why s.15 claims were created, as there is no need for any comparator in such claims. Once the treatment for disability related reasons is established, under s.15 the issue then is one solely of justification. Such claims, however, are not open to the claimant in associative discrimination cases, and, for the reasons given, her attempts to bring direct associative claims on this basis must fail.

57. It will be appreciated that, in the light of the Tribunal's findings, no determination of any time limit issues has been necessary.

Unfair dismissal.

58. We turn now to the unfair dismissal claim. The first issue, of course, is whether the respondent has shown a potentially fair reason for dismissal. If so, the claimant would succeed at that stage. The reason relied upon is capability, in the sense of ability to give satisfactory attendance at work. The claimant submits that the respondent has not shown a potentially fair reason. We disagree. We are satisfied that the reason for dismissal was indeed the claimant's absence from work. She was absent from 4 December 2017, and dismissed on 8 June 2018. She not been at work for over 6 months. The respondent was of the view that there was no prospect of the claimant returning to work, and dismissed the claimant on that basis. Whilst, as will be seen, we accept that the respondents were desirous from late 2017 that the claimant leave their employ, we do accept that her sickness absence was the trigger for her dismissal, even if it afforded the respondents an opportunity to gratify that desire. On balance, therefore, we do accept that the respondents have shown that the claimant's capability was the reason for her dismissal. We will now consider whether that dismissal was fair in all the circumstances.

59. The caselaw on capability dismissals has been summarised in Mr Lassey's submissions. The leading case is ***Spencer v Paragon Wallpapers Ltd [1977] ICR 130.*** In that case Phillips J emphasised the importance of scrutinising all the relevant factors.

"Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?"

He added that the relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'.

60. Where there is a conflict between the needs of the business and those of the employee, the Tribunal must be satisfied that the employer has sought to resolve that conflict in a manner which a reasonable employer might have adopted. In the course of doing this, he will have to show that he carried out an investigation which meant that he was sufficiently informed of the medical position. As the dictum of Phillips J in ***Spencer v Paragon Wallpapers Ltd*** indicates, there are a variety of factors to be weighed up in considering whether the decision to dismiss is reasonable under ERA 1996 1996 s 98(4). These include:

— the nature of the illness and the job;

— the applicability and clarity of an employer ill health policy;

— the needs and resources of the employer;

— the effect on other employees;

— the likely duration of the illness;

— how the illness was caused;

— the effect of sick-pay and permanent health insurance schemes;

— alternative employment; and

— length of service.

The weight to be given to particular factors will vary from situation to situation.

61. Where the employee's ill health may have been caused by the conduct of the employer, this does not mean that a dismissal of the employee is necessarily unfair. The correct approach is contained in the leading case of ***McAdie v Royal Bank of Scotland [2007] IRLR 895*** in which the Court of Appeal upheld the decision of the EAT (Underhill J presiding) that if an employee's ill health was caused by the employer's treatment, that might justify a Tribunal requiring the employer to demonstrate extra concern before implementing a dismissal, but that this remains a question of fact, not a rule of law.

62. In ***McAdie*** the employee had argued that her long-term stress-related illness was attributable to a manager and to the employer's failure to deal with her grievance properly. The Tribunal in effect held that that tipped the balance into unfairness when she was finally dismissed. The EAT (with whom the Court of Appeal concurred) agreed with ***Edwards*** to the extent that ***Betty*** was capable of suggesting too rigid a divorce between employer culpability and unfairness ('It may, for example, be necessary in such a case to “go the extra mile” in finding alternative employment for such an employee or to put up with a longer period of sickness absence than would otherwise be reasonable'). However, there were then two significant limitations. First, Underhill J said that much of what was said in ***Betty*** was important and plainly correct. Were it otherwise, a culpable employer would never be able to dismiss a missing employee, whereas the unfair dismissal test is whether the employer behaved reasonably in all the circumstances. Secondly, on the facts the decision of the tribunal was reversed on the basis that it had fallen into the trap of considering not what a reasonable employer would have done, but whether it should have got into that situation in the first place. Thus, a balance has to be struck in these cases and the EAT judgment concludes by saying that, although it had sympathy for the employee, it had to be remembered that this was not a personal injury claim. These particular factors are now considered, to the extent that they arise on the facts found in this case.

63. The claimant submitted that the decision to dismiss was not reasonable in all the circumstances of the case. She relied upon the following main points, though there are many others. Her absence from work was caused by stress, which was itself resultant from the respondents’ treatment of her. The dismissive attitude of the respondents in the persons of Fraser Cherry and Dr Parker did not help the situation, but made it worse. The respondents’ refusal to accommodate a change to her shift

pattern in November 2017 without providing a clear explanation as to why in circumstances where Fraser Cherry had previously agreed to such a change, added to her stress. GP's complete failure to engage with the substance of C's grievance and/or request for flexible working in his response of 4 December 2017 (pages 170 – 171 of the bundle).

64. The claimant relies also upon the inconsistent application of the disciplinary policy, the ill-founded , and illogical nature of the disciplinary allegations levied against the claimant , and the fact that her disciplinary hearing and disciplinary appeal hearing were both conducted without allowing her the opportunity to make representations at a hearing.

65. The claimant submits that the respondents' failures to address and deal with her complaints contributed to her stress, and subsequent absence from work. Having caused her absence, the respondents did not act to alleviate her stress, thereby facilitating her continued absence from work.

66. The claimant's absence was not dealt with in accordance with any defined process or procedure. At no stage throughout her 6-month period of absence was the claimant invited to an absence management meeting, or informed of any trigger points reached. Sara Mayer had accepted that in an ideal world, it would have been another individual conducting the welfare meetings, and that she could understand why the claimant would have preferred the welfare meetings to be with someone other than her. Dr Parker also had accepted it was a mistake for him and Sara Mayer to conduct the welfare meetings in light of his conclusions at the disciplinary outcome.

67. Both Sara Mayer and Dr Parker admitted to having had sight of the letter from the claimant's General Practitioner (page 226 of the bundle) which indicated that it would alleviate stress if her welfare meetings were conducted by a different person. Despite this, Dr Parker nonetheless insisted that the same should be held by Sara Mayer .

68. Dr Parker could have complied with the recommendation contained within the OH report, and acted so as to alleviate the claimant's stress. The fact that the respondents chose instead to utilise their credit with Peninsula for the grievance in April 2018 (at least one month after these events) using that same credit, demonstrates that they could have complied with this request, and the recommendation set out in the OH report.

69. The respondents also refused to appoint an alternative mediator in order to assuage the claimant 's concerns, and reduce her anxiety levels.

70. Dr Parker admitted did not understand the concept of a risk assessment until the capability meeting on 6 June 2018, and admitted that in retrospect, it "*would have been better*" had a stress risk assessment been conducted at a much earlier stage.

71. In general terms, at no stage throughout the entirety of the claimant 's absence, but in particular at or following the capability hearing on 6 June 2018, did the respondents consider the implementation of reasonable adjustments that may have facilitated the claimant 's return to work.

72. The appeal did not cure the unfairness of the dismissal. Both Dr Parker and Sara Mayer confirmed that they were the decision makers in respect of the appeal against the termination of her employment alongside Dr Chanda, having both also presided over the capability hearing and the subsequent decision to terminate the claimant's employment. They were, in essence, reviewing their own decision. This factor alone renders the dismissal procedurally unfair.

73. Paul Stevens and Dr Chanda did not give any consideration to the near two-month delay in arranging a welfare meeting , nor explore the reasons behind that delay with Sara Mayer .Paul Stevens never had sight of the OH report of 22 March 2018, or Sara Mayer's initial referral. He nonetheless concluded that the report was incorrect in its conclusion that welfare meetings should be held with different managers, that OH did not understand the management structure of the respondents , and that the practice of inviting the claimant to welfare meetings where both Dr Parker and Sara Mayer would be present was a reasonable one.

74. The appeal did not address the question of why mediation was not offered until almost three months after it was first suggested, and only after it was recommended by three separate processes . Paul Stevens did not know what, if any, reasonable adjustments Sara Mayer and Dr Parker had considered as part of their decision-making process, or why such adjustments were not found to be practicable in the circumstances of her case. This is despite this being one of the grounds of appeal. The appeal did not consider whether such an adjustment to her hours at this stage, as opposed to November 2017, was feasible. Paul Stevens took the decision without considering any stress risk assessment, obtaining up to date OH advice, or considering what steps, including appointing a new mediator, could now be taken to get the claimant back to work.

75. Accordingly, it was submitted that in treating capability as the reason for the dismissal, the respondents' actions fell very considerably outside the band of reasonable responses open to a reasonable employer in these circumstances, thereby rendering the dismissal both procedurally and substantively unfair within the meaning of section 98(4) ERA 96.

The respondents' case on fairness.

76. The respondents emphasise that the claimant was absent from work from 6 December 2017 until 8 June 2018 , and the evidence of how the claimant's hours, during her absences, were covered by other members of staff and this placed a number of individuals under strain, including Janine Needham herself. It was apparent as early as 15 November 2017, that the claimant's absence (at that time) was causing operational problems , and was affecting the wider team. The respondents' staffing levels did not change between 15 November 2017 and 8 June 2018, and so it naturally follows that the claimant's long-term absence caused ongoing disruption to the respondents. The Tribunal should bear in mind that the respondents provide health services to the public and the claimant's role was pivotal in the successful delivery of their services. The respondents could not sustain such long-term absence.

77. The respondents went above and beyond in agreeing to several variations to the claimant's working hours in order accommodate her. They are not rogue employers who punish employees for being absent from work. The evidence before with Tribunal was that they were supportive and endeavoured to cooperative with the claimant at all times.

78. The claimant had refused to attend a welfare meeting arranged for 31 January 2018. On 2 March 2018, the respondents took steps to engage OH in order to ascertain the medical position regarding her health and an assessment was carried out with the claimant on 21 March 2018. Dr Sen confirmed that the claimant informed him that the claimant said she was unable to return to work even with adjustments. Dr Sen advised that he was unable to predict a return to work date in her current role as this depended on mediation and measures being implemented to reduce her stress.

79. The claimant had confirmed to the respondents that she simply 'wanted to be seen to engage' in the mediation and her union rep, Mr Jim Moody, in May 2018 confirmed that she no longer wished to attend a mediated meeting. The claimant in her evidence stated that she wanted to have mediation with five individuals and the respondents confirmed that this was something that was not feasible from a financial perspective. This would mean incurring the costs of mediation on five separate occasions and so they would not have had sufficient credits with Peninsula to facilitate mediation on the claimant's terms in any event. Sara Mayer confirmed that she had explored the costs of having ACAS conduct the mediation, however those costs were far too great for the practice to incur. This was communicated to the claimant during the capability meeting on 6 June 2018.

80. This was the reason why Mrs Keane was engaged to conduct the mediation yet the claimant disapproved. She confirmed to her union rep on or around 16 April 2018, following receipt of the grievance outcome letter, that a return to the workplace was 'untenable'. On Friday 18 May 2018, the claimant confirmed that she would not engage in mediation with the respondents via her union rep, Mr Jim Moody.

81. On 22 May 2018, the claimant was invited to a capability meeting. The first line in this letter states 'I write further to my telephone conversation with Jim Moody on Friday 18 May 2018 where it was confirmed you no longer wish to attend a mediated meeting.' Therefore, mediation was off the table and OH had confirmed to the respondents that they could not predict a return to work date for the claimant .

82. On 6 June 2018, the respondents met with the claimant to consult with her in relation to the content of the OH report and her absence from work. The claimant was put on notice that if there was little likelihood of a return to work in the foreseeable future then a potential outcome of that meeting could be dismissal. The purpose of the 6 June 2018 meeting was so that a discussion could take place to weigh up the situation regarding the claimant's absence, bearing in mind the respondents' need for the work to be done.

83. Mr Gilbert cited ***McAdie v Royal Bank of Scotland [2007] EWCA Civ 806*** where the Court of Appeal endorsed the EAT's approach in finding that an employer could fairly dismiss an employee for ill-health capability despite the fact that the employee's stress-related illness was attributed to the conduct of the employer. In

McAdie, the employee made it clear that she would not consider returning to work (and medical evidence supported this).

84. The claimant's fit notes cite the reason for her absence from work as 'Stress at Work', which the claimant attributes to the respondents' conduct. In the 6 June 2018 meeting the claimant confirmed that she agreed with the content of the OH report and that the only recommendation she felt had not been met was OH's recommendation for meeting with the claimant to be held by 'HR'. The claimant's union rep. confirmed in the same meeting that there was no expected return date and the claimant added especially whilst her grievances were not upheld. Her grievances had previously been considered by an external HR Consultant, Ms Rachel Waugh. The claimant was essentially telling the respondents that unless her previous grievances were upheld then she would not be returning to work , and so the claimant was never going to return to work because her grievance had already been heard and subsequently appealed. Even if an independent HR person conducted the capability meeting it would not have changed the position with the claimant 's grievances , and she made it clear she would not return to work under these circumstances.

85. Ms Waugh had given full consideration to the grievance and in fact upheld one, which confirms that there was not a witch-hunt to exit the claimant from the business but rather that all evidence was considered on merit.

86. Both parties agreed during the capability meeting that there were no suitable alternative roles. At the time the capability meeting was held, the claimant had been employed by the respondents for approximately three and a half years and therefore she did not have considerable length of service with the respondents. She was entitled to six weeks contractual sick pay as per her contract of employment, which had been exhausted when the decision to terminate her employment was taken.

87. Mr Gilbert submitted that the claimant did complete a stress risk assessment questionnaire on 6 June 2018 and that she fully understood the purpose of the document provided to her. Sara Mayer confirmed in her evidence that she considered the content of the stress risk assessment prior to making the decision to terminate the claimant's employment, and had acknowledged receipt of it. She confirms in the stress risk assessment that she no longer felt that she could rely on her managers and that trust and relationships had broken down.

88. He submitted that the Tribunal should focus on what information the respondents had before them when they took the decision to dismiss and following the capability meeting . He summarised that information as follows;

a) The claimant would not be returning to work unless her grievances, previously dismissed, were upheld;

b) The claimant did not wish to engage in mediation;

c) It was agreed that there were no alternative roles for the claimant;

d) The claimant had exhausted her entitlement to contractual sick pay;

e) Her most recent sick note had signed her off from work from 27 April 2018 to 27 July 2018, a period of a further three months;

f) She could give no indication as to when she was likely to return to work.

89. He went on to make further submission as to procedural fairness , pointing out that although the ACAS Code states specifically that it applies to misconduct and poor performance situations, it does not mention other issues affecting capability, such as ill health as in this case. In ***Holmes v Qinetiq Ltd UKEAT/0206/15*** the EAT held that the ACAS Code will only apply to ill-health cases where there has been "culpable conduct", which effectively means poor performance or misconduct, and this is not apparent in the case before this Tribunal.

90. The capability procedure is set out on page 428 of the bundle. Section C refers to what will happen procedurally in a situation relating to 'Personal Circumstances / Health Issues'. The claimant's absence was clearly related to 'Health Issues' namely, stress at work. Subsection 2 in section C (page 428 of the bundle) outlines the procedure to be followed in circumstances where an employee is absent from work for a prolonged period. The claimant was taken through section C during cross-examination and it was put to her that this was the procedure that was followed, which she accepted. The claimant confirmed in the capability meeting on 6 June 2018 that she agreed with the content of the OH report and therefore there was no further investigation to be carried out in respect of her health i.e. obtaining further medical evidence. She further confirmed that she did not feel a return to work was likely while her grievances remained outstanding and that she did not wish to engage in mediation, and so there was no further investigation or exploration for to be carried out in this respect.

91. The was afforded the right to appeal and attended an appeal meeting with her union rep. on 25 July 2018. Her appeal was dismissed for those reasons set out clearly in the appeal outcome letter dated 2 August 2018. It was submitted that the respondents had carried out a fair procedure, especially in consideration of their size and administrative resources.

Discussion and finding on fairness.

92. The Tribunal accepts , as Mr Gilbert has reminded it, of the test of the range of reasonable responses that must be applied (see ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439***), and the particular warning that he cited from the EAT in capability dismissal cases, in ***DB Schenker Rail (UK) Ltd v Doolan UKEATS/0053/09*** as to how easy it can be for tribunals to fall into the substitution mind set in cases of ill-health. Tribunals must guard against being carried along by sympathy for an employee whose employers have concluded that he is not fit to return to his job and resist the temptation to test matters according to what they would have decided if they had been in the employer's shoes .For the purposes of this test, it is irrelevant whether or not the Tribunal would have dismissed the claimant. The Tribunal must ask whether a reasonable employer might have reached the same conclusion as the respondents.

93. Whilst the claimant's submissions as to the fairness of the dismissal run to some 14 pages, which it is not intended to repeat here, and the Tribunal would agree

with many of them, the Tribunal's primary conclusions on the fairness of the dismissal are quite simple and straightforward. Being careful to avoid approaching these claims as ones for failure to make reasonable adjustments for the claimant (or her daughter), language which has crept into Mr Lassey's submissions on the unfair dismissal, the Tribunal finds many of the matters relied upon, and remarked upon, as being unfair in the discussion of the discrimination claims, become highly relevant to the fairness of the dismissal.

94. As can be seen from the email between Sara Mayer and Fraser Cherry on 16 November 2017 (page 157 of the bundle) , the respondents were contemplating , some 7 months before the claimant's eventual dismissal , some form of settlement with her, on the grounds of the amount of direct management time that she was taking up, and the additional costs to the business of covering her sickness and other absences, and the broader impact of her absences in terms of the detrimental effect on the wider team. Sara Mayer's response document after the meeting on 19 October 2017 (pages 131 to 138 of the bundle) , in which she very fully, and with supporting appendices , rebuts points made by the claimant in the meeting with Fraser Cherry and Dr Parker, reads very much like a management statement of case for a disciplinary or capability hearing. That document was not, at the time , and not until disclosure in these proceedings , provided to the claimant , but it was , it can be assumed, to Fraser Cherry and/or Dr Parker.

95. It is clear to us that from then on, if not actually earlier, the respondents wanted rid of the claimant. That is quite understandable, but not, of course, necessarily fair. From then on, the Tribunal considers that the respondents conducted themselves in a manner entirely consistent with that aim. Dr Parker's failure to address her grievance of 29 November 2017 is consistent with this desire, and is explained by it.

96. The chronology of the actions taken by the respondents, as set out in Mr Lassey's submissions, reinforces how, from late November 2017, the claimant had become an irritant and an inconvenience for the respondents. The claimant having raised her grievance on 29 November 2017 , which Dr Parker dismissed in his letter of 4 December 2017 , and the claimant having started on 4 December 2017 a period of sickness absence, on 11 December 2017 (pages 173 to 174 of the bundle) , the respondents instigated disciplinary action against her, requiring her to attend a formal disciplinary hearing, whilst off work sick, just 4 days later to answer allegations of potential serious misconduct , comprising of alleged persistent lateness, 4 instances of alleged failure to follow company procedures for reporting lateness or absence going back to 14 September 2017, 2 instances of alleged failure to follow reasonable management requests, and 2 instances of allegedly threatening behaviour towards other members of staff on 19 October 2017 and 6 December 2017.

97. The respondents had gone to the trouble of engaging their employment consultants, HRFace2Face, from Peninsula, to conduct this exercise. The Tribunal was struck by a number of features about this disciplinary action. Firstly, its haste is striking. The claimant was given four days, whilst off sick , to answer serious disciplinary charges. They were substantial in number, and there was no prior investigatory stage. The claimant was informed that the outcome of this hearing may be a final written warning. As it was , the hearing was postponed in order for the claimant to obtain union representation.

98. Secondly, its timing is also significant. This action was taken 7 days after the claimant started a period of sickness absence. It must have been prepared earlier than that. Only one allegation , however, postdates the claimant's start of her sickness absence, and that relates to the allegation that on 6 December 2017 the claimant informed Janine Needham that if her working hours were not resolved she would obtain another sick note. All the other allegations pre-date the start of the claimant's sickness absence, and several go back to September, October and November of 2017. The respondents, however, did not see fit to raise any of them as disciplinary matters until after the claimant went off sick on 4 December 2017, and after , on 16 November 2017, the respondents had expressed a desire to have the claimant leave the business.

99. Thirdly, there is the questionable and somewhat hyperbolic terms of the allegations in this letter. Para. 3 contains allegations that the claimant had "failed to follow reasonable management request". That turned out to be the claimant not completing action points from the meeting on 19 October 2017, and then not replying to Fraser Cherry's email of 24 November 2017. The former may have had some merit, but the claimant was never warned that such continued alleged failures would be likely lead to disciplinary action, and the latter was a very minor issue – the claimant's request for flexible working on a permanent basis answered Fraser Cherry's question as to whether the claimant was seeking the 16 hour week over two days on a temporary , or a permanent basis. She made it clear it was the latter.

100. The charges , for want of a better word, at para. 4 of this letter are also instructive. These are framed as "alleged threatening behaviour towards other member(s) of staff". This would lead the reader to expect allegations that the claimant had threatened other members of staff in some way, perhaps with violence or some other form of harm. The particulars, however, reveal that this was not the nature of the allegations at all. Rather , the allegations are that the claimant said she would cancel a meeting if she could not bring a union representative with her, and that she told Janine Needham that she would put in another sick note if her request to work the hours she wanted was not granted. That is not any form of threat to another member of staff. It may be some form of attempt to blackmail her employer, but it hardly warrants the description of threatening behaviour towards another member of staff. That it was couched in such terms, we consider, is indicative of a desire on the part of the respondent to ramp up allegations against the claimant to be as serious as possible. In short , this set of disciplinary allegations is redolent of an employer scraping the bottom of the disciplinary barrel, and trying to find any minor offence or misdemeanour with which to achieve , or facilitate, the employee's dismissal, which, we are quite satisfied, was the respondents' desire.

101. The unfairness of this process, however, does not end there. Having given the claimant a very short period for the disciplinary meeting on 15 December 2017, the respondents then adjourned it to 3 January 2018, a date of their, and not the claimant's , choosing, for which her union representation could not be arranged. Communication about this was unclear, leading to the claimant having to ring the Practice on 3 January 2018. Then, Dr Parker, somewhat magnanimously, postponed the disciplinary hearing to 11 January 2018. He considered this to be "in the interests of fairness". That fairness , however, did not extend to allowing the claimant to attend,

or be accompanied by her union representative, the next meeting merely to allow her to make written submissions.

102. This was despite him adding a new allegation, arising from the claimant's telephone call on 3 January 2018 , and disclosing no less than 10 further documents relating to the disciplinary allegations, only two of which related to the new allegation.

103. A number of obvious points can be made. Firstly, three weeks to arrange union representation is not necessarily enough time when that period includes Christmas and New Year. Secondly, three weeks is the maximum possible calculation of the time period in question, when the claimant may well not have seen the disciplinary invitation until 14 December 2017. Thirdly, Dr Parker seems to have taken the view that the claimant had missed her one and only opportunity to attend this meeting, and then he would only let her make written submissions. Quite why she was to be so penalised is unclear. Fourthly, there was in any event a new allegation, so the claimant was afforded virtually no time at all to consider and respond to this. Finally, the inclusion of 8 further pieces of disclosure which related solely to the original allegations was, of course, something that should have been included with the original invitation letter.

104. Now, at a date after that on which the disciplinary was originally to have been held , the respondents were disclosing yet more evidence , to which they were then limiting the claimant's right to respond , by limiting her to written submissions, and without union representation. Added to that was a wholly new allegation, again, the Tribunal considers an example of the respondents seeking to pile on yet further disciplinary allegations to make the claimant's position more difficult.

105. All this was, the Tribunal considers , grossly unfair. Dr Parker, in cross – examination, accepted that , in hindsight, not allowing the claimant to attend the meeting on 11 January 2018 , was unfair. The Tribunal accepts the claimant's submissions that this entire process was pre - determined and evidence of the respondents' settled intention by late 2017 to remove the claimant from the business.

106. The Tribunal appreciates, of course, that its task is not to judge the fairness of a process which resulted in what was only a written warning, and that it is the fairness of the eventual dismissal that has to be considered. The Tribunal considers, however, that the unfairness and haste of this process is highly relevatory of the respondents' state of mind, and how they had by then come to view the claimant , who had become a irritant, and was taking up a lot of management time, and resources.

107. Ironically, however, and the Tribunal suspects to the chagrin and disappointment of the respondents, Lucy Crossley, the Consultant who carried out the disciplinary hearing, whilst finding that most of the allegations made were well founded, did not consider that a final written warning , applicable in cases of serious misconduct (see page 432 of the bundle) was appropriate sanction, and only imposed a written warning. Crucially, however, she also made recommendations to address the claimant's absence for work related stress, and that the respondent should consider conducting a stress risk assessment to assist the claimant in returning to work. The respondent did not, until the disciplinary hearing on 6 June 2018, attempt to carry out such an assessment.

108. The outcome of this disciplinary hearing was sent to the claimant on 25 January 2018. Thereafter the claimant was invited to a welfare meeting on 5 February 2018, brought forward to 2 February 2018. On 31 January 2018 the claimant issued a series of letters, raising or following up grievances, and appealing against the written warning. That appeal was heard , in the claimant's absence, by Dr Chanda on 23 February 2018. It was dismissed. How fair that was does not greatly concern the Tribunal, but the respondent's unwillingness to allow the claimant to postpone the hearing when she could not attend it, and to proceed on written submissions only , the Tribunal considers , is a further example of the respondents' determination by then to uphold the warning , and put the claimant at continued risk of dismissal. The Tribunal considers Dr Chanda's consideration of the appeal was perfunctory, and with only one likely outcome.

109. The claimant continued to pursue her grievances. She did so in her letter of 9 March 2018 (page 231 of the bundle). On 21 March 2018 the claimant attended an Occupational Health assessment, and the ensuing report is dated 22 March 2018 (pages 234 to 235 of the bundle). The Tribunal will return to this report in due course.

110. On 28 March 2018 another Consultant from Face2Face heard the claimant's grievances. She reported on 6 April 2018 (pages 240 to 261 of the bundle). Whilst only one aspect of the claimant's grievances was upheld, Rachel Waugh did acknowledge that working relationships had broken down, and she suggested workplace mediation. Pausing there , the Tribunal accepts that this was indeed a genuine and bona fide attempt by an independent arbiter to assess the claimant's grievance, and Rachel Waugh was not part of any witch – hunt. That does not, however, mean that the respondents themselves had not determined that the claimant must go, it is merely evidence of the respondents being aware of the need to be seen to take the claimant's grievance seriously, and ensure that they followed "due process".

111. After the abortive attempts at mediation that ensued in April 2018 , the claimant submitted a further sick note on 27 April 2018, covering three months up to 27 July 2018. The claimant appealed the grievance outcome , and that too was heard by Dr Chanda on 16 May 2018, again on the papers, because it had been submitted outside the 5 day period specified in the respondent's grievance procedure. This was yet another example of the respondents taking every opportunity to deny the claimant an in person hearing if they could do so. It is of note, that when conducted not by any external consultant , but by the respondents themselves, these exercises were very perfunctory, and , the Tribunal, finds, pre-determined. Whilst the respondents were within their strict rights to refuse to accept the appeal at all outside the 5 day period, the Tribunal considers that the respondent's unwillingness to depart from the procedure is another instance of the respondent's unwillingness to give the claimant any further leeway. The outcome was sent to the claimant by letter of 18 May 2018.

112. On 22 May 2018 the respondents sent the claimant an invitation to a medical capability meeting on 6 June 2018, the result of which could be her dismissal. Again the timing is interesting. The claimant's last sick note had been submitted on 27 April 2018. It covered her for a further three months. That, however, did not prompt such an invitation. Rather , the invitation was issued four days after the grievance appeal outcome. In terms of what prompted it, the respondents can point to no particular event, and the claimant's fit note did not expire for another month. No staffing crisis

had arisen, the respondents appear to have managed the claimant's long term absence quite satisfactorily, the claimant was not receiving contractual sick pay, and, other than a desire to make long term staffing arrangements, there was no reason for the action being taken then. We do consider that the action was indeed prompted by the dismissal of the claimant's grievance appeal, the last impediment to the respondents executing their intention to dismiss.

113. At that meeting , conducted curiously by Sara Mayer, but with Dr Parker to whom any appeal may presumably have lain, also in attendance , with no further updated OH report, and with no risk assessment carried out – it was to be carried out after the meeting – the respondent proceeded to consider dismissal of the claimant. The outcome letter of 8 June 2018 was signed by Sara Mayer, though again the hand of Dr Parker was upon it, as he was present in the capability meeting.

114. This is a fairly brief document. It summarises what the claimant had said in the capability meeting. It is to be noted that no mention whatsoever is made in it of the stress risk assessment, which was received after the meeting, but was presumably considered to be a relevant document . The Tribunal considers that this is for two reasons. The first is that the provision of that document was a mere formality. It was something the respondent realised it should do, but had not done. It was never going to make any difference. It had, however, first been recommended as long ago as Lucy Crossley's disciplinary outcome letter in January 2018. Further, a similar recommendation had been made in the OH report in March 2018, but again the respondents had taken no steps to carry out such an assessment. Secondly, the document is in any event not an attempt at a true stress risk assessment, it is an HSE pro-forma Return to work questionnaire. Whilst it may have been unlikely to move things on very far, if it was to be used in any genuine attempt to resolve the workplace stress from which the claimant was suffering, it would have to be at least discussed with her before the decision to dismiss her was taken. The Tribunal cannot accept the respondents' contention that this was truly a stress risk assessment , or that it was seriously considered at all before the decision to dismiss was taken. That there was no such discussion, or indeed, even mention of this document in the outcome letter, is consistent with the respondents' conclusion by this time that the claimant's employment was to end.

115. As Mr Lassey submitted, Sara Mayer admitted that she did not consider changing the claimant's hours as a reasonable adjustment, or as a possible alternative to dismissal. This is despite the fact that changing the claimant's hours had previously allowed her to return from a period of absence , and despite the same being identified as a possible reasonable adjustment by the claimant on the return to work questionnaire, the stress risk assessment document (page 395 of the bundle). Janine Needham confirmed in evidence that she was never approached in May – June 2018 to ascertain whether the claimant's requested shift pattern could have been accommodated at that time, either as a reasonable adjustment or otherwise. The issue was never re-visited after Sara Mayer's initial refusal in November 2017. There is no evidence to suggest that the same was ever considered as an alternative to the termination of the claimant's employment. Indeed, both Dr Parker and Sara Mayer gave evidence that they did not consider a change in hours to be a reasonable adjustment that may have allowed the claimant return to work, but could not provide any explanation for their view. That said, it may well have taken more than an

adjustment to the claimant's hours to resolve the issues at work that had by then arisen. That dispute, however, was at the heart of the issues between the claimant and the respondents , and resolving it would have been at least a good start to getting the claimant back into work.

116. Similarly, neither Sara Mayer nor Dr Parker considered that changing the mediator to be an alternative option that could have been explored in order to avoid dismissal. The Tribunal is left with the overwhelming impression that , having worn the claimant down over the 6 months since her absence started, with obstacles to her returning to work, rather than serious and genuine efforts to achieve that, once her grievance appeal had been disposed of, and she given up on mediation, which the respondents had discouraged by their inflexible choice of mediator, the respondents took the opportunity they had been waiting for to dismiss her.

117. Mr Gilbert's submissions do not comment upon the concerning procedural aspects raised by the claimant. The role of Dr Parker in meeting, in particular the final dismissal meeting, is not addressed, nor is any real submission made about the appeal process to which we will now turn.

The Appeal.

118. There was then the appeal. It is clear, of course, that an unfair dismissal can be cured at the appeal stage, provided that the appeal takes (usually) the form of a complete re-hearing , and remedies any unfairness in the original dismissal process (see ***Taylor v OCS Group Ltd [2006] IRLR 613*** *).*

119. The appeal against the claimant's dismissal was not a re-hearing. It was something of a curious beast. Whilst Paul Stevens, the Executive Officer of Stockport Local Medical Committee was drafted in, apparently to chair and hear it, presumably because Dr Chanda had heard and dismissed the claimant's appeals against her written warning and her grievance , and was not considered sufficiently independent, she was present in the appeal, and, as the minutes show (pages 297 to 299 of the bundle) , took an active role in it. Paul Stevens had not been provided with any of the relevant documents before the appeal, and hence only saw them, if at all, after the hearing. In the introduction Dr Chanda said the she and Paul Stevens would listen to the information provided by the claimant , and then consider it after the meeting.

120. The appeal outcome letter, however, bears the signature of Paul Sevens alone. It is written in the first person. There is no suggestion in this letter that this was a joint decision, or indeed a decision taken by Dr Chanda, upon his recommendation. Dr Chanda admitted under cross – examination that she made the decision jointly with Paul Stevens , despite paragraph 14 of her witness statement stating that the decision was his. Dr Chanda's role in the decision-making process in respect of the appeal is not set out in her witness statement. Paul Stevens disagreed, and gave evidence that his role was advisory only , and that paragraph 14 of Dr Chanda's statement did not accord with his understanding of the appeal process followed in this case, despite his own witness statement also disclosing no mention of the fact that the decision not to uphold the claimant's appeal against dismissal was made jointly with Dr Chanda. Similarly, the appeal outcome letter appears to be written solely by Paul Stevens.

121. Paul Stevens carried out no independent analysis of the process whatsoever, nor did he conduct any further investigations. In particular, he did not interview the either Sara Mayer or Dr Parker to ascertain the rationale behind their decision to terminate the claimant's employment, or understand what considerations they had made before making their decision.

122. It later transpired that Dr Parker too was likely to have had involvement in the appeal outcome , as his evidence was that it would be a partnership decision.

123. Regardless of who took the decision, in terms of the actual decision , there are three elements in particular where the Tribunal considers the respondents did not act reasonably in dismissing the points made by the claimant .

124. Firstly, the claimant's first ground of appeal , the involvement of Dr Parker and Sara Mayer in her dismissal was dismissed by the appeal. This was on the basis that the claimant's grievances had been dismissed, and that it was appropriate for Dr Parker to be in the meeting , as he was the HR lead. This misses the point. Whereas the respondents may have been entitled to have Sara Mayer as the dismissing officer, notwithstanding that there had been a grievance about her, the role of Dr Parker , her superior, and a person to whom an appeal may lie, was hard to understand, even if he was , technically , the respondents' HR lead. It was inappropriate, and outside the band of reasonable responses in procedural terms. This feeds into the second ground of appeal , which was dismissed too by Paul Stevens, namely that the respondents had ignored the OH recommendation that she should not attend meetings with those with whom she had difficulties. He did so on the basis that in making that recommendation the OH adviser was unaware of the structure of the respondents' organisation , which meant that Dr Parker was the HR lead, so it was appropriate that he was involved in such moments. With respect, that view betrays Paul Stevens' own lack of understanding of the point that the OH report was making. The OH adviser clearly intended that the claimant should not have to meet with any of the persons who were causing her stress, assuming that an HR department , outside the claimant's management structure, would not be in that category. Dr Parker was one of those persons. No OH advisor in those circumstances would have intended that he should still continue to be involved in meetings to discuss the claimant's stress related absence. Paul Stevens did not make enquiries about this, but a moment's thought would have made it obvious that this is not what the OH report meant. Further, even without that, the claimant's GP had written in similar terms (page 226 of the bundle), a document , of course, which Paul Stevens was not provided with for the appeal.

125. Secondly, and probably most importantly, in relation to Ground no. 3 of the appeal, the claimant in the appeal made it clear that she would now agree to mediation. The appeal rejected this as a ground of appeal because it found that the claimant's reasons for rejection of the proposed mediator were unsubstantiated. That again misses the point. The object of the suggestion of mediation was to enable the claimant to return to work, by repairing relationships at work. Choosing a mediator with whom the claimant was uncomfortable was not going to achieve that. Whether the claimant was right or wrong in her concerns, the simple and reasonable course would have been to find another mediator. The respondents, however, would not do so, so the ensuing, and largely irrelevant discussion of ACAS and costs

considerations then arose. In any event, whatever the position had been, by the time of the appeal the claimant was clearly saying that she was open to mediation. The appeal gave no further consideration to such an option. The respondents again were displaying the attitude that they had throughout their dealings with the claimant from November 2017, that in effect she would only get one chance , like she had to attend meetings, to agree a mediator , and if she failed to take that chance, that door would then be closed to her. The issue here is not so much one of reasonableness, but one of the light that this shows upon the degree to which the respondents genuinely wanted to try to resolve the claimant's workplace issues, by, for example, mediation, rather than being obliged to appear to want to do so.

126. Thirdly, the claimant's Ground no. 5, which is the overall one that she did not consider that the reasons for her sickness absence had been adequately considered or addressed , were give only perfunctory consideration. No mention is made of the further possibility of mediation , or of the stress risk assessment. If the respondents were truly interested in trying to get the claimant back to work, even at this late stage, these matters would have been considered.

127. The claimant's appeal therefore does not rectify any of the defects in the dismissal process. Firstly, and quite crucially, it transpired late in the evidence that the decision on the appeal was made by Dr Parker and Dr Chanda, on recommendation from Paul Stevens. Paul Stevens' role as an apparently independent appeals officer was therefore rather illusory. As it was, he was in any event very badly equipped for this role, in terms of the very sparse information he was provide with ahead of the appeal meeting. All that, as Mr Lassey submits, would be enough to render the appeal unfair, or to prevent it from beginning to remedy the unfairness of the dismissal.

128. Quite apart from those aspects, in terms of the decision made, that was unreasonable , in that the appeal concluded that mediation would not be successful without an objective basis for this conclusion. Whilst there was a suggestion that mediation would not be successful, as it would involve five individual members of staff in the appeal the claimant was still expressing a willingness to engage with mediation at the appeal hearing , but Paul Stevens did not think mediation would be feasible due to the number of persons involved. As confirmed by Dr Chanda, the cost of mediation was not a factor that prohibited meditation from taking place at this stage – only the appeal decision – makers' view as to its feasibility. The stress risk assessment was not considered in the appeal, and is not mentioned in the outcome letter. It was, of course, not raised by the claimant as a ground of appeal, but it equally did not feature in the capability outcome letter. This rather emphasises what an irrelevant document it was.

129. In short, the appeal was doomed to failure from the start. To some extent that was not Paul Stevens' fault, as he was not provided with the necessary material upon which he could have conducted a fair appeal. He (to the extent that it was his decision, which, in any event, we are satisfied, it was not) did not, and probably could not have, carried out a fair appeal , capable of remedying the unfairness of the original dismissal. The dismissal was, accordingly, unfair.

Remedy.

1. Polkey.

130. The parties made submissions in relation to whether there should be any reduction in the compensatory award to reflect the chance that, had a fair procedure been followed, the claimant would have been dismissed in any event. Mr Gilbert invites the Tribunal to do so, saying that the claimant , having stated that a return to work was untenable, and having declined mediation, would have been dismissed in any event, and there should be a 100% reduction.

131. Mr Lassey says that it is impossible to say what difference a fair procedure would have made, and hence no reduction at all should be made.

132. The law on this topic is well summarised by Elias J in ***Software 2000 Ltd v Andrews [2007] IRLR 568*** from Elias, then the President, where he said this:

"(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) [Now irrelevant following repeal of s 98A(2) ERA] ……..It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that

the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the Tribunal may determine

(a) That if fair procedures had been complied with, the employer has satisfied it—the onus being firmly on the employer—that on the balance of probabilities the dismissal would have occurred when it did in any event. ……...

(b) [N/a]

*(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the **O'Donoghue** case.*

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

133. Thus it is clear that the range of options open to a Tribunal is considerable. It may make a 100% reduction in an appropriate case, a lesser reduction if it thinks the changes of the claimant being fairly dismissed are less than 100%, or may make none.

134. The Tribunal's view is that no reduction for ***Polkey*** should be made. The first reason for that is that the Tribunal considers it impossible to say what the outcome would have been had the respondents, firstly, carried out a proper stress risk assessment before the capability meeting, instead of at it, and then in meaningless format. Secondly, had mediation been attempted , as the claimant agreed at the appeal hearing, that may well have resulted in the claimant being able to return to work. It is, however, impossible to say whether that would or would not have been the case. Thirdly, agreement to the claimant working a 16 hour week , her major objective, may well have gone a long way to getting her back into work. The respondents did not investigate whether, as at the date of her dismissal, that was feasible, so we cannot know what the position would have been had they done so

135. Our fourth reason, however, is that we are satisfied that the claimant's dismissal was an inevitability come what may. From November 2017 the respondents had regarded the claimant as taking up too much management time, a situation which only got worse with her subsequent disciplinary action, and her appealing of that, and then her subsequent grievance, and her appealing of that as well. By May 2018 the respondents were keen to dismiss the claimant as soon as possible, and had a fair procedure been followed the Tribunal is satisfied that she would still have been dismissed, but unfairly dismissed, and therefore no reduction for ***Polkey*** is appropriate. Finally, and in the alternative, as the decision whether to make such a reduction is a matter for the Tribunal's discretion, the Tribunal would have no hesitation in holding that , given the respondents' determination to dismiss the claimant, and how they treated her between December 2017 and June 2018, it would not be just and equitable to make any such reduction.

2.Contribution.

136. Mr Gilbert for the respondents confirmed that they were not pursuing any reduction for contributory conduct (raised in para. 74 of the response).

Remedy – initial observations.

137. Turing to issues on remedy, whilst the Tribunal will, if required, convene a further hearing to consider remedy, now that only the claim of unfair dismissal has succeeded, there will be limits upon the compensation payable. The Tribunal would invite the parties to note and consider the following issues, however, which appear to be likely to arise in determining remedy. There may, of course, be others.

138. The first main issue that appears to be relevant to the Tribunal will be the basis upon which the claimant's basic and compensatory award should be assessed, in terms of her pre – dismissal earnings. Whilst her contracted hours were originally 30 hours per week, by December 2017 her hours had reduced to 16 hours a week. It does not matter for these purposes what days she worked, her total weekly hours were 16. Her hourly rate appears to have been £9.22, hence her gross weekly wage would be £147.52. She was, however, off work sick from December 2017 until her dismissal on 8 June 2018, a period of over 6 months.

139. In assessing the basic award, s.221 of the ERA requires a week's pay to be assessed by reference to whether the employee has normal working hours. If so, a week's pay is the contractual remuneration payable under the contract if the employee works throughout her normal working hours in a week. This raises two questions. The first is, by the date of termination, what were the claimant's normal working hours, and the second, what was the amount payable in respect of those hours? If her normal working hours were by then , and had been since November 2017, 16 hours per week, her week's pay would be £147.52. She had not, however, been in work since December 2017. It is unclear whether she received any form of sick pay after the initial 6 weeks of contractual sick pay, so it would have been SSP if anything from then on. It is a moot point (which the Tribunal leaves to the parties to research and argue if necessary) as to what , if any, effect that has on a week's pay for the purposes of calculation of the basic award.

140. Turning to the compensatory award, that too would appear, rather more clearly, to need to be assessed on the basis of the 16 hour week, as that was what the claimant was seeking as the basis upon which she would return to work. Her week's pay, in those circumstances would have been £147.52, and her losses should be assessed on that basis. That raises too the effect of the statutory cap on compensatory awards of 52 weeks' pay , under s.124(1ZA)(b) of the ERA. That refers back to a week's pay, which is to be calculated in accordance with the other provisions of the ERA referred to above. Leaving aside the niceties of the effects of SSP and the like, the Tribunal can see a valid argument that the maximum compensatory award must be limited to 52 weeks at £147.52, £7,671.04. That is, as is often not appreciated, a financial, and not a temporal limit, meaning that a Tribunal can make a compensatory award which covers a period of loss of earnings in excess of 52 weeks, provided that , after mitigation or other deductions , the total amount of the award does not exceed the maximum calculated on this basis.

141. In any event, regardless of the cap, the Tribunal will have to assess what proper basis for assessing the claimant's loss of earnings at the time of her dismissal should be. The Tribunal invites the parties to consider these issues, and, if possible, to agree remedy, or agree to narrow , and formulate the issues that the Tribunal will have to determine in any remedy hearing. (It is noted that the respondent in fact, in paying the claimant notice pay, did base her entitlement upon a 30 hour week, but that may not be determinative of the issue) . In the event of the parties notifying the Tribunal of the need for a remedy hearing, and identifying the issues to be determined, the Tribunal will make further case management orders for the determination of remedy.

Employment Judge Holmes
DATE : 6 July 2021

RESERVED JUDGMENT SENT TO THE PARTIES ON 12 JULY 2021

FOR THE TRIBUNAL OFFICE

ANNEXE

The relevant statutory provisions.

Direct Discrimination:

Direct discrimination is defined by Section 13 of the Equality Act 2010 as follows:-

"*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

Comparator:

Section 23(1) of the Equality Act 2010 provides that:

"On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material differences between the circumstances relating to each case".

Victimisation:

Section 27 of The Equality Act 2010 defines victimisation as:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act."

Section 34(4) of The Equality Act 2010 provides that:

"(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment."

Burden of Proof:

Section 136 of The Equality Act 2010 provides that:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if (A) shows that (A) did not contravene the provision.

Unfair Dismissal:

Section 94(1) of the Employment Rights Act 1996 ("ERA 1996") provides that an employee has the right not to be unfairly dismissed by the employer. Section 98(1) provides that in determining whether the dismissal of an employee is fair or unfair it is for the employer to show the reason (or if more than one the principal reason) for the dismissal and that it is one which the law regards as being potentially fair.

Sections 98(1)(b) and 98(2) of the ERA 1996 set out the potentially fair reasons, which include, at s.98(2)(a) a reason which "*relates to the capability of the employee for performing work of the kind which he was employed by the employer to do*": see section 98(2)(a).

Section 98(4) of the ERA 1996 provides as follows:

"*The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating [conduct] as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case".
