**Case Number: 2502158/2020**

# THE EMPLOYMENT TRIBUNAL

**Claimant** Ms Nicola Bryan

**Respondent** Landmarc Support Services Limited ("Landmarc")

**RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**Held at Newcastle (by CVP)** **On 2-6 August 2021**

**Before Employment Judge Garnon** **Members Ms A. Tarn and Mr S.Carter**

Appearances
For the Claimant: Ms B. Davies of Counsel
For the Respondent Ms H. Marsland Solicitor

**JUDGMENT**

**The unanimous judgment of the Tribunal is all the claims succeed. The remedy issues will be decided on a date to be fixed.**

**REASONS** (bold print is our emphasis, italics are quotations and numbers in brackets are pages in the agreed trial bundle )

## 1 introduction and Issues

1.1. These reasons are lengthy and detailed (hopefully not too repetitive) because they deal with the collective failure of Landmarc, rather than individual's failures, to deal properly, reasonably and in accordance with its legal obligations with the greatest challenge to society generally, employers and employees in particular, in our lifetimes -the Coronavirus/Covid 19 pandemic ("the pandemic"). The claimant, born 12 July 1976, was employed by Landmarc from 25 June 2018 until she resigned with effect from 28 August 2020. She claims constructive unfair dismissal, generally and on grounds relating to health and safety, detriment on that ground and indirect sex discrimination.

1.2. A list of issues, initially suggested by the respondent, were replicated in orders of 11 February 2021 by Employment Judge (EJ) Garnon after a case management discussion conducted by telephone from his home without the paper file. He wrote they would "*suffice for now*". Ms Marsland, suggested we are all constrained by them.This is not so. In Price-v-Surrey County Council Carnwath L.J., as he then was, said "*even where lists of issues have been agreed between the parties, they should not be accepted uncritically by employment judges at the case management stage. They have their own duty to ensure the case is clearly and efficiently presented. Equally the tribunal which hears the case is not required slavishly to follow the list presented"*. The list requires attention to make it more reflective of the relevant law. The real issues are

Constructive Unfair Dismissal

1.2.1. Was there an actual or anticipatory fundamental breach of contract by Landmarc , specifically did it (a) take reasonable steps to address concerns raised by the claimant about attending the

workplace (b) undertake an adequate risk assessment (c) undertake a fair disciplinary/ grievance process (d) breach the implied term of mutual trust and confidence?
1.2.2. Did her line manager make any dishonest statements as alleged?
1.2.3. Was requiring her to attend the office 1 in 7 weeks itself a fundamental breach of contract?
1.2.4. Did the claimant resign, at least in part, in response to any such breach?
1.2.5. Did she affirm her contract, after the breach, by delay in terminating it until her full sick pay entitlement had been exhausted?

Automatic Unfair Dismissal / Detriment
1.2.6. Was the dismissal automatically unfair because the principal reason for any breach of contract by Landmarc was her refusal to attend her workplace due her reasonably believing herself to be in serious and imminent danger which she could not reasonably have been expected to avert if she did, and/or taking appropriate steps to protect herself and/or other persons from the danger?
1.2.7. Was she subjected to a detriment at least in part, on the grounds she acted in those ways ? Specifically, was a disciplinary process against her for her failure to attend the office and the manner in which she contacted colleagues and her appeal not being progressed such detriment?

Indirect sex discrimination
1.2.8. Has her complaint been presented with the time limit as set out in section 123 of the Equality Act 2010? If not, would it be just and equitable to extend the time limit?
1.2.9. If so, did the respondent apply provisions, criteria or practices (PCPs), specifically requiring staff to work some time in the office during the pandemic?
1.2.10. If so, would that PCP put women at a particular disadvantage in comparison with men and put the claimant at that disadvantage?
1.2.11. If so, can Landmarc show it was a proportionate means of achieving a legitimate aim?

Remedy
1.2.12. If she was constructively dismissed, what compensation should be awarded taking into account (i) any possibility she may have been dismissed for gross misconduct(ii) any contributory conduct (iii) her duty to mitigate and (iv) any failure to follow the ACAS Code of Practice?
1.2.13. What compensation, if any, should be awarded for financial loss and injury to feelings in her detriment and discrimination claims?

## 2.The Relevant Law

2.1. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) provides an employee is dismissed if: - "*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."* An employee is "entitled" so to terminate the contract only if the employer has committed a fundamental breach of contract, ie. a breach of such gravity as to discharge the employee from the obligation to continue to perform the contract. Western Excavating (ECC) Ltd-v-Sharpe 1978 IRLR 27. The conduct of the employer must be more than just unreasonable or unfair to constitute a fundamental breach. We should ask the following questions: -
(i) What are the relevant terms of the contract said to have been breached?
(ii) Are any of the alleged breaches made out (the burden of proof being on the employee)?
(iii) If so, are those breaches fundamental?
(iv) Did the claimant resign, at least in part, in response to the breaches not for some other unconnected reason and do so before affirming the contract.
If the answers to questions (ii), (iii) and (iv) are affirmative, there is a dismissal.

2.2. Section 98 (1) requires the respondent to show the reason for dismissal. In constructive dismissal it was explained in Berriman-v-Delabole Slate Company 1985 ICR 546 as: - *"First in our judgment even in a case of constructive dismissal section 57*(now section 98) *imposes on the employer the burden of showing the reason for dismissal notwithstanding it was the employee not the employer who actually decided to terminate the contract. In our judgment the only way in which the statutory requirements of the Act can be made to fit the case of constructive dismissal is to read section 57 as requiring the employer to show the reason for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer*."

2.3. Contractual terms may be express or implied. Express terms are those specifically agreed between the parties, whether in writing or orally. Common reasons for implying terms include to insert those which are obviously what the parties intended but failed to say, sometimes called the "officious by-stander test" which means if such a person had asked whether the parties understood a certain modification or supplement to an express term would happen in given circumstances , **both** would have answered "*But of course*!". Employers are under a statutory duty under the Health and Safety at Work Act to take reasonable care to ensure the health and safety of their employees while at work. This duty is a non-delegable duty which extends not only to physical, but also mental health, Petch-v-Customs and Excise Commissioners 1993 ICR 789.If a term is implied by statute, it may modify an express one. The contractual implied term that employers will take reasonable steps to safeguard thealth and safety of employees was held to exist in Waltons and Morse-v-Dorrington, a case about "passive smoking". Another such term is it will not discriminate against employees on any prohibited ground. The express term she should attend her place of work when ordered to may be displaced if it becomes unsafe and/or requiring her attendance becomes discriminatory.

2.4. The Court of Appeal held in Financial Techniques (Planning Services) Ltd-v-Hughes 1981 IRLR 32, when there is a genuine dispute about the terms of a contract it is not an anticipatory breach for one party to do no more than argue his or her point of view. Lord Justice Templeman said this did not mean a party could invariably insist on a plausible but mistaken view of his contractual obligations without being held to have repudiated the contract. In the case of an *actual* breach, an employer's insistence on performing the contract according to a genuine but incorrectly held belief may prevent those actions from constituting a **repudiatory** breach, Bridgen-v- Lancashire County Council 1987 IRLR 58, accepted without comment by the EAT in O'Kelly-v-GMBATU EAT 396/87 and Haberdasher's Monmouth School for Girls-v-Turner EAT 0922/03.

2.5. Whether a breach is fundamental is essentially a question of fact and degree. The employer's motive is irrelevant. In Wadham Stringer Commercials (London) Ltd-v-Brown 1983 IRLR 46, a sales director was demoted in status and moved into a cramped and unventilated office. The employer argued economic circumstances impelled it to treat him in this way, but the EAT stressed the test of fundamental breach is purely contractual and the surrounding circumstances are not relevant, **at this stage**. They may be to **the reason** for the dismissal . Section 98(1) provides:

"(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –*

*(a) the reason (or if more than one the principal reason) for dismissal*

*(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the employee held.*

One valid reason is that it relates to the employee's conduct. If that, or some other substantial reason, is shown s 98(4) is engaged which says

"*Where an employer has fulfilled the requirements of subsection (1), the determination of .. whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

*(a) depends on whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee*
*(b) shall be determined in accordance with equity and the substantial merits of the case*."
Even constructive dismissal may be fair if the respondent shows a potentially fair reason for its breach and acts reasonably. In some cases third party pressure has been argued to be some other substantial reason but that argument has not been put by Landmarc .

2.6. WA Goold (Pearmak) Ltd-v-McConnell 1995 IRLR 516, held an employer is under an implied duty reasonably and promptly to afford a reasonable opportunity to employees to obtain redress of any grievance they may have. The claimant is not complaining of not being afforded an opportunity, rather of the rejection, without due consideration, of her concerns and the result of her grievance being pre-determined to produce the outcome the employer wanted.

2.7. Even if the employer has not breached any express or other implied term, an employee may rely on the implied term of mutual trust and confidence. Woods-v-WM Car Services 1981 IRLR 347 held "*It is clearly established there is implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner, calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee. To constitute a breach of this implied term,* ***it is not necessary to show the employer intended any repudiation of the contract. The Employment Tribunals function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer.*** *Any breach of that implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract."*

2.8. Malik-v- BCCI emphasised if conduct, **objectively considered**, was likely to cause serious damage to the relationship between the employer and the employee, a breach was made out **irrespective of the motives of the employer.** "Reasonable and proper cause" also must be objectively decided by the Tribunal. It is not enough the employer thinks it had reasonable and proper cause. In Gogay-v-Hertfordshire County Council, Hale L.J. dealt with conflicting duties which are *difficult to reconcile* and rejected the argument it was for the Council, rather than the court, to judge it had 'reasonable cause to suspect' a child was at risk. This argument was plainly wrong, there must be objectively reasonable grounds, not simply grounds the decision-maker thinks sufficient Castorina-v-Chief Constable of Surrey. Bournemouth University Corporation-v-Buckland 2010 ICR 908 held whether the employer's conduct fell within "the range of reasonable responses" is not relevant when determining whether there is a constructive dismissal. It is something to be considered under s 98 (4)if the employer shows a potentially fair reason for dismissal. Examples of conduct which may breach the term include unjustified warnings and oppressive use of disciplinary process Walker-v-Josiah Wedgewood 1978 IRLR 105 and Post Office-v- Strange 1981 IRLR 515

2.9. A breach of the implied term of mutual trust and confidence may result from a number of actions over a period, as said in Lewis-v-Motorworld Garages1985 IRLR 465 "*Even if an employee does not treat a breach of that express contractual term as wrongful repudiation, he is entitled to add such breaches to other actions, which taken together may cumulatively amount to a breach of the implied obligation of trust in confidence."* This, sometimes called "last straw" doctrine, was further explored in London Borough of Waltham Forest-v-Omilaju 2005 IRLR 35. The last straw does not have to be a breach of contract in itself or of the same character as the earlier acts. Its essential quality is that when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to

that breach, although what it adds may be relatively insignificant. An entirely innocuous act by the employer cannot be taken as the last straw, even if the employee genuinely but mistakenly interprets it as hurtful and destructive of her trust and confidence in the employer.

2.10. Resignation is the employee saying the breach has ended the contract. Conversely, she may expressly or impliedly affirm the contract and thereby lose the right to resign in response to an antecedent breach. There is a lengthy explanation of affirmation in WE Cox Toner (International) Ltd-v-Crook 1981 IRLR 443, which the Court of Appeal confirmed in Henry-v-London General Transport 2002 IRLR 472, but we will give the short, but effective explanation in Cantor Fitzgerald-v-Bird 2002 IRLR 267, affirmation is "*essentially the legal embodiment of the everyday concept of 'letting bygones be bygones'".* **Delay of itself does not mean the employee has affirmed the contract** but if it shows acceptance of a breach, then in the absence of some other conduct, reawakening the right to resign (see Omilaju), the employee cannot resign in response to the earlier breach. Kaur-v-Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978, affirmed previous breaches may be "revived" despite affirmation if the employer's conduct is continued by further acts, entitling the employee to terminate based on the totality of the employer's conduct.

2.11. Even if there has been a fundamental breach which has not been affirmed, if it is not at least in part an effective cause of the employee's resignation, there is no dismissal, see Jones-v-F.Sirl Furnishing Ltd and Wright-v-North Ayrshire Council, EAT 0017/13

2.12. Section 44 includes

*(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—*

*(d )in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave)* ***or (while the danger persisted) refused to return to his place of work*** *or any dangerous part of his place of work, or*

*(e)in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take)* ***appropriate*** *steps* ***to protect himself or other persons from the danger.***

*(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances* ***including, in particular, his knowledge*** *and the facilities and advice available to him at the time.*

*(3) An employee is not to be regarded as having been subjected to any detriment on the ground specified in subsection (1)(e) if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did.*

*(4) This section does not apply where the detriment in question amounts to dismissal (within the meaning of Part X).*

2.13. Section 100 provides in essentially identical terms if the principal reason for dismissal, ie the breach which caused the employee to resign is one in that section it is automatically unfair. There is no reason to limit danger to those generated by the workplace itself. Harvest Press Ltd-v-McCaffrey 1999 IRLR 778, held *"the word danger is used without limitation in section 100(1)(d)… Parliament was likely to have intended those words to cover any danger however originating."*

2.14 Ms Davies submitted these sections require an enquiry into the **subjective** mind of the employee and the reasons for her belief are not of the essence (Chatterjee-v-Newcastle Upon Tyne Hospitals NHS Trust 2019 9 WLUK 556). In our view that is not quite right in that a purely subjective belief may be genuine but unreasonable. Oudahar-v-Esporta Group Limited EAT/0566/10 held *"the mere fact an employer disagreed with an employee as to whether there were (for example) circumstances of danger, or whether the steps were appropriate, is irrelevant. The intention of Parliament was that an employee should be protected from dismissal if he took or proposed to take steps falling within section 100(1)(e)"* Edwards-v-Secretary of State for Justice 2014 7 WLUK 909, held a tribunal has to *"make findings as to what each Claimant actually believed, to decide whether that added up to a belief there were circumstances of danger which were serious and imminent and to decide whether that belief was reasonable."* In Kerr-v-Nathan's Wastesavers Limited EAT/91/95, the EAT stated "*in considering what is reasonable, care should be taken not to place an onerous duty of enquiry on an employee".* Under section 100(1)(d), the danger must be one which the employee *"could not reasonably have been expected to avert".* Section 100 gives effect to the Framework Directive (European Directive 89/391/EEC). Article 8(4) provides *"workers who, in the event of serious, imminent and unavoidable danger, leave their workstation and/or a dangerous area may not be placed at any disadvantage because of their action and must be protected against any harmful and unjustified consequences, in accordance with national laws and/or practices."*

2.15. This is not a protected disclosure claim but such claims provide instructive parallels. Darnton-v-University of Surrey and Babula-v-Waltham Forest College held the worker making the disclosure does not have to be correct. Her belief must be reasonable. Darnton said whether there was a correct factual basis for the disclosure is "*an important tool in determining whether the worker held the reasonable belief the disclosure tended to show a relevant failure.* If there is evidently a causal link between Landmarc's conduct and her refusing to attend work while raising health and safety concerns, provided her beliefs were, in that sense, " reasonable" that should suffice even if at hearing we find they were not correct.

2.16. Unlawful discrimination requires an unlawful **act or omission** and a **type of discrimination**. The **acts** in section 39 of the Equality Act 2010 ( the EqA) include
*(2) An employer (A) must not discriminate against an employee of A's (B)—*
*(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving* ***any other benefit****, facility or service;*
*(c) by dismissing her (*which includes constructive dismissal).
*(d) by subjecting B to any other detriment.*

2.17. The relevant **types** of discrimination include, in section 19, "indirect discrimination":

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

*(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*

*(a) A* ***applies,*** *or would apply, it* ***to persons with whom B does not share the characteristic,***

*(b) it puts, or would put, persons with whom B shares the characteristic at a* ***particular disadvantage*** *when compared with persons with whom B does not share it,*

*(c) it puts, or would put, B at that disadvantage, and*

*(d) A cannot* ***show*** *it to be a* ***proportionate means*** *of achieving* ***a legitimate aim.***

2.18. Discrimination occurs when an employer treats employees whose circumstances, apart from the protected characteristic are the same, differently (direct discrimination) **or** treats people whose circumstances, because the protected characteristic, are different, the same (indirect discrimination) In indirect discrimination we are not concerned with why the respondent acted as it did. The inquiry is into whether the members of a group, in this case women, have not in fact had equal treatment protection as a result of the disproportionate adverse impact of a neutrally worded provision, criterion or practice (PCP). In Essop-v-Home Office and Naeem-v-Secretary of State for Justice 2017 UKSC 27. Lady Hale identified features of indirect discrimination including that the reasons why one group may find it harder to comply with the PCP than others are many and various.They could be social, such as the expectation women will bear the greater responsibility for caring for the family than will men. There is no requirement the PCP puts every woman at a disadvantage.

2.19. The first PCP is staff should work at their workplace, even if doing so is incompatible with child care duties. The second PCP is if one refuses to she is liable to be dismissed. As is well recognised, many more women than men have childcare responsibilities. The rigid application of a gender neutral PCP cannot be justified simply by her contract. The EqA requires an employer applying a manifestly disadvantageous PCP itself to take proportionate steps to alleviate the disadvantage. A claim of indirect discrimination will succeed if the way in which the respondent dealt with this situation, whilst not ill intentioned, was not a proportionate balance between its legitimate needs for business efficiency and the disparate impact of the PCP's being imposed. Showing a proportionate means of achieving a legitimate aim used to be called " Justification". In Hardys and Hanson plc-v-Lax Pill L.J. provided an overview

*" **In other words, the ground relied upon as justification must be of sufficient importance for the national court to regard this as overriding the disparate impact of the difference in treatment, either in whole or in part. The more serious the disparate impact on women or men as the case may be, the more cogent must be the objective justification**.*

2.20. Pill LJ cited with approval Sedley LJ in Allonby-v-Accrington and Rossendale College and Others 2002 ICR 1189 , who, dealing with the facts in Allonby, stated:

*27. The major error, which by itself vitiates the decision, is that nowhere, either in terms or in substance, did the tribunal seek to weigh the justification against its discriminatory effect. On the contrary, by accepting "any decision taken for sound business reasons would inevitably affect one group more than another group" it fell into the same error as the appeal tribunal in the Brook case 1992 IRLR 478 and Enderby case 1991 ICR 382 and disabled itself from making the comparison.*

*28. Secondly, the tribunal accepted uncritically the college's reasons ... They did not, for example, ask the obvious question why departments could not be prevented from overspending on part-time hourly-paid teachers without dismissing them. They did not consider other fairly obvious measures short of dismissal which had been canvassed and which could well have matched the anticipated saving of £13,000 a year. In consequence they made no attempt to evaluate objectively whether the dismissals were reasonably necessary – a test which while of course not demanding indispensability, requires proof of a real need.*

*29... Once a finding of a condition having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the college's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.*

## 3. Findings of Fact

3.1. We heard Nicola Bryan and her witness Ms Emma Easby (giving evidence under a witness order). For the respondent we heard Mr Mark Allport, their line manager, Mr David Jones Head of HR, Mr Clive Comport, Head of Quality, Health Safety and Environment(QHSE) and Mr Kevin Kneeshaw a Regional Operations Manager. We had a 400+ page agreed bundle of documents. All 6 witnesses said the evidence in their statements was true to the best of their knowledge and belief. All appeared decent people but had different priorites and interpretation of Government guidance.

3.2. Landmarc provides project management services for military locations to the Ministry of Defence ("MOD") and Defence Infrastructure Organisation ("DIO") which each year receive a pot of money to use on projects, which Landmarc manage. It is advised of the budget and the projects to complete. If the money is not used within the financial year, it cannot be "rolled over" to the following year even if the project has been delayed but still needs to be delivered. This means in the next year, MOD/DIO have to deliver any delayed projects plus whatever new projects are required. If the money in the previous year was not used, it can result less funding for the next year.

3.3. The claimant joined Landmarc on 21 June 2018 initially as an Administration Supervisor when her line manager was Ms Amber Lee. The claimant was promoted to Project Management **Coordinator** on 1 August 2019. She was based at Wathgill Camp, Richmond, North Yorkshire. Her line manager became a Mr David Morrison, from whom Mr Allport took over on 9 March 2020. Above him was the Regional Operations Manager, Mr Steve Johnson. The claimant worked closely with the Project Managers, Ms Emma Easby, Ms Claire Burdon and Mr Carl McGee and, less so, with Ms Claire Travis and Commercial Manager Mr Richard Crosby who were based at Wathgill but part of another division. The claimant's job included opening of tenders, and maintaining a tender register. She had not been asked by Mr Morrison to do everything in her job description. Mr Allport aimed to change this, for good reasons.

3.4. The claimant is asthmatic, uses a steroid inhaler twice a day to help prevent asthma attacks, and a reliever inhaler when required. Although her asthma is relatively well controlled, she has been hospitalised on occasions due to an asthma attack, the most recent being in January 2019, and needed oxygen to assist her to breathe. In January 2019, Ms Lee had carried out a return to work interview detailed on her HR record. None of this was passed by HR to Mr Allport.

3.5. When the pandemic began, seeing the effect Covid 19 had on individuals with underlying health conditions such as asthma was extremely worrying. The thought of catching it and potentially passing it on to her family, particularly her mother who is on medication for cancer and has a supressed immune system, was distressing. The thought of having to attend work was worrying as she would be at an increased risk of coming into contact with Covid by mixing with other individuals.

**3.6. "Vulnerable" covers increased risk of (i) catching Covid (ii) being hospitalised or dying if one does (iii) passing in on to others who are at either risk. Generally employers can only reduce the risk of catching Covid.** On **6 March 2020**, Landmarc advised all office staff to work from home. It issued updates to staff via the intranet, verbally and by emails. With evolving facts and guidance Landmarc tried to balance business needs and the safety of staff.

3.7. On **18 March 2020**, the claimant forwarded to Mr Allport an e-mail which she had sent to Mr Johnson about being in a "higher risk group", at which point Mr Allport became aware she had asthma. He advised her to take any precautions necessary, such as working from home, until they had further guidance,both internally from higher in Landmarc and externally from the Government.

Further guidance included information about "key workers", "essential operations", what was meant by "vulnerable" or "extremely vulnerable", who should "shield" and when to isolate. Extremely vulnerable people received shielding letters, but others were advised to be “cautious” **depending on personal circumstances and risk levels**.

3.8. On **20 March**, Landmarc’s operations were confirmed as "essential services" to continue, regardless of restrictions (111). Its employees were deemed "key workers" (127). Mr Allport says the claimant's role was **crucial** for (a) co-ordinating Project Managers attending differing sites and managing or obtaining papers in the office, which, because they were stretched and needed administrative support was best done on site (b) taking phone calls and completing administrative tasks (c) for security reasons, meeting and escorting to the relevant location site visitors, who could knock on or wave through the glass unit door marked with a stop sign not to walk into the building, wait for the claimant outside and be escorted whilst maintaining social distance, with masks and any other PPE, in open air (others could do this but it would divert them from work within their skills and remit and not in the claimant's) (d) opening tenders received by post ,**in the presence of a witness**, recording details in a tender register, and sending relevant documents to project managers.

3.9. The claimant was the only Project Management Co-ordinator for the site (the next closest being some 400 miles away) so it was not possible to ask another to do tasks which had to be done on site. **The claimant says she had not been given the authority to do (c).**

3.10. We accept it is important the tender process is done correctly to evidence transparency, independence and avoid actual or alleged misuse of taxpayer's money. It is **not ideal** for Project Managers or Mr Allport to do this before someone has independently logged the tenders, otherwise there **could be** allegations a Project Manager favours a particular contractor and once seeing the other bids, tells them what they have to quote and allows them to submit after the deadline. Because of security, MOD require this task was done in person with physical documents and registers. No-one asked, as far as we know, if this could be modified during the pandemic . **Initially** Landmarc said it had **regular** audits from the MOD. Under cross examination this was shown to be wrong. Had anyone asked the MoD to relax the requirement to handle paper and attend the office during the pandemic it is unlikely it would have refused. Mr Allport’s statement says not having the claimant in the office resulted in Landmarc not passing **an internal audit** due to significant gaps and the register being out of date so he was reprimanded by Mr Johnson about this who had been warned “*by Head Office*” ( we later found out it was Mr Kneeshaw who warned him) . This issue needed to be remedied immediately so a long serving member of staff who knew about the processes and was willing temporarily to increase her workload resolved the problems quickly.

3.11. The claimant does not accept much of Landmarc’s argument and neither do we. She acknowledges a few duties needed to be done in the office, but they could easily be done by others, as had happened when she was on annual or sick leave. The tasks were not time consuming, and colleagues were willing to do them. Ms Easby and Mr Burton in particular appreciated asthma had put her in hospital before. She worked from home effectively during this period. Her, and Ms Easby’s, genuine and reasonable belief was the only tasks which **could not** be carried out at home, were opening tenders, scanning the paperwork and occasionally answering the phone. At this time, Landmarc were trialling E Tendering where tenders were being sent electronically direct to the commercial manager. Ms Easby corroborates during this period minimal tenders were received by post as it was the start of the new financial year and they had only just received the work commencing April 2020 so they would have no schemes out to tender. taking 15 minutes each at most to open and scan. Provided it was not a tender for a particular Project Manager ( which could

be detected from a code on the envelope) anyone could do that and email the relevant information to the claimant to enable her to complete the tender register which was stored in SharePoint and can be accessed by all who needed to in the North Region. The office had an answerphone on which a message could have been put instructing the caller to phone the project managers direct, or the claimant. She did not have a work issued mobile but did use her personal one. Project Managers who covered the office told her the office phone hardly rang. Subcontractors and the client had been ringing them direct on their mobiles because they were aware Government guidance was to work from home so presumed nobody would be in.

3.12. Landmarc accept for short periods (e.g. annual leave), the basic tender process was carried out by Project Managers until the claimant returned, upon which she completed any gaps, verified the information and finalised the process to ensure full compliance. **The respondent says** to ask them to do this on a longer term basis is **not efficient**, as there were extra demands of COVID projects taking place eg Nightingale hospitals and vaccination centres. **Ms Easby said no such projects existed in the North region**. When this was put to Mr Allport, he departed from his statement saying there were other matters which required work from Landmarc eg adapting buildings such as shower blocks for military personnel. Neither the claimant nor project managers like Ms Easby would be aware if Mr Allport ,as a new manager, needed the claimant's help on these In Mr Allport's words he wanted her to be the "*face of the office*" not as she had been "*Emma's PA*". Landmarc's statements explained none of this, which was never explained to the claimant. If a manager knows facts which the claimant does not, she cannot "***engage***" properly. Security is important in matters involving the military but does not necessitate non-communication of salient points. For example, if the claimant needed to know additional work not within the scope of normal projects was likely to come Landmarc's way and require her to help Mr Allport in strategic planning, when she had not had to help Mr Morrison in the past, she did not need to know the "classified" details of what that work was or why it was required.

3.13. In many aspects of life, people have to take some risk, but the fewer the better. They are more ready to do so if others will be seriously disadvantaged if they do not and the risk to them is not much greater than most would regard as worth the risk, ie the "stakes are not so high". If the consequences of the risk becoming a reality are really dire, and the need to take the risk is not explained to them as pressing, any reasonable person would refuse to take the risk.

3.14. The claimant was, in her word, "terrified" of catching Covid. As she said, " *I know how it feels not to be able to breathe*" In the early months she hated going to a supermarket or pharmacy and ordered goods to be delivered where possible. Her son going to school, which with her key worker letter should be possible, was also a risk to him and her. Supermarkets with good online shopping and delivery services and schools in North Yorkshire tend to be fewer and smaller than in or near major towns. Her mother who otherwise may have helped with childcare was so vulnerable now the claimant could not visit her other than to drop off shopping at the door. She had no choice. The danger of serious illness or death posed by Covid-19 to the claimant could not be avoided but the risk of catching it could have been minimised by her working from home .

3.15. **On 20 March**, staff were forwarded an email by Mr Allport saying Landmarc staff had been designated key workers (111). It explained some measures to ensure a COVID-19 secure office (112-124) eg hand sanitisers, PPE, deep cleans, one person only in the kitchen at any one time, social distancing, and reducing numbers in the office on any given day. We accept Landmarc did what it could in the short time to maintain a COVID-19 secure site but that does not mean it communicated this to the staff to help them feel confident and safe. Throughout Landmarc allowed staff who received shielding letters to work from home. At Wathgill and other sites, employees

deemed vulnerable (but not in receipt of a shielding letter) because of asthma or other conditions attended work "*because of co-operation and dialogue with their line manager*".This is what Mr Allport hoped to achieve with the claimant. **He implies she obstructed that plan. We find Landmarc's failure to communicate openly and fully, not the claimant's alleged failure to "*engage*", reasonably caused her to question the need to do all she was ordered to.**

3.16. Her first day of her working from home was 23 March from which time she did everything she had always been expected to do, with limited help from others who could go to the office with no problems**. Landmarc says** "***We required where possible for everyone to pull together to undertake their assigned roles*". The key question is who decides what is "possible" and how do they do so. The danger is of any operational manager conflating what is not "possible" with what is most productive and efficient.** Landmarc says its approach changed and adapted at short notice in line with evolving guidance. It **sought** to respect the government's message to *"work from home **where possible**"* but its operations, unlike some commercial ones, could **not always** accommodate all tasks being done at home.

3.17. On **23 March**, Mr Johnson told staff via Skype of the measures **to be** put in place and the plans around attendance at work. This was followed by an instruction from Landmarc's Managing Director everyone should work from home especially if vulnerable (245-246). After the call, Mr Allport spoke to his team about what this meant for them. The claimant received an email saying everyone was to work from home. The claimant was in the category highlighted in red at page 126- to attend the office "*only when needed".* **On 25 March** a key worker letter dated 24 March (127) and, on the following day, FAQs was issued by HR (105-108). They were slightly different.

3.18. **On 27 March**, Mr Johnson, and/or someone above him, decided at least one member of staff needed to be on site every day (129-130). **Landmarc say ,based on the requirements of her role ideally the claimant would have been office based full time,** but given her concerns, Mr Allport included her on a rota with Project Managers so she would be required to attend the office one in every 7 weeks which he felt reasonably balanced her concerns with Landmarc's requirements and would still allow her to complete any gaps in the tender register. Having the claimant come to the office 1 week in 7 made **no sense to her or us** because for 6 weeks in 7 the problems would remain. No thought was given to training a junior employee to do simple tasks properly and scan the right information to the claimant at home. Landmarc's witnesses' said the defective tender register caused **reputational risk**. If the claimant had caught Covid and died after coming in to open envelopes that would cause far greater reputational risk. Opening tenders and escorting contractors **could** be covered by others. Mr Allport stated in oral evidence "*it was never about tenders for me"*, and "*80% of Nicola's work can be done from home"* but "*to have her there ..would have been perfect for me"* and "*if you stretch everything to the infinite, yes it could have been done remotely".*

3.19. **On 30 March** Mr Allport e-mailed the Project Managers and the claimant **(130).** This email contains crucial passages. A Colonel on site had a conference call earlier that day with senior managers. Mr Allport wrote " *The direction from the Col on this afternoons conf call was pretty clear, Corona virus **will not be an excuse** for non-delivery of the FASP"(Harsh but at least we know the train of thought early on)*and later *" The ROM* ( Mr Johnson )*has made it pretty clear he expects the office to be manned every day …This is not a request, **if you are working from home then you can also work from the office , using the key worker latter for childcare etc** . ... To stress one point working from home still includes visiting sites when needed"* **Later** Mr Allport sent an office attendance rota. As he lived close to the office, he offered to cover anybody unable to attend (e.g. because they had to self-isolate after being in contact with Covid).

3.20. **On 31 March** the claimant attended a telephone conference involving Mr Allport and other project team members during which staff were informed by Mr Johnson no one would be **forced** to attend the office, especially those with underlying health conditions. This was reassuring.

3.21. On **2 April** in a telephone call (132) Mr Allport agreed she could work from home, and said he was aware **childcare** could be an issue because schools were closed. Mr Allport says she was not happy with the rota system. He assured her a lot of work had gone into re-arranging the office, a **Risk Assessment (RA)** had been completed, she would be in the office on her own and the only person using her desk which would be regularly deep cleaned. He says he suggested she could visit when no one else was around to see the changes and suggest anything else which would make her feel comfortable to attend. Landmarc had taken this approach with other office staff who were anxious and followed their suggestions, provided extra signage, one way systems etc. He assured her she would be listened to. He says nothing would "*appease*" her and she was simply adamant she would not be attending. He said she "***deemed herself***" to be vulnerable despite having no shielding letter. The implication was of her refusing to attend when she did not have valid cause. Landmarc as an organisation had all the information it needed to know that was not true. Under cross examination he and Landmarc's other witnesses accepted she **was vulnerable.**

3.22. **On 3 April 2020**, an email was sent by Mr Allport, following a call he had with Mr Johnson to the team saying they now **had to work from the office** and the option to work from home was not available (133-134), unless they had symptoms, were self isolating or had a shielding letter. It continues " *If you decide **for your own health reasons** that you do not want to risk working at site , then if you don't fall into the allowing categories the option left is unpaid leave. **Disciplinary action has not been ruled out for people who just choose not to come to work**. I know this email must read pretty blunt. The call in which it came was actually a lot more supportive …but the* "*direction is clear, as key workers we must strive to deliver and keep working as normal as possible*". There was no case by case approach. He asks staff not to engage in" *email ping pong*", but call or email him direct. He says he had verbally asked the claimant on calls to provide a doctor's letter stating although she was not required to shield she could not attend the office. She did not. We do not believe he made such a clear request

3.23. **On 6 April** Mr Allport emailed a rota to the team including the claimant (136). She was scheduled to attend in the week commencing 27 April 2020 but responded later that day she was not happy to attend, had "sought advice" and was awaiting a response (135). She spoke to him and HR explaining the differences between "vulnerable" and "extremely vulnerable". He told her **he** was happy for her to work from home and the instruction to attend the office was coming from above him (137). There are emails on the matter between 6 and 7 April (138-143) and an email trail between her and Mr Jones (149-151).

3.24. **On 8 April** there was updated Guidance from Head Office on Vulnerable groups issued after the claimant had pointed out the differences of vulnerable and extremely vulnerable (144). Previous guidance issued by HR (105) stated "*Those with underlying health issues including Asthma, had to self-isolate for 12 weeks as per NHS guidance*" and "*If you feel you fall into one of these but have not received an NHS letter, you should contact your line manager*". Landmarc's own documents suggest a case by case approach. All the evidence points to Landmarc's view **in practice** being anyone in the "vulnerable" category (which may mean they were only marginally short of being classified as "extremely vulnerable") was to be treated in the same way as those with no higher risk or pre-existing health condition at all, and regardless of their level of anxiety.

3.25. Mr David Jones has been employed by Landmarc for 9 years. During the pandemic he helped formulating policies and staff communications in line with guidance and instructions from Directors. He had no personal knowledge of the claimant, but was aware from Tamsin Gee (HR Advisor) she had expressed concerns about attending the office because she suffered from asthma. **On 6 April 2020**, she emailed expressing concerns about the proposed rota(136). He understood her concerns but clarified the previous messages had been at the start of the pandemic when everyone was told to work at home, businesses had not yet been classified as an essential service, making employees key workers. When initial announcements were made many thought lockdown would be for a very short period. The changing guidance and needs of the business necessitated a change in approach. In particular, it was vital to keep running to support the national effort and military aid to the civil authorities, her role was a crucial part in this and involved tasks which **had to be** done on site. As to whether that was really so, **as opposed to "always had been"** done on site, he accepted the view Mr Allport and/or Mr Johnson. In his e-mail, he erroneously used the term "vulnerable", but was referring "extremely vulnerable". Anyone who was " vulnerable" was to attend if work **could not be** done at home but employers had to risk assess their work environment.

3.26. He said if the claimant was deemed "extremely vulnerable", there would be absolutely no suggestion she should come into work. Whilst not ideal Landmarc would have to look at how to support her as it did with a significant number of employees. She would qualify for contractual sick pay if she had to shield or self-isolate. He also suggested if she had not received such a letter, but believed she should be "shielding", she would need to contact her GP. A number of employees were "extremely vulnerable" which meant there was a very real need for those who could attend the offices to do so. He accepts he is not a medical expert but understands asthma has varying degrees of severity. He says, without further evidence, Landmarc had no indication where she fell in that spectrum. A number of staff had asthma but, following dialogue with their respective line managers and being reassured by seeing the Covid safe measures in place, felt able and willing to attend work. Mr Jones accepted when asked he had not seen the medical records showing she had been in hospital only 14 months earlier adding they did not show how vulnerable she was at the present time, **and should be kept confidential anyway**.

3.27. Mr Jones clarified unpaid leave had been offered to employees who could not, for various reasons undertake their role (eg. childcare/ having extremely vulnerable family members) and said this was arguably an option for the claimant but accepted it was at the discretion of management. When Ms Davies put it to him there was a "disconnect" between saying her personal attendance at the office was **crucial** and there being any likelihood she would have been given unpaid leave, he responded they could have used the money saved on her salary to get a replacement for someone else who was security cleared who could be moved into the claimant's role. This suggests cost, rather than the claimant being indispensable was a major factor. He urged the claimant to engage in detailed discussions with Mr Allport to find the best way forward but expressed the hope that, on understanding the RA's and measures in place, she would feel able to attend work. She was not placed at the start of the rota, giving time for her to take any necessary steps.

3.28. Mr Jones said a member of his staff who was "vulnerable" agreed to come in when he explained everything to her. There are three distinctions. First, they had known one another some time, not two weeks like the claimant and Mr Allport. Second, Mr Jones as Head of HR could explain to his employee measures he **knew** were in place and she would trust him to continue. Third, the member of his staff who was asked to attend on some days every week, the need for which he explained, but on the reasons given by Mr Allport to us initially, and to the claimant throughout, her being at home six weeks in seven would not solve the problems of tenders not being opened promptly or the register kept up to date.

3.29. **On 7 April,** the claimant emailed that her doctor had confirmed her asthma made her vulnerable, but not extremely vulnerable so she would not receive a shielding letter (143) (149-150), In hindsight, Mr Jones accepts "vulnerable", "extremely vulnerable" and "shielding" were initially being used too interchangeably, but re-iterated as a key worker, she should attend when necessary subject to measures to ensure the building was COVID-19 secure and a specific RA of her health condition. He said she seemed unwilling to "*co-operate*" and "*deemed herself*" to be so vulnerable office work was dangerous for her. Mr Allport says she would not discuss with him what her concerns were and, despite an **RA having been** completed and the measures in place, took the firm stance she would not be in the office. At this point we find there probably **was no RA**, at least not a written personalised one. The claimant plainly was "discussing" her concerns and only refusing to "capitulate" to an instruction given to all staff only 14 days after "lockdown".

3.30. **On 9 April**, the claimant supplied a picture of her inhaler and a patient summary, which show she had asthma but not how severe it was (152-155). She received an email from Mr Allport with details of measures put in place in the office (156). She prepared a response email ,never sent it but instead discussed her concerns with Mr Allport by telephone. Being the only member of the project office classed as vulnerable, she said others could cover the opening of tenders, **mentioned having no childcare** as she did not want to send her son to school to mix with others and put herself at an increased risk. Mr Allport said he understood her concerns, but the instruction was coming from above him. She asked him what tasks had not been completed whilst she had been working from home, but he could not answer. Mr Allport denies childcare was raised before 2 July, but Ms Davies cross examination showed it very probably was.

3.31. **We asked Mr Allport what if she said, "*there is no more you can do, but I am terrified that if I get it, knowing what being unable to breathe is like and I may die***". Mr Allport's response was she did not say that to him. He understood she was anxious, as he and others in the team were, about an unknown virus. He acknowledged her feelings and confirmed he could see it from her side as well. He said the issue had been raised to those in more senior positions. He offered (as he did to others) to pick up 2 days in her week to minimise her time in the office.

3.32. Ms Easby says the claimant continued to perform all her duties to a high standards and accomplished her workload. The team were in daily contact by email and phone, and Ms Easby was easily able to issue the claimant tasks as normal. The remote electronic way of working was managed well. In fact, the claimant's tasks were being delivered quicker, presumably due to lack of office disturbance and interruption. The only physical task the claimant could not carry out at home was the opening of tender envelopes, scanning the opened tender paperwork and occasionally answering the phone. The claimant told her she has been instructed by Mr Allport to return to work, felt anxious about returning due to her condition and was distressed and tearful on the phone. We accept Ms Easby's evidence.

3.33. None of Landmarc's witnesses threw caution to the wind as regards the health and safety of any employee including the claimant. We accept they took steps to put precautions in place, though not all were done before the claimant was due to attend. They did not write down in RA's everything they had done when they did them. Mr Allport repeatedly said if he could have got the claimant to come in she would see for herself what had been done. That is a "Catch 22" situation. If the claimant saw no RA's, and Ms Davies showed in cross examination how far short of adequate they were on paper, she would not come in. That is not a "*failure to engage*" as Ms Marsland submitted. Overall, the clear picture emerged of an unbending, business driven approach regardless of the claimant's individual problems and the issuing of a blanket order to attend **before** any assessment of individual risk to the claimant.

3.34. **On 15 April** Mr Allport said he would swop weeks with her so her week was pushed back (157). He asked if attending the office was still a concern. She said it was "*stressing me out*" and he stated he imagined it was but thought soon the government were to relax lockdown rules, so all staff would be expected in the office anyway and it would be back to normal . He reiterated the requirement to attend the office was coming from above him. On 15 April, he messaged her on the instant messaging service to check how she was. Her rota week was now week commencing 4 May

3.35. Landmarc had claimed measures were in place to make the office Covid secure. Having spoken to colleagues, the claimant believed adequate measures were not actually in place for many weeks after she was ordered to return to work. Later emails from Ms Easby and Ms Burdon on 29 May (315-319) point out what had and had not been implemented even then. The claimant believed it was an unnecessary risk for her to be in the office. We accept that was a reasonable belief in a danger she could not avert.

3.36. **On 23 April** she claimant emailed the rest of the Project Team asking if any would cover her week, in the hope that if she pushed her return further back things would get back to normal (159). She made arrangements with Ms Easby and Ms Burdon they could cover the duties that had to be done in the office to allow her to continue working from home. Both were agreeable as neither were vulnerable, but knew the claimant was. She was later disciplined for the content of this email, which on any objective reading is polite, puts no pressure on anyone to agree her request but does say she is having a "*battle*" to stay working at home and mentions having sought advice from ACAS and the legal department of Landmarc's Employee Assistance Programme. **The only objection managers could take to this email is if they would not tolerate anyone questioning orders.**

3.37. **On 29 April** Ms Easby attended a Benchmarking meeting with Mr Allport during which he asked if the claimant was intending to man the office week commencing 4 May. Ms Easby stated she was "*not anticipating*" coming in. She said the claimant had emailed the team asking if they could cover her week and all were more than happy to as they felt if she did catch COVID the risk of severe illness was greater than for the rest of the team and cover had been agreed. Ms Easby also covered another colleagues' rota due to health and shielding issues and regularly swapped days with other Project Managers. These arrangements worked and the work was covered productively.

3.38. **On 30 April** Mr Allport was told much the same by Ms Burdon. He replied it was likely he would have to tell the claimant to attend the office as per Mr Johnson's instruction. He told Ms Burdon he would advise the claimant to call in sick (280-281) but he did not contact her. On 30 April he "personalised" an RA for her (163-168), highlighting in red particular measures relevant to her As per Landmarc guidance (145) the claimant required a personalised RA of whether it was safe **for her** to return to work. This one does not identify her increased risk of serious illness or death.

3.39. **On Friday 1 May 2020**, the claimant called Mr Allport and for 28 minutes they discussed her return to work on 4 May (170). Although phone records do not identify the caller (due to it being a military camp) the time matches the date and time in an email sent on Monday 27 April (161) "*Friday morning any good, say 09:00*" They went over and over her concerns, she reiterated delivery drivers would frequently come into the project office and no-one could guarantee they would use the hand gel at entry points. Even if there were only a few people in the building, because of the layout she could still physically bump into someone exiting the WC if exiting the kitchen at the same time. The claimant said she would not be attending the office week commencing 4 May.

3.40. Mr Allport says it was clear she still had reservations, so he read out the RA and said a copy would be on her desk . Had she wanted to see this before coming to the office, he would have emailed it to her. **This is denied by the claimant, and we prefer her account.** Mr Allport in cross examination stated even prior to the RA he was *"confident it was safe, this was aimed to give her confidence".* The RA, prepared well after the order to return, was to **persuade** her to comply. It was not provided to her until after her grievance on 12 May. Mr Allport says he told her he knew she had emailed others about trying to swap shifts but **hoped** following their conversation she would be coming in. He informed her these decisions, to ensure the office is manned and Landmarc continued to deliver normal service,**were guidance from above** not him trying to make her attend. He added her **unwillingness to co-operate** was now also being considered at a more senior management level. To avoid "***escalation***", he would do two days in her week but he recommended she did attend, if not on Monday then at least one day that week, preferably Wednesday because Mr Johnson would be on site and him seeing her might stop matters escalating.

3.41. Mr Allport initially said he believed she agreed to attend on 4 May, **despite "whisperings" from colleagues she was still not happy and did not want to, but he does not pay heed to "office gossip"**. He said there is a difference between "*not wanting to*" and "*will not* "attend and she did not copy him into the emails trying to swap shifts. There was no reason she should as he has authorised staff to swap shifts between themselves. On 1 May at 11.45. he sent an instant message (170) "*Nicola, last bit of encouragement, I hope to see you in the office next week but if any day was possible, Wednesday would be in your interests. I'll say no more. Just trying to help*". She replied "*thanks*". He denies Ms Easby and Ms Burdon told him she would not be coming in. They made comments such as "*we will never see Nicola in this office again*" and she was "*not anticipating*" coming in but no one **formally** passed on a message she would not be attending on 4 May . On this point Ms Davies in cross examination convinced us Mr Allport was not telling the truth. **He was splitting hairs about language used and , we find, did not expect to see the claimant on Monday 4 May. The best he hoped for was she would come in one or two days that week.** Ms Davies put to him he was *"a scapegoat for Mr Johnson",* which he denied.

3.42. **Late on Sunday 3 May** she emailed a formal grievance (171-175) raising concerns relating to health and safety and the situation being so stressful she was not able to sleep properly, feeling nauseous and physically shaking every time she had to read an email from or speak by phone to Mr Allport. She told Ms Easby she had done so.

3.43. **On 4 May**, Mr Jones acknowledged the grievance and asked whether it was against Landmarc as a whole or a specific manager to allow him to allocate an independent manager. She said she believed Mr Johnson was the one "demanding" she attend (178-179) but following messages, advised she did hold him personally responsible if he was implementing Landmarc's policy . Mr Jones says she wanted to continue working from home without risking disciplinary action "*until such time that the government and other organisations have advised it is safe and acceptable to return to work, including those of vulnerable status*" (175) despite the government saying vulnerable people **could** attend work where working from home was **not possible** (220).

3.44. When the claimant did not attend on 4 May, Mr Allport's statement says he told HR who progressed to an investigation. **We believe the report to HR may have been on 5, not 4 May.**

3.45. **On 5 May** at 11:22 the claimant received a call from Mr Allport saying Mr Johnson had told him to phone to find out why she was not in the office. She replied "*You know why I am not in the office, I am clinically vulnerable and I am following the government guidance of working from home. Emma and Claire are covering the office this week. Why have you called me again causing me*

*further stress when we have discussed this several times*?" His response was he would inform Mr Johnson. We think it was after this Mr Allport "escalated" a disciplinary referral because Mr Johnson told him this could go on for months so such steps were needed now. It was apparent Mr Allport confirmed to Mr Jones he had received a commitment from her to attend and had informed her about an RA. Mr Jones stated someone was either mistaken or not telling the truth. The claimant's trust in Mr Allport and HR was seriously damaged, **and we can easily see why**.

3.46. Mr Jones later wrote to the claimant (180) to confirm that the grievance would proceed. Ms Jo Cornish (a Health, Safety and Environment Manager who has since left) was appointed to hear it. The claimant said in an email she was not asked to provide medical evidence to support her contention she should not attend the workplace. Mr Jones says he, Tamsin Gee and Mr Allport thought they had made it **clear**, but we find previously they had not. However, it should have been obvious to the claimant a doctor's letter would strengthen her argument and give Mr Allport and Mr Jones "ammunition" to argue hers was a "special case". The claimant has not claimed disability discrimination though she may well be a disabled person under the EqA. In such claims we frequently see people who are disabled to some degree demanding adjustments they want, rather than those they need. It is for that reason employers ask for medical evidence of needs rather than agreeing to whatever an employee says she needs. **When we asked the claimant why she did not take the initiative of obtaining a doctor's letter she said** her GP (who doubtless , like others, was under great pressure and as reluctant to spend time writing letters as she was to ask him to do so) had said it should not be necessary as her asthma was severe enough to have hospitalised her just over a year earlier, and an obvious known factor leading to very serious illness and death if she were to catch Covid. As she says, the news every night was of such people suffering great pain and dying due to the effect of the virus on those with pre-existing respiratory conditions. **As she was classed as "vulnerable" to her it was obvious she should not attend**. Mr Jones advised her to explain her position in full to Ms Cornish. and on 5 May at 15.56. said she should obtain medical confirmation (176). Later she clarified she still did not. **It is her failure to do so which causes us to consider a contributory fault reduction.**

3.47. **On 6 May** she had a telephone investigation meeting with Amber Lee under the Managing Behaviour (Disciplinary) Policy to consider an allegation she had refused to attend her place of work thus failing to follow a reasonable management instruction (186-190). Nothing was alleged about the email at page 159 being unprofessional. That same day Ms Burdon confirmed she had told Mr Allport on 30 April the claimant would not be attending the office and she would be covering certain days (186-199). Mr Allport told Ms Lee (192-195), whilst he knew she had reservations, he thought following their discussions she would be in **on 4 May**. He was questioned later as part of the disciplinary process too (277–278) and then said he expected her in one or two days that week, not necessarily 4 May**.**

3.48. Someone clearly decided the claimant should be "charged" with misconduct for not turning up on 4 May, **impliedly without good reason**. It is plain that charge could not sensibly be dealt with in isolation from her grievance that for her to do so would be unsafe. Part of the reason she gave for not wanting to come in was her belief not all the steps supposed to be put in place actually were and/or were not being "enforced". Compliance was monitored by the on site health and safety representative **Amber Lee**, who, for example, reminded people to wear masks. The only two examples Mr Allport gave at this hearing were of Ms Lee telling him of Ms Easby not wearing a mask on one occasion and the claimant herself on not doing so on 14 August, after she resigned and came with her son to the workplace to hand in her PPE and say goodbye. Mr Allport said, rather cynically. that was the same workplace "*she had refused to attend for months*". Two points are significant, (i) that was weeks later when Government guidance was optimistic and (ii) that she

brought her son shows she had no choice. We will return to that. For now, we observe Ms Lee was not the best person to be investigating whether the claimant had cause to be concerned that steps theoretically in place were not being taken or enforced in practice.

3.49. **At 14:30 on 6 May,** the claimant had a telephone interview with Ms Cornish (204-206). Mr Allport was interviewed on 7 May (207-209). He said he attended the site almost every day over the period and did not feel unsafe or the measures were not adequate and there were no reports of people not adhering to the measures. **On 7 May,** Mr Jones was interviewed (212) and confirmed the claimant did **not** provide any evidence she fell into the extremely vulnerable category or had to stay at home, but **may** fall into the vulnerable category, and had been told if she could produce medical evidence she should not attend the office this **would be** accepted. Without that, the office was COVID-19 secure, including for vulnerable staff many of whom did return to the office once they were made aware of the measures in place. He also commented if she was so stressed at the idea of coming back she could ask her doctor to be signed off sick on that basis. **He told us there was emerging evidence some individuals, although not technically 'at risk' were suffering what was starting to be called Covid Anxiety and medical guidance was key**. We do not accept a letter from her GP would have been accepted, and for good reasons we will explain later at 3.61. below. The greater concern we have is why Landmarc did not make an Occupational Health (OH) referral at a much earlier date than it did. A full month after she had provided photos of her inhaler and her patient summary there is no sign of one being made.

3.50. Mr Kevin Kneeshaw had been employed by Landmarc for 16 years and was a friend of Mr Johnson. **On 7 May**, **by letter,** he invited the claimant, of whom he had no prior knowledge, to a Managing Behaviour Review Meeting, by Skype on 14 May (213). The background he was provided from HR was an employee had refused to attend the office when requested and an investigation deemed there was a case to answer. He reviewed the investigation report (186-199) and offered the claimant either to attend (with the right to be accompanied) or provide written witness statements and submissions two days before on allegations of "*Refusing to attend work and failing to fulfil a reasonable management instruction which is an act of Gross Misconduct,* ***and*** *a serious breach of Landmarc's Code of Conduct by failing to act in a professional manner/being respectful to your colleagues, specifically via email."*

3.51. Strouthos-v-London Underground held an employee should have disciplinary offences put to her so she knows what she has to answer. Pill LJ said *It is a basic proposition, whether in criminal or disciplinary proceedings, the charge against .. the employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge"* and later "*It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does not, in my judgment, destroy the basic proposition that a defendant should only be found guilty of the offence with which he has been charged.* Mr Kneeshaw thinks the second charge was added by "HR", but he does not know who, **after** Ms Lee's investigation only the day before. Section 2.1.1 of the Code of Conduct (397-400) states employees should act in a professional manner to clients and colleagues at all times. Landmarc say the tone of the e-mail the email was *inflammatory and unprofessional* (i.e. sending a group message to her colleagues and deliberately not including her manager) given Landmarc was in dialogue with her. She was warned if the allegations were upheld, one outcome could be summary dismissal (213).

3.52. In 2020 the early spring bank holiday fell on 8 May being the 75th VE Day. If the letter was posted, she would have three days notice of the added charge, if emailed, seven days notice. There is no clue as to what is wrong with the tone and the strongest term she uses is that she is in "battle" with Landmarc to continue working from home. Mr Kneeshaw accepted it was trivial. **On no**

**objective reading of the email should it ever have been added as a charge. The question is, why was it? Only someone who believes no employee should ever express discontent with her employer's decisions, and be deterred from ever doing so again, could take objection to this email. To borrow the terminology of Browne-Wilkinson P. in Woods-v-WM Car Services some in management were "gunning for" the claimant , not to get rid of her but to compel her to do what they wanted and show others what would happen to those who did not do as every non "extremely vulnerable" person was expected to.**

3.53. **On 10 May**, as Mr Jones recalls, the Prime Minister was actively encouraging people who could not work from home to return to their workplace, and by 1 June, rules for those who were ordered to shield started to relax. He said the claimant was the only case of its kind against Landmarc in the country, suggesting its approach to Covid, and anxiety about it, was generally correct. **That does not mean this case was not handled in a way which destroyed the trust and confidence the claimant should have in Landmarc.**

3.54. On **11 May**, Ms Cornish provided the claimant with the grievance investigation report (200-212). The grievances were not upheld on the basis: (a) Landmarc had complied with the required guidance for vulnerable/ extremely vulnerable persons; (b) the measures in place followed the appropriate guidance of risk assessing and implementing measures to mitigate risk to individuals. Ms Cornish said, as did Mr Jones, the claimant's anxiety was genuine and, in Mr Jones word "blinded " her to a logical approach to assessing the efficacy of the steps put in place and efforts made by Mr Allport. The written outcome was sent later. On 17 May she appealed (214-244)

3.55**. On 12 May** the claimant received from Mr Allport the RA(163-168) only after she asked to see it (249). It covered Covid and activities such as manual handling, asbestos. The claimant had completed an IOSH Managing Safety course in the past which covers how to write an RA. We agree this one falls far short of the minimum requirement to identify the risk accurately, in this case of death or serious illness if she contracted Covid, and weigh that against the need to and benefits of taking that risk. No-one could tell us when Tamsin Gee made an OH referral as to the safety of the claimant coming into work, taking into account her health, but it was likely to be about then.

3.56. **On 14 May** the claimant attended the disciplinary meeting with her former line manager Mr Morrrison as a companion. Mr Kneeshaw was accompanied by Ms Gee as note taker (258-266). At the start of the meeting the claimant alleged some failures to follow policy including:
6.3.1 '*Only minimal prior notice will be given of an investigation interview, with this being held on the same day on which notice of the interview is given'* . She was not given any notice.
6.3.2 '*Interview with employees who may have seen the allegation'* Although other staff members have since been interviewed, they should have been interviewed prior to the outcome.
6.4.2 '*Summarise the facts from the investigation stating both the case to support and to disprove the allegation. It is important that this section is kept short and factual and is not subjective'* There was no reference to evidence she had provided.
Mr Kneeshaw and Ms Gee made it clear they would carry on regardless. As part of his preparation Mr Kneeshaw had set out some questions based on the investigation report, which he asked towards the end to make sure he was clear as to the claimant's position (262-264). He gave her the opportunity to ask questions and present her response (264).

3.57. Mr Kneeshaw broke the investigation report down and asked the claimant to provide her comments under each section. She accepted (a) Wathgill was her contractual place of work, (b) she could not open tenders from home (c) this was a part of her job (d) her GP said asthma makes her vulnerable, not extremely vulnerable so she would not receive a letter advising her to shield (e) she

chose not to seek further medical advice from her GP because she was already aware of her status ("vulnerable") (f) she had been informed of the COVID-19 measures put in place (g) she had not received a copy of her individual RA left on her desk, but did receive a copy on 12 May (247); (h) she had e-mailed Project Managers to ask them to swap shifts without copying in Mr Allport .

3.58. She contended (a) this was a unique situation and "most" people were working from home at this time (by "most" people Mr Kneeshaw though she was referring to office staff in general,who may not have been classed as "key workers") (b) tender opening and register work had previously been covered by others in her absence; (c) she was not disruptive/ inflammatory in the email (159).

3.59. Mr Kneeshaw says Landmarc had **no formal evidence** the claimant should be working exclusively from home **other than her word**. At this point no OH report was available. In respect of the week commencing 4 May, it was the claimant's position throughout she, and others, had let Mr Allport know she would not coming into the office and why, but Mr Kneeshaw said there was no documentary evidence and noted she had kept Mr Allport out of the e-mail chain seeking cover for that week. The statements from her two colleagues (251 and 409) alleged conversations on 30 April which pre-dated a conversation Mr Allport held with the claimant on 1 May. The meeting was adjourned at 16:00 and would reconvene on 21 May at 11:00.

3.60. Mr Jones accepted he was aware of an ongoing disciplinary process but not know the details. Mr Kneeshaw said people are "*scared of GDPR*" (General Data Protection Regulations). He meant information about the claimant known to one manager or department in Landmarc was not communicated to others. Mr Jones also spoke of divisions of responsibility being necessary to ensure a manager dealing with one aspect of a case is not biased by knowing of another aspect. Paragraph 46 of the ACAS Code deals with "Overlapping grievance and disciplinary cases". Where there is a grievance and a disciplinary process is related to it, it may be appropriate to deal with both together. It is not the aim of data protection law (in which an employee may be invited to give consent anyway) or the ACAS code to result in a situation at an employer where, metaphorically put, "the right hand does not know what the left hand is doing" .

3.61. We have not been shown anything sent to OH by Ms Gee who, like Mr Kneeshaw, was based in Edinburgh. OH reports are sometimes criticised for saying what the employer wants them to on the basis "*he who pays the piper calls the tune*". We do not readily accept any OH provider would allow themselves to be manipulated in that way. However, the reason many employers use OH providers, is that clinicians treating a patient rely on what the patient tells them, so employers view OH as providing a more objective opinion. That is reasonable, but if OH are given less than the full story, or instructed to answer too narrow a question the report will be poor. The claimant asked to see the report in advance of it being sent to Landmarc. It referred to her as "Sarah" throughout, an error still on the last page of the corrected version. There is no indication OH were told of her hospitalisation in January 2019. The omission of any reference to her anxiety, despite her having spoken at length to the OH nurse about it and added comments to the report in writing, is significant. The report is about half a page of platitudes about Covid precautions generally. Mr Jones told us orally OH were under great pressure too and the report was a basic one. We find that understates its obvious inadequacy, despite which Mr Jones statement said OH advised on 19 May **it was safe for the claimant to attend the office (282-284).**

3.62. **On 20 May** the claimant had a grievance appeal meeting via Skype with Mr Comport and Kay Kerr of HR. Mr Comport says the appeal, in summary, was based on: (a) her view, the guidance remained everyone should work from home wherever possible (b) most of her role could be carried out remotely (c) where this was not possible, colleagues could cover those tasks as they had when

she was on leave or sick; (d) the RA was not specific to her as "clinically vulnerable"; (e) the request for her to come into the office given her vulnerable status was unfair and unreasonable; and other members of staff across Landmarc were not being asked to attend in the same way. Minutes were added to and amended by the claimant (285-290).

3.63. Mr Comport considered the claimant's comments and (a) her original grievance (171-175); (b) the grievance investigation report (200-212) including interview notes of the claimant, Mr Allport, Mr Johnson and Mr Jones (c) the "personal" RA (163-168); and (d) the general RA's for Wathgill (252-257). Having done so he considered Landmarc had acted reasonably in asking the claimant to attend the office for 1 in every 7 weeks**.** His rationale as set out in an outcome letter was
(a) the claimant's time in the office was limited, which balanced Landmarc's needs and her duties, did not require her to be in at the same time as others.
(b) she was allowed to work from home for the majority of the time
(c) Landmarc had been **consistent in its position on office attendance once it was confirmed as an essential service and its employees key workers, i.e. attendance at the office would be as and when required but on as limited basis as possible**;
(d) Landmarc had done a general RA and one personal to her dated 30 April (163-168).
(e) the claimant was informed by Mr Allport of measures in place on several occasions , never asked for the RA to be e-mailed to her, but appeared not to want to discuss them meaningfully;
(f) her role as a key worker required to her be in the office in order to do certain tasks
(g) she was not "extremely vulnerable" requiring her to shield so for other members of the team to cover for her and pick up her tasks was not a sustainable solution given that it would place an extra burden on the team, in very trying circumstances**. He says this despite, the fact they did not.**

3.64. In Mr Comport's role as Head of QHSE, we believe he takes safety seriously, but within the overall context of Landmarc's aim to maintain a service to clients. The claimant stated she was at more risk than working from home (287). He says other staff with health conditions, who were not shielding but perhaps considered "vulnerable" still willingly did come in. He did not say what conditions or vulnerable to what (ie catching Covid or dying from it). The underlying absurdity of this approach can be easily illustrated. Assume risk is graded 1-10 (10 being the highest) and "extremely vulnerable" on that scale is 10 and 9,"vulnerable" is 8-6 and little to no significant increase of risk is 5-1. What reasonable employer would apply the same requirement to someone graded 8 as to someone graded 1? Assume a risk can be reduced, eg for playing cricket by leg pads, gloves and a helmet, so the worst that can be anticipated is a bruise if hit by the ball travelling at speed on an uncovered part of the body. It may be reasonable to expect most pupils in a school to play cricket. What reasonable school would apply the same expectation to a haemophiliac pupil?

3.65. Mr Comport says he was not aware of any suggestion the measures were not being adhered to (other the claimant giving examples). He spoke of the claimant relying on what others told her as "heresay" but that was exactly what he did. He relied on "hearsay" from Amber Lee, while not allowing the claimant to rely on evidence of Ms Easby and found "***no suggestion*** *of measures not being adhered to*" despite the claimant giving details. In respect of her comment others were not being asked to attend in the same way at other sites, he said different roles across the organisation have different responsibilities and requirements which meant they did not necessarily have to be on site. Partly because he knew something of extra work the MoD wanted, he accepted everything Mr Allport and Mr Johnson said about the need for her to come in unquestioningly. He found the claimant's absence was an "*extra and unnecessary burden*" on others without anyone saying it was.

3.66. Mr Comport said risk assessment is a two way process, "*top down-bottom up* " and the claimant had not engaged with it. We agree with the theory but the only message coming down from

the top was Landmarc was an essential service, she was a key worker so should obey the order to attend unquestioningly. He accepted some things could have been done better, and that the claimant's fears were genuine. When asked by Ms Davies if he could not see how, from the claimant's viewpoint, her trust and confidence in her employer was damaged, he said he could not because **she should have faith in her managers being "trustworthy"**.

3.67. On 22 May, Mr Comport confirmed to the claimant by email he had decided not to uphold her grievance (291-292). A copy of his findings was attached (293-294) concluding **no case to answer**. She had amended the notes from the grievance appeal hearing (sent back to HR on 21 May at 13:59 and the outcome was received on 22 May at 15:34, indicating no more thought had been given to the grievance and he, and/or other managers, had already made their decision. Although we accept Mr Comport's integrity this result appeared to her, and to us, a whitewash of whatever local managers had decided was necessary for the business, regardless of specific danger to her.

3.68. **On 18 May** Ms Easby confirmed to Tamsin Gee why the RA was not adequate (274-276). On 19 May, Ms Gee had e-mailed the claimant to invite her to the reconvened disciplinary meeting (273). On 21 May, it was held and Mr Kneeshaw advised the claimant of his decision which he later confirmed in writing on 26 May. She received a first written warning to remain on record for 12 months (265-266). If targets were not met she could face dismissal.

3.69. Before his final decision Mr Kneeshaw had made some further investigations by requesting HR interview members of the Project Management team (274–281). He read these and (i) the Managing Behaviour Investigation Report (196-199); (ii) the Managing Behaviour Meeting minutes (258-266); (iii) the claimant's RA (163-168); (iv) the general RA for Wathgill (252-257); (v) the tender register;(vi) documents the claimant asked him to consider (132,135,137,156-161,169,170,251). He concluded the allegations should be upheld because:
(a) the claimant had accepted the tender register and opening of tenders was within her job role and could not be done from home. On reviewing the tender register, it was no longer compliant and as such put Landmarc at significant risk (of which he rang Mr Johnson to warn him). He corrected his statement the register would be **routinely** checked by MOD/DIO, to being that they **may** check it and if not satisfied end Landmarc's contract, causing reputational risks and redundancies.

(b) the request to attend the office was in line with guidance and reasonable in the circumstances; as Landmarc is an essential service and the claimant a key worker. Landmarc had carried out the necessary RA's and implemented measures. There was no evidence or complaints (formally or informally) to suggest people were not adhering to these. Others in the office had signed the RA's given to them as an indication of agreeing to the measures being adequate. **At that date, this was simply not correct (see 3.72 and 3.73 below)**

(c) the claimant did not have a letter from a medical professional stating she was required to shield. Whilst he appreciated she was understandably "*like a lot of people at the time*" anxious, with the steps put into place there was no reason to suggest she would be at a heightened risk. **This was not correct either.** She was at heightened risk of serious illness or death and Mr Kneeshaw had not even seen the defective OH report, so had no basis for his conclusion.

(d) she had not co-operated with Mr Allport and whilst her behaviour "*appeared to come from a genuine place of concern*", she had approached the situation in an unacceptable way by (i) failing to obtain medical evidence despite requests to do so (ii) directly approaching other members of the team without Mr Allport's knowledge (iii) the tone and content of the communication (159-160) placing undue pressure on others who may feel unable to say no ( he had no evidence of that and

no objective reading would suggest this); (iv) failing meaningfully to engage in respect of the RA's and simply refusing to attend based on her own interpretation of the guidance and risk.

3.70. Mr Kneeshaw says as for 4 May, there may have been "*crossed wires*" in that she had not committed to coming in, whereas Mr Allport understood she would **that day, which is not what Mr Allport told Tamsin Gee** (277). He took into account as "mitigating factors" the "crossed wires" and her genuine fears so felt it was appropriate to issue a first improvement notice **rather than dismissal**. In short, his view appeared to be that despite little, if any, evidence to uphold the charges put, an unsupportable " conviction" could be offset by a lenient penalty.

3.71. **In the 11 working days from 6-21 May, the claimant had gone through a disciplinary investigation, a grievance hearing, a grievance appeal and two disciplinary hearings, all resolved against her. On 22 May**, she was signed off sick by her GP with Anxiety. She was absent from work from 22 May until she left. The fit notes are at 358-362. At that date Ms Easby says staff still had not received a COVID specific RA.

3.72. **On 29 May** staff received a COVID specific RA from Mr Allport, were asked to read it and pass any queries back to him. A meeting was planned on how best to man the office as staff were no longer allowed to work only I in 7 weeks. He said this new way was a step closer to coming back to work. Ms Easby responded listing many outstanding matters including :
*The risk assessment isn't completed with actions. The "Who might be harmed and how?" columns are not completed with the How comments so not completed. There is no risk matrix table (cause/effect) so how can we look at the risk and severity?*
*Government guidelines state Businesses and workplaces should make every reasonable effort to enable working from home as a first option. This does not seem to be in the RA.*
*I haven't seen any floor plans of the taped 2m zones in the office, corridors, outside the entrance and no one way system (keeping people 2m apart wherever possible).*
***Nothing about stress or anxiety and support given,***
*I have no PPE gloves, face mask etc only sanitiser*
*How do we manage contractors coming in or visitors .. how can we stop them coming in?*

3.73. **On 1 June** Mr Allport responded '***Emma, quite a list! Agree with some of the points,*** *however that's what I wish to discuss with the team on Wednesday to ensure that the extra measures we put in place for the AWS office are agreed by the team and all happy, rather than me dictating to all'*. Mr Allport did not reply via email to her many bullet points, a list he described to us as "*War and Peace*". They did have a meeting **after which** Ms Easby signed the RA.

3.74. **On 31 May** the claimant received Mr Kneeshaw's formal outcome letter (295). On 1 June she appealed (312-313) in particular, with regard to Mr Allport knowing she would not be attending the office on 4 May. David Morrison explicitly stated in the meeting before Mr Kneeshaw he had also informed Mr Allport yet the notes did not state this. She explained she could not partake in the appeal at that time due to her ill health. The appeal was acknowledged by Kirsty Pearce (Operations Director) (314) and the claimant told it could be picked up once she was back in work. She would have preferred it to proceed but as she was off sick until her resignation, it never did. We do not find the appeal being held in abeyance was caused by anything the claimant did under s.44.

3.75. **On 2 June,** Ms Gee e-mailed Mr Jones in respect of the OH report **delivered two weeks earlier** (320). The claimant had written in the space for her comments that the nurse had indicated she should work from home. Ms Gee (also present as an observer during this hearing but not called) phoned OH and spoke to Dr Brennan (the doctor in charge). He spoke to the nurse and he

relayed back to Ms Gee the report was a true reflection of the nurse's assessment. Ms Gee relayed this to Mr Jones who says in his statement, "*there was nothing preventing the claimant from attending*" .. she" *simply did not appear to be willing to co-operate with the respondent in any way* ". No-one told her this. Ironically, Mr Comport having spoken of the dangers of "hearsay" ,Mr Jones view is based on an overtly deficient OH report "clarified" by quadruple hearsay.

3.76. **On 3 June**, the claimant received an email from Mr Allport to all Projects Office staff confirming she was required in the office **two days every week**. Mr Allport says once matters had been "*escalated*", she stopped "*engaging with*" him. He tried to contact her on several occasions but she did not respond. The claimant does not accept he tried to contact her. She may not have been opening her work emails but there was nothing to stop him sending her a letter. We find, if he tried at all, he did not try enough.

3.77. **On 23 June**, Mr Allport resorted to the absence management policy (73-81) and invited her to a Managing Attendance Review on Monday 29 June via Skype due to the amount of sickness she had. Managers had suggested if she was too anxious to attend work she should have asked her doctor to sign her off. Mr Jones said in oral evidence she should have done so earlier than she did. **That is exactly what she did**. Long term absence is defined as four weeks or more. Mr Allport acted a mere three days after that was reached, in our view to keep the pressure on the claimant.

3.78. **On 26 June** she telephoned Mr Allport at 14:30 and declined to attend saying her mental health was poor and attending would only add to the stress and anxiety (335). Mr Allport says he has no recollection of taking that call which could have been answered by anyone. When they spoke it tended to be on his mobile and she would not have called the landline. The claimant's call log shows a call made on 26 June lasting for 3 minutes 36 seconds (410) to the landline number. Mr Allport was now questioning her honesty. We accept he had spoken to her .

3.79. **On 29 June** she received an email from Mr Allport (335) stating he was sorry she did not feel she was well enough to attend the Managing Attendance review and offering another OH assessment. She refused given her last encounter was a "fiasco". He says that meant she disputed their findings **but it was far more than that. By any standards the OH report was "basic", as Mr Jones agreed. In our view it was grossly deficient.**

3.80. **On 30 June**, the claimant asked Mr Allport to confirm future expectations in regards to working in the office or from home. He replied (333-334), including additional measures in place and saying his intention was to include **his and her role as the constant** in the office i.e every day, now it was confirmed there could be three individuals in the office at any one time. He assured her social distancing etc would still be in place. He said he would email her every week to keep her updated and if she would like him to ring her asking for the best number to be contacted on. He said a revised RA was in place and asked if she would like it sent to her.

3.81. **On 27 May**, the claimant had received a letter from her son's school advising she keep him at home as, despite her being a key worker, they could not ensure the school would be risk free, and did not want her placed at an increased risk due to being clinically vulnerable (269). **On 19 June** the school sent her a letter confirming they were now at capacity for care of children of Key Workers (324-326). **On 2 July** she sent an email to Mr Allport with her new sick note, requesting the new RA and reiterating she did not have any childcare so was unable to attend the office until her son went back to school in September as it was at capacity. She explained her husband was not able to work from home. She asked about home working to accommodate childcare. No guidance

stated Key Workers **could not** work from home. Mr Allport initially said this was the first time she raised childcare, but Ms Davies cross examination showed she had **in April**. On the same date, Mr Allport emailed an RA which seemed to her to be the same as the one sent out on 29 May (336-338). He claims on childcare he told her he would seek guidance from HR and be happy to discuss it during catch up calls (337). She says he made it clear she would not be allowed home working for childcare reasons. We prefer her evidence. She knew Landmarc has a flexible working policy (86-89) but did not submit a formal request because it would not solve her problem as the policy is aimed only at minor adjustments to hours. Generally, Landmarc appeared to take the view with all mothers childcare was their problem, not its problem. In normal circumstances, we accept it is proportionate for an employer to expect employees whose children would be left alone while they were at work to make their own arrangements, but that is not so clear during the pandemic.

3.82. Mr Allport had rescheduled the meeting for 9 July (327-331a) but erroneously the date on this letter was left as 23 June. It would have been sent out around **29 June**. By then, the claimant's colleagues who were friends outside of work were making comments such as "*we won't be seeing Nicola in this office again*" speculating she did not have childcare. They said this then, and on 30 April, according to Mr Allport. **On 6 July** Mr Allport phoned about the rescheduled meeting she was expected to attend. She explained she was off work with anxiety, and attending a meeting which could lead to a sanction, was only causing further anxiety so she did not wish to attend. She asked why, as no-one had contacted her in the first 5 weeks of sickness, it was deemed necessary to hold a formal review **now**. He could not answer this.

3.83. On **8 July** a solicitor, Mr Paul Hargreaves, instructed by the claimant wrote to Mr Allport and Mr Jones explaining she was unfit to attend and requesting to make written representations instead. **He invited Landmarc to seek a medical report from her GP** (343-4). **On 10 July**, Mr Allport e-mailed the claimant to allow her to make written representations (341-342) and attached an OH referral consent form. This strengthens the view we expressed at 3.61 above. In a situation as complex as this, if Landmarc were seriously interested in finding out whether the claimant was a "special case" , the norm would be a second referral to OH on questions of increased risk of serious illness or death **and** the effect of what Mr Jones and other managers had spotted as potential "Covid anxiety" together with an authority from the claimant to have revealed to OH her previous medical history and a report from her GP. Landmarc did not reply to Mr Hargreaves until **13 July.**

3.84. The claimant did not attend the rescheduled meeting, despite being informed if she failed to it may be considered in her absence (339). E mails show that was planned for as early as 6 July when Ms Gee, in reply to Mr Johnson checking on 2 July something was being done, said she was waiting for Mr Allport to fix a new date and if the claimant did not attend it could be dealt with in her absence (336-7). Ms Davies submitted no part of the managing attendance policy allows for the review to be held in the employee's absence. However, if there really was "no option" we would accept that could be implied. **On 16 July** Mr Hargreaves responded to Ms Gee reiterating the claimant had not agreed to speak with OH (353-354). It is clear he was acting on her behalf and trying to find a mutually acceptable solution. **Any employer which actually wanted to reach a solution, rather than impose its own, would in the circumstances have dealt through him.**

3.85. The claimant's trust in Landmarc, in particular Mr Allport was very damaged at this stage by it insisting she work in the office, the misrepresentations by Mr Allport and being disciplined. Landmarc showed no concern for her physical or mental health. She did not want to lose her employment at such a time and needed to consider carefully.

3.86. **On 21 July** Mr Allport rang her mobile twice, but she did not answer as speaking to him would only cause further anxiety, and Mr Hargreaves had already stated he was instructed to act for her. No voicemail was left by Mr Allport. **On Friday 24 July**, Mr Hargreaves told the claimant he still had not received a response to the email sent to Ms Gee on 16 July.

3.87. On **Monday 27 July**, Mr Allport provided his written outcome, **dated 24 July**, to the attendance review (348-349). As she did not attend either meeting, provide written representations or answer his calls, he felt he had **no option** but to decide in her absence to issue a First Improvement Notice and set targets, including returning to work on 1 August, maintaining regular attendance, speaking with a mental health first aider and attending an OH appointment. If these targets were not met, she would move onto a further stage where her continued employment could be at risk. He confirmed she had the right to appeal **to Mr Johnson**, the very person she believed had orchestrated the whole process(348). **Of course Mr Allport had an option--to reply, himself of via HR to Mr Hargreaves**. In the email, Mr Allport said he had been trying to speak to her to keep in touch. She replied as he had not left any messages, she did not know what he was calling about (350). On **28 July**, he e-mailed to emphasise **her duty** to maintain contact during her absence and set out his disappointment she had not called back.

3.88. Mr Allport struggled to answer Ms Davies' cross examination, largely because he appeared to be trying to justify steps we do not think he personally would have chosen to take. When Ms Davies asked about the "impossible" target of return by 1 August when she had a sick note covering her until 26 August, EJ Garnon pointed out he had set it on 24 July and sent his outcome **early on 27 July** when her sick note expired at midnight that day and before she sent in the one covering her until 26 August, so when the target was set it was not impossible to achieve. However, 1 August was a Saturday, a non-working day for her and the date was not revised. Also, she was being given 5 working days to arrange childcare if she could. Mr Allport noted her sick note now referred to work related stress and offered to conduct a work stress risk assessment at a time that suited her (355). Ms Gee belatedly emailed Mr Hargreaves that day suggesting the claimant work with Mr Allport to resolve her issues but frankly Landmarc's offers did not have a ring of sincerity.

3.89. On **30 July** the claimant resigned by letter (356). She believes Landmarc did not want her back anyway. Mr Allport had made statements which contradicted representations he had made. He denied knowledge of matters he knew and, especially, said he expected her in on 4 May, for which she was given a warning. On **31 July**, Mr Allport says he was "disappointed" to receive her resignation. He signed a standard form letter acknowledging it, enclosing an exit questionnaire (357) but **did not try to persuade her not to resign** .Her employment formally ended on 28 August.

3.90. **On 31 July** the claimant informed Ms Easby she has resigned, Ms Easby, who is no longer an employee at Landmarc, was surprised the claimant was ordered to come into work as she was vulnerable, had been carrying out her work to a high standard despite her absence from the office . In Ms Easby's opinion, Landmarc were **badgering** a vulnerable and stressed, person into attending the office. **We agree and find its aim was to enforce its "blanket policy" by taking a series of steps against her calculated to force her into obeying orders regardless of the risk to her physical and mental health**.

3.91. The claimant sent to her personal email address the Landmarc/DIO phone list in case she needed to contact any of them **after** she had already resigned on the date she sent this. Mr Jones says, if she had not resigned, she may have been dismissed for sending confidential information to her personal e-mail in breach of security policies (90-93), and the Official Secrets Act. We wholly disagree. If there was any "breach" it was technical as she could have printed the list and kept it in a

drawer at home without anyone knowing. Her evidence was "*I would never have sent it if I still worked there.* That she did not, only happened because of what Landmarc had done. We ask the "hypothetical question" of what would have happened (Fisher-v-California Cake and Cookie Ltd 1997 IRLR 212). There is no chance she would have been fairly dismissed so it would not be just and equitable to make any " Polkey" deduction in these circumstances.

3.92. Mr Allport says his handwritten notes (408) show as early as 3 July her colleagues and friends said a parcel which had arrived at work was her leaving present and she would be handing in her notice, and she does not disagree she was thinking hard about it. Her case is **from May** she was being treated as no more vulnerable than the healthiest of her colleagues when it should have been evident she was. When it became clear that would continue, then she resigned.

3.93. Mr Allport saw postings on Facebook of the claimant having drinks in a pub (407), taking day **trips** to Whitby and shopping in places like Tesco on dates before she resigned being, he says, places of higher risk to her than a Covid secure office, so it is not reasonable for her to allege she was at serious or imminent danger and resigned as a result. Again,we wholly disagree. We accept she attended a pub once, on 11 July, the day before her birthday where she sat outside and had a meal with social distancing. The Chancellor of the Exchequer announced the "Eat out to Help out" scheme on 8 July. She had one day trip to Whitby with her son in July in her own car, as her GP had advised her to get out, spend time with family and exercise. Her husband was working away so she still had to visit supermarkets if delivery for her, or her mother, could not be arranged. All these events were in July, several weeks after she was ordered to work in the office.

3.94. She attended Wathgill camp with her son **on 14 August** to collect her belongings and sat in the office, not the common areas, without a face covering, for a short time to say goodbye to colleagues. Mr Allport says this is **in contradiction** to her position she could not possibly attend the office due to her vulnerabilities and did not consider it safe for her to do so. We entirely disagree. She (a) had to attend to hand in her PPE anyway (b) face coverings protect others not the wearer (c) more measures were in place than in May (d) this was not comparable with regularly attending the office and common areas. It is significant she took her son demonstrating she cannot have had any childcare alternative.

3.95. A survey Landmarc has now supplied of staff being content with measures does not indicate the opinions of individuals who are clinically vulnerable, and relates to all regions of Landmarc not just Wathgill. She has been told by former colleagues her successor Megan Allerston has been allowed to work from home for the majority of the time and issued with a mobile phone.Landmarc did nothing to help its case by raising the points in 3.92-3.94. If anything it appears still to be challenge the genuineness of the claimant's concerns and her integrity which does not sit comfortably with what any of its witnesses told us.

## 4.Conclusions

4.1. Our starting point is all the events occurred in the early uncertain times of the pandemic. Mr Allport was new to the job and only worked in the same place as the claimant for two weeks. He saw her as very good at her job when she was physically present which she was until Friday 20 March. In the first week and a half after that most if not all people were staying at home. **Then things changed**. We accept these were very difficult, unprecedented circumstances.

4.2. On rare occasions it is helpful to mention matters in our personal knowledge by way of analogy and to remind ourselves of the prevailing state of knowledge at the time. The virus is easily

transmitted by people breathing it out and coughing. Face coverings reduced risk of transmission to others, not the wearer. Concerns included that the virus can live for several hours on surfaces including paper and cardboard so handling paper files was a risk. The mantra from Government at the time was "*Hands, Face, Space*" ie washing hands , wearing face coverings and "social distancing". There was no vaccine and no prospect of there being one soon.

4.3. Some "essential services" were more essential than others, especially health services which had to cope with the pandemic on top of the normal needs of patients. The mantra from Government at the time was "*Stay at home, Protect the NHS, Save lives*". Covid 19 is a respiratory disease and the NHS reported it had not enough ventilators to cope with a surge in demand and people with pre-existing respiratory conditions were at greatly increased risk of serious illness or death. **The death rate in the UK increased dramatically in April and May**, reduced gradually by the summer months, before the " second wave" in the autumn.

4.4. Like Landmarc, the courts and tribunals were "essential services" and its workers "key workers". Three of the six full time judges based in Newcastle Employment Tribunal, E.J. Garnon included, had pre -existing medical conditions, as did some administrative staff, so needed where possible, to stay at home. The three judges at home dealt with cases remotely. Those in the office worked hard to ensure correct paperwork was sent electronically to judges at home. The work was done to the required standard, albeit with some delay, by collaboration and **creative thinking**.

4.5. As guidance for essential services changed and "Covid secure workplace" became a common phrase, people with conditions for whom the risk was less obvious (eg E.J. Garnon takes medication to control rheumatoid arthritis which suppresses the immune system making him more likely to catch and less able to "fight "the virus if he does) were asked to produce doctor's letters to explain that. The request was in clear written terms. EJ Garnon provided a consultant rheumatologist's letter which explained the higher risk for him **despite** the office being "Covid secure". Each person was considered on a case by case basis. There was no "blanket" rule that only "extremely vulnerable" people could work from home and everyone else was expected to attend the workplace.

4.6. Most people had to do essential food and pharmacy shopping for themselves and any shielding relative, taking every precaution eg hand washing and sanitising, they could. That posed some risk, but was unavoidable. The claimant's circumstances, all of which should have been known to every representative of Landmarc's management who had to deal with her, were (a) she does not live near a major town where delivery of shopping ordered online is more readily available (b) her husband, also a key worker, worked away (c) she had a ten year old child at home and (d) her mother was shielding so could not help with childcare as she normally would. The claimant reasonably assumed what was on her HR records would be known to all relevant managers. She would have agreed readily to any request for her "data" to be shared with them.

4.7. She knew the vast majority of the tasks she had always done could be done from home and her colleagues, who were not vulnerable, were happy to do the other tasks in her place. She was not told of any different work Landmarc had in the pipeline or Mr Allport's plans to expand her role to doing everything in her job description including tasks Mr Morrison had never asked of her. She did not know Mr Allport had decided she was to be the "*face of the office*" which she never had been. She had never been authorised, let alone asked, to show people around the camp. Phone calls could be made, or diverted, to a mobile. From her viewpoint there was **no reason** for her to have to go to the office, even for part of the time, in April/May. We agree.

4.8. Landmarc's witnesses made a more cogent case for her being actually **needed** in the office, as opposed to it being more efficient and easier on others she be there, in their oral evidence than in their witness statements and, more importantly, than it ever gave to her at the time. Mr Allport told her repeatedly if it were up to him she could work from home and the pressure for her to come in was from above him. Whether it was from Mr Johnson or higher still in Landmarc, or maybe MOD/DIO we do not know. As Ms Davies pointed out there was no reason Mr Johnson could not have given evidence, as he, like Ms Gee, was present by CVP as an observer for nearly the whole of this hearing. It was he who told Mr Allport the office must be manned every day and on 3 April there was no option to work from home permanently.

4.9. Paragraph 3.19 above shows Covid being "no excuse" was a message from the on site military senior officer(s) on 30 March , only a week after "lockdown and we cannot accept MOD/DIO would have expected Landmarc , or any other contractor, to deliver " business as usual throughout the peak of the pandemic. Paragraph 3.22. on 3 April 2020 shows the rigid application of categories with the earliest sign of no "case by case" approach (so a person just short of the "extremely vulnerable" category was treated in exactly the same way and the healthiest of employees). **Also, there is a thinly veiled warning disobedience will lead to disciplinary action.**

4.10. As in Wadham Stringer-v-Brown, difficult surrounding circumstances, in this case essential services having to be delivered by key workers, do not mean a blanket policy can be imposed or that those who question its application to them sanctioned for doing so as misconduct. In disability discrimination cases we often hear employers say," *if we agree to this person having some adjustment, others will want it too*". That is a misconceived argument, because only those who need an adjustment due to their disability are entitled to one. We find Landmarc were worried if they adopted a case by case approach to the claimant, others may demand the same and it did not want any of the workforce "breaking ranks" by resisting the blanket approach it was using.

4.11. The Government and Landmarc's guidance, was for vulnerable individuals to work from home ***wherever possible***. Key worker status does not override her vulnerability, nor does it answer the question of why it was **necessary** for her to work in the office. Landmarc closed it mind to " creative thinking" and failed to undertake an adequate RA before ordering her to attend. It applied a policy, "we are an essential service, you are key workers, if you do not meet strict categories, you must **all** come to work". The claimant at times before us "*shot the messenger* ", Mr Allport, for decisions which came from higher but we are of the clear view there was no **need** for the claimant to come in to the office which could not have been avoided so work from home was ***possible***.

4.12. There were many signs that challenging manager's decisions rather than unquestioningly trusting their judgment was not to be tolerated. Certainly managers are entitled to give lawful and reasonable orders but if they may pose a danger, those given the orders should be able to question them and expect a reasoned and frank response. Some would prefer if it were, in the words of Tennyson, "*Their not to make reply, Theirs not to reason why, Theirs but to do, and die*" . However, this is the 21st century not the middle of the 19th, and Parliament has acted to give employees the right to raise health and safety for their own protection and other matters in the public interest. There is no inconsistency in our finding the witnesses we heard for Landmarc to be caring as individuals but following a policy that everyone not extremely vulnerable or self isolating should "pull their weight" by attending the office unless the employee concerned could **prove** she should not.

4.13. A "blanket policy" is easier to implement. It was obvious the claimant was "vulnerable", and "anxious" The OH report, and how it was dealt with, seriously damaged her trust and confidence. Mr Jones, laudably, recognised her anxiety, as did Ms Cornish and others, and said it "*blinded her*" to a

logical analysis of measures taken. That possibility should was not taken into account but there is no illogicality in her saying the measures only reduced the risk of her catching the virus, not of the likely consequence to her of doing so.

4.14. We accept OH were busy, but there is no evidence of a referral until after she raised her grievance, following which Landmarc referred her to OH "*to offer you some reassurance to reduce your anxiety*" (271). Yet when the OH report was produced without any reference to anxiety it failed to query it. When she challenged it, Ms Gee belatedly asked Dr Brennan for his view, he spoke to the nurse, and told Ms Gee what she said, who told Mr Jones who just accepted it. While we do think the claimant could have done more herself to supply medical information as to not only her physical vulnerability but her mental state, and will deal with that later, Mr Hargreaves suggestion of a medical report from her GP was just ignored. It all points to Landmarc not wanting to know, or have to consider, her individual case, lest allowing her to "break ranks" might make it harder to deliver projects for which some individuals thought Covid should be "no excuse" .

4.15. Landmarc conducted itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant, by (i) unnecessarily ordering her to attend the office before it had even assessed the risk to her and breached the implied term to take reasonable steps to protect **her** health and safety. Landmarc may think it had reasonable and proper cause, but on the correct objective test we find it did not. It did not strike a balance between its needs and hers, it put its above hers. All this amounted to a fundamental breach of contract

4.16. Landmarc compounded this by its response to her not capitulating to its policy by accusing her of misconduct by not attending on 4 May. Ms Lee's investigation simply went through the motions before recommending a charge be brought. Mr Allport would have been content to allow her to have cover for the whole of that week but advised her to be in on Wednesday 6 May when Mr Johnson was visiting. In our judgment he knew she would not be in on 4 or 5 May. Only when Mr Johnson told him any "concessions" could go on for months, did he say he thought she would be in on 4 May. We conclude Mr Allport made dishonest statements because he adopted the line expected of him rather than telling the whole truth. We have emboldened in our findings of fact many key dates. Every working day for 13 before she went sick put more pressure on her as someone decided to "*throw the book at her*" for daring to place her health and safety above obeying orders. Her trust and confidence in Landmarc to do what is right was reasonably destroyed by this process.

4.17. It was contrary to the ACAS code, and common sense, to deal with the grievance and disciplinary separately. Mr Kneeshaw accepted the outcome may have been different if matters were dealt with together and all this led to the claimant feeling she had not been listened to. Amber Lee, as Health and Safety Representative, investigated a disciplinary matter inexorably linked to health and safety measures it was her role to enforce. The connection between all aspects is unmissable. The claimant's grievance raised the issue of necessity to attend (171) which was never determined. Her local managers views were simply accepted. We found Mr Comport a truthful and decent man but his absolute faith that whatever local managers said was safe, the claimant should trust as right, reasonably undermined her trust and confidence in the grievance process by which she is supposed to be able to challenge their judgment .

4.18. The disciplinary outcome cannot be justified. The first offence charged was misconduct by deliberately not turning up as ordered, which cannot be upheld as consistent with Mr Kneeshaw's finding of "crossed wires". The second offence charged was an afterthought by someone which on no objective reading of the email can be established. We accept Mr Kneeshaw's evidence the tenders register used to be "immaculate" and declined to a state whereby the "gaps" in information it

contained could have caused problems. He phoned his friend and colleague Mr Johnson to tell him so. The gaps were remedied quickly by a non-vulnerable employee brought in from outside the team. That could have been done earlier and the Project Managers, also non vulnerable, could have been better instructed as to what to send to the claimant. In turn she could have done tasks at home to relieve the pressure on those in the office. That would be far more effective than the claimant attending one week in seven. Mr Kneeshaw, in his own mind, viewed the register becoming defective during the weeks the claimant was not attending as proof of the charges against her, which it logically is not. We found him a truthful and decent man who accepted the limitations of trying to decide the disciplinary charges in isolation from the grievance. But he had HR guidance and we conclude he upheld a disciplinary charge, albeit with a lenient penalty, to show to the claimant and others what Landmarc would do to those who "disobey".

4.19. As for the attendance process there are no records of emails, telephone calls, or instant messages sent between 22 May and 23 June of Mr Allport seeking to maintain contact with the claimant who, on 26 June, telephoned to inform him she was too unwell to participate.It was decided in her absence to give her another warning and set demanding targets to prevent her being dismissed. The claimant felt the objective was to "*set her up to fail*" and we agree. Landmarc compounded this by not responding to Mr Hargreaves, other than with hollow encouragement to her to continue to speak to Mr Allport.

4.20. Landmarc's intention is irrelevant. Objectively, the totality of the aforementioned conduct reasonably made the claimant's feel unsupported, unsafe, not listened to, and attacked for daring to challenge it which amounts to a fundamental breach of the implied term of mutual trust and confidence. She resigned in response so there was a constructive dismissal. Her answer to EJ Garnon in this regard was "*I felt like I could not trust anyone, they had decided to get their eggs in one basket and stick to one story*". To Mr Carter she stated "*I just could not trust them anymore, they all stuck together, and I have people telling me I was a liar. I have been betrayed, I thought they would look after me, from the start, they didn't like me ruffling feathers."* Childcare issues were not the main reason for her resigning, they simply affected its timing

4.21. As for delay in resigning her evidence was clear, in re-examination: *"I didn't resign [earlier] because I enjoyed my job, I was hoping that we would have got over it".* In answer to a question by EJ Garnon, she confirmed at no point did she " let bygones be bygones". Her sick pay dropped from full to half pay but if she was seeking to exhaust her sick pay, she would have delayed resigning until she had used the half pay period rather than leave herself unemployed. There is an unbroken chain of acts and omissions which cumulatively amounted to a clear breach of the implied term of mutual trust and confidence. Even if someone could construe an earlier affirmation of the contract, the managing attendance outcome was the last straw. Landmarc have shown no potentially fair reason for the breach. **We decide issues 1.2.1 – 1.2.5 emphatically in the claimant's favour**

4.22. As to whether the dismissal is automatically unfair and whether she was at least in part subjected to detriments short of dismissal, we find both **issues 1.2.6 – 1.2.7 in her favour** . Berriman-v-Delabole Slate Company held the reason for dismissal is the principal reason for the employer' conduct which entitled her to terminate the contract. The reason the claimant resigned was the cumulative effect of the grievance, disciplinary and attendance processes. The principal reason they were pursued falls squarely in s.100 and s.44, especially *"in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave)* ***or (while the danger persisted) refused to return to his place of work*** *or any dangerous part of his place of work*

4.23. The claimant accepted in oral evidence after 3 June no further steps could make the workplace safer. However, the risk posed by a potentially deadly and very infectious disease remained was *"serious and imminent".* As to the reasonableness of the claimant's belief, Landmarc believes she was being unreasonable and overreacting. We wholly disagree. She was "vulnerable" due to her chronic asthma. The Government guidance as of 11 May was that vulnerable staff "*should be helped to work from home, either in their current role or in an alternative role"* (268). A personalised RA was not completed until 12 May. Ms Easby said measures were not being followed and/or were not sufficient until the end of May. She could not have averted the danger. Therefore she refused to return. We accept all essential services were under pressure to deliver but that does not explain why Landmarc adopted the stance it did over he refusal to return of mounting a campaign against her to force her to return as and when ordered . Let us not forget that by early June the requirement was to to attend two days every week and by the end of June every day.

4.24. Finally we turn to indirect sex discrimination. Ms Marsland did a good job of putting forward Landmarc's case but there were two hopeless arguments---affirmation and EqA time limits. Landmarc continued to apply the PCP until the claimant's employment terminated. Under s.123(3)(a) following Barclays Bank-v-Kapur 1991 ICR 208 we have in relation to childcare even during the pandemic a *practice, in accordance with which decisions are taken from time to time'.* In our view the claim has been brought in time but not it is just and equitable to extend time as per s.123(1)(b) EqA because there was minimal delay and no impact on the cogency of the evidence

4.25. Women have greater childcare responsibilities than men and a tribunal can take judicial notice of this. The PCP is in two parts (i) an ongoing policy to require attendance during normal working days and hours whenever an employee is ordered to attend and (ii) taking disciplinary and/or attendance process against those who do not. This places those with childcare responsibilities at a particular disadvantage. The claimant need not show she suffered the specific disadvantage as s.19(2)(c) states *"it puts,* ***or would put****, B at that disadvantage"* but she plainly did. During the pandemic, schools were initially operating at a significantly reduced capacity, children were being home schooled or taught "virtually" at home. Despite key worker status she was unable to send her son to school, initially due to her vulnerability, and later as it was at capacity.

4.26. Keeping Landmarc running efficiently and in compliance with contractual and legal obligations was undoubtedly a legitimate aim. In normal times it is proportionate to require those with childcare demands themselves to make suitable arrangements, so the first part of the PCP may be justified . The second part cannot. On the facts of this case, including her mother's vulnerability and the stance taken by her son's school these were unprecedentedly abnormal times. Landmarc's unbending means of enforcement were not proportionate, for all the reasons set out by Sedley LJ and Pill LJ at paragraph 2.19-2.20. above. They could have allowed her some time off, set realistic targets and negotiated a longer term solution through her solicitor. Instead the answer to her request to work from home until her son went back to school, was an outright " No". We reject Mr Allport's evidence the matter remained open for discussion . Therefore, Landmarc does not show the PCP was a proportionate means of achieving a legitimate aim **when it was applied to her so we decide issues 1.2.8 – 1.2.11 in the claimant's favour.**

4.27. There will be some difficult remedy issues. Financial loss may be covered under the automatically unfair dismissal claim unless it reaches the "statutory cap". The EqA definition of dismissal includes "constructive" ones. The indirect discrimination does not have to be the principal reason for her resigning only an effective cause. In any event it subjected her to detriment and the denial of homeworking was the deliberate refusal of a benefit. The claimant may be able to recover financial loss under the EqA or the ERA, but never under both.

4.28. There is no doubt the claimant was subjected to detriments contrary to s 48 for reasons covered by s44. It has always been a difficult point to separate in constructive dismissal cases those which are detriments short of dismissal from those which " amount to dismissal". This does not appear to be a case for a high award of compensation for injury to feelings, though we need further submissions and such an award can be made only under s44 and/or the EqA We will need further submissions on these points at the remedy hearing .

4.29. As for contribution, initially, Landmarc did not make clear to the claimant what medical evidence they needed. They certainly did not use their OH provider well. However, by late May/early June it must have been obvious to the claimant that had she provided medical evidence she was at increased risk of serious illness or death , as well as the anxiety caused by being terrified of returning to her normal workplace, the witnesses we have heard could have said to those above them the rule which applies to others should not be applied equally to her. When on 8 July Mr Hargreaves **invited Landmarc to seek a medical report from her GP such a step was one which had been crying out to be taken for weeks, if not by Landmarc then by her. To that extent** her conduct *'caused or contributed'* to her dismissal and as to the extent to which it was culpable or blameworthy as EAT said in Steen-v-ASP Packaging Ltd 2014 ICR 56, *'it is the tribunal's view alone which matters'.* We conclude she did not take the step of pro-actively providing such evidence, **partly, especially in the later weeks** because she was at times meeting Landmarc's rigidity with her own. We will need further submissions on the degree to which she did.

**Employment Judge T.M. Garnon**
**Judgment authorised by the Employment Judge on 24 August 2021**