



EMPLOYMENT TRIBUNALS

Claimant: Ms Tina-Jaine Haigh

Respondent: Rolls Royce PLC

Heard at: Liverpool (CVP and in person)

On: 1, 2, 3, 4, 5, 8, 9, 10,
& 11 April 2019, 7 May
2019, 12, 13, 14, 15, 16,
19, 20, 21, 22, 27, 28
& 29 July, 2, 3, 4 & 6
August 2021 (in
chambers)

Before: Employment Judge Shotter

Members:
Mr M Gelling
Mrs JC Ormshaw

Representatives

For the claimant: In person
For the respondent: Mr J French-Williams, solicitor

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. The respondent did not unlawfully discriminate against the claimant on the grounds of her disability, and the claimant's complaints of disability discrimination brought under section 13, 15, 19, 20-21, 26 and 27 of the Equality Act 2010 are not well-founded and are dismissed.

2. All allegations involving Jimmy Thompson and Ingolf Kirsten were received outside the three-month statutory limitation period. It was not the conduct extending over a period under section 123(3). It is not just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010, and the allegation. are dismissed.
3. Allegation 72 brought under section 13 of the Equality Act 2010 dated 11 November 2016 was received out of time and was not the conduct extending over a period under section 123(3). It is not just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010, and allegation numbered 72 is dismissed.
4. Allegations 63, 64, 73, 74, 77, 78 90, 93 and 95 brought under section 15 of the Equality Act 2010 were received outside the 3-month time limit. It is not just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010, the Tribunal does not have the jurisdiction to consider the complaints which are dismissed.
5. Allegations 28 and 41 brought under section 26 of the Equality Act 2010 were not received within the time limit set by Section 123(1) of the Equality Act 2010. Neither act alleged amounted to conduct extending over a period of for the time. It is not just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010, the Tribunal does not have the jurisdiction to consider the complaints which are dismissed.
6. The respondent was not in breach of its duty to make reasonable adjustments. The claimant's claims brought under section 120-121 of the Equality Act 2010 are not well-founded and are dismissed.
7. The respondent was not in breach of the implied term of trust and confidence sufficiently serious to amount to a fundamental breach of contract. The claimant was not unfairly dismissed and her claim for constructive unfair dismissal is not well-founded and is dismissed.
8. Allegations 67, 73 and 77 brought under section 27 of the Equality Act 2010 were not received within the time limit set by Section 123(1) of the Equality Act 2010. Neither act alleged amounted to conduct extending over a period of for the time. It is not just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010, the Tribunal does not have the jurisdiction to consider the complaints which are dismissed.
9. The claimant was not wrongfully dismissed and her claim for notice pay is not well-founded and is dismissed.
10. The claimant's application to introduce new documents at the liability hearing was refused, and oral reasons were given.

RESERVED REASONS

Preamble

1. In a claim form received on the 25 September 2017 following ACAS conciliation that took place between 27 July to 27 August 2017, the claimant claims constructive unfair dismissal, disability discrimination and other payments clarified at the preliminary hearing held on the 30 November 2017 as wrongful dismissal (notice pay).
2. The claimant brings claims under section 13, 15, 19, 20-21, 26 and 27 of the Equality Act 2010. The allegations are set out in a schedule totalling 111 discriminatory events of which 67 are actual allegations dating from 12 November 2014 to the date of resignation, involving past and present employees Ingolf Kristen, Shoja Farr, Jimmy Thompson, Alex Warren all managers at a higher level than the claimant, Leslie Biddiscome, HR professional, Anne-Marie Schilling-Jones, Eddie Marrett and Bod Calender, managers who dealt with the investigation, disciplinary hearing and grievance hearing in that order.
3. In the Scott Schedule the claimant also brings a complaint under section 111 and 112 claiming Jimmy Thompson and Lesley Biddiscome induced and aided discrimination.
4. At the outset of the liability hearing the claimant confirmed the “last straw” was her grievance not being upheld, the oral warning and that the “agreed reasonable adjustments were removed which made it impossible for the claimant to work and this was a breach of contract.”
5. There exist a number of time limit issues concerning the claimant’s allegations, including those made against Jimmy Thompson, who left the business in February 2017. The claimant relies upon a continuing act and understands this is one of the key issues she needed to deal with. In track changes to the draft list of issues produced by the respondent and disputed by the claimant she indicated that it was not necessary for the Tribunal to consider time limit issues in relation to each head of claim of discrimination. The case management summary records that the claimant contended Jimmy Thompson had acted with the tacit and/or express support of the respondent’s human resources department. In the Scott Schedule the claimant names Lesley Biddiscome as the relevant HR professional.
6. It is agreed between the parties that the effective date of termination was 31 May 2017, the date when the claimant resigned.

The agreed list of issues.

7. The list of issues produce by the respondent in draft were initially disputed by the claimant. The claimant was given time to consider the position which resulted in several amendments set out in track changes and discussed, which have been incorporated by the Tribunal where relevant, in the agreed list of issues below.
8. Given the number of allegations in this case the list of issues references the relevant number set out in the Scott Schedule which includes a chronology as perceived by the claimant and the allegations of unlawful discrimination start at number 15 and finish at 107 of 111. Numbers 19, 25, 26, 27, 29,30, 37, 50, 54, 55, 59, 60, 61, 62, 69, 70, 82, 83, 86, 88, 91,92, 94, 98, 100, 108-111 are not complaints and have been discounted for the purpose of drawing up the list of issues to be resolved. The remaining allegations have been subsumed into the list of issues and these reasons in order to ensure that they are captured in their entirety. I have highlighted the number of the allegation as the Tribunal found the volume, extent and inter-relationship confusing at times.
9. The agreed list of issues following the same numbering: as in the original document:

Constructive unfair dismissal

1. Did the events detailed at rows **15 to 107** of the Scott Schedule, to the extent not admitted by the Respondent, take place as alleged by the Claimant?
2. If so, did any or all or a combination of the above acts amount to a repudiatory breach of the implied term of trust and confidence?
3. If there was a repudiatory breach of the Claimant's contract, did the Claimant resign in response to it?
4. Did the Claimant affirm the contract and/or waive the breach?
5. If the Claimant succeeds in her constructive unfair dismissal claim: -
 - a) Should the compensatory award be reduced or extinguished, to reflect the Claimant's culpable and/or blameworthy conduct which caused or contributed to her dismissal, pursuant to s123(6) of the Employment Rights Act 1996?
 - b) Should the basic award be reduced or extinguished, to reflect the Claimant's conduct, pursuant to s122(2) of the Employment Rights Act 1996?

- c) Should any compensatory award be reduced, to reflect the Claimant's failure to follow the ACAS Code by not appealing the disciplinary outcome or the grievance outcome before resigning?

Disability Discrimination

Whether Claimant was a disabled person

- 6. It is agreed that, at the material times, the Claimant was a disabled person within the meaning of the Equality Act 2010, her disability being irritable bowel syndrome ("IBS").

Direct discrimination: Equality Act 2010 s13

- 7. The Claimant alleges that the Respondent did the things listed at rows **17, 18, 20, 21, 24, 28, 32, 33, 34, 35, 36, 39, 43, 44, 45, 46, 51, 52, 56, 57, 67, 72, 79, 81, 89 and 102** of the Scott Schedule, which constituted direct disability discrimination.

Whether Claimant subjected to a relevant detriment

- 8. Did the Respondent or, where relevant, its representatives, do the things referred to at point 7 above (where not already admitted by the Respondent)?

Whether claim(s) in time

- 9. Has the Claimant brought her claim within the time limit set by Section 123(1) of the Equality Act 2010? This gives rise to the following sub-issues:
 - a. What was the date of the acts to which the complaint relates?
 - b. Were the acts to which the complaint relates an element of conduct extending over a period? If so, when did that period end?
 - c. Insofar as the complaint relates to a failure to do something, when did the Respondent decide on it?
 - d. If relevant, is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010?

Whether treatment was less favourable

- 10. In doing the acts complained of at rows **18, 34 and 89** of the Scott Schedule (that is, failing to promote the Claimant to the Team Leader role), did the Respondent treat the Claimant less favourably than it treated Dr Jimmy Thomson and / or Helen Seals?
- 11. In doing the acts complained of at rows **17, 20, 21, 24, 28, 32, 33, 34, 35, 36, 39, 43, 44, 45, 46, 51, 52, 56, 57, 67, 72, 79, 81** and **102** of the Scott Schedule, did the Respondent treat the Claimant less favourably than it treated non-disabled

employees (“hypothetical comparators”) in relation to homeworking, sick leave and allocation of work.

12. If so, was there any material difference between the circumstances relating to the Claimant and those hypothetical comparators referred to at point 11 above?
13. In doing the act complained of, did the Respondent treat the Claimant less favourably than it would have treated others in comparable circumstances?

Reason for less favourable treatment

14. If the Respondent treated the Claimant less favourably, was this because of the Claimant’s disability?

Discrimination arising from disability: Equality Act 2010 s15

15. The Claimant alleges that the Respondent did the things listed at rows **15, 24, 28, 33, 41, 42, 47, 56, 63, 64, 65, 66, 73, 74, 76, 77, 78, 79, 81, 84, 85, 89, 90, 93, 95, 96, 97, 99, 104, 105** and **107** of the Scott Schedule which constituted discrimination under section 15 of the Equality Act 2010.

Whether Claimant treated unfavourably

16. Did the Respondent or, where relevant, its representatives, do the things referred to at point 15 above (where not already admitted by the Respondent)?
17. If so, was this unfavourable treatment?

Whether claim(s) in time

18. Has the Claimant brought her claim within the time limit set by Section 123(1) of the Equality Act 2010? This gives rise to the following sub-issues:
 - a. What was the date of the act to which the complaint relates?
 - b. Was the act to which the complaint relates an element of conduct extending over a period? If so, when did that period end?
 - c. Insofar as the complaint relates to a failure to do something, when did the Respondent decide on it?
 - d. If relevant, is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010?

Reason for treatment

19. Was the unfavourable treatment because of something arising in consequence of the Claimant’s disability? This gives rise to the following sub-issues:
 - a. Was the unfavourable treatment because of the Claimant’s: -

- i. sick leave.
- ii. working hours.
- iii. home working; or
- iv. failure to communicate with the Respondent.
- v. Difficulty with travelling
- vi. Anxiety over discussing health issues
- vii. Symptoms in morning
- viii. Unpredictable nature of those symptoms
- ix. Pain causing distractions

b. Were any or all a.i to a.iv above something arising in consequence of the Claimant's disability?

Whether Respondent had knowledge of disability

- 20. Did the Respondent know that the Claimant had an impairment, namely irritable bowel syndrome?
- 21. If not, could the Respondent reasonably have been expected to know that the Claimant had an impairment, namely irritable bowel syndrome?
- 22. Did the Respondent know that the Claimant's impairment had an adverse effect on her ability to carry out normal day to day activities?
- 23. If not, could the Respondent reasonably have been expected to know that the Claimant's impairment had an adverse effect on her ability to carry out normal day to day activities?
- 24. Did the Respondent know that the effect of the Claimant's impairment on her ability to carry out normal day to day activities was substantial?
- 25. If not, could the Respondent reasonably have been expected to know that the effect of the Claimant's impairment on her ability to carry out normal day to day activities was substantial?
- 26. Did the Respondent know that the effect of the Claimant's impairment on her ability to carry out normal day to day activities had lasted for a period of at least 12 months or was likely to do so?
- 27. If not, could the Respondent reasonably have been expected to know that the effect of the Claimant's impairment on her ability to carry out normal day to day activities had lasted for a period of at least 12 months or was likely to do so?

Whether treatment justified

- 28. Was the treatment a means of achieving a legitimate aim?
- 29. If so, was it a proportionate means of achieving that aim?

Disability related harassment: Equality Act 2010 s26

- 30. The Claimant alleges that the Respondent did the things listed at rows **28** and **41** of the Scott Schedule which constituted disability related harassment.

Whether incidents/events complained of occurred

- 31. Did the Respondent or, where relevant, its representatives, do the things referred to at point 30 above?

Whether claim(s) in time

- 32. Has the Claimant brought her claim within the time limit set by Section 123(1) of the Equality Act 2010? This gives rise to the following sub-issues:
 - a. What was the date of the act to which the complaint relates?
 - b. Was the act to which the complaint relates an element of conduct extending over a period? If so, when did that period end?
 - c. Insofar as the complaint relates to a failure to do something, when did the Respondent decide on it?
 - d. If relevant, is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010?

Whether conduct related to disability

- 33. Was the conduct in question related to the Claimant's disability?

Whether conduct unwanted

- 34. Was the conduct in question unwanted?

Purpose/effect of conduct

- 35. Did the conduct in question have the purpose of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- 36. Did the conduct in question have the effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account: the Claimant's perception, the circumstances of the case, and whether it was reasonable for the conduct in question to have that effect?

Indirect Discrimination: Equality Act 2010 s19

37. The Claimant alleges that the Respondent did the things listed at row 38 of the Scott Schedule, that is introduced a Lone Working Policy at the Warrington site requiring employees to leave the office by 6.30pm, which constituted indirect disability discrimination

Whether claim(s) in time

38. Has the Claimant brought her claim within the time limit set by Section 123(1) of the Equality Act 2010? This gives rise to the following sub-issues:
- a. What was the date of the act to which the complaint relates?
 - b. Was the act to which the complaint relates an element of conduct extending over a period? If so, when did that period end?
 - c. Insofar as the complaint relates to a failure to do something, when did the Respondent decide on it?
 - d. If relevant, is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010?

Whether Respondent applied a PCP

39. Did the Respondent apply a provision, criteria or practice (PCP) of requiring employees to leave the office by 6.30pm?
40. Did the Respondent apply the PCP in question to the Claimant?
41. Did the Respondent apply, or would the Respondent have applied, the PCP in question to people who did not have the same disability as the Claimant?

Whether PCP caused disadvantage

42. Did the PCP in question put, or would it have put, people who have the same disability as the Claimant at a particular disadvantage when compared with people who do not have the same disability as the Claimant?
43. Did the PCP in question put, or would it have put, the Claimant at that disadvantage?

Whether PCP justified

44. Was the PCP a means of achieving a legitimate aim?
45. If so, was it a proportionate means of achieving that aim?

Duty to make reasonable adjustments: Equality Act 2010 s21

46. The Claimant alleges that the Respondent failed to comply with a duty to make reasonable adjustments as detailed at rows **22, 23, 31, 40, 48, 49, 53, 58, 66, 68, 87, 93, 103** and **106** of the Scott Schedule. In particular the Claimant alleges that the Respondent failed to: -
- a. Allow the Claimant sufficient opportunity and means to work from home.
 - b. Make sufficient adjustments to the Claimant's hours of work.
 - c. Provide sufficient funding for medical treatment.
 - d. Adequately amend the sickness absence triggers.

Whether claim(s) in time

47. Has the Claimant brought her claim within the time limit set by Section 123(1) of the Equality Act 2010? This gives rise to the following sub-issues:
- a. What was the date of the act to which the complaint relates?
 - b. Was the act to which the complaint relates an element of conduct extending over a period? If so, when did that period end?
 - c. Insofar as the complaint relates to a failure to do something, when did the Respondent decide on it?
 - d. If relevant, is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010?

Whether Respondent had knowledge of disability

48. Did the Respondent know that the Claimant had an impairment, namely irritable bowel syndrome?
49. If not, could the Respondent reasonably have been expected to know that the Claimant had an impairment, namely irritable bowel syndrome?
50. Did the Respondent know that the Claimant's impairment had an adverse effect on her ability to carry out normal day to day activities?
51. If not, could the Respondent reasonably have been expected to know that the Claimant's impairment had an adverse effect on her ability to carry out normal day to day activities?
52. Did the Respondent know that the effect of the Claimant's impairment on her ability to carry out normal day to day activities was substantial?
53. If not, could the Respondent reasonably have been expected to know that the effect of the Claimant's impairment on her ability to carry out normal day to day activities was substantial?

54. Did the Respondent know that the effect of the Claimant's impairment on her ability to carry out normal day to day activities had lasted for a period of at least 12 months or was likely to do so?
55. If not, could the Respondent reasonably have been expected to know that the effect of the Claimant's impairment on her ability to carry out normal day to day activities had lasted for a period of at least 12 months or was likely to do so?

Whether Claimant disadvantaged by a PCP

56. Did the Respondent apply any or all of the following provision, criteria or practice (PCP): -
- a. Office based working.
 - b. Normal working hours between 9.30am and 5.30pm.
 - c. Requirement to leave the office by 6.30pm.
 - d. A requirement to phone to inform line management if one would be late.
57. Did the PCP(s) in question put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?
58. Was the disadvantage in relation to employment by the Respondent?

Whether Respondent had knowledge of disadvantage caused by PCP

59. Did the Respondent know that the PCP in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the Respondent?
60. If not, could the Respondent reasonably have been expected to know that the PCP in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the Respondent?

Whether Respondent took reasonable steps to avoid disadvantage caused by PCP

61. Did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage caused by the PCP?

Victimisation: Equality Act 2010 s27

62. The Claimant alleges that the Respondent did the following things listed at rows **67, 73** and **77** of the Scott Schedule which constituted victimisation.

Whether Claimant did a protected act

63. Did the Claimant make an allegation that someone had contravened the Equality Act 2010?

64. Was the allegation made by the Claimant that someone had contravened the Equality Act 2010 false and made in bad faith?

Whether Claimant subjected to a detriment

65. Did the Respondent do the things referred to at point 62 above.
66. Did the act complained of constitute a detriment to the Claimant?

Whether claim(s) in time

67. Has the Claimant brought her claim within the time limit set by Section 123(1) of the Equality Act 2010? This gives rise to the following sub-issues:
- a. What was the date of the act to which the complaint relates?
 - b. Was the act to which the complaint relates an element of conduct extending over a period? If so, when did that period end?
 - c. Insofar as the complaint relates to a failure to do something, when did the Respondent decide on it?
 - d. If relevant, is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010?

Reason for detrimental treatment

68. Did the Respondent subject the Claimant to a detriment because the Claimant had done a protected act or because the Respondent believed the Claimant had done or may do a protected act?

Evidence

69. The Tribunal heard oral evidence on behalf of the claimant and took into account the written witness statement. For the reasons set out below it found her evidence could not always be relied upon without supporting contemporaneous documents, and when it came to conflicts in the evidence balancing the fact that towards the end of the employment relationship both parties were preparing for the prospect of litigation that can affect the written evidence, it preferred that given by the respondent's witnesses who were overall more cogent, credible and believable.
70. It was clear to the Tribunal that this case was not assisted by the delays; proceedings were issued on the 25 September 2017, almost 4-years before the hearing all the evidence was completed, as a result of the claimant's medical condition and the reasonable adjustments agreed with her to start at 1pm which required several dates in 2021. The delay has affected the memories of all the witnesses who relied largely on their written statements and contemporaneous documents.

71. On behalf of the respondent it heard evidence from Ingolf Kristen, safety team leader until April 2018 and the claimant's line manager to that date, James Thompson, safety and licencing team leader who left the respondent's employment in February 2017, Helen Seals, principal safety engineer during the relevant period now employed by the respondent as Systems and Safety Capability manager, Anne Marie Schilling-Jones, Programme Manager in Civil Aerospace and the investigating manager in to the disciplinary allegations, Bob Callender, head of engineering and governance, disciplining officer, Eddie Marret, Head of Security Consultancy for Civil Nuclear UK who heard the claimant's grievance, Lesley Biddiscombe, HR manager.

Applications made during the hearing

72. At the outset of the liability hearing the claimant made an application for a permanent restricted reporting order which was refused in a separate judgment with reasons. It is notable the claimant's primary reasons for requesting a restrictive reporting order was the fact that she had been absent from work for "40 to 50-days per year" and "employers were likely to be put off by that." The claimant's application reflects her perception that her absence was substantial, and it is notable this knowledge was not reflected in her evidence or cross-examination of the respondent's witnesses, when she attempted to underplay the substantial amount of time, she had taken off work and the fact that she was not placed on any sickness absence management procedure despite the excessive number of days taken.
73. On the 13 July 2021 the claimant made an application to introduce additional documents consisting of the following:
- 73.1 An email dated 9 September 2020 from an employment consultant relating to the vacant position of safety case lead nuclear located in Derby on an IR35 contract at £70-76 per hour and job specification requiring on-site presence of "at least 4-days per week (essential)". The email confirmed "the team at RR [Rolls Royce] will be open to discussing a split-week/remote offering for the duration of the assignment – though this would likely be discussed and agreed at interview."
- 73.2 An email dated 15 February 2021 from an employment consultant asking the claimant if she would be interested in applying for the role of safety substantiation engineer homebased "with infrequent travel to Derby for site walk downs" on an initial 6-month employment contract.
- 73.3 Job description for the role of safety and reliability engineer job category safety and product assurance– submarines confirming "we'll consider a flexible working arrangement for everyone, in any role."
- 73.4 Emails dated 5 and 6 July 2021 from an employment consultant concerning the vacancy of "Rolls-Royce Safety engineer role

Derby/remote” to be carried out remotely 4 days per week and on site one day a week.

- 74 The claimant submitted she wished to rely on the documents to dispute the respondent’s case that it was not possible for her to do her job remotely. The claimant argued the roles were very similar to the one carried out by her, and the nature of the work had not changed requiring “a lot on interaction with other engineers.”
- 75 Mr French-Williams objected to the introduction of the new evidence on the basis that the claimant has no idea what technical changes have been made since she was employed by the respondent, and the respondent would need to introduce additional evidence by way of documents and witnesses to deal with this point. Mr French-Williams did not accept the claimant’s view that the new evidence could be dealt with by the respondent “in a few questions” as advanced by her in oral submissions, and he maintained it was a matter for the respondent who would want to produce further evidence.
- 76 The Tribunal was unanimous in its decision that on the face of it the new evidence was not directly relevant to the events that allegedly took place between 2014 to 2017 when it is undisputed between the parties the claimant worked from home on several occasions. The Tribunal took the view that the position with reference to homeworking throughout the UK had changed dramatically over the last 18-months or so as a result of the Covid Pandemic and the period between 2014-2017 was more likely than not to have different constraints on IT and security in comparison to 2020/2021 when it is evident that secure working from home has become the norm when it was not the case before.
- 77 Applying the overriding objective and the balance of prejudice between the parties the Tribunal concluded (a) the new documents were not relevant to the claimant’s employment with the respondent, (b) there was a risk the liability hearing could go part-heard in order that the respondent be given an opportunity to produce documentary evidence and call witnesses and (c) there was nothing to stop the claimant from cross-examining the respondent’s remaining witnesses, particularly James Thompson (referred to as “Jimmy Thompson”) who is yet to give evidence, on her belief that the respondent possessed adequate technology during the relevant period to enable remote working via Link and displaying documents on screen. The Tribunal concluded September 2020 and July 2021 are not relevant periods in these proceedings. The Tribunal emphasised that given the lengthy delay between the last hearing and reconvened hearing on 12 July 2021 coupled with the difficulties in listing cases with multi-day hearings being listed in 2023, it is imperative the case is dealt with within allocated 15-half days.
- 78 As it transpired the claimant did not cross-examine Jimmy Thompson or any other witness from the respondent on the differences, if any, between jobs advertised in September 2020 and July 2021 with her role to the effective date of termination

which could have included MOD confidential information had the claimant obtained the necessary clearances and worked in the “submarine room” as envisaged by the respondent when she was employed.

- 79 Finally, a number of reasonable adjustments had been made by the Tribunal in this case ranging from a daily hearing start time at 1pm, any amount of breaks and adjournments requested by the claimant ranging from five minutes upwards, the Employment Judge, Mr Gelling and Mr French-Williams forgoing three and one days holiday respectively to hear oral submissions on 2 August 2021 and deliberate (without the parties on 3 and 4 August 2021) to enable the claimant to refresh her mind on all the evidence and prepare written submissions for exchange by 4pm Sunday 1 August 2021 before making oral submissions the next day. In making these adjustments the Tribunal accept the claimant’s indication that as a litigant in person she found the litigation process stressful which made her IBS condition worse, and she was unable to attend any hearing or prepare written submissions before 1pm. The Tribunal’s acceptance on this point does not translate into it accepting the claimant was unable to contact the respondent before or on 11am if she was unable to attend work and/or attend the office by 1pm.
- 80 The Tribunal has considered the substantial number of documents to which it was taken in the bundle, the agreed chronology incorporated into the finding of facts, written and oral submissions, which the Tribunal does not intend to repeat and has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and has made the following findings of the relevant facts resolving on the balance of probabilities the contradictions in the evidence.

Facts

- 81 The respondent is in the business of providing power systems, luxury cars and aerospace engines. The respondent employed nuclear safety engineers based in a civil nuclear team at Warrington. Safety engineers held key positions, and it was a requirement for the role of a principal safety engineer that they oversee the team, mentor and train. The respondent took the view that overseeing, mentoring and training was not effective remotely and face-to-face team contact was required. Safety engineers were also expected to work on highly confidential information concerning submarines, and both factors made home working remotely difficult.
- 82 Prior to the claimant’s employment the team leader was Ingolf Kirsten, a nuclear safety engineer, who recruited the claimant and line managed eight staff until June 2015, when he moved to another area in the business.
- 83 A section of the civil nuclear team dealt with the Ministry of Defence and highly classified information on nuclear submarines, which severely limited the way confidential information could be dealt with. Employees in the secure “submarine room” could not work with the information outside the allocated room, and

therefore homeworking was not impossible. Jimmy Thompson, her line manager, worked in the “submarine room” and the Tribunal finds the claimant was expected to work in the submarine room and she had access to Jimmy Thompson’s email addresses inside and outside the submarine room. The claimant communicated to him on both his highly confidential email address, and his other office email address. The Tribunal finds there was no good reason for the claimant not to contact Jimmy Thompson when it came to use of mobile phones or email communications.

Commencement of the claimant’s employment

- 84 Ingolf Kirsten, team leader, and Shoja Farr, operations manager of the Warrington site, appointed the claimant on 3 February 2014 into the civil nuclear team as a senior principal safety engineer. Neither were aware the claimant was disabled with irritable bowel syndrome (“IBS”) and that she had found it difficult to work in the mornings.
- 85 At the time the team was small, consisting of four principal safety engineers (the highest grade in the team), two safety engineers and two principal engineer contractors, who worked on different projects. The aim of Ingolf Kirsten was to grow the business in the expectation that nuclear power stations would be built around the UK in the future, but this did not happen with the result that it was difficult to provide a certain level of work to employees commensurate with their qualifications and experience including the claimant who was aware of the difficulties faced by the respondent.
- 86 The team grew over time. Eventually, as a result of the downturn in anticipated work people resigned and it was reduced to four through natural wastage and redeployment. This had an impact on the type of work that could be allocated to the claimant and restricted the amount of work she could do from home, and so the Tribunal found. In short, the claimant was prohibited from working at home on MOD projects as the respondent did not possess the necessary certification for working on protectively marked safety cases over the internal and external network, and this requirement also restricted the claimant’s ability to supervise and support more junior team member’s when working from home.
- 87 The respondent had set up the Warrington civil nuclear team consisting of engineers, designers and so on, with the intention of building up its business by the effective use of multi-disciplinary highly qualified professionals physically working together to produce multi-disciplined designs. The idea was that the senior principal engineer, a key element, integrated the team to ensure the best safe solution where the team developed a complex system for which the respondent could charge a premium in the marketplace. It was an important part

of the senior principal engineer's role to mentor and train the team, which the respondent believed was best achieved face-to-face when the team were all working together at the same time. The respondent had evolved this way of team working over a period of time and the senior principal safety engineer was the "top of the tree, the leader" which required an understanding of the complex work carried out by the rest of the team, regular dialogue and training team members. Jimmy Thompson gave the Tribunal this lengthy explanation in oral evidence on cross-examination that was not disputed by the claimant, who thanked him for his "insight" and the Tribunal preferred his evidence to that given by the claimant who attempted to minimise the positive effect of working face-to-face in multi-disciplinary teams with a view to persuading the Tribunal that contact with the team via technology whilst working at home was sufficient, evidence the Tribunal did not accept as credible on the balance of probabilities. As can be seen below in its conclusion, the Tribunal did not find working from on a regular basis was a reasonable adjustment in the circumstances.

- 88 The claimant was employed as a senior principal engineer from 3 February 2014 to her resignation on 31 May 2017. She was the second most senior person working in the civil nuclear team, the most senior being her line manager Ingolf Kirsten, the safety team leader who along with his manager Shoja Farr, operations manager of the Warrington site, were responsible for maximising the professional talent within the multi-disciplinary teams.
- 89 The claimant assisted Ingolf Kirsten with recruitment of the team early on in her employment, but this tapered off when Ingolf Kirsten came to the view the claimant was not team leadership material due to her poor people skills. The Tribunal explored with Ingolf Kirsten the reason for this, and whether there was any link to the claimant's attendance in the office, her turning up to work late on a regular basis and the fact she worked at home, satisfied that there was none, and Ingolf Kirsten's decision-making process was not tainted by disability discrimination on the balance of probabilities.
- 90 In oral evidence the claimant confirmed Ingolf Kirsten had agreed "on an informal basis" a later start time due to the fact her disability affected her in the mornings and when she did not feel able to come in, she worked from home in or around from 2015 onwards.

30 July 2014 the claimant deputising.

- 91 In or around the 30 July 2014 the claimant deputised for Ingolf Kirsten when he was on holiday for a period of three-weeks and the Tribunal conclude on the balance of probabilities in contrast to the claimant's evidence that she was the deputy team leader until Jimmy Thompson took the role off her, this was the only time the claimant deputised. During this short period the claimant was described by Ingolf Kirsten as a deputy team leader and his agreement with the claimant at

the time was that she was to deputise in his absence on all technical issues and consult with Shoja Farron everything else. The Tribunal prefers the claimant's evidence that she covered a range of matters spanning the team leader's responsibilities over that short three-week period. At a later date, unbeknown to the claimant, Ingolf Kirsten reached the view that the claimant did not possess team leader qualities as she did not possess the people skills necessary for being a team leader but made up for this in her excellent technical knowledge. Ingolf Kirsten did not inform the claimant in order to avoid hurting her feelings.

- 92 The claimant's technical expertise was the reason for her employment into a key position that required teamwork, mentoring and assisting less experienced team members. It is undisputed working, mentoring and training the team was an "important part" of the claimant's role. On the balance of probabilities, the Tribunal found Ingolf Kirsten's view that the claimant had poor people skills and was not a suitable deputy had no connection with the claimant's absences and late attendance. Ingolf Kirsten's opinion was purely and simply she was not suitable to be second in command. As the team expanded there were better people who fitted the bill; one person was "brilliant" and was "snatched" to lead another team, the other person was Jimmy Thompson. Ingolf Kirsten nurtured and gave Jimmy Thompson and his colleague the training and opportunity to advance and grow into the team leader role during this period, which included assisting with recruitment and project leadership. The claimant raised no issues and at no point did she indicate she was seeking advancement into a team leader role, in either her formal appraisals or informally throughout her employment. The respondent was thus entitled to assume that she was not interested in comparison to Jimmy Thompson who had shown a key interest.
- 93 The Tribunal accept Ingolf Kirsten's oral evidence that he was non-confrontational, and as far as the claimant was concerned reluctant to hurt her feelings by criticising her personality (she was on several occasions perceived as difficult to work with) and lacked people skills which she made up for in technical expertise. After the claimant had covered his three-week absence in July 2014 the claimant was not given specific team leadership duties and her evidence that she was, was not supported by contemporaneous documentation. Ingolf Kirsten gave detailed credible evidence as to why he took the view the claimant's personal skills "were not really there to be a team leader" which the Tribunal does not intend to repeat in this reserved judgment and reasons other than to observe Mr Kirsten's evidence was straight-forward and credible on this point.
- 94 The Tribunal has referred to the claimant's annual reviews ("PDR") below. Ingolf Kirsten explained in oral evidence on cross-examination the claimant was meant to score herself against her peer group, and she scored herself "outstanding" on everything, which was not right. At the time he took the view the claimant had "no self-criticism" and questioned how she could have fairly carried out the team reviews when she could not objectively assess her own performance.

- 95 To the claimant's credit Ingolf Kirsten confirmed she had "very good technical skills" which were not tested at the time because the respondent did not have the right projects, and there were opportunities for her within the respondent for technical advancement. This evidence was undisputed by the claimant, and the Tribunal finds this was the case throughout the claimant's employment until she gave notice of resignation.
- 96 The claimant used her own laptop and mobile phone prior to being provided one by the respondent, at different times on unknown dates that neither party could recall, possibly 2015 or 2016. It is not disputed the claimant had access to the respondent's IT (with the exception of confidential material that could never be accessed from home) via a computer and mobile phone, and both had the facility on which the claimant could email the respondent. Eventually the claimant's personal mobile phone was replaced by an iPhone, and she was provided with a laptop in or around 2016; however, the Tribunal finds on the evidence before it the claimant was able to work from home and communicate with the respondent and managers from early on in her employment, and there were no IT issues which prevented her from doing so.
- 97 A few weeks into her employment Ingolf Kirsten noted the claimant was often late for work and members of the team were unhappy with her timekeeping and complained including her coming into the office at midday and immediately preparing lunch. Employees were expected to work core hours commencing 9.30am and Ingolf Kirsten noticed the claimant arriving in the office 10:30am or 11:00am without agreement. When Ingolf Kirsten raised the issue, the claimant explained, for the first time, that her late arrival was due to an unspecified medical condition. The medical condition was not explained in full by the claimant, Ingolf Kirsten had limited knowledge and referred the claimant to occupational health.
- 98 In oral submissions for the first time, despite lengthy cross-examination of Ingolf Kirsten, the claimant submitted she was working in a hostile environment as a result of employees "raising their eyebrows" and commenting when she turned in to work late (which was not a complaint within the Scott Schedule or particulars of claim). The claimant stated that Ingolf Kirsten did not give her too much trouble over the start time, and only once questioned her about sick leave, in contrast to Jimmy Thompson, against whom most of the discrimination complaints were raised.

Occupational Health report 7 October 2014

- 99 Following an examination on 21 August 2014 a medical report was prepared by Dr Croft that confirmed the claimant had experienced gastroenterological symptoms for the past 5 or 6 years, was fit for duties and "she reports it takes a couple of hours for her symptoms to settle in the morning and for her to feel comfortable

and confident about leaving the house. This has led to reporting late to work. She does work later in the evenings to ensure she does work her contracted number of hours. **I understand that issues can arise if colleagues who are in earlier need to discuss any issues with her as she is not always at work when necessary** [the Tribunal's emphasis]. The medical report reflects as far as the claimant was concerned there were issues with the team at the start and end (when the claimant was lone working late) of the working day and this could be resolved by telephone contact. No issues were raised by the claimant concerning working at home or working late into the evening in contrast to the evidence given in these proceedings.

100 Dr Croft recommended the claimant was fit to continue working in her role and "given the difficulties she experiences first thing in the morning it would seem likely that she will struggle to be able to come in to work earlier. Allowing her to report late is a suitable adjustment. **It is helpful if Ms Haigh could be allowed to come in later during the working day to improve communication with her colleagues.** Ms Haigh has agreed that she would be happy to have telephone contact. She has requested for the provision of a mobile phone to facilitate this" [the Tribunal's emphasis]. The view was expressed that the Equality Act 2010 may apply and "it is possible that Ms Haigh may experience **occasional exacerbations of her symptoms which may cause difficulty in attending work for short periods or may require her to take a break.** It is not possible to predict these occurrences" the Tribunal's emphasis. Dr Croft confirmed the claimant reported her symptoms "seem to be exacerbated by stress."

101 The Tribunal noted that the adjustments recommended by Dr Croft were put in place and formalised in the flexible working agreement referred to below later in the chronology. It is relevant that the medical advice was that the claimant may occasionally have difficulties in attending work for short periods. This prognosis did not change. The Tribunal finds the respondent made reasonable adjustments as set out below. A reasonable adjustment was not for the claimant to work from home more than "occasional" which would have enabled her to carry out her contractual office bound duties.

102 Ingolf Kirsten agreed to provide the claimant network access from home, a company laptop and a start time of 10am. There is an issue as to whether the claimant was provided with a mobile phone, and as indicated earlier it appears the mobile phone was provided sometime in 2015, prior to which the claimant used her own mobile phone. Ingolf Kirsten initially took the view the agreement worked well, however the claimant started coming into work later and later. The claimant came in between 11am to 12 am once or twice a week and she worked from home but not on a regular basis. Ingolf Kirsten was flexible and did not monitor the claimant's comings and goings and the work she carried out.

103 An issue of missing time sheets was raised, and in an email sent on 14 October 2014 by the claimant referred to the respondent's system of pushing her down the path of "fudging your bookings to match the expected 7.6 hours every day" evidence that she was not working her full contractual hours. Ingolf Kirsten was concerned with the claimant's performance and sought manager HR support via Dave Keegan on 31 October 2014 concerning the claimant lone working after normal working hours, working at home was discussed, putting team meetings back to the afternoon to facilitate the claimant (which was carried out), reduced hours and flexible working. Ingolf Kirsten was concerned because the claimant's role required her to work in teams and mentor more junior employees. The claimant working lone hours late into the evening was an issue in this case for the claimant. It is notable Ingolf Kirsten was not cross-examined on a matter raised by the claimant for the first time later in the liability hearing, when she suggested she was accompanied back to the car by a security officer every time she worked late in the office. There was no evidence before the Tribunal in any of the contemporaneous documentation that an agreement had been reached between the respondent and claimant that when she lone worked late she was accompanied back to her car by a security officer, there was no record this had taken place and the Tribunal preferred the evidence given on behalf of the respondent that (a) no such agreement was in place and (b) it would not be possible for the claimant to be accompanied "every time" she wanted to leave work late.

12 November 2014 meeting

Allegation 15: Ingolf instructs claimant that she must reduce her sick leave.

S.15 EqA

104 Ingolf Kirsten and the claimant met to discuss her attendance record and excessive amount of sick leave. Ingolf Kirsten instructed the claimant to reduce the amount of sick leave. The claimant raised no complaint.

2014 End of Year Review

105 Ingolf Kirsten conducted the 2014 end of year review which reflected "opportunities have been limited" within the department and there is a reference to the claimant doing more to help other members of the team develop their skills "including a lunch-and learn." The claimant requested more opportunities "to use my skills for producing nuclear safety work" and under the heading "manager's comments" Ingolf Kirsten confirmed there was "little opportunity to show off her great technical skills" corroborating the evidence given on behalf of the respondent preferred by the Tribunal to the unsubstantiated evidence given by the claimant that she was being discriminated against by the work offered to her.

106 In this Review the claimant did not raise an issue about the level she was working at; she merely requested more client engagement. In respect of mentoring despite the claimant described her own performance as “outstanding” Ingolf Kirsten described it as “good” acknowledge she helped other team members develop their skills but “could do more in this area...” “Increasingly visibility of skills internally” was another area of improvement. There was no reference to the claimant acting as deputy or seeking a team leadership role in the future. The Tribunal found an End of Year Review is the obvious vehicle for a discussion about matters such as progression and opportunities. On the balance of probabilities, it concluded the claimant did not raise the possibility of future advancement to a team leader position because this was not her future intention, and it has been raised as a complaint within these convoluted and complex proceedings to strengthen the case against the respondent. In direct contrast to Jimmy Thompson, who showed an eagerness for advancement to the role of team leader with the result that he was given additional responsibilities to carry out, the claimant gave no such indication and nor did she put herself out or forward.

Promotion James (“Jimmy”) Thompson

Allegation 17& 18 Jimmy promoted over the claimant S.13 EqA

107 Shoja Farr offered Jimmy Thompson the position of team leader, taking over from Ingolf Kirsten in or around end of May 2015, which he accepted. The position had initially been advertised in late 2014/early 2015. The claimant did not apply. Jimmy Thompson did not apply but unlike the claimant had made it known he was interested. In contrast, the claimant did not make it known she was interested in a team leader position. An external candidate was appointed who pulled out, and Jimmy Thompson replaced him without the vacancy being advertised again.

108 Jimmy Thompson was made aware by Ingolf Kirsten the claimant started work at 10am instead of 9.30am as a reasonable adjustment, and he knew an occupational health report had been obtained. When giving oral evidence under cross-examination over 6-years down the line he could not recall whether he had read the report or not, which the Tribunal found credible reinforcing its view he was attempting to give honest evidence.

109 The claimant was not happy with the promotion because she believed Jimmy Thompson held a lower grade than her and should not have been promoted.

Allegation 20 and 21: the claimant being given “trivial work” by Jimmy Thompson who allegedly allocating “more minor tasks” to the claimant from May/June 2015 to 2016.and giving challenging tasks to less qualified people – S.13 EqA.

110 There was no satisfactory evidence the claimant was given “more trivial work” and “minor tasks” as alleged, and on the balance of probabilities the Tribunal found this was not the case. The work distributed between the department was limited and as confirmed by the claimant in her exit interview, people were under-resourced, bored and resigned as a result. During this period Ingolf Kirsten’s undisputed evidence was that the claimant worked from home albeit “rarely”, and she was not security cleared to work in the “submarine room” at the time due to the issues with the claimant’s security clearance application as a result of the claimant not filling in the form in time.

Meeting 9 June 2015

Allegation 22: reasonable adjustments refused by Jimmy Thompson – S.20-21 EqA.

111 There is an issue as to what took place at the meeting held on 9 June 2015. The claimant relies on a handwritten note she produced for this hearing. In oral evidence on cross-examination Jimmy Thompson denied the note reflected the discussion, maintaining the claimant had not taken any notes, and homeworking was not requested as alleged. The claimant’s handwritten notes references requiring an 11am start and flexibility to work at home, and when she pointed out refusal “will result in more sick leave” Jimmy Thomson responded allegedly “so be it” and he was reminded of reasonable adjustments and disability discrimination. The Tribunal found the claimant’s “record” of the meeting did not reflect the reality and impacted on the claimant’s credibility, preferring the contemporaneous record set out in an email sent to the claimant the next day which the claimant received and did not question at the time.

112 Following the meeting held on 9 June 2015 between the claimant and Jimmy Thompson sent an email to the claimant on 10 June 2015 at 9.36am recording “our discussion and agreement from yesterday” as follows:

112.1 It was agreed the claimant’s symptoms were “around” the “same intensity/frequency.”

112.2 There was no need for another OH assessment because the claimant’s symptoms had not changed.

112.3 A “10am start was a reasonable adjustment for those days where you have symptoms which prevent you making it to work at 9.30am. A 10am start time is consistent with the opening and closing time of the office...”

112.4 “We discussed and agreed that if you were not able to make it to the office for 10am you would contact me via phone or send an email if I’m not available by phone. We also discussed/agreed that if you were not able to

make it to work for 10am regularly then we would initiate another assessment by occupational health. It is accepted you will be at work for 9.30am where your symptoms allow.”

113 In short, the claimant’s medical condition had not changed from when the adjustments had been agreed with Ingolf Kirsten earlier. The claimant was invited in the first paragraph of the email “please reply if you feel” the record of the meeting “is misrepresentative of our conversation/agreement.” The claimant did not write in and dispute the 10 June 2015 email was incorrect and did not reflect the agreement she had reached. The discussion recorded by the claimant in the hand-written note she allegedly took that referenced disability discrimination, working at home and Jimmy Thompson refusing to provide her with a mobile phone or laptop never took place, and the Tribunal concluded the claimant had produced the alleged contemporaneous note to strengthen her case. Jimmy Thompson’s evidence was that the note taken by the claimant was fabricated.

114 Given the fact there was no response from the claimant and had she no laptop or mobile and had Jimmy Thompson refused to provide the equipment as alleged, this is surprising given the plethora of emails from the claimant in the trial bundle. The Tribunal found that the alleged contemporaneous note referencing the claimant seeking an 11am start in the office or start earlier at home and come in later because she needed more flexibility to work at home did not reflect the actual discussion that took place as per Jimmy Thompson’s email sent on 10 June 2015. It preferred the more credible evidence provided by Mr Thompson to that of the claimant given the existence of the 10 June 2015 email is uncontroversial, and the claimant is deemed to have accepted its contents without any dispute. The Tribunal found the claimant’s credibility was yet again brought into question, and the Tribunal found her evidence could not be accepted on this issue, the note was an attempt to strengthen this claim and it raised a question mark over the reliability of the claimant’s other evidence when it came to conflicts.

115 In conclusion the Tribunal found on the balance of probabilities as at the 9 June 2015 the reasonable adjustment agreed was a 10am start with the claimant having agreed to contact Jimmy Thompson by 10am if she was unable to attend work as a result of her disability, and if she was not able to make it to work an occupational health report would be obtained. There was no indication from the claimant that there would be many occasions in the future when she would be unable to contact Jimmy Thompson by phone or email as a result of the effects of her disability, or that she was unable to contact him when he was working in the submarine room.

116 The Tribunal also found Jimmy Thompson had in his mind reasonable adjustments, whether they would change in the future and throughout this period took HR advice on how best to manage the claimant and the respondent’s expectation that the claimant would attend work at 9.30am if her symptoms allowed it. The claimant’s case is that Jimmy Thompson’s attitude caused her

stress which exacerbated her symptoms, however there is no evidence of this in the contemporaneous documents which reflect in the main the difficulties Jimmy Thompson had managing the claimant, a high performing professional, who did not want to be managed and took the view that she should not be managed by Jimmy Thompson or anybody else and this remained the case up to her resignation.

10 June 2015

Allegation 23: reasonable adjustments refused by Jimmy Thompson – S.20-21 EqA.

- 117 Jimmy Thompson sought advice from Dave Keegan on 10 June 2015 concerning the claimant who had attended work at 10.35 and “when you reviewed your fire register you saw that Tina had put in 9.35 as a start time.” Following advice, he spoke with the claimant and related the explanation given by her to Dave Keegan as follows: “She stated she had mistakenly inserted 09.35 instead of 10.35. Tina’s reply was not instant, and I was not convinced it was a genuine error. This is the second instance this week whether there has been an issue with Tina recording her presence in the fire register as she never signed in on Monday...I stated to Tina that if there is a repeat occurrence I would seriously consider escalating the matter which may lead to formal action which may result in a formal sanction up to and including dismissal from the company. I hope there is not a repeat occurrence with respect or the register.”
- 118 On 16 June 2015 Jimmy Thompson saw the claimant in Asda shopping at 17.40 when she had left work approximately two and a half hours earlier to attend a meeting. Jimmy Thompson understood the claimant’s explanation to be that she was waiting for the traffic to die down. Jimmy Thompson was not happy and decided to escalate the issue together with the incorrect fire register time recording for an independent investigation.
- 119 There is an issue as to whether Jimmy Thompson viewed the time recording as fraudulent raised by the claimant during cross-examination. On the balance of probabilities, the Tribunal accepted Jimmy Thompson’s evidence that he would not have used the terminology “fraudulent time recording” as it was not fraud in his mind, and the email referring to this sent on 26 January 2016 was not sent by him but someone from HR shared services centre covering all the respondent’s business. It is uncontroversial the allegation was not dealt with as one of fraud. The claimant was unaware of this email until she obtained copy documents following a data access request in the anticipation of this litigation.
- 120 During this period Jimmy Thompson received a report of alleged bullying by the claimant of a team member which the employee described as not being an isolated incident alleging the claimant had behaved “in this way with colleagues previously.” Jimmy Thompson did not bring this matter up with the claimant in an

attempt not to upset her. It reinforced the respondent's view that the claimant was not suitable team leader material because she possessed poor people skills.

121 It is apparent from the documents in the bundle the claimant throughout this period continued to email Jimmy Thompson with adjustments to her hours, for example, by an email sent 13 May 2016 the claimant sought an adjustment of 1.58 hours for Friday and on 3 June 2016 3 hours covering Wednesday and Friday in accordance with the agreement reached to the effect that the claimant would be paid her contractual hours even if she was unable to work them all as a result of her late attendance at work. Jimmy Thompson had agreed to this as a short-term measure with the money coming out of the departmental budget, which points to his favourable treatment of the claimant as there was no evidence any other employee was paid for the hours they did not regularly work.

122 Jimmy Thompson emailed the team on 3 June 2016 informing them that Helen Seals "will be standing in for me while I'm on leave." No complaint was raised by the claimant alleging she was being "stripped" of a deputy role, supporting the Tribunal's findings as set out above that the claimant had no intention of acting as team leader either as a deputy or team leader.

123 The claimant was called to an investigation meeting on 29 June 2015 relating her time recording and referred to occupational health.

21 July 2015 occupational health referral

Allegation 24: Referral implies Jimmy Thompson does not believe the claimant about her condition – S. 13 & 15EqA.

124 Jimmy Thompson referred the claimant to occupational health concerning the claimant "for the past week I have continually had phone calls after 9.40 telling me she couldn't make it in...because her condition is such that she is stuck in the toilet for prolonged periods. I was informed by my manager that Tina-Jayne has had conversations with colleagues about attending Glastonbury. Therefore, it is not clear that the symptoms of Tina-Jayne are not as serious as stated." Advice was sought on "how she can attend work during the reasonable adjusted hours."

125 Taking into account the adjustments made including full payment of wages when the claimant was not working her contractual hours, coupled with the sensitivity by which Jimmy Thompson treated the claimant, the Tribunal on the balance of probabilities did not accept the referral implied Jimmy Thompson did believe the claimant, all of the evidence points to Jimmy Thompson seeking to understand why her attendance was so poor when reasonable adjustments had been agreed and whether additional adjustments were necessary in order that the claimant could perform her role.

Occupational health report dated 2 July 2015

126 The claimant authorised the release of the occupational health report dated 2 July 2015 to the respondent. Dr Ephrain's opinion was "I do not think she requires any specific restrictions in her role. She should be able to offer reliable service if the timing of her late start is effectively managed. She does have an impairment with significant impact on her daily living. The adjustment with late start I believe should continue. She is fit for the role." The only late start agreed was 10am and Jimmy Thompson took the view that the adjustments previously agreed with the claimant remained valid.

Investigation meeting 16 July 2015

127 The investigation meeting was rearranged several times due to availability issues with the claimant and her representative, and it finally took place on the 16 July 2015 before an independent chair supported by HR. The claimant confirmed she had misread her watch and recorded the wrong time "two mistakes in quick succession." In relation to the Asda incident the claimant admitted she made a mistake.

128 The Tribunal concluded it was legitimate for an investigation to have taken place in the circumstances given the fact there were issues as conceded by the claimant who accepted she had made a number of mistakes. The investigation was adjourned to 10 August 2015 to investigate the claimant's lieu days a further error made by the claimant as admitted by her, including on 12 June misreading her watch by 50 minutes when signing out of the car park.

129 Jimmy Thompson emailed the claimant on the 17 July 2015 reminding her "as per my email of 10 June 2015 if you are not able to make it to the office for 10am that you would contact me via phone (or send an email if I'm not available by phone) this should be done at the earliest possible convenience and prior to 9am. It is expected that you will be at work for 9.30am where your symptoms allow." There was no response to this from the claimant and the Tribunal concludes that this was the agreement and had it not been the case the claimant would have replied and said so in no uncertain terms.

130 On 21 July 2015 Jimmy Thompson emailed Dr Ephraim with questions concerning whether the claimant could make it into work for a 10am start, contact him by 9am when she would be in work late, whether she can work her contracted hours and whether the occurrences of the claimant not making it into work for 10am was short or long-term in nature. The claimant's car park reader reflected her attendance at work between 10th and 19 June 2015 commencing a variety of start times after 10.30 onwards to 11.32am and finish times up to 20.56, and from 2 July 2015 between 10.57 to 13.40 and finish times late in the evening and on one occasion after midnight lone working. On the 2 July the claimant had worked just under a 12-hour day, demonstrating she can work a long-shift but not before late

morning/midday. Jimmy Thompson's concern was understandable, given the Lone-Working Policy, the time spent by the claimant when she was not working part of a team and dealing with highly confidential "sensitive" information when lone working.

131 Jimmy Thompson took HR advice on every step in the claimant's case, mindfully keeping capability and health a separate issue from conduct and sought Dr Ephraim's advice on the claimant's health and adjustments. The Tribunal, on the balance of probabilities, finds Jimmy Thompson did not disbelieve the claimant about her condition; he was seeking medical evidence in order that reasonable adjustments could be put in place and the claimant managed as part of the team. The fundamental problem for Jimmy Thompson was that the claimant did not see why she should be managed; she believed she should be left to her own devices and took umbrage that Jimmy Thompson was dealing with matters which the claimant deemed to be unimportant given her important role of principal safety engineer.

Meeting 22 July 2015 between claimant and Jimmy Thompson

Allegation 28: The claimant complains to Jimmy Thompson of unreasonable pressure- S.13, 15 & 26 EqA.

Allegation 31: reasonable adjustments refused by Jimmy Thompson – S.20-21 EqA.

132 There is a conflict in the evidence concerning whether Jimmy Thompson and the claimant met on the 22 July 2015 and what had been said at that meeting. The claimant relies on handwritten notes she allegedly took at the meeting which record the following: "Sick leave amount unacceptable must reduce...can't trust me due to illness/condition. Not going to give me decent projects. If I can work @ home might be able to reduce sick leave...Jimmy refuses to consider. Unreasonable. The pressure from Jimmy only makes it worse...current absence levels make me untrustworthy. Acts like I'm pulling sickie/lying...Say to make someone feel useless." In the claimant's witness statement, there is a reference at paragraph 98 to a meeting in approximately quarter 3 2015 with no reference to a specific date, the handwritten notes or the request for homeworking.

133 Jimmy Thompson in oral evidence on cross-examination denied a meeting had taken place as described in the claimant's handwritten notes, and he could not recall the meeting date. The claimant's description of him in the notes did not reflect the advice he was receiving at the time, and the notes do not reflect any

meeting he would have held, and the Tribunal accepted this evidence on the balance of probabilities.

134 In the bundle the only reference to a meeting taking place is an email sent to the claimant by Jimmy Thompson on 24 July 2015, a document to which the Tribunal was not taken by either party. The email references a meeting held on Wednesday, the 24 July 2015 which was a Friday, and the claimant was reminded confidential employee assistance was available to her “in respect of the stress that you mentioned on Wednesday.” Apart from this reference to the meeting the only other relevant document is the claimant’s handwritten note that refers to the pressure from Jimmy Thompson “only making it worse”. Interpreting the notes by giving them their ordinary common-sense meaning the Tribunal concludes they did not record the meeting that took place and the words said by each party, rather the note reflects how the claimant felt about the meeting after the claimant has been seen in Asda, and her attendance had been brought into question.

135 On the 16 July 2015 there was the Asda incident and yet there was no reference to this in the claimant’s handwritten note and taken into context, as per the contemporaneous documents in the bundle, the Tribunal concludes on the balance of probabilities there was a meeting on 22 July 2015 and the claimant complained to Jimmy Thompson about the pressure he was putting her under, and his response was to offer the Employee Assistance programme. The Asda and other incidents incident not being mentioned reflects the evidence given by Jimmy Thompson that he chose not to deal with conduct issues directly because he did not want to put the claimant under pressure as he was aware her disability can be exacerbated by stress. Had Jimmy Thompson told the claimant that he did not trust her, use the words “untrustworthy”, and threatened disciplinary action if there is no improvement in sickness absence as alleged, the claimant would have responded to the 24 July 2015 email, and she did not. The first time the claimant raised the issue was in her written grievance sent to the respondent in January 2017 after 18-months had lapsed, and in her grievance, she does not specifically refer to the 22 July 2015 meeting despite having in her possession the written notes of the meeting which made a number of serious allegations.

136 In conclusion, the Tribunal found on the balance of probabilities a meeting took place on the 22 July 2015 and the claimant’s stress was discussed, as was the attendance and timekeeping requirement set out by Jimmy Thompson in the email 17 July 2015 sent to the claimant five days earlier. The handwritten note did not reflect what took place at the meeting and reflected the claimant’s subjective feelings about what she believed was happening in the workplace and her belief that Jimmy Thompson “acts like I’m pulling sickie/lying but won’t say it.” The Tribunal finds on balance Jimmy Thompson did not say the claimant could not be trusted due to her sickness absence as alleged, instead the note reflected the claimant’s subjective feelings about her sickness absence and not the reality which was that Jimmy Thompson was attempting to manage the claimant’s

attendance and timekeeping following HR advice and occupational health with a view to establishing what adjustments were reasonable and necessary. The claimant was not happy being managed and did not perceive she was accountable for her attendance and time keeping when working in a key role and required to meet her contractual obligations, notwithstanding her disability. As a matter of fact, taking into account the contemporaneous evidence, the Tribunal found on the balance of probabilities, excessive scrutiny was not applied to the claimant; there were a number of issues regarding her management, and this required resolution whether the claimant liked it or not.

Occupational Health response dated 23 July 2015

137 The consultant occupational physician having assessed the claimant's medical notes responded in a report dated 23 July 2015; "normally" the claimant "should be able to make it into work for 10am but due to the unpredictable nature of her condition this may not always be the case...the situation is likely to be long-term, **she may not always be able to give you warning that she will be late in and she should be able to work to her contracted hours although starting late as discussed**" [the Tribunal's emphasis]. Jimmy Thompson understood occupational health advice to mean the claimant if well enough to work she was well enough to inform him of her intentions either by email or by phone. One of the key issues for him was the timing of the communication as he was required to manage the work and the team, and the claimant was aware of this and the necessity of the team having access to her expertise which it did not have if Jimmy Thompson was unaware of whether the claimant was working or not.

Alleged meeting between the claimant and Jimmy Thomson to discuss work unknown date mid 2015

Allegation 32: Jimmy Thompson refuses to give the claimant suitable work and says this was because of her health condition S.13 EqA

138 There is no satisfactory evidence the alleged meeting took place, and the Tribunal preferred on balance the more credible evidence of Jimmy Thompson that it did not. The Tribunal finds on the balance of probabilities Jimmy Thompson did not tell the claimant he was unable to give her more challenging work because of her medical condition at any stage during her employment; he felt threatened by the claimant's behaviour and took advice throughout from HR and it was unlikely Jimmy Thompson gave the claimant the explanation alleged given the undisputed fact that the department had difficulties attracting work and this had nothing to do with the claimant's disability.

139 The undisputed evidence before the Tribunal was that there was not enough work, including the type of work the claimant was employed to carry out bearing in mind she had failed to obtain security clearance for the submarine room. Jimmy

Thompson had to look overall at the work available; some members of the team went on secondment which was not an option available to the claimant who her health prevented her from doing so and she had made that very point to the Jimmy Thompson who accepted the position. It is uncontroversial that as a direct result of the lack of work several employees left and on balance, the Tribunal was satisfied Jimmy Thompson made sure the claimant was given what meaningful work there was available for her to take up

Investigation meeting 16 July 2015

140 An independent investigation took place on 16 July 2015 which was adjourned. The investigation dealt with the following allegations:

140.1 10 June 2015 when the claimant registered her start time on the fire register as 09:35 when she had arrived at work 10.35 and on the same day the claimant had said she's left work at 19.35 when the evidence was that she had left work earlier, security having recorded the building as being empty by 19.20 and Shoja Farr noting there were no cars in the car park by 19.30. The claimant was unable to provide evidence and in respect of the start time she maintained she had "misread her watch." The claimant admitted to making "two simple mistakes in quick succession."

140.2 With reference to the leaving work early to travel to Barnwood the claimant confirmed she had made a mistake. The claimant confirmed there was an agreement in place with Jimmy Thompson to "start up to 10am, as an adjustment and if later, she would need to let him know."

140.3 Without notice the issue of lieu days was brought up and the claimant was unable to deal with it, alleging "this feels like you are throwing mud at me."

The adjourned investigation meeting 10 August 2015

141 The purpose of the reconvened meeting was to discuss several matters, including the claimant booking seven lieu days when she was entitled to six, which the claimant maintained was an error. A 12 June discrepancy was discussed, which showed a 50-minute discrepancy of the time the claimant started work to which the claimant responded, "I probably misread my watch." Evidence spanning a month of claimant's attendances was produced and discussed and it was clear to the Tribunal that there were several issues to be investigated which could result in disciplinary proceedings unconnected to the claimant's disability.

Investigation Report dated 11 August 2015

142 The report was prepared by an independent manager who conducted the investigation and was not involved in these proceedings. The report was

concerned with the claimant's accuracy and integrity of her time recording. It did not concern her medical condition. It referred to the 10 June 2015, 17 June 2015 and the claimant having booked 7 lieu/leisure days when she could accrue 6 lieu days per annum. She had taken took lieu days that had not been accrued and one lieu day more than her entitlement. The documents reviewed were attached to the report, a number of findings were set out and it was clarified that the subject of the investigation was time recording and not the claimant's work performance. The matter was not taken any further by the respondent.

143 During this period the respondent arranged for the claimant to undergo psychotherapy from early July 2015 to assist her better cope with her IBS symptoms with a view to her attending the office in the mornings on a more regular basis. Jimmy Thompson took the view the claimant should be given time for the psychotherapy and adjustments with the claimant's start time to take effect in order that the claimant's office attendance improve, which was his primary concern as he wanted her physically present working with the team in core hours when possible.

Allegation 34 & 36: late 2015 Helen Seals appointed deputy team leader over the claimant and continues in that role onwards – S.13 EqA

Allegation 35: the claimant was stripped of deputy role – S.13 EqA

144 The Tribunal found on the balance of probabilities there was no evidence Helen Seals was formally appointed deputy team leader in August or September 2015 or at all. The contemporaneous documents do not reflect Helen Seals, or the claimant were formally given the title of deputy team leader, although both at various times supported their manager when he was on holiday. Helen Seals was a point of contact in Jimmy Thompson's absence which involved her chairing team meetings and her role as advanced safety engineer remained the same with no increase in remuneration.

145 The Tribunal found there was an informal arrangement between the claimant and Ingolf Kirsten to the effect that in his absence she would be the contact point for safety related technical questions and as found by the Tribunal above, the claimant who was considered to have poor people skills, was not a suitable second-in-command. The Tribunal found there was no deputy role for the claimant to be stripped of, and the Tribunal found she was not. The Tribunal's finding in relation to this is supported by the end of year review 2015 when the claimant made no mention of being demoted as she now alleges, and there is no mention to her having previously held the position of deputy team leader. Given the fact the end of year review in early 2016 took place shortly after the alleged demotion, it is surprising the claimant did not mention it in her appraisal. The Tribunal concluded on the balance of probabilities that the reason for this was that it did not happen. It is notable the End of Year Review provides for feedback on "developing capability", "wider contribution" and "overall rating" in which the

claimant made no reference to progressing to any leadership role, including deputy team leader.

146 In conclusion, Helen Seals was not appointed deputy team leader over the claimant in late 2015.

Late 2015 allegation 33 Jimmy Thompson threatens disciplinary action over sick leave – S.13 & 15 EqA

147 By September 2015 the position had not improved despite the therapy and late start. On the 28 September 2015 Jimmy Thompson had a conversation with the claimant about her “late coming and the fact that she wasn’t around core hours. I stated that I would be reviewing the situation over the next two weeks and would escalate it if there is no improvement.”

148 The Tribunal found there was no satisfactory evidence the claimant was threatened with disciplinary action as alleged, and contemporaneous documents point to Jimmy Thompson far from threatening the claimant, adjusting as a result of her sickness absence whether those absences were connected to her disability or not. A reference to escalation is not the same as a threat to disciplinary action. It is notable HR was advising Jimmy Thompson on the capability process and he also chose not to go down this route.

149 In conclusion, Jimmy Thompson did not threaten disciplinary action over sick leave, the Tribunal did not find the claimant’s evidence credible, it was not supported by any contemporaneous documentation and her allegation had no basis.

150 On the 6 October 2015 the claimant made a data subject access request and requested copies of Jimmy Thompson’s occupational health referrals.

151 During this period the claimant was working on an internal safety presentation with another colleague as the respondent had not managed to increase the client work available to the department as anticipated and was looking for work internally to make up the shortfall. There are emails in the bundle evidencing the part played by the claimant, who raised no complaints at the time, and it is undisputed staff were resigning as a result of the situation the department had found itself in.

152 In an email sent 14 October 2015 Jimmy Thompson emailed Lesley Biddiscombe concerned about the claimant’s lack of attendance in the office. He wrote, “**In July I received the occupational health assessment** which stated that normally Tina-Jayne would be able to make it into work for 10am. This was the start time which the business felt it could reasonably accommodate. **Since the assessment was undertaken Tina-Jaine had commenced work before 10am twice, most**

of start times are after 11am and some are in the afternoon” [the Tribunal’s emphasis]. The office core-hours are 9.30 -12.00 and 14.00-16.00 (15:00 on a Friday). Reference was made to the flexible working policy which states that the office should be open between 7.30am and 6.30pm. The respondent’s updated lone working Policy was to preclude lone working past 7pm. He recorded that the claimant’s working times were not “sustainable from a business perspective” and as part of her role the claimant was required “to be available when a majority of the team are in the office. This is so she can advise and contribute to the professional development of the rest of the team.” In short, he was complaining that the adjustment agreed with the claimant was not being adhered to and “the current situation is not sustainable.” The claimant was aware of Jimmy Thompson’s concerns.

153 By October 2015 the claimant had five episodes of sickness absence in rolling period of 12-months, returning from the most recent absence on 23 October 2015. Jimmy Thompson made the decision not to take any action in relation to the claimant’s recurring sickness absence preferring to go down the route of reasonable adjustments and occupational health advice. The claimant’s absence continued sporadically throughout this period, and the respondent’s HR “manager support” were in regular communication with Jimmy Thompson concerning the absences including the absence 14 December to 2 January relating to flu and chest infection that no connection with the claimant’s disability. Jimmy Thompson instructed manager support to “close the case because of the underlying condition underpinning the other episodes” actions which in the Tribunal’s view points to Jimmy Thompson treating the claimant with consideration and not discriminating against her. It would have been open to Jimmy Thompson to progress the capability procedure and yet he consciously chose not to throughout the time the claimant was line managed.

November 2015 Lone Working Policy

Allegation 38: Policy prevents late working beyond 6.30pm – S.19 EqA

154 The claimant’s workplace was on the Warrington site shared by other companies and most of the offices on site closed by 6:30/7:00pm. There had been problems with security, vandalism and an assault had taken place. There were two reasons why the 6.30pm limit to working was introduced by the respondent, both connected with health and safety. The first was to prevent people from “over-working” and the second was the risk to safety. The respondent’s aim was to ensure the health and safety of its employees.

155 It is notable during cross examination of Lesley Biddiscome the claimant did not put to her new information brought before the Tribunal via the claimant’s cross-examination later in the case that she always arranged for a security officer to accompany her to the car when lone working late when every other office had closed down. The claimant was aware that Lesley Biddiscome was responsible for

the amended Lone Working Policy, and she was the obvious person to put the proposition to. The Tribunal concluded, as set out above, the reason for this was that no such agreement was in place and the claimant's evidence was not found to be credible.

156 Because of health and safety risks to all employees when lone working the respondent decided to review its existing lone working policy. Lesley Biddiscome reviewed the new version in October 2015. She was unaware of its effect on the claimant as her understanding at the time was the claimant's absences were causing problems not the fact she could not work late in the office, and she was unaware of any employee requiring late office working in order to fulfil their hours. She was aware that people could and did work at home after 8:00pm.

157 The Lone Working Policy applied to all employees and provided:

"Lone-working is not a preferred method of working – it is by exception only. Lone working must not be carried out beyond the normal closing time of 6.30pm unless agreed on each occasion by your line manager and must not be undertaken beyond 8pm." A procedure was set out for safe home working which included provided information concerning location, vehicle, mobile numbers, arrival and departure times, calls with work colleague contacts who were required to be updated and contacted with the result that a colleague would need to be available up to 8pm. There was no reference to a security officer accompanying employees in the car.

158 There were also restrictions in place concerning early morning working which were irrelevant to the claimant as she could not work early mornings due to her disability.

159 The Lone Working Policy came into force on November 2015, the relevant time limit for the discrimination allegation.

160 The Tribunal found the Lone Working Policy did not prevent employees from working beyond 6.30pm or late working as alleged by the claimant. Health and safety measures had been put in place for those employees working between 6.30pm and 8pm which were open to the claimant to take up, and there was no evidence before the Tribunal that the claimant complied with the terms of the Lone Working Policy when she decided to work late, and this was a concern for the respondent who had the claimant's health and safety in mind.

The events of 2016

Allegation 39, 43, 44, & 45: In early 2016 Jimmy Thompson refuses to give the claimant suitable work and says this was because of her health condition S.13 EqA.

In early 2016 Jimmy regularly briefs team about forthcoming projects in team meetings. Tina-Jaine regularly volunteers for leading roles in suitable projects – S.13 EqA.

Throughout 2016 Jimmy continues to give challenging tasks to less qualified colleagues and gives the claimant various more minor tasks, which someone at a lower grade could easily do. – S.13 EqA.

End of Year Review 2015 conducted in early 2016

161 Jimmy Thompson conducted the claimant's 2015 End of Year Review. The claimant rated herself highly, including a "high performance" mark "in respect of helping junior members to develop skills". She wrote "I continue to make myself freely available to team members...I developed and presented a lunch-time lecture." Jimmy Thompson wrote having scored the claimant with a "good performance...Tina-Jayne is one of the most senior and experienced members of the team. As such, **it would be expected that Tina-Jayne provides a good contribution to the development of the team safety capability...I feel that the experience of Tina-Jayne is not being disseminated to the team as efficiently or effectively as I would have hoped**" [the Tribunal's emphasis]. He also recorded that the claimant's lead on work packages were not meeting full performance expectations and "the external work packages...are on time. The internal work packages regarding health and safety training material had gone some months over...this was disappointing."

162 There was also a discussion about lone-working and Jimmy Thompson recorded the claimant had not met performance expectations in health and safety. He wrote, "Tina-Jaine would be even more effective if she worked by the lone-working procedure which has been put in place. People lone working is a key concern for the business and the HS&E shadow is fundamental for a safety engineer." The claimant was found not to have met full performance expectations on internal work packages regarding safety training material that had gone "months over the anticipated duration." There were issues with the claimant's performance and relationships with colleagues who found the claimant difficult to work with.

163 With reference to overall rating the claimant's position was that she was being underutilised, had "limited suitable projects" and was seeking more challenging nuclear safety projects to work on. The claimant did not specify what those projects were, and whether they were available. The claimant referenced one project she had in 2015 which went "smoothly under my leadership" and other projects complaining "I have had minimal billable projects during 2015, despite my efforts to volunteer myself whenever possible." There was a reference to the "downturn in revenue generating work" and this fact was not disputed by the claimant.

- 164 Jimmy Thompsons's view was that from feedback there was a problem with how the claimant was perceived by her colleagues, and his comments with respect to quality, planning and wider contribution was that they "have an impact on work too. The implication is that if the customer (internal or external) doesn't feel satisfied the opportunities to lead safety work packages will reduce. This is an area where we need to improve the perception of Tina-Janie." In overall comments he recorded the reasons for his rating that the claimant was not "meeting full performance expectations" there was a "problem with regards to how she is perceived by colleagues. This is detrimental to the contribution that Tina-Jaine provides to the business..."
- 165 Jimmy Thompson's undisputed evidence on cross-examination was that there was insufficient fee generating external client work, he was struggling to find work internally for the team and was seeking secondments for the most capable engineers to be seconded into customer organisations, a resolution the claimant believed was not suitable for her due to her disability and as a consequence she did not put herself forward to be seconded.
- 166 It is notable in the end of Year Review and evidence before the Tribunal at this liability hearing the claimant has not identified work suitable for her that was available at the time and refused by Jimmy Thompson, and on the balance of probabilities the Tribunal infers the reason is because the claimant was provided with suitable work that was available within the department at the time.
- 167 The End of Year Review was sent to the claimant on 10 February 2016 and acknowledged by the claimant on 18 March 2016. No amendments were made and there was no reference to any of the allegations that there was suitable work for the claimant to undertake that was not allocated to her. The work in the submarines department which had MOD restricted access was not available to the claimant as she still did not have security clearance. The respondent's main customers were Rolls-Royce Submarines and EDF, and the EDF work was "considerably less" than anticipated. It was accepted by the claimant in her oral evidence on cross-examination that the amount of work was "lower."
- 168 The Tribunal concluded the technical work that could be allocated to the claimant was primarily affected by lack of availability and security constraints. Whether the project required significant physical time spent in the office with the team because the claimant's attendance was "sporadic" was also an issue with Jimmy Thompson, who attempted to resolve it by agreeing the claimant's flexible working time proposal referenced below, with a view to her attending the office and mentoring the team more than she was doing.
- 169 As a result of the lack of availability of technical work reflected in the loss of income suffered by the respondent during this period, team members were allocated internal jobs within Rolls-Royce, work on procedures and "feeding into

the design teams.” The claimant has not pointed to any technical work she should have been undertaking, and on the balance of probabilities the Tribunal found there was no satisfactory evidence that Jimmy Thompson refused to give the claimant suitable work and giving the reason that this was because of her health condition. It is undisputed Jimmy Thompson regularly briefed the team about forthcoming projects in team meetings and there is no evidence the claimant raised any issues about how the projects had been allocated at the time. The Tribunal finds there was no satisfactory evidence apart from that given by the claimant who was not found to be a credible witness, that Jimmy Thompson intentionally refused to give the claimant leading roles in suitable projects, was continually giving challenging tasks to less qualified colleagues and the claimant various more minor tasks, which someone at a lower grade could easily do. In short, the Tribunal finds on the balance of probabilities that Jimmy Thompson did not behave as alleged by the claimant, preferring his evidence against the factual matrix in this case taking into account the manner in which he supported the claimant over a considerable period of time in an attempt to utilise her expertise for which she was receiving a substantial salary.

Engineering Improvement at Rolls-Royce Submarines project

Allegation 46: Jimmy Thompson assigns the claimant to a long project which is primarily a HR matter, with little or no technical content.

170 The claimant has referred to three projects she worked on including a project undertaken on behalf of head of Engineering Improvement at Rolls-Royce Submarines. The claimant maintains it was a HR position, this was disputed by Jimmy Thompson. The project was designed at sharing nuclear resources across the different aspects of the production of a nuclear submarine engine and decommission after five years, including ensuring nuclear safety which was the claimant’s expertise and well outside the capabilities of any HR professional and so the Tribunal finds. The role had to be undertaken by a nuclear safety engineer, it involved hundreds of thousands of pounds during a period when the respondent was losing between one to two million pounds per year. Jimmy Thompson was hopeful the claimant would be in a position to generate more work for the team as a result of her involvement. The Tribunal on the balance of probabilities preferred the evidence given by Jimmy Thompson which was that the project consisted of looking at what type of tasks could be shared across the nuclear production network and this task could only be carried out by a nuclear safety engineer. There is no reference in any contemporaneous document to the claimant complaining about the project or referencing any work which she was more suited for given to more junior team members and Jimmy Thompson was not cross-examined on this point. As at the 4 October 2016 the support the claimant had been given was described “good.”

The Enterprise Approach project

171 The claimant was involved in the Enterprise Approach Project for the MOD that resulted in the project team leader providing positive feedback on her “invaluable contribution” with the team having considered “the Civil nuclear element that without you would most likely have been overlooked.” This comment does not suggest the claimant had been given less challenging and minor tasks which someone at a lower grade could easily do, as alleged by the claimant and the Tribunal finds the claimant’s allegation had no basis in reality.

The EDF Heat Exchangers Project.

172 The claimant was involved in the EDF project which involved some of the team members based in America and communication with the use of IT. Alex Warren on cross examination took the view the claimant was the lead in “the most complex project our office had ever seen” to which the claimant commented “I want to come back to that” and never did. On the balance of probabilities, the Tribunal found the Heat Exchanger was the most complex project in the office, the claimant led that project, was the author of document and reviewer of several documents, which does not suggest the claimant had been given less challenging and minor tasks someone at a lower grade could easily do, as alleged by the claimant and the Tribunal finds the claimant’s allegation again had no basis in reality. It is notable the claimant in an email sent on 16 October 2016 to the respondent concerning the EDF Heat Exchangers Project, was described as “the author of the document and reviewer of several documents” and the claimant’s evidence to the effect that she was carrying out low level review work was not credible taking into account the contemporaneous documents. The claimant was described as “very knowledgeable and thorough...but could be even more effective if she could do this within the given time constraints for delivery...no indication was given that the deadlines would be missed until a point when nothing could be done to resolve the issue. There have been times when I feel like I probably should have micromanaged the situation better however I don’t believe this should be necessary for a Senior Principal engineer.”

173 Taking into account the contemporaneous documents in the bundle there was no indication any of the projects were below the claimant, and it is apparent that a senior principal engineer was required and so the Tribunal found.

Claimant’s request for adjustments to her hours.

174 In early 2016 the claimant was emailing Jimmy Thompson asking him to adjust her hours that made up her pay, which he did. In other words, the claimant was not working her contractual hours and Jimmy Thompson was essentially writing off the hours she did not work to ensure she received her full pay which he set against the overheads budget.

175 The claimant's recurring sickness absence negatively hit the respondent's targets for sickness absence, and Jimmy Thompson ensured no action was taken against the claimant for her attendance, the actions of a caring manager who did accept the claimant's medical condition and took steps to provide her with support, primarily to assist the claimant in order that she could continue working and attend the office when possible. During this period the claimant was often late, and her office attendance remained an issue for Jimmy Thompson as he found it more difficult to manage the department when the senior principal engineer's intentions concerning her day-to-day presence at work were not always communicated to him in good time. The claimant was aware of this issue. She was unaware of the fact Jimmy Thompson had requested advice from occupational health and a meeting was to be arranged to discuss her health and reasonable adjustments.

176 Jimmy Thompson requested an up-dated medical report on 28 January 2016 by which the claimant had completed 8-sessions of psychotherapy and her attendance had not improved.

Occupational health case review 29 February 2016

Allegation 41 & 42 of the Scott Schedule: Leslie, Jimmy Thompson & Dr Ephraim breach patient confidentiality – S.15 EqA.

177 A meeting took place on 29 February 2016 between Dr Ephraim, Jimmy Thompson and Lesley Biddiscombe, who took notes of the meeting. It appears from the notes taken that Dr Ephraim confirmed the claimant's symptoms were worse in the morning. It was recorded the claimant's working hours had become an issue because of the lone working policy she cannot work after 7pm. Dr Ephraim suggested a 10 to 10.30 start as a reasonable adjustment and questioned whether she could do some work at home as a reasonable adjustment. The claimant's 25-days absence over 13 periods was noted. In short, the meeting was about reasonable adjustments for the claimant, and it is not apparent any confidential information about the claimant's disability was discussed, as alleged by the claimant who was not present and can only make assumptions. The Tribunal finds Jimmy Thompson was exploring with a medical professional what reasonable adjustments could be carried out in order to improve the claimant's attendance in the office. The Tribunal finds that such conversations with occupational health are the norm and appropriate within the workplace, and do not necessarily denote a breach of patient confidentiality for which the respondent would not have been vicariously liable in any event, as Dr Ephraim was independent to the respondent.

Meeting Jimmy Thompson and claimant 9 March 2016

Allegation 47: at a meeting with Jimmy Thompson and Alex Warren the claimant was told off for working late – S.15 EqA

Allegation 40: In early 2016 reasonable adjustments refused, and Jimmy Thompson threatens the claimant with disciplinary action.

178 On the 9 March 2016 Jimmy Thompson held a meeting with the claimant following the review with Dr Ephraim. A discussion took place concerning the adjustments that had been made to the claimant's start time at work, and Jimmy Thompson proposed a number of different options including the claimant starting work later in the day, reducing her hours and increasing the number of absences that would trigger an investigation from 3 to 6 occasions i.e., a fifty percent increase compared to other employees. He proposed the current adjustment should be stopped and a new arrangement agreed. One of the earlier adjustments had been ensuring the claimant was paid for the contractual hours she did not work as a result of the Lone Working Policy preventing her from working late in the office (referred to as "the hours adjustment"), which Jimmy Thompson indicated should be stopped. The claimant was not happy and questioned the definition of reasonable adjustments under the Equality Act.

179 Jimmy Thompson emailed Lesley Biddiscombe at 16.42 on 9 March 2016 informing her "Just had a meeting with TJ. She was not pleased about what was being proposed and questioned our definition of reasonable adjustment citing the Equality Act...I stated that the current adjustment of hours that the business has made is not sustainable from a business perspective. Therefore, I stated the hours adjustments that I have been making will stop in the next week or two and we are asking Tina-Jayne to abide by her contract...I suggested she write a response with respect to the Equality Act and that we may involve an Employee Relations specialist in our future meetings...it was rather an uncomfortable meeting." Following on from the discussion the hours adjustment did not stop until the flexible working agreement referenced below, and the claimant continued to be paid for the contractual hours she did not work.

180 Having considered the contemporaneous documentation exchanged between the claimant and Jimmy Thompson after the meeting the Tribunal concluded on the balance of probabilities Jimmy Thompson did not threaten the claimant with disciplinary action as alleged. Jimmy Thompson during the entire period he dealt with the claimant was mindful that disciplinary action should be separated from ill-health. At the 9 March meeting he was discussing ill-health capability and there was no suggestion of the claimant being subjected to disciplinary proceedings in the future. Jimmy Thompson was concerned with the claimant's ill-health and adjustments that could be agreed to the benefit of the claimant and the business in order that they could both move forward.

Letter Jimmy Thompson to the claimant dated 9 March 2016.

Allegation 48 Jimmy Thompson proposes arrangements which the claimant considers inadequate – S.20-21 EqA.

181 The 9 March 2016 discussion was confirmed in a letter sent to the claimant on 9 March 2016. Jimmy Thompson made the following points:

1. The reasonable adjustments were not working as “you have not been able to regularly come to work at 10am.”
2. A start time at 10.30 was proposed finishing at 6.30pm (when the office is closed) considering the Lone Working Policy, working an additional 30 minutes at some point during the week reduce her hours, reduce the one-hour lunch break or reduce the lieu days. It was made clear that the choice was the claimant’s, and there was an open invitation for the claimant to suggest other alternatives.
3. “Under normal circumstances an absence rate of three occurrences in a 12-month period will trigger an investigation. However, we are prepared to make an adjustment in your case and the trigger will start at 6-occasions...**As I said we will start with a clean sheet from the date of our new agreement. I hope that you will agree that these adjustments along with the help you are getting from the occupational health team will help you attend work on a regular pattern**” [the Tribunal’s emphasis].

182 The claimant emailed Jimmy Thompson sent on 15 March 2016 asking for an adjustment to her hours; she did not respond to the 9 March letter and did not dispute that its contents correctly reflected the conversation that had taken place on the 9 March 2016 which made no reference to the claimant being threatened with disciplinary action. The Tribunal found the claimant did not raise this as an issue at the time because she was not threatened with disciplinary action by Jimmy Thompson as alleged, and her evidence in this respect undermined the claimant’s credibility as a whole.

Email Jimmy Thompson to claimant dated 15 March 2016

Allegation 49: Working arrangements not sustainable S.20-21 EqA

183 In an email sent 15 March 2016 to the claimant by Jimmy Thompson reference was made to the 9 March meeting and he confirmed “the ongoing adjustment of hours that has been conducted from mid-October 2015 is not sustainable for the business and regular adjustments will be stopped on the 24 March. I would like you to consider the proposed changes to your working times detailed in last week’s letter.”

184 The claimant responded by an email sent on 16 March 2016 indicating she needed to take advice and “absence of a specific reply does not indicate any agreement regarding your proposals.” Again, there was no reference to Jimmy Thompson having allegedly threatened the claimant with disciplinary action,

further supporting evidence that this allegation had not taken place. Jimmy Thomson responded he would organise a meeting for the week beginning 11 April 2016.

185 On the 16 March 2016 Jimmy Thompson sent documents for discussion to Lesley Biddiscome and Dave Keegan which included details of the claimant's role, the background issue reasonable adjustment and business impact. Within that document the safety engineering work "currently" conducted in nuclear services and projects was set out and included the following;

185.1 "multi-discipline system design for operational/new plants – case studies...EDF Heat Exchangers with the principal safety engineer being expected to be "involved in regular planning and update sessions associated with safety and reliability deliverables...oversee the production of documentation supporting the project...actively resolve problems and issues resulting in real time with design engineers and stakeholders. Daily and often hourly interactions would be expected with the programme manager and the team". From the evidence before it the Tribunal found that the EDF Heat Exchangers work was suitable, given the constraints on the type of work available, for the claimant to undertake, and was not a role for someone working at a lower grade as alleged by the claimant.

185.2 A number of projects involved "protectively marked information" and "typically the majority of this work can be conducted in a suitably secure location. This requires a dedicated infrastructure and severely limits the work- or work-related conversations that can be undertaken outside due to security." At this liability hearing a number of the respondent's witnesses described the confidential nature of some of the work, for example, in the submarine room and this was not disputed by the claimant, who unsuccessfully argued that it was not necessarily confidential and could be conducted from home. The Tribunal found on the balance of probabilities that there was work marked confidential, including MOD requirements, which could not be undertaken at home or outside a secure environment and it did not accept the claimant's arguments that she could carry out nuclear safety work relevant to specific clients at home when confidentiality was involved. Any security issues arising from homeworking in 2016/2017 lay beyond the respondent's control, including access to documents and overhearing confidential conversations.

186 The description set out in the 10 March 2016 contemporaneous document was similar to the evidence given by Jimmy Thompson under cross-examination that was largely undisputed by the claimant who was attempting to prove she could meet all of the responsibilities set out in her role working from home, when she clearly could not as found by the Tribunal on the balance of probabilities who preferred the more credible evidence of Jimmy Thompson on this issue.

187 The Tribunal found the 10 March 2016 document is a snapshot of Jimmy Thompson's thought processes at the time which was as follows;

187.1 The role of senior principal engineer is office based, requiring mentoring and under leadership is responsible for "team coaching."

187.2 The role is most effectively undertaken when the senior principal engineer works the same hours as the rest of the team. It is also preferable for the work to be undertaken in the same location as the design team. In oral evidence under cross-examination Jimmy Thompson stated this was not always possible, and some team members could be in other locations and travelling was required.

187.3 Under the heading "Background Issues" reference was made to the problems with the claimant's irregular attendance in the office before 12.30pm "from early on in her employment" when under the management of Ingolf Kirsten. Occupational health confirmed the claimant was fit to work and allowing her to report late was a suitable adjustment. A second referral was made when the "frequency of the late attendance increased to the point where Tina-Jaine was not available in the office after 11am on most days and regularly into the early afternoon." And reference was made to the advice received on 23 July 2015 from occupational health which reflects (a) Jimmy Thompson was aware of its contents, and (b) he understood the claimant should be able to work her contracted hours although starting late.

187.4 Jimmy Thompson understood a reasonable adjustment that balanced the needs of the claimant and the business needed to be found. At no point was this a matter of conduct resulting in a disciplinary and there was no reference to conduct throughout the briefing document. Jimmy Thompson was aware he was dealing with capability issues and recorded the respondent's absence trigger was doubled from three occurrences to six with a "clean absence record to maximise the probability of success." The Tribunal found Jimmy Thompson's reduction of the triggers and a clean absence record pointed towards a positive attitude towards the claimant's ill-health capability issues, and the Tribunal is aware that some of the claimant's absences, for example, flu, had no connection with her disability.

187.5 Jimmy Thompson set out the business impact of the loss of hours (for which the claimant had received her full remuneration on a substantial salary) and effect of "over twenty-five days sickness absence...the time lost due to an inability to complete a full working week due to restricted working hours and the direct and indirect cost of absence is not sustainable for the

business. “It was not disputed the business was losing between one to two million pounds per annum.

187.6 Jimmy Thompson concluded “the reduced working hours prevent Tina-Jaine operating in the working environment when the majority of her key stakeholders and colleagues are around. This reduced the likely efficiency and effectiveness of Tina-Jaine on the types or projects detailed in the first section. Therefore, the business does not receive the service from Tina-Jaine that it anticipated during the initial hire.” Jimmy Thompson gave evidence on cross examination describing how the respondent had arrived from teams working on submarines to a working environment when the majority of the team were in the same building working together as the most effective way to work. This evidence was supported by Bob Callender, retired, who had previously worked as head of engineering and governance. Bob Cullender had more than forty-years’ experience in engineering and he described how teams worked better when they were together physically. The Tribunal found Bob Callender was a reliable witness who gave uncomplicated credible evidence which the Tribunal accepted in preference to that given by the claimant, who had no objective appreciation or understanding of her impact on the team and the business when she was not present in the workplace mentoring and training junior employees face-to-face during the currency of the project.

21 March 2016 case conference.

188 On 21 March 2016 a case conference took place with Jimmy Thompson, Dave Keegan and Lesley Biddiscome. The respondent was concerned as there had been a marked increase in the claimant’s level of absence despite adjustments being made in the absence trigger points. The outcome of the case conference was that there should be a conversation with the claimant about what the respondent can do to help her and how the position could be resolved. It is clear from the note of the meeting no decision had been made concerning the next step. Jimmy Thompson, Dave Keegan and Lesley Biddiscome needed answers from the claimant, and were at a loss as to what work she could carry out and what they could do to take pressure off her and find a “peaceful balance.” Jimmy Thompson was not happy with the prospect of the claimant home working for the reasons outlined above.

189 During this period the respondent was waiting for the claimant to respond to the offer of a reduction in hours put forward in Jimmy Thompson’s earlier emails on which the claimant was taking advice and had not said how long she would take.

Allegation 51: Jimmy refuses to give Tina-Jaine suitable work in second quarter of 2015 – S.13 EqA

190 The irrefutable evidence before the Tribunal was that the claimant was working on various projects, and there was no satisfactory evidence that the claimant had been refused “suitable work” and so the Tribunal finds. During this period the respondent’s HR department recorded the claimant working on a “consultancy type work with Patrick Kniveton, at the moment TJ is starting at about 1500 and leaving at 1830. This most recent type of work was carried out at different sites.” The Tribunal repeats its observations set out above.

191 A case was opened and closed relating to the number of absences the claimant had taken.

3 June 2016 email

Allegation 52: Helen Seals became deputy team leader – S. 13 EqA

192 Jimmy Thomson sent an email to the department, including the claimant, at 16.43 on 3 June 2016 stating Helen Seals would be standing in for him while he was on leave, and he named four other high-level managers who would be available to deal with queries. Helen Seals was not described as deputy team leader and the Tribunal found on the balance of probabilities that she was merely standing in in.

29 June 2016 meeting

Allegation 53: Leslie invites Tina-Jaine to meeting to discuss working arrangements. Jimmy refuses claimant’s requested adjustments. Leslie agrees – S. 20-21 EqA.

193 A key meeting took place on the 29 June 2016 between the claimant, Lesley Biddiscombe and Jimmy Thompson to discuss the claimant’s working arrangements as the claimant’s wanted to work part-time and more flexibly. Notes were taken at the meeting which record the claimant stating, “hours during week have averaged around 30 pw but **wd like to do couple @ home** so 32 hours...still having more issues in a morning than afternoon” [the Tribunal’s emphasis]. The notes record Jimmy Thompson pointing out “**diff working at home is when on submarines**” [the Tribunal’s emphasis]. The claimant’s response was “on current project none of the work has been restricted, all done on the CN network. If need to go to Derby and meet people wd do that.” The evidence before the Tribunal was that the work carried out by the claimant was unrestricted because the claimant was largely working at home, and the respondent was attempting to unsuccessfully take control of the situation.

194 There is no evidence a decision was made on the claimant’s request and the Tribunal finds, contrary to the claimant’s allegation 53 referenced above, Jimmy

Thompson had not refused the claimant's request with Lesley Biddiscombe's agreement and the claimant's allegation to this effect calls into question her credibility and the unreliability of her evidence.

195 Following the meeting Lesley Biddiscombe immediately emailed the claimant at 16:00 attaching a flexible working application form as discussed which will "kick the process off." The claimant was also referred to occupational health. This is direct evidence that the working arrangement requested by the claimant was not refused, and goes directly to her credibility. Lesley Biddiscombe's immediate action reflects her concern and the respondent's attempts to try and address the situation proactively.

Occupational health report dated 12 July 2016

196 In a report dated 12 July 2016 the occupational health advisor wrote "**I understand from you and Ms Haigh that her sickness absence has increased in the last few months...**I cannot see a particular pattern regarding the sickness absence. **Ms Haigh acknowledges within a month she may have at least 4 days off work. I believe that this is usually when she has not been able to attend work by lunchtime.** In my opinion Ms Haigh is fit for work with adjustment. Ms Haigh has described the adjustment that has been in place so that she can attend work later in the mornings, however this currently appears to be exacerbating her anxiety symptoms, which in turn impacts on her [disability]. **To relieve this cycle, it may be beneficial if Ms Haigh could work from home when she is experiencing increased symptoms as an adjustment,** if this is operationally possible, as this may enable her to be more productive and therefore may alleviate the other symptoms as well...if this could **be put in place on a temporary basis initially and could be reviewed as to whether this approach has enabled some of the symptoms to settle.**" A number of recommendations were made to provide the claimant with the technology necessary for her to work from home repeating again it was a "temporary adjustment....is fit to continue in her current post" [the Tribunal's emphasis].

197 It is notable that despite the claimant's protestations at this liability hearing she acknowledged to occupational health the fact that her sickness absence had increased, despite the adjustments carried out. It is accepted between the parties that during this period the claimant was not working in the office for some of the time, and she worked from home.

Claimant's flexible working form

198 On 20 July, 3 weeks after the claimant had been sent the flexible working application, she submitted a completed form seeking a permanent arrangement. The current working pattern showed 7.6 hours Monday to Friday when in fact that was not the claimant's pattern of working at the time. The table required "current working pattern" not contractual hours, and the evidence before the Tribunal was

the claimant was not working her contractual hours and was working later in the afternoon and not morning.

199 The revised working pattern offered by the claimant was 7 hours a day and 5 hours on a Friday with the claimant working 10.00 to 18.00 for 4 days, and 16.00 on a Friday. The claimant recorded “The workday will often begin at home. I will come into the office as soon as my symptoms allow. There needs to be flexibility around the time of arrival at the office. **I will make every effort to make myself available to respond to phone calls/emails at home with the constraints of my disability**” the Tribunal’s emphasis. It is notable the claimant did not refer to suitable work not being provided, and she was making it clear to the respondent that with a late start when required, she could work a 32-hour week.

200 Withing the body of the application in response to the question “describe how you think the effect on your department and colleagues can be managed” the claimant responded “Good use of comms. Workload to be managed accordingly. **Already discussed and agreed with Lesley Biddiscombe and Jimmy Thompson**” [the Tribunal’s emphasis] undermining allegation 53 that Jimmy Thompson refused the adjustment and Lesley Biddiscombe agreed, when clearly on the claimant’s own admission at the time an agreement had been reached and on the strength of it the claimant frequently did not attend the office. It is notable the claimant indicated she would make herself available for phone calls, and yet, later when she refused to make the calls, maintained she was unable to do so despite the respondent’s expectations based on the claimant’s offer that communication by phone and email was possible when the claimant was at home.

201 Jimmy Thompson emailed Lesley Biddiscombe on 4 August 2016 at 17.24 that the claimant “has stopped coming into work and appears to be working from home.” Lesley Biddiscombe noted the claimant had been in work on the 3 August. In response Jimmy Thompson confirmed the claimant had not turned up into the office and “there have been emails from her email account which suggests that she has decided to work from home the whole day.” It is clear from the tone of the emails Jimmy Thompson was frustrated because he was expecting the claimant to attend the office more in order that she could fulfil her full role, including mentoring, training and guiding junior employees, when the adjustments suggested by the claimant had been put in place. In oral evidence Jimmy Thompson confirmed throughout this period the claimant had the facility to work from home and did in contrast to the claimant’s evidence that reasonable adjustments had not been made and she was not allowed to work at home. It is clear from the contemporaneous documents the claimant was working from home and the Tribunal found the claimant to be an inaccurate historian in relation to the facts she presented to further and strengthen her claim.

5 August 2016 meeting between claimant, Jimmy Thompson and Lesley Biddiscombe

Allegation 56: The claimant explains more about her condition, how it affects her life and ability to do day to day tasks, or sometimes to leave home, and how most of the time she is still able to work at home. The claimant confirms she considers this a disability in line with the Equality Act. Jimmy Thompson's behaviour is dismissive. He shows a lack of care or belief – S. 13 & 15 EqA

202 The claimant met with Jimmy Thompson and Lesley Biddiscombe who was acting in the position of HR support, to discuss her flexible working application on 5 August 2016. Notes of the meeting was taken by Lesley Biddiscombe.

203 All the claimant's requests set out in her flexible working form were granted.

204 The agreement and expectation was that the claimant would be in the office by 10am, but there was flexibility if she needed to arrive later and if this was the case, Jimmy Thompson would be informed. From Jimmy Thompson's viewpoint the claimant had stopped coming into the office and "appeared to be working from home." The Tribunal concluded on the evidence before it that Jimmy Thompson had no control over the claimant, was not managing her performance (or lack of it) and did not understand the extent of the work she was carrying out because he took the view, she was a highly qualified professional who should not be micromanaged. Jimmy Thompson was pleased an agreement had been reached via the flexible working application submitted by the claimant, and contrary to the claimant's criticism on cross-examination, he did not think there was a requirement to set in place hard and fast rules about when the claimant was to attend work and when she would be working from home.

205 As far as Jimmy Thompson was concerned, he took the view the claimant, a professional, would attend work as and when she could with the expectation that the claimant's attendances in the office would increase even if she attended work after 1pm, and let him know when she could not. This arrangement takes trust between employee and manager, and in Jimmy Thompson's mind this trust was breached by the claimant soon after the flexible working form had been agreed. The result was a total breakdown in their relationship as set out below and so the Tribunal found.

206 After the meeting Jimmy Thompson and Lesley Biddiscombe discussed the claimant's application, and Jimmy Thompson accepted it pointing firmly to the fact that he believed the claimant, and he did not show any lack of care or lack of belief as alleged. The claimant would work 32 hours to include working at home when unable to come into the office. The core hours set out by the claimant in her application were agreed "flexibility around the time of...arrival but we expect her to be in the office by 1pm. If she's not able to come into the office she needs to let her manager know by 11am...or nominated deputy."

207 In oral evidence Lesley Biddiscombe confirmed no limits had been placed on the claimant as to the number of occasions she could work from home, and that this was left “wooly” when in hindsight perhaps it should not have been. Jimmy Thompson took the view the claimant’s contract was not home working; she was required to come into the office and the homeworking occasions would be minimal given the respondent’s agreement that she start work at 1pm when necessary, with a view to the claimant’s attendance improving with the adjustments in place.

208 In short, as a result of the adjustments the respondent expected less homeworking and not more, and it did not occur to Jimmy Thompson the claimant would work more at home under the flexible working arrangement and not less and she would refuse to keep him informed by 11:00am. When the claimant was suffering from the effects of her disability the expectation was that the claimant’s workday would start at home, and she would ring her line manager or deputy by 11am to confirm if she was able to come into the office by 1pm or not. No specific number of homeworking days were agreed, they were to be only when necessary, with the expectation that the claimant’s management of her condition coupled with the respondent’s reasonable adjustments would assist her attending the office, albeit in the afternoon.

209 It was agreed Lesley Biddiscombe would report back to the claimant and finalise the agreement.

24 August 2016 telephone meeting claimant and Lesley Biddiscombe.

210 Jimmy Thompson did not attend the telephone meeting. He did not attend because he found the claimant difficult to deal with and his intention was that the decision he had made, and he alone, were to be communicated via Lesley Biddiscombe in her capacity of an impartial HR professional who had and continued to provide HR because for Jimmy Thompson “it was a complex case.” In cross-examination of Lesley Biddiscombe the claimant suggested she was a decision maker, which was denied, and the Tribunal found overwhelmingly Jimmy Thompson’s evidence that he was the only decision maker was credible, and Lesley Biddiscombe provided advice and guidance on policies, procedures and consistency of treatment, with Jimmy Thompson making all of the decisions. Having heard evidence from both Lesley Biddiscombe and Jimmy Thompson it was apparent to the Tribunal that Jimmy Thompson was most definitely the manager in charge, he would not have been dictated to by anyone from HR, and contrary to the claimant’s allegation he was the sole decision maker.

211 The agreement reached with the claimant was confirmed as follows:

1. Working hours 10.00am to 18.00pm Monday to Thursday.
2. Working hours 10.00am to 15.00pm Friday
3. Work an additional hour on Fridays to 16.00pm to accrue 6 lieu days.

4. "There will be some flexibility around her time of arrival, but we expect her to be in the office by 1.00pm."
5. "If she's not able to come into the office she needs to let her manager know (JT) by 11.00am. If her manager isn't available, then she needs to contact his nominated deputy."

212 The claimant sent Jimmy Thompson with a draft communication informing her team of the changes. The claimant's draft referenced she was working "slightly part-time...and will involve some working at home. **My usual start time will be 10am, but often at home, coming into the office later in the day...**" [the Tribunal's emphasis].

Allegation 58: Shortly after the agreement on reasonable adjustments Jimmy Thompson did not intend to follow this agreement. Adjustment to trigger points for disciplinary action re sickness absence was not discussed – S.20-21 EqA.

213 Jimmy Thompson in an email sent on the 6 September 2016 supported the claimant's suggestion that she should inform the team of her new working arrangements. However, he made it clear (1) that the claimant was to contact him or Helen Seals "by 11am if you will be later than 11am." Telephone numbers were provided. The claimant's wording was changed by Jimmy Thompson to the following "I have a new working pattern following a consultation with occupational health and HR. My new working hours are from 10am to 18.00pm Monday to Thursday and 10am to 15.00pm Friday. **I will try to make it into the office in good time but have agreed to be in by 1.00pm at the latest, Jimmy or Helen would be able to advise if I am arriving later. Where I am unable to be in the office in the morning, I will be available by link, or email or mobile (number below)**" [the Tribunal's emphasis]. It is clear from this communication Jimmy Thompson was concerned with integrating the claimant into the team and facilitate them working together both in the office and when the claimant was working at home. The clear message to the claimant was that in order to achieve team working she was required to communicate her whereabouts, and this required the claimant to make contact no later than 11.00am. This requirement was key to the respondent agreeing the flexible working application and at no stage did the claimant suggest (a) she would not be in the position to communicate her whereabouts by 11am by phone or email, and (b) that there were times when she could carry out work i.e. send work-related emails to internal and external recipients but not inform Jimmy Thompson or any other nominated deputy of her intention to work at home or the office by 11.00am.

214 There is no evidence to the effect Jimmy Thompson did not intend to follow this agreement, and the Tribunal finds that this was not the case. There was no adjustment to trigger points for disciplinary action re sickness absence, the

adjustment was a 50% increase in the number of attendances that would trigger a capability investigation and not a disciplinary investigation. This had been discussed and agreed earlier as set out above.

Allegation 57: Jimmy Thompson refuses to allocate Tina-Jaine to appropriate work – S.13 EqA Aug/Sept 2016.

215 The 6 September 2016 email reflected Jimmy Thompson attempting to manage the department and the importance the team leader and the team being made aware by the claimant of her whereabouts during the working day.

216 There was no satisfactory evidence the claimant was not allocated satisfactory work and she continued to be involved in several projects including EDF Heat Exchange referenced above, as submitted by the claimant.

The new contract issued 12 September 2016.

217 On 12 September 2016 the claimant was issued with a new written contract reflecting the agreed change to her working hours including flexibility around the time of arrival. The claimant was expected to be in the office by 1pm, if unable to do so let her manager or a nominated deputy know by 11am. There is a reference to the new working pattern beginning on 1 September 2016. The contract reflected the following:

1. The claimant's designated place of work was Warrington and not the claimant's home, homeworking was to be reviewed at 6 monthly intervals, with 12 weeks' notice ending homeworking. The homeworking was to be risk assessed. In cross-examination the claimant had difficulty understanding her contractual base at work was the office in Warrington and not her home, despite the contract which made the position beyond doubt.
2. The agreed new working patterns was 7 hours Monday to Thursday and 4 hours on Friday as requested by the claimant. The claimant agreed to the terms that "expected" her to be in the office by 1.00pm, and if she was not able to come in to let the respondent know by 11.00am.

218 Four days later the claimant emailed Jimmy Thompson on 16 September at 11.28 stating she was unable to come into the office "but I am working from home." The claimant did not say her absence was attributable to a flare up of her disability, but because "I had a long day yesterday." The claimant did not provide an explanation why she had not made contact by 11.00am as previously agreed. Jimmy Thompson was exasperated by the claimant's attitude to the new contractual terms, when 4-days after the written contract had been sent to her, she was in default. This set the tone for what followed.

219 In cross-examination it was put to the claimant she was being intentionally disruptive by her behaviour because Jimmy Thompson was promoted above her. In response the claimant denied this was the case. It is notable that the emails informing Jimmy Thompson of when she was not coming into the office were all sent after 11am during this period. For example, on 3 October the claimant wrote at 11.37 “I plan to be in later, but I’m not sure what time yet.”

4 October 2016 emails

220 The Tribunal has taken considerable time to understand the email exchanges scattered within the bundle sent on the 4 October 2016, given the importance the claimant gave this information during her cross-examination. The exchange of emails unfolded as follows:

220.1 At 9:40 Jimmy Thompson requested feedback regarding the claimant’s performance on the projects she was working.

220.2 At 9:53 the mechanical design engineer working in nuclear for the respondent on the EDF project, emailed Jimmy Thompson commented that whilst the claimant was “very knowledgeable and thorough...all documents were delivered after the agreed date... but no indication was given that the deadlines would be missed until a point in which nothing could be done to resolve the situation”. He commented that it should not be necessary to micro-manage a senior principal engineer.

220.3 At 9:58 the claimant allegedly emailed Jimmy Thompson according to the claimant’s records. The claimant maintains she was working at home. The Tribunal was not with a copy of the email, and there is no satisfactory evidence before it to the effect the claimant had informed Jimmy Thompson that she was or was not in the office, concluding on the balance of probabilities that she had not.

220.4 At 10:33 Jimmy Thompson asked the claimant for an “overview of the forward programme for yourself” and an estimate of work taking her to “the end of the year and the relevant deliverables to the end of year.”

220.5 At 10.48 the chief engineer emailed Jimmy Thompson regarding feedback on the claimant and one of her colleagues that he had only just taken over the role the day before and gave “second-hand feedback” that they had both provided “good support.”

220.6 At 14.08, three and a half hours after Jimmy Thompson’s request for information sent at 10.33am, the claimant responded, “Sorry I have no information on this,” and referred the query to the mechanical engineer

(who had provided the email at 9.53 that day) in charge of the project who was copied into her reply. The mechanical engineer replied to the claimant and Jimmy Thompson “the last two deliverables which should have been issued to the customer on 16 September are still outstanding. He wrote, the claimant “may only be required to address any comments that come back from the customer” on the last two deliverables which were still outstanding. The main EDF contract had yet to be signed, and when it was “the scope of the remaining work will be looked at...at this point TJ [the claimant] may be required to support.”

220.7 At 15:22 the claimant asked Jimmy Thompson for the conference link phone number. This email was sent both Jimmy Thompson’s email addresses including the confidential email address used in the secure submarine room.

220.8 In a response sent at 15:26 Jimmy Thompson wrote “Sorry I’ve been in meetings all afternoon; I was expecting you in the office as I’ve had no notification that you would not be in for 11am or 1pm?” The claimant did not respond despite the fact she was not keeping to the agreement as she had not informed him whether she was working in the office or at home.

220.9 The claimant emailed Jimmy Thompson stating she could not communicate in the conference because her laptop had no microphone. The undisputed evidence before the Tribunal was that Jimmy Thompson had moved the team meeting to the afternoon in order that the claimant could attend as he understood she would be in the office at the team meeting, not attempting to connect from home and so the Tribunal found.

220.10 At 17.42 the claimant emailed Jimmy Thompson stating she had a medical appointment in the morning and “should be in the office in the afternoon.” This was the first reference to the medical appointment and the fact it was taking place the next morning when Jimmy Thompson expected the claimant to be at work if possible. This email was also sent both Jimmy Thompson’s email addresses, including the confidential email address used in the secure submarine room. Apart from the 15.22 email, all other emails were sent to one address and not the confidential email address. The Tribunal found the fact the claimant had and used both email addresses indicated communications could be sent to and read by Jimmy Thompson when he was working inside and outside the secure submarine room.

220.11 The remaining emails which the Tribunal has not had sight of, appear to indicate the claimant was working on projects at home.

221 Jimmy Thompson was concerned. The department was losing money, between one to two million pounds and the team needed to generate revenue. He had inherited a department consisting of 20 employees, and a number had gradually left because of the lack of work and a lot of them “sitting on their hands.” The department ended up acting as consultants and producing tenders/bidding for work, including the claimant as the nuclear services work had dried up in 2015. Jimmy Thompson was responsible for managing a situation that was “far from ideal” and the claimant, in her role of senior principal engineer was perceived to be key to the generation of work. He believed she possessed the expertise to attract new contracts into the team, coupled with her mentoring and training team members. Jimmy Thompson had been “trying to improve” the claimant’s “perception about getting in work” and his concern was if deliverables were late this could have an impact of the claimant’s ability to generate and attract work in the future.

222 In an email sent at 15.22 on the 4 October 2016 by the claimant to Jimmy Thompson she requested his telephone number. There was no contemporaneous documentary evidence that the claimant tried to make contact before 15.22 and the Tribunal finds she had not attempted to communicate with Jimmy Thompson or anyone else by 11.00am as per the agreement, with the result that Jimmy Thompson did not know if she was working at home or not, and whether she would be attending the office to work with the team. In short, Jimmy Thompson was having difficulties managing the claimant, who did not want to be managed by him and so the Tribunal found. In contrast to the claimant’s evidence on cross-examination, she was not “doing all I could to minimise the impact of the health issues on work”. It was not apparent to Jimmy Thompson because the claimant could not comply with her part of the agreement, and it crossed his mind that there may be a conduct issue. He wanted to keep separate conduct and capability and took HR advice. He decided to wait and see if the flexible working agreement would produce an improved office attendance by the claimant; it did not.

223 On the 7 October 2016 Jimmy Thompson emailed Alex Warren and Lesley Biddiscome for advice as follows:

223.1 “I am...disappointed to report that I think Tina’s behaviour is below the standards we [set] and that she has broken our rules.” He referred to the flexible working arrangement agreed to accommodate the claimant’s health issues which resulted in “high absence rates and the problems completing her working hours in the normal working hours and arrangements of the office...there were some symptoms attached to this working pattern that allowed flexibility for Tina-Jaine to work at home when her symptoms were such that she could not make it into the office by 10am. In these instances, Tine-Jayne was expected to let myself of my nominated deputy (Helen Seals) aware that Tine Jaine was having difficulty by 11am.”

223.2 Jimmy Thompson referred to the earlier meeting held on 13 September 2016 “organised due to early breaches from Tina-Jaine against the terms of the flexible working arrangement, it was hoped this information action would result in a change of behaviour of Tine-Jaine such that she could meet the requirements of the business. Alex stated that Tina-Jaine should be making contact by phone (voice) when she thought it was unlikely, she could make it for 10:00am or 13:00pm.” Jimmy Thompson referred to the 16 September 2016 email recorded above, and referenced instances reported to him when the claimant failed to meet her reporting commitments, and the 3 October 2016 email sent at 11.37am when the claimant “eventually made it into the office by 14.20pm.”

223.3 Jimmy Thompson complained about the 4 October 2016. “On Tuesday 4 October I was busy with multiple meetings and received no correspondence regarding ability to come into the office from Tina-Jaine by 11:00am. Note that I had some correspondence relating to a query I had sent earlier in the morning requesting feedback from a customer for PDR purposes. At 15:22 I received a request for a phone number to dial into a team meeting...in the evening of the 4 October I received an email from Tina-Jaine stating she had a medical appointment...There was no prior notice of this appointment and Tina-Jaine had included internal customers (project leads) too...Tine-Jaine made it to work by 13:05 on the 5 October. On Thursday 6th October there was no notice from Tina Jaine by 11am and she did not turn up to the office at all. On Friday 7th October there was not notice from Tina Jaine by 11am and the sign-in sheets records her entry to the office at 12.55. I have tried informal action such as coaching multiple times with Tina Jaine. Unfortunately, this has not had the desired results. Can you please advise...also please be aware that similar conduct related issues have previously been recorded with MSAL?”

224 In relation to the 4 October 2016 Jimmy Thompson was not complaining that the claimant was not working; his complaint was that she had not informed him whether she was working in the office or at home and he had expected her to be in the office by 1pm and attend the team meeting that afternoon. In cross-examination the claimant took Eddie Marrett, who heard her grievance, to a document she had provided at the time, maintaining Jimmy Thompson had “visibility” of the fact that she was working that day. The Tribunal has considered the evidence it was taken to by the claimant as to the communications that took place on the 4 October 2016; Jimmy Thompson’s communication to HR and his line manager asking for advice was not concerned with the claimant’s visibility at work. The issue concerned the claimant phoning in confirming whether she was going to be in the office or not.

225 The claimant relies on a screen shot of a phone that set out several dates (but not times) when the claimant states she rang Jimmy Thompson. One of the dates is the 10 October 2016 against which two calls were made at an unknown time. The screen shot reflected there were no calls between 6 August and 10 October 2016. On the 10 October the claimant maintains she sent a message "Sorry I am unable to come in" which Jimmy Thompson denied receiving. There was no time against this message, and on the balance of probabilities the Tribunal preferred Jimmy Thompson's evidence taking into account the claimant's credibility issues. The Tribunal concluded that the claimant had failed to communicate her whereabouts in accordance with the flexible working agreement and there was a possible conduct issue relating to a failure to comply with a reasonable management instruction to which she had agreed.

226 The claimant in cross-examination of Eddie Marrett referenced 16 emails she sent out on the 4 October 2016 to several recipients including Jimmy Thompson the first sent at 9:58 with the last at 18.54, six of the emails had Jimmy Thompson's name included, which does not assist her given the issue at the time was the claimant's refusal to comply with the flexible working agreement and make contact as agreed.

11 October 2016 meeting

227 The claimant, Jimmy Thompson and Alex Warren had a meeting on 11 October 2016.

228 In an email sent on 18 October 2016 Jimmy Thompson confirmed what had been said in the meeting as follows:

228.1 Alex Warren took the view the claimant did not give a plausible explanation for why she could not make contact, and he concluded she did not think it was important to make contact.

228.2 The meeting emphasised the requirement that the claimant was expected to contact Jimmy Thompson or Helen Seals by 11:00am and in "instances where the claimant was having difficulties modified core hours in the office would commence at 13:00pm in the afternoon.

228.3 The recent attendance record in the office and time of notification regarding difficulty to travel was summarised by Jimmy Thompson. It was explained that there were recent occurrences where Tina Jaine had not made contact by 11am and instances where Tina Jaine didn't attend the office at all. There are also instances where Tina has not made contact or arrived at the office throughout the working day.

- 228.4 It was discussed that due to the lack of communication from Tina Jaine the business were often unaware of her location and that this made it difficult for the company to maintain its duty of care for Tina Jaine.
- 228.5 It was reiterated that Tine Jaine should aim to be in the office by 10am unless Jimmy Thompson or Helen Seals know by 11am if she was having difficulty.
- 228.6 The claimant explained that she “often delayed communication in the hope that her symptoms would ease to the point that she could travel to work.”
- 228.7 It was discussed that from a “duty of care and business planning perspective Tine Jaine should let the business know that she was having difficulty as soon as practicable and that 11am should be considered a limit. It was discussed that this was the same situation for all employees who are suffering with illness.”
- 228.8 The claimant was again provided with two telephone numbers for Jimmy Thompson and one for Helen Seals.
- 228.9 “Alex asked Tina Jaine if she understood the rationale and reasoning of the business. Tina Jaine confirmed that she understood the requirements to call in and its origins. Alex stated that should there be a further occurrence, then consideration should be given to escalating the matter for a formal investigation, which could lead to disciplinary action.”
- 229 The claimant did not write in disputing any aspect of the email, and the Tribunal concluded that it correctly recorded the situation as at October 2016, and the fact the Jimmy Thompson and Alex Warren was concerned about her failure to communicate in accordance with the flexible working agreement.
- 230 It is notable in her witness statement the claimant made no reference to this meeting or the fact that she was put under no illusion that the main bone of contention was her failure to communicate, and should the position not be remedied she could be investigated and dealt with under the respondent’s conduct procedure. The Tribunal finds that the actions of Alex Warren and Jimmy Thompson were aimed at managing an employee who did not want to be managed, and whose behaviour was adversely affecting the business in that they were a high-level key professional and yet the line manager did not know when she was going to be working, and where. From a client and team point of view, giving the key position held by a senior safety engineer with mentoring and team

training responsibilities, the claimant's whereabouts was necessary. The claimant was aware team members were reluctant to communicate with the claimant unless they knew she was well enough to work, and the respondent owed the claimant a duty of care whilst she was working at home.

231 On the 12 October at 8:45 the claimant emailed Jimmy Thompson "I currently expect to be in later." On the 14 October at 13.08 the claimant wrote "further to my phone call earlier, I won't be able to come in but I'm working at home" and so it continued in a similar vein. It was as if the meetings never happened, and Jimmy Thompson took the view the claimant's actions were deliberate.

Allegation 63: October 2016 False sick leave records- s.15 EqA

Allegation 64, 65, 66 & 67: October 2016 False sick leave records deliberate- s.15 EqA

Allegation 65: October 2016 False sick leave records deliberate. Jimmy Thompson tells the claimant off for requesting correction to the sick leave record. She tells him she was not sick she was working. He says he doesn't care and insists it is recorded as sick leave. He instructs her to amend her timesheets (which show the work she was working on) to reflect sick leave for those days. His behaviour is very aggressive. The claimant says it may be disability discrimination to misrepresent her sick leave- s.15 EqA

232 In an email sent on 14 October 2016 at 1.19pm the claimant emailed Jimmy Thompson about timesheets asking him "Did you fill in a timesheet on my behalf last week...last week shows bookings I don't recognise. Will correct this."

233 Jimmy Thompson responded at 13.40 "I did fill it out as you were a missing booker. Please change it accordingly."

234 The claimant responded at 13.34 "OK, I have corrected the timesheet. I tried also to correct the sick leave bookings in workday with partial success...I think you will need to approve the deletions before I correct." The claimant took it upon herself to partly correct the sick leave booking before informing Jimmy Thompson, when she was aware only managers could enter the respondent's "Workday programme and make changes.

235 This exchange led to Jimmy Thompson querying the claimant's sick leave records as recorded below. There was no satisfactory evidence before the Tribunal that Jimmy Thompson had acted in the way alleged by the claimant allegations 63, 64 and 65 and the Tribunal found sick leave records were not deliberately falsified by Jimmy Thompson, and his behaviour had not been "very aggressive." Had it been the claimant would have raised this in the numerous emails exchanged, which she

did not. The Tribunal on the balance of probabilities found the claimant had not referred to misrepresenting her sick leave records may be disability discrimination and this was not a protected act for the victimisation complaint.

17 October 2016 request for further psychological treatment.

236 On the 17 October 2016 the claimant requested further psychological treatment. Lesley Biddiscombe took occupational health advice and the consultant occupational physician by email sent on 18 October 2016 confirmed the claimant “already had a considerable number of sessions with Psych Health (20) considerably a lot more than would normally be paid by RR. Long term psychological damage is not normally funded by RR but is a NHS responsibility. **I am unable to make a recommendation...**” [the Tribunal’s emphasis].

Allegation 68: Leslie Biddiscombe advises that the company not support/fund my request for a referral for continuation of the treatment recommended by occupational health (phone conversation) – S.20-21

237 The claimant’s request was declined by Lesley Biddiscombe following occupational health advice. Contrary to allegation 68, occupational health did not advise the respondent the treatment should be continued, and the Tribunal found this was not the case. The respondent ordinarily paid for six sessions per employee, and in the claimant’s case it had paid for twenty sessions and the claimant’s attendance in the office had not improved. In short, a view was taken that the treatment had not assisted the claimant and the Tribunal accept it was not a reasonable adjustment to increase the session from the twenty already paid for in the circumstances.

238 In an email sent on the 18 October 2016 at 11:00 the claimant was sent a record of the meeting on the 11 October 2016, which she did not dispute.

239 In an email sent by an internal contractor on 19 October 2016 at 10.54 Jimmy Thompson was provided with screenshots of the claimant’s deletions on the Workday programme with no entries to replace the deletions and he was concerned the claimant was not recording her sickness absences. The Tribunal found on the evidence before it, Jimmy Thompson had little understanding of when the claimant had been working at home or was absent with sick leave partly due to the minimum information provided by the claimant and the fact, he was managing the whole department and not just one person.

240 On the balance of probabilities, the Tribunal did not accept the claimant’s allegation that Jimmy Thompson deliberately falsified the claimant’s sick records and acted aggressively toward her finding he had not. Deliberate falsification of records required intent, and Jimmy Thompson was confused about the position when the claimant should have been working in the office, instead she was

working at home and yet not well enough to contact him as per the agreement they had reached. Jimmy Thompson assumed if the claimant was too unwell to make contact by phone or email, she was not well enough to work. Jimmy Thompson's decision-making process in this regard was based on inexperience and lack of knowledge of the respondent's policies and procedures, and this was put right by Lesley Biddiscome later. The Tribunal did not accept Jimmy Thompson was intent on building up a case against the claimant, contrary to the claimant's case. Had this been so, he had the opportunity to take the claimant through a capability procedure and chose not to do so.

Jimmy Thompson's email sent on 21 October 2016

Allegation 66: 21 October 2016: Jimmy Thompson emails his view of the above meeting & an incorrect statement about interpretation of the claimant's contract, which seems to limit work at home and detracts from the agreed adjustments – S.15 & 20-21 EqA

Allegation 67: October 2016 onwards Jimmy Thompson bullying the claimant in private

Allegation 73: October 2016: Jimmy Thompson raises conduct allegations re sick leave & related matters to HR.

241 In the 21 October 2016 Jimmy Thompson emailed Alex Warren at 9:53 complaining about the claimant's attendance record "**it is apparent that there has not been an improvement following our meeting.** Phone calls have not been made for the 11am time stated in various agreements and discussions. I recommend that this matter is escalated for an investigation" [the Tribunal's emphasis].

242 Jimmy Thompson relied upon events from 3 October to 20 October 2016 and the claimant's failure to make contact in accordance with the agreement. He found it "difficult and tiresome" to manage an employee who was highly qualified and highly paid and yet chose to disregard the agreement reached. On a common sense reading of the 21 October 2016 email Jimmy Thompson does not raise allegations regarding sick leave and HR matters, Jimmy Thompson took the view at the time that if the claimant had not made contact in accordance with the flexible working agreement, which she had not, he took it that she was not at work in the office or at home, and there had been no improvement.

243 The claimant cross-examined on two of the dates listed when Jimmy Thompson had allegedly deliberately falsified her sick leave records. She referred the Tribunal to the 10 and 14 October 2016 dates she disputed, having been informed by the Tribunal that any disputed dates needed to be cross-examined on.

Accordingly, the Tribunal has concentrated on the two dates disputed by the claimant, concluding the other dates were not disputed and she was absent.

244 At 9.59 on the 21 October 2016 Jimmy Thompson emailed the claimant requesting her to complete five self-certification forms for the dates when he believed she had not been working, including 10 and 14 October 2016, repeating the dates provided to Alex Warren. Jimmy Thompson took the view that once the matter was escalated for investigation it was for an independent investigator to look into it. His main concern was where the claimant was and what she was doing against the flexible working agreement, and this needed an investigation. Jimmy Thompson was not concerned if the claimant was legitimately off work ill, and her disability had no bearing on his attempt to control her failure to make contact and let him know what she was doing. The Tribunal took the view that this was the nub of the case.

245 After the claimant had received the emails, it is notable she sent Jimmy Thompson an email at 10.09 confirming she was “aiming to be in before lunch time.”

21 October 2016 conversation.

246 A conversation took place with the claimant and Jimmy Thompson on 21 October 2016 regarding the claimant changing her absence record on Workday, to which the claimant replied “I may have” when she had. Workday was accessible to managers only. The claimant was informed by Jimmy Thompson it was inappropriate for her to amend her sickness record in Workday “and this must not happen again.” The ensuing discussion is recorded as follows.

246.1 The claimant expressed her view that it was “unfair to record days” when she was unable to attend the office as sickness.

246.2 Jimmy Thompson “reinstated...the conditions of the flexible working arrangement. The flexible working arrangement allowed additional flexibility for you to work from home when your symptoms were such that you would not make it into the office by 10am. In these instances, you are expected to notify myself...or Helen Seals by phone with a time limit of 11am. In instances where you are having difficulty modified core hours in the office would commence at 13:00pm in the afternoon. I stated that instances where you do not attend the office through the day are treated as absence and that self-certification is therefore required.”

246.3 The claimant did not complaint to Jimmy Thompson that it may be disability discrimination to misrepresent her sick leave, and the Tribunal finds there was no protected act.

247 Jimmy Thompson emailed the claimant on 21 October 2016 at 15.33pm recording the conversation they had that day regarding her self-certification for absence and adjustment to the absence record on Workday, the computer programme where absences were recorded by the Friday of each week at the latest as this affected the wage run.

248 The Tribunal concluded from interpreting the email that Jimmy Thompson had taken, the factual matrix and oral evidence it heard that Jimmy Thompson took the view if the claimant had not notified him or Helen Seals by phone by 11am and she had not turned up to work by 13:00pm, the day was treated as absence and self-certification was required. The Tribunal considered Jimmy Thompson's mental processes concerned they could be tainted by disability discrimination if the claimant was not credited for work carried out at home and made to self-certify a sickness absence when she had been working, albeit not in the office.

249 On the balance of probabilities, the Tribunal concluded that Jimmy Thompson believed if the claimant was unable to keep him informed and/or come into the office she was not well enough to work. Jimmy Thompson believed that agreeing to the start time proposed by the claimant of 1:00pm would result in an increased attendance at the office, he was put out that it did not, and unhappy the claimant chose to work at home rather than in the office. In short, he took the view if she was well enough to work, she should be working in the office even if it as limited to 5-hours between 1pm and 6.30pm, and if she was too unwell to let him know about her intentions, she was not well enough to work. The claimant did not provide him with any information about her condition to explain why she could not make contact, and if she was well enough to work, she could not travel to the office. The claimant did not discuss in any detail her medical condition with Jimmy Thompson and so the Tribunal found and did not enlighten him about why she was unable to communicate about her attendance and yet still be able to carry out work.

250 During this period Jimmy Thompson was receiving HR advice about the issue that concerned him the most as recorded in an internal note taken by HR, "there has been no improvement in Tina Jaine's communication with you about her attendance following your reiterating the agreed arrangements and your meeting of the 11 October." In short, informing him or Helen Seals by 11am whether she was going to be absent, in work, working from home or working in the office.

11 November 2016 meeting with the claimant and Lesley Biddiscombe.

251 Jimmy Thompson spoke with Lesley Biddiscombe about the claimant not returning to work after holiday leave and failing to give him notice she would not be working on the 9 and 10 October 2016. He raised the issue of the claimant on the 10 November 2016 emailing at 12.04pm "asking if she could attend a careers fair. Didn't come in though. Four minutes after "not coming in." Now triggered six

absences, we have made adjustments.” The tenor of the email reflects Jimmy Thompson’s frustration with the claimant.

Allegation 71: 2nd complaint of discrimination (1st time to HR). Leslie Biddiscombe says she will look into it. She later denied this – allowing ongoing situation.

252 Lesley Biddiscombe met with the claimant to discuss Jimmy Thompson’s concerns. The claimant complained Jimmy Thompson had asked her to put in self-certification note for some days when she had worked from home. In the contemporaneous note of the meeting Lesley Biddiscombe recorded “TJ feels there may be a DA thing going on and that Jimmy seems to be exacerbating the issue, detrimental to sick pay record. Has been phoning in as requested.” The notes taken record Lesley Biddiscombe “reiterated that working from home is on the odd occasion until she can come in...flexible working letter state revised hours, then says core hours as per local site.” There was no specific discussion about discrimination, and the only reference was to the claimant stating a (“DA”) Disability Act “thing” was going on, and she did not request HR to look into this, there was no indication a grievance was being raised and so the Tribunal found.

253 The Tribunal took the view that even if the matter was not entirely clear, once the claimant made reference to possibility of disability discrimination, it was encumberant on a HR professional to explore the issue further, whether or not they thought there was anything in it. Lesley Biddiscombe had a discussion with Jimmy Thompson as record below.

254 On the same day, at 14.57 Lesley Biddiscombe emailed the claimant confirming under her contract the core hours “means the core hours for the Warrington office...when all employees must be present at work...outside core hours, employees can stagger their start and finish times to suit their individual circumstances. These are flexible hours...you can take my email as being the amendment to the flexible working arrangement letter and keep it with your copy. I’m quite happy for you to do this, but the actual letter can’t be changed.” In the claimant’s case this meant she could work until 6.30pm every day providing she was present in the core hours set out in the flexible working agreement, or later with manager’s consent to 7.30pm. There was no evidence the claimant had ever requested her manager’s consent to work until 7.30pm and this had been refused, and the Tribunal found that she had not.

255 In the claimant’s case it is conceivable were she to start work at 1:00pm as a result of her disability preventing her from working the morning core hours 10:00am to 12:00, she could work until 6.30pm or with manager’s consent, 7:30pm. The claimant’s contractual working hours were 32, with the result that if she were to limit her work to afternoon only, she could work twenty-seven and a half hours, leaving four and a half hours short to be covered either in the mornings

or by 7.30pm with manager's consent. The Tribunal noted the core hours were those agreed by the claimant, and she was given the facility to work from home in the mornings taking into her account her disability. Lesley Biddiscome was aware of the background and the adjustments made, together with the claimant's refusal to keep her manager informed, and she took the view there had been no discrimination and was referring to a "DA thing going on" with Jimmy Thompson because he was trying to manage her, and the claimant was deflecting.

256 After the meeting with the claimant Lesley Biddiscome discussed the position with Jimmy Thompson and concluded he was ignorant of the correct process if any employee worked part of a day, even if it was one hour. She informed him that the claimant, in such circumstances, should not be recorded as having taken sick leave but classed as working. Following their meeting Lesley Biddiscome researched the position further and wrote to Jimmy Thompson with the relevant extract from 'Your Hr' confirming if an employee worked part of a day there was no need to record it as an absence on Workday. Jimmy Thompson followed this procedure thereafter. Contrary to the claimant's allegation Leslie Biddiscombe did look into it, and she did "not allow" an ongoing situation.

257 After being told this Jimmy Thompson did not change the claimant's record, rather he left it for the investigation to sort out, which is what happened as none of the disputed dates went through to a disciplinary hearing. The evidence from the Tribunal was that the claimant had omitted to record her sickness absence and she was required to put this right. It appears to the Tribunal that the position was confusing for a manager who had no experience in such matters, and it was not for Jimmy Thompson to go searching for evidence that the claimant had worked on a particular day as submitted by the claimant. It was for the claimant to have kept Jimmy Thompson informed in accordance with the flexible working agreement which she did not on numerous occasions, and Jimmy Thompson took the view the claimant was not working. This view had no causal link with the claimant's disability, and the Tribunal found on the balance of probabilities, Jimmy Thompson's sole concerns was not being kept informed, not knowing if the claimant was working on a particular day and at a particular time, not knowing if she was available for team contact and communicating with the team, and not knowing if the claimant was meeting deadlines and "deliverables." All of these matters had no connection with the claimant's disability; and are part and parcel of managing a team and individual employees, and so the Tribunal found.

Allegation 72: The claimant emails Jimmy Thompson & Leslie Biddiscome regarding Jimmy Thompson's actions. She highlights disability discrimination & false data about her sickness absence – S.13 EqA.

258 In an email sent to Jimmy Thompson and copied to Lesley Biddiscome and Alex Warren at 17.42 the claimant set out her understanding of the agreement, which

was “when I am unable to get to the office, if I am able, I will work at home...This is not sick leave...only 3 of the dates you mentioned...are sickness absence. The other 5 dates were full days worked, in line with my part-time hours...I am happy to fill in the self-certification forms for 12/10, 13/10 and 19/10...a further point discussed in our meeting on 21/10/16 but not mentioned in your email below, was that you told me to amend my SAP timesheet records for the time I worked at home all day, deleting the bookings to change it to sick leave. I stated that the majority of time I had been working at home, this had been on billable project work...I have demonstrated that I can work productively at home...even if my illness makes me unable to leave the house...to disregard the work I have done at home and record it as sick leave would result in a false high sickness record, an disadvantage my ability to fulfil my role and disadvantage my career opportunities, and as such could constitute discrimination under the Equalities Act...using sickness leave records to influence an individual’s progress, career opportunities or grounds for dismissal, are considered discrimination under the act if that sick leave relates to disability.” It is notable that (a) the claimant admitted not properly recording her sickness absence, (b) during this period the claimant was under no threat of dismissal and (c) nor was her progress/career opportunities at risk. The issue was self-certification as the claimant had not completed the required forms and was not making contact.

259 On the 14 November 2016 the claimant sent in self-certification absence for the 12, 13 and 19 October 2016, covering absences that had taken place a month earlier and the reason given as unspecified as “illness.” There were valid concerns with the claimant self-certifying her absences, and it is notable that there was a vast number of emails from the claimant to various individuals which she copied to other managers at a time when Jimmy Thompson was carrying out his own work, largely in the submarine room and managing a team of professionals.

15 November 2016 meeting

Allegation 74: 15 November 2016: HR act on Jimmy's complaint immediately – S.15 EqA

260 A meeting took place between the claimant, Jimmy Thompson and Lesley Biddiscome concerning the fact that she had not been making contact and had not turned in to work.

261 The email chain records the claimant was still not communicating by the required time, for example on 15 November at 11.48 when she informed Jimmy Thompson “I expect to be heading in the office in about an hour.” The meeting explored the claimant’s lack of contact, absences and her failure to inform the respondent. There were clearly contact and absence problems, and the claimant was informed that conduct issues are to be “escalated to an independent manager who will review independently. Expectations were clearly set out with both Alex and myself. Haven’t been the expected change of behaviour.”

262 The claimant's response was the emails she had sent "must have been held up," she had left a voicemail on the desk phone and "you are a very difficult person to reach," a reference to Jimmy Thompson, who was fully aware he was contactable, the claimant had two telephone numbers and email address including the email used in the submarine room, and contact details of Helen Seals. At this meeting on 15 November 2016 Jimmy Thompson knew the claimant was not telling the truth. The claimant admitted making "mistakes" on her timesheet and there were issues with her "signing in earlier than physically coming into the office." Jimmy Thompson sought to distance himself from any investigation, and the Tribunal took the view that the issues raised and the claimant's responses did not give rise to discrimination; they were workplaces matters that required investigation and resolution as it was apparent Jimmy Thompson had reached an impasse in his failure to manage the claimant, who refused to be managed by him and could not see why she should report her movements to him despite having agreed to do so in the flexible working agreement.

263 At the very latest by the 15 November 2016 the working relationship between the claimant and Jimmy Thompson had irretrievably broken down, and the only way of remedying this would have been to leave the claimant to her devices managing her working day as she saw fit without any liaison with managers, the respondent was not prepared to do this with the result that all the parties were aware litigation in the future was inevitable and were gearing themselves up for this eventuality.

264 The 15 November 2016 meeting notes were handed to the claimant, which she did not dispute. The claimant was handed a notice of investigation dated 15 November 2016 which set out the following allegations:

264.1 You failed to attend work on the 8th and 9th November 2016 and didn't contact the company on these dates.

264.2 There are discrepancies in your timesheets and the actual time you attended work on the 14 November 2016.

264.3 You are failing to meet the requirements of your flexible working agreement (mainly during October 2016).

264.4 Your absences are becoming frequent and not sustainable (over a 12-month period).

265 The notice of investigation was produced by HR at the request of the investigating office Annemarie Schilling-Jones, engineering business manager.

266 The issue that concerned Jimmy Thompson the most was 264.3 because he had not managed to resolve that problem, and the Tribunal accepts he did not bring up the claimant's frequent absences, this was a matter introduced by HR who had been communicating with Jimmy Thompson throughout the 12-month period concerning the claimant's poor absence record and Jimmy Thompson had refused to take it any further by closing the case. The Tribunal took the view that had Jimmy Thompson been bullying and victimising the claimant as she alleged, he would have taken the first opportunity to progress any case against her down the capability procedure, and the fact he did not reflects his genuine attempt to enter into discussions with the claimant, and agree adjustments that would benefit her and the business jointly.

267 At 11.35am the next day being the 16 November 2016, the claimant emailed Jimmy Thompson "I am unwell and won't be working much more today" and at 10.31 on 17 November "I am expected to be around earlier." It is notable that the first email was sent to Jimmy Thompson's office address, the second was sent to both his office and the confidential address used in the submarine room which was evidence before the Tribunal that the claimant had access to both and the ability to communicate even if Jimmy Thompson was working in confidential and restricted room, contrary to the suggestion given by the claimant in cross-examination.

268 On 16 November 2016 at 13.37 following a conversation between Lesley Biddestone and Jimmy Thompson, an extract of YourHR was copied and paste setting out what happens when an employee leaves during their working day.

269 During this period the claimant was sending in emails concerning her symptoms, for example, 21 November at 11.03 "I am struggling with symptoms today, but I am still hoping to come in later. I am working in between" and at 12.03 "update – I am unable to get my symptoms under control, so I won't be in today. I will do what work I can at home." On 22 November 2019 11.05 the claimant wrote "I am still struggling with symptoms but still trying to come in, 24 November at 10.20 "I expect to be in later" 25 November 2016 at 8:49 "I am trying again to get symptoms under control and come in today" and so on. It is clear from this evidence even if the claimant was experiencing symptoms as a result of her disability, she was able to send emails to Jimmy Thompson at both his email addresses before 11am in direct contrast to the evidence she gave at this liability hearing, which raised further credibility issues.

Allegation 75: 16 November 2016 HR support misrecording of work at home days – allowing ongoing situation

270 There is no evidence of this; on the balance of probabilities the Tribunal found far from ignoring the situation HR advised Jimmy Thompson on the correct process, which he then followed.

Allegation 76: approx. November 2016 Data from a swipe system is incorporated into the disciplinary allegations. Anne Marie confirms swipe data comes from car park barrier. The site has no swipe system forming part of employee time recording systems – S.15 EqA.

271 Jimmy Thompson and other employees took the view that the swipe card was one way of establishing when an employee was in the office because it was an electronic record of when they entered and left the site. The fire register also recorded attendance for health and safety purposes and coupled together they confirmed when an employee was working in the office. Apart from the swipe card and fire register there was no other system of time recording and so the Tribunal found, and the claimant is correct that there was no time recording system, However, it was expected that the claimant correctly recorded on the fire register the time when she entered and left the building, and when she did not this raised a question mark over her conduct bearing in mind the earlier issues with the claimant's record of her attendance in the office, that was investigated but nothing came of it.

22 November 2016 disciplinary investigation meeting with claimant

Allegation 77: 4th complaint of discrimination – S.15 EqA and allowing ongoing situation.

Allegation 78: December 2016 the claimant finds more false sick leave records, totalling 15 days from Jan-Oct. 13 of these she was working, 2 were bank holiday/weekend (01 & 02 Jan) – S.15 EqA and allowing ongoing situation

272 On the 22 November 2016 an investigation meeting took place with the claimant and Annemarie Schilling-Jones who was supported by Lesley Biddiscombe. Notes of the meeting were produced. The claimant was unable to produce evidence that she had informed Jimmy Thompson by phone by updating him when she was sick on 8 and 9 November 2016 following taking leave, and the contemporaneous documentation reflects that she had not. The claimant stated she had emailed Jimmy Thompson but was unable to check her phone history. The discrepancy on the 14 November 2016 timesheet was discussed when the claimant recorded, she was at work one hour before her swipe record. The claimant explained she could have come in with someone else who held the door open. The flexible working arrangement was discussed, and the claimant should either be in the office by 10:00am or call in by 11:00am and she had not done this, to which the claimant explained was attributable to the "unpredictability" of her medical condition.

273 The notes record Annemarie Schilling-Jones stating "the contract had been put together to help Tina Jaine and there was now a worry that she was moving away from it. There are 2 people to call, and it is important from a workload point of view

that work is covered, so it is important that Tine Jaine contacts us...Tine Jaine said she did not want to discuss her condition with others in the office. She said she always liaises with the programme manager from submarines, and she agreed in the future to adhere to that requirement.

274 The notes record the claimant's response when she agreed to what was being said, "but there would have to be a caveat, I may say yes I'm coming in but may not get better and may not be able to, so the information may change. I have tried to do this and there has been an occasion where I've had to say I can't come in now."

275 The claimant did not object to the issues set out above being raised; she did object to the attendance at work record saying, "she felt there was a possibility that there might be disability discrimination going on." The claimant did not clarify what the discrimination alleged was. Lesley Biddiscome, who was aware of the allegation and the fact it was linked to some of the days being marked as sick leave when the claimant had worked at home, stated "we are here to investigate the case and whilst we would listen to what Tine Jaine had to say, we were looking at the facts of the case, if any form of discrimination was found that would be dealt with separately."

276 In her written statement at paragraph 157 the claimant wrote that she had repeated her concerns about discrimination "but Lesley refuses to consider this within this meeting. I explained it was vital to understanding the credibility of Jimmy's allegations. No action was taken about this." There is no contemporaneous to support the claimant's version of events, and the Tribunal finds Lesley Biddiscome had not refused to consider discrimination, the reverse, she indicated that the claimant would be listened to and if the facts of the case show any form of discrimination, it would be dealt with separately. In any event, none of the matters relating to the discrepancy in time recording resulted a disciplinary hearing. The Tribunal concluded that the claimant's written statement at paragraph 157 could not be relied upon, was not supported by the contemporaneous notes that were undisputed by the claimant and gave further rise to issues of credibility on the claimant's part.

277 The Tribunal found that at the investigation meeting it was made clear to the claimant that she could discuss the alleged discrimination and if "any form" of discrimination was found, it would be dealt with outside the disciplinary investigation. The claimant raised the issue that "Jimmy had asked her alter her days to sickness when she was not sick at all" and the days the claimant maintained she was working, with "deliverables" was discussed. It was pointed out to the claimant that even if the disputed 5 days in October were taken off her sick leave record, her record remained "quite poor" to which the claimant responded they should not be discussing her absences because of her disability, even

though some of the absences had no connection with it, for example, flu. Lesley Biddiscome informed the claimant “we still need to investigate and even where people have a disability we are allowed to challenge, we have taken OH advice and made adjustments by amending the triggers for the absence policy to start and with the flexible working arrangements. But it seemed like the situation still hadn’t improved...it is still a high level and we have already made adjustments.” The claimant was provided with the notes of the meeting which she did not dispute.

278 By this stage in the factual matrix the evidence in the bundle reflects the claimant emailed Jimmy Thompson within the times agreed, and keeping him informed, for example, on 30 November 2016 she emailed at 9.49 “I currently hope to come in later,” However, she did not and at 13.05 confirmed “I am not fit to come in.”

279 On 22 November 2016 at 12.00pm Annemarie Schilling-Jones emailed Lesley Biddiscome; “the absences (apart from sickness and hols and lieu days) are ridiculously high, really needs to be questioned again. I think these were additional sick hours to the 100% sick days which make the picture even worse. What I find the absolute insult is that she took 6 lieu days this year, one of which might have been from last year. How can she do that with her attendance record. I really think you can take her to a disciplinary. The disputed sick days make sense when you look at her bookings. On the other hand, did she work these hours from home or did she only just book the time. Is there any way we can find out what she delivered the last couple of months and whether that equates to what she actually booked?” In short, Annemarie Schilling-Jones was seeking evidence on whether the claimant had attended the office, and if not, the work she had carried out at home when she was unable to come into the office. The Tribunal found that it was in the forefront of Annemarie Schilling-Jones’ mind the possibility that if the claimant was disciplined it would result in litigation and “the more hard evidence we have the more likely it is that RR will be successful” on the basis that employees are usually “very well protected” at the Employment Tribunal.” By this stage both parties were gearing themselves up for this litigation and this affected how they reacted to each other, the claimant intent on bringing a Tribunal claim and the respondent HR department intent on fighting it. The Tribunal has attempted to take this finding into account when analysing the contemporaneous documentary evidence and the credibility of witnesses.

1 December 2016 investigation meeting with Jimmy Thompson

280 Annemarie Schilling-Jones met with Jimmy Thompson on the 1 December 2016 with Lesley Biddiscome in capacity as HR support. Jimmy Thompson confirmed the claimant had been off sick on 24 and 25 October 2016 and had made no contact on 8 and 9 November 2016 immediately following annual leave. He stated

he and others in the team had seen the claimant come in to work at 12.30pm when she signed in at 11.30am.

281 Annemarie Schilling-Jones produced a “Brief Summary of the Findings” going through the allegations in a 2-page document that was before Bob Callender, head of engineering and governance, Civil Nuclear UK, who read the investigation report prior to the disciplinary hearing.

Meeting 17 January 2017 claimant and Alex Warren

282 A meeting took place to discuss the outcome of the disciplinary investigation. The claimant was informed the report had been considered by him and Jimmy Thompson was to be interviewed as part of the investigation and “I believe there are grounds for a formal disciplinary hearing.” Reference was made to Bob Callendar chairing the disciplinary hearing and Lesley Biddiscome acting as HR support, to whom the claimant did not object despite her cross-examination points and oral submissions that Lesley Biddiscome should not have taken part.

283 It was made clear to the claimant that there were two issues; “the fact that the flexible working arrangements we agreed to at the end of 2016 have not been adhered to, and secondly your attendance levels have not improved, despite the new working arrangements being introduced.” Alex Warren’s reference to attendance levels was specifically in relation to the claimant’s lack of attendance at the office.

Allegation 79: late 2016 to early 2017: The claimant repeats her request to Jimmy Thompson for more relevant challenging technical work. He refuses. He cites her condition and occasional working from home as preventing him assigning submarines-related work which requires working in the submarines room. Tina-Jaine notes that several team members do not have access to the submarines room but are given relevant work in the civil nuclear sector. He also says he thinks she can’t be trusted because of her condition – S.13 & 15 EqA.

284 There was no evidence in the claimant’s witness statement or contemporaneous documents to which the Tribunal was taken, to the effect that the claimant repeated her request to Jimmy Thompson for more relevant challenging technical work. The Tribunal finds on the balance of probabilities that the claimant did not ask for more meaningful work, Jimmy Thompson did not refuse it and he did not reference her condition and working from home as preventing him assigning submarines-related work which requires working in the submarines room.

285 The Tribunal heard no evidence concerning the comparators, “several team members who allegedly did not have access to the submarines room but...given relevant work in the civil nuclear sector”, and the claimant did not cross-examine Jimmy Thompson on this issue. The Tribunal found the respondent did not give MOD confidential submarine work to employees outside the submarine room.

286 Finally, the Tribunal finds Jimmy Thompson did not tell the claimant he thinks she can't be trusted because of her condition as alleged, and had he done so there would have been contemporaneous correspondence in the bundle referencing this bearing in mind the raft of email communications and meeting notes generated during this period. The Tribunal is mindful of the fact that by this stage in the process the claimant was facing disciplinary proceedings, and each party was arming themselves for future litigation. For a period, Jimmy Thompson had sought the protection of HR both at meetings with the claimant and in private. Jimmy Thompson was out of his depth and followed HR advice. It is not credible he would have behaved in the way alleged by the claimant, bearing in mind his earlier attempts at finding a resolution to the adjustments issue. In arriving at this finding, the Tribunal took into account the claimant's allegation set out in her grievance at 3(a) and the PDR she referred to that had been carried out by Jimmy Thompson as referenced above. The PDR was carried out in or around February 2016 for 2015 and there was no reference to any of the allegations set out by the claimant that Jimmy Thompson had refused the claimant's request for submarine related work, and she could not be trusted because of her condition. The Tribunal concluded the claimant's credibility was again in issue, and she intentionally confuses and conflates the evidence in order to strengthen her claim.

287 The Tribunal found on the evidence before it (a) the claimant could not carry out confidential submarine work from home and that had nothing to do with her disability or a lack of trust; it was a MOD constraint that affected all employees who were unable to deal with matters outside a secure room, even to the extent of having conversations, (b) the respondent was short of work attempting to build it up so the claimant and her colleagues could fulfil their expertise and earn money for the department. The Tribunal accepted Jimmy Thompson's evidence that there was a shortfall of technical work, and this was supported by Ingolf Kirsten who described the claimant's technical skills which could not be properly tested because of the lack of work available. Finally, (c) the evidence before the Tribunal was that the MOD had not granted the claimant security clearance, after she had worked in the submarine room for a very short period on a specific piece of work. The Tribunal's understanding was that security clearance only lasted as long as a specific project, and after that it required renewal with the support by sponsors from the relevant project involved.

Allegation 80: No action about discrimination – allowing ongoing situation.

288 The discrimination alleged earlier by the claimant related to Jimmy Thompson treating the days she worked at home as sick days. There was no evidence before the Tribunal that this was continuing and allowed to continue by Lesley Biddiscome and the Tribunal found it was not, preferring Lesley Biddiscome's evidence given on cross-examination that she had told Jimmy Thompson if the claimant worked one hour at home and was then absent for the remainder of the

day staying at home, he could not record that day as sick leave and it should be recorded working at home. Lesley Biddiscome was satisfied, as was the Tribunal on the balance of probabilities, Jimmy Thompson's action arose as a result of his inexperience managing people; this was his first team leader role, and he did not understand the correct process. As far as she was concerned there was no discrimination, and the matter was not taken any further.

289 The sickness absence dates produced by Jimmy Thompson of which the claimant was critical had been left to be considered at the investigation stage and the allegations raised against the claimant in respect of sickness absence recording did not proceed to a disciplinary despite the fact the claimant had made mistakes.

290 During this period Alex Warren was aware of the allegation of discrimination raised by the claimant concerning Jimmy Thompson allegedly deleting time bookings and marking the claimant on sick leave and took the view he thought there was a disagreement between the claimant and Jimmy Thompson in terms of the claimant working when sick at home and failing to comply with the flexible working agreement. Alex Warren did not consider it to amount to discrimination and he was aware the matter went no further when Bob Callender became involved. There was no satisfactory evidence Alex Warren "tacitly" supported Jimmy Thompson as put to him in cross-examination by the claimant. His understanding at the time was that there were issues regarding the flexible working agreement and the claimant failing to comply with it and so the Tribunal found.

Allegation 81: Helen Seals promoted over the claimant to team leader – S.13 & 15 EqA.

Allegation 89: Helen Seals is promoted over the claimant – S.13 & 15 EqA.

291 Jimmy Thompson and Alex Warren appointed Helen Seals as acting team leader, which was an interim position, to replace Jimmy Thompson who was due to leave the business and the department re-organised.

292 Unlike the claimant, Helen Seals had been identified with "high" potential and the intention was to develop this for the future. The claimant was not informed of the position, and she was not invited to apply. The reasons for this are manifold; primarily the claimant did not possess good people skills and was not considered to be suitable team leader material. There was also a view that people could not work at home regularly for sustainable periods due to the nature of the work and this translated to team leader responsibilities. Working at home regularly affected the mentoring system and building up relationships with the team which required face-to-face contact.

293 The Tribunal concluded on the balance of probabilities, the claimant working at home was a factor in the decision not to invite her to apply for the interim team leader role, coupled with her unsuitability and the fact she had shown no interest in being appointed a team leader. It is notable in the 2015 End of Year Review there is no reference by the claimant to her seeking any leadership role. An annual review is aimed at discussing how employees foresee their future within the organisation and developing their career. The Tribunal is satisfied on the balance of probabilities at no stage did the claimant indicate to Jimmy Thompson or anybody else within the respondent that she was seeking a leadership role and wished to have the opportunity to train for that role, in direct contrast to Helen Seals who did show an interest. In conclusion, Helen Seals was not “promoted over the claimant” and the claimant was not prejudiced over the promotion as she had no intention of being a team leader which required attendance in the office, and so the Tribunal found.

Claimant’s grievance 30 January 2017.

294 In an email sent on 30 January 2017 the claimant emailed Lesley Biddiscome at 20:58 “a formal grievance complaint about discrimination.” She referred to raising a discrimination complaint on 11 November 2016 “that my line manager has made false records about my sick leave.” The claimant set out several concerns numbered 1 to 10 primarily making allegations against Jimmy Thompson, including alleging he had falsified 15 instances of dates recorded as sick leave “when he was aware I was working from home.” The claimant confirmed it came to her attention in October when she “spotted” 5 dates recorded as sick when she was working and attempted to get them corrected, which Jimmy Thompson refused and initiated disciplinary action as an act of victimisation. The Tribunal noted that the claimant misunderstood the position; Jimmy Thompson had not initiated disciplinary action; he had requested several issues to be independently investigated and Alex Warren had intimated the disciplinary action after reading the investigation report.

295 The respondent reasonably interpreted the grievance to be against Jimmy Thompson, given the fact the claimant refers to him by name or “my line manager” in each and every allegation bar para. 7 where a breach of the Data Protection Act is alleged, para.8 which a reference to the adverse effect on health and paras. 9 & 10 that references the respondent’s anti-discrimination Policy and her complaint of being discriminated having been ignored. In cross-examination the claimant criticised the respondent for its interpretation of her grievance, maintaining it complained about Alex Warren and Lesley Biddiscome failing to act when she had raised a discrimination complaint. The investigating officer reasonably did not interpret the grievance to raise complaints other than against Jimmy Thompson.

296 Jimmy Thompson stepped away from some aspects of management during the transition period, including management of the claimant. Helen Seals took over in late January/early 2017, and she started communicating with the claimant

providing her with another nominated deputy details including telephone numbers. The claimant emailed Helen Seals about her availability from early February 2017, for example, at 9.20m stating she was having problems connecting the laptop but was contactable on her phone.

Allegation 85: Lesley Biddiscombe proposes grievance should wait until after completion of disciplinary action – S.15 EqA and allowing ongoing situation.

297 Lesley Biddiscombe was under the impression Jimmy Thompson was leaving at the end of February 2017, and immediately after the receipt of the grievance she wrote to Eddie Marrett on the 31 January 2017 asking him to chair the grievance hearing as “I would like to start hearing the grievance as soon as possible” informing him the disciplinary process will continue at the same time with Bob Callendar.

298 Lesley Biddiscombe informed the claimant that the grievance should wait until after completion of disciplinary action and gave the reason that the disciplinary investigation had already been concluded and it was anticipated the disciplinary hearing would take place on the 7 February 2017. Lesley Biddiscombe was not to know that the claimant and her union representative would be unavailable on that date due to sickness and other reasons which also affected the claimant’s ability to attend a grievance investigation meeting. As it transpired the grievance was heard first followed by the disciplinary on the same day without objection by the claimant who was supported by a union representative.

299 There was no satisfactory evidence Lesley Biddiscombe allowed an “ongoing situation” concerning the sickness records and the Tribunal found this was not the case the burden being on the claimant to satisfy the Tribunal that there exist primary facts from which inferences of unlawful discrimination can arise that she has failed to meet.

Allegation 84: 2 February 2017 invite to disciplinary hearing – S.15 & allowing the ongoing situation

300 In an email sent to the claimant on 2 February 2017 the claimant was invited to a disciplinary hearing and provided with a copy of the investigation. Of the four allegations investigated only two remained. The claimant would have understood the issues concerning time recording and sickness absence records would not proceed to a disciplinary. The Tribunal finds that was the end of the matter and contrary to the claimant’s allegation, the “situation was not ongoing.” There was a real issue with the claimant’s compliance with the flexible working arrangements she had agreed that required resolution, and so the Tribunal found. The two remaining allegations were:

1. Failure to adhere to the new flexible working arrangements,
2. Continued poor attendance despite reasonable adjustments being made. In oral evidence on cross-examination Bob Callendar, who sent the claimant the 2 February 2017 letter setting out the invite and two allegations explained he understood the second allegation to mean her continued poor attendance in the office.

Allegation 87: Lesley Biddiscombe continues Jimmy's misinterpretation of agreed adjustments – S.20 and S.111 (inducing).

301 The Tribunal heard no evidence or oral submissions on the allegation that Lesley Biddiscombe had induced discriminating and the allegation made no sense. On the 7 February 2017 Helen Seals emailed the claimant “formally confirming” the flexible working agreement allows “additional flexibility...to work from home when her symptoms are such that she would not make it into the office by 10 am. In these instances, Tina-Jaine is expected to contact Helen Seals or the nominated deputy (Carlo Henry) to make them aware that she was having difficulty by 11 am. In instances where Tina-Jaine has difficulty, modified core hours in the office would commence at 13.00pm in the afternoon.”

302 Unbeknown to the claimant at the time Helen Seals was informed by Lesley Biddiscombe on the 8 February 2017 that on review of the claimant’s flexible working letter dated 7 February 2017 referred to above, “it does mention working from home, but its not specific...I would advise that in the circumstances where Tina-Jaine isn’t able to come into work but is able to work from home for the full duration of the working day, then we should allow her to work from home – under these circumstances she must be able to show some deliverables for the work she has done during that time. However, I would caveat this with the fact that this I an exception rather than the norm and if it become untenable, then we would review this as per the last clause...” The Tribunal concluded the spirit of the flexible working agreement was encapsulated in this communication and reflected occupational health advice before the respondent.

303 Helen Seals had a subsequent discussion with the claimant to the effect that she could work at home when she was unable to travel to the office due to her condition, providing deliverables of work completed were provided, but this was to be an exception.

304 On the 13 February 2017 Lesley Biddiscombe attempted to arrange a meeting with the claimant to discuss her grievance as Jimmy Thompson was leaving “next Friday,” the claimant was away from the office and Lesley Biddiscombe on leave at the end of February. The 19th of February was proposed as the date to hear the initial grievance and then interview Jimmy Thompson immediately after. A second email was sent on 14 February from Lesley Biddiscombe “I’ve only just found out Jimmy is leaving on the 17th of February” and she emphasise the need to discuss

the grievance with the claimant. The meeting could not be arranged as the claimant was not at work, and the interview with Jimmy Thompson went ahead on 14 February 2017 without any clarification being provided by the claimant concerning how she put the grievance.

14 February 2017 grievance investigation meeting Jimmy Thompson

305 A meeting took place between Jimmy Thompson, Eddie Marrett and Lesley Biddiscombe regarding the claimant's grievance. Jimmy Thompson was leaving the business as he had shortened the notice period. Eddie Marrett felt it was important to understand Jimmy Thompson's position, and his responses were explored with the claimant at the grievance hearing. It is unfortunate this meeting went ahead without first meeting with the claimant to gather an understanding of her grievance, which was not possible due to availability issues and for which neither party can be criticised. The respondent was limited to exploring with Jimmy Thompson through the limited terms of the written grievance.

306 In cross-examination the claimant criticised Eddie Marrett for his failure to fully explore all her complaints with Jimmy Thompson to see if there was discrimination. By the 14 February 2017 Jimmy Thompson viewed the claimant through the lens of a relationship where all trust and confidence had broken down, one of the reasons for him leaving was the difficulties in managing the claimant and he described her behaviour in strong terms, using for the first time the word "fraudulent which had previously been used by HR, to describe her time and attendance recording.

307 Jimmy Thompson's explanations are paraphrased as follows.

307.1 Jimmy Thompson provided an explanation for "statement 2" referencing "a long background lodged with MSAL (Manager Support Advice Line) regarding issues where Tina-Jaine's attendance and general behaviour were highlighted. I was advised to separate conduct and attendance e.g., fraudulent use of time and attendance system, lone working (sometimes upon until midnight) these were conduct and should keep separate from her health issues. These were issues that resulted in increased surveillance, this was due to her conduct not health."

307.2 With reference to "statement 3a" Jimmy Thompson referred to the over-capacity of the department and criticised the claimant's performance. He did not directly answer the issues that he did not trust the claimant because of her health condition. It appears from Jimmy Thompson's replies that he was trying to provide factual information reflecting work allocation had nothing to do with health, and there were issues with performance with Helen Seals avoiding delays by "picking up the work" on the claimant's behalf. The Tribunal is aware from the contemporaneous documents that

there were issues with the claimant's performance she was unable to acknowledge. For example, in her performance reviews the claimant marked herself as excellent when "good" by her managers and on occasions it was criticised.

307.3 Jimmy Thompson clarified at 3b. that system reliability, the role Helen Seals had taken on, required "engagement with the engineers on a regular basis. Tine-Jaine isn't in the office to undertake this role effectively, this was a result of her inability to come to work even after a reasonable adjustment." Jimmy Thompson provided technical information about the enterprise work carried out by the claimant (referenced earlier at 3(b), she's had good feedback from an influential work provider "so I left her there." He also referred to what other employees were doing and where the skill shortages were.

307.4 Statement 3d was dealt with and Jimmy Thompson explained he had not been told the claimant was a deputy, and when he was on holiday, he asked Helen Seals to provide cover as the claimant was out of the office and "most of the active team were working for Helen."

307.5 Statement 4a, 4band 4d related to the key allegations that Jimmy Thompson recorded the claimant as being off sick 15 times when she was working at home. Jimmy Thompson's explanation was because of the extent of the claimant's absence he was not able to do all the returns to work and the claimant wanted to adjust an absence. "When Tina-Jaine didn't turn up, I challenged her about it in workday. She amended [a] whole month's attendance record...the situation became cloudy due to the flexible working arrangement; she could come in by 13:00pm but I'd get correspondence at 11:00am saying she can't make it but working from home. I tried to obtain evidence from the HX team that work was done from home, but I doubted it could be done properly." He flatly refuted he had told the claimant off stating "we had agreed one day to change, and she tried to change them all."

307.6 Jimmy Thompson referred to working with occupational health and making reasonable adjustments that made the claimant "difficult to sell out as a specialist or second her. On occasions when Tina-Jaine's symptoms stop her from coming in she can work from home, but not as frequent – it's a common occurrence – disappointed...this required exceptional effort from myself, and I don't think Tina-Janie is abiding by the spirit of the agreement."

308 The Tribunal is aware that investigating a grievance does not need to be perfect, and the respondent was limited due to circumstances as to what information could

be gathered in a short period of time. On the limited information before Jimmy Thompson at the grievance meeting held on 14 February 2017, he answered the relevant parts of the claimant's written grievance and provided an explanation for his actions refuting discrimination. There was nothing more the respondent could do to investigate this further given that fact three-days later Jimmy Thompson was no longer an employee in the business.

17 February 2017 Jimmy Thompson left his employment with the respondent

309 Jimmy Thompson left his employment with the respondent, and he was therefore unable to take any further part in the claimant's grievance or disciplinary hearing.

2016 End Year performance

310 Helen Seals carried out an end of year review for 2016 in early 2017 (date unknown) that included comments on the claimant being given positive feedback in relation to the Enterprise Approach work, "not entirely satisfied" for other matters including timing being a challenge with deadlines missed in the EDF Heat exchange work and the "author was late in delivering documents to TJ for review".

311 Reference was made under the heading "team development" to "communicating challenges with the team on EA. Extra effort is required given working arrangements and presence in the office."

312 It is apparent Helen Seals was positive about the claimant's contribution and agreed with the claimant's assessment that "more is expected of a senior principal. More suitable roles to be sorted for the next year." The claimant's assessment was that during 2016 she had "mainly worked on EA project which has little demand on my core nuclear safety skills...the company will get much better value from me when I am allowed to get back to what I am best at – technical leadership on a large-scale nuclear safety projects."

313 The End of Year review appeared to be a positive one for the claimant's potential future and Helen Seal's approach to the claimant was an expectation for a better performance in "a less challenging year with more suitable roles to be sourced". Reference was made to "no subs opportunities arose for TJ in 2016. She gained security clearance for the enterprise approach activities." Helen Seals was concentrating on the future possibilities for the claimant taking into account the flexible working arrangement and on the balance of probabilities there was no evidence Jimmy Thompson had tainted her view of the claimant in any way as alleged by the claimant, and so the Tribunal found.

Claimant's disciplinary hearing 17 February 2017

Allegation 90: the claimant repeats concern that allegations are linked to discrimination and provides extensive evidence that 15 of the alleged sick days are falsified. Only evidence provided against her is hearsay, solely from Jimmy Thompson. Company has no written evidence. Car Park swipe records are not provided – S.15 & allowing continuing situation.

314 The disciplinary hearing took place before Bob Calendar, chair, it was attended by Lesly Biddiscombe who took notes in her capacity as HR. The claimant did not object to her presence. The claimant was accompanied by Tony Hammond, her trade union representative. The notes taken by Lesly Biddiscombe were provided to the claimant and there were no issues with them.

315 The hearing was adjourned to review the absence data as the claimant was querying this evidence, and it was agreed it would reconvene on 6 March 2017. The claimant raised the issue of Jimmy Thompson “falsifying the days she had been off work.”

316 At the grievance and disciplinary hearings, the claimant was accompanied by her union representative throughout.

317 On the 3 March the claimant was unable to come into work but was able to work from home and informed Helen Seals at 11.26am. On 1 March the claimant indicated she was working at home in an email sent earlier at 10.12am. On the 3 March the claimant emailed “I am unable to leave home. I am able to work” having indicated at 11:26am “My symptoms are making it difficult for me to go out today. I will carry on at home.”

Grievance meeting followed by the reconvened disciplinary hearing 6 March 2017 on the same day

Allegation 93: the claimant was found guilty of misconduct, without having addressed her discrimination claims, and without consideration of her claims that Jimmy Thompson’s evidence was discriminatory, and dishonest. Bob Calendar sets home working limit of 2 days per month, as punishment for disciplinary action removing the agreed reasonable adjustments – S.15 & 20 EqA.

Claimant advised of right to appeal on 8 March 2017 by Lesley Biddiscombe

Allegation 95: claimant is inform of deadline for appeal re disciplinary action: Monday 13/03/17 – S.15 EqA.

Allegation 96: Claimant unable to appeal as the timescale set was too short to enable her to seek advice (deadline Monday 13/03/17 as informed Wed 08/12/03) – S.15 EqA.

Grievance hearing

318 The grievance hearing took place before the disciplinary hearing, with Eddie Marrett as decision maker. Lesley Biddiscombe provided HR support and took notes. It is undisputed the claimant, who was supported by her union representative, did not object to this in the knowledge that she had attended the disciplinary hearing previously which was reconvened to take place that afternoon. It is common practice for union representatives to raise objections either before or any hearing if there are issue, and by not raising any objections the respondent was not forewarned the claimant had an issue with Lesley Biddiscombe and no stage did the claimant or her union representative give any indicating that she should not be in attendance because she was discriminatory and aiding discrimination as the claimant now argues.

319 The undisputed notes confirmed the following;

319.1 At this grievance hearing the claimant criticised the grievance process and the part played by Eddie Marrett and his alleged failure to investigate Lesley Biddiscombe and Alex Warren referenced in the written grievance complaint as not taking action when the issue of discrimination was raised in November 2016.

319.2 The notes of the grievance meeting record that this was the opportunity for the claimant to explain her grievance, produce supporting documents and answer questions.

319.3 The claimant referenced working on the "Enterprise Approach" project "over the last 18-months" described by her as "mostly HR focused" alleging Jimmy Thompson restricted the technical work because of her health condition and he had said he could not trust her because of this. The claimant accepted there was a lack of work in the team, and that people were "aiming to complete deliverables for the business" and get work in for the future.

319.4 The allegation of Jimmy Thompson falsifying records which came to light in October 2016 was discussed, and the claimant confirmed there had been an informal and then formal agreement that she could work from home if she was unable to come into the office.

319.5 It was confirmed 15-days had been removed from the claimant's absence record, and this was not disputed by the claimant who made the point that Jimmy Thompson by including them in the first place

“exacerbated her attendance record” maintaining this was an act of direct discrimination and was a pattern of behaviour that included appointing Helen Seals as deputy. The claimant referred to the fact that she could “demonstrate working from home and he [Jimmy Thompson] knew it.” It is notable that the claimant accepted the disputed days had been removed from her absence record in direct contrast to the case she now presents before this Tribunal of a course of conduct extending beyond her resignation and they had never been moved even after she had resigned with the effect that any future employment application could adversely be affected.

319.6 The claimant referred to the 2016 PDR held with Helen Seals in 2017 where the claimant alleged, she had asked for relevant technical work” and Helen Seals had responded “there was a doubt whether I could be trusted to do this, essentially relaying what Jimmy had told her, so she had been influenced on my disability.” As noted by the Tribunal above there was no evidence of this alleged response by Helen Seals, and the Tribunal concluded the claimant was intent on strengthening this litigation and prepared to raise allegations when there was no factual basis to support them.

319.7 The claimant alleged she had complained to Lesley and “saw no action.” There was no reference to Alex Warren disregarding any discrimination complaint.

319.8 Lesley Biddiscombe asked the claimant “if we are starting to get more safety cases and licensing work through now” to which the claimant responded “yes, the others are getting busy. Helen said she would find TJ something to do which would fit around the HR project she was working on.” The claimant’s comment reinforced the Tribunal’s findings about (a) the positive attitude adopted by Helen Seals despite the claimant’s evidence to the contrary, and (b) the department was beginning to generate safety cases supporting the fact there was an issue beforehand with work that could be offered to the claimant as it was not available, and so the Tribunal finds.

319.9 The claimant discussed the flexible working contract confirming she worked 32.86 hours per week, 10:00am to 6:00pm Monday to Thursday and 10:00am to 4:00pm on Fridays...allows for working at home whenever her symptoms prevent her from coming into the office in the morning, or all day if required. She has a laptop and grs [internet access], **no need for secure working** and generally she does not work beyond 6:00pm” [the Tribunal’s emphasis] The claimant alleged the 6:00pm cap was put on when she was on her own in the office. It is notable the claimant did not

add that when she was working alone in the office late, she was accompanied by a security officer at all times to her car, and the reason for this was that such a procedure did not exist and so the Tribunal found.

319.10 The claimant discussed improvements that should be made to the anti-discriminatory policy.

320 The Tribunal concluded the claimant aired the entirety of her grievance, which was listen to by Eddie Marrett who took the decision that he would interview Lesley Biddiscombe, Helen Seals and Ingolf Kirsten before deciding. It did not cross his mind to interview Alex Warren as the claimant had not referenced him or criticised him when she elaborated her grievance at the meeting, and he cannot be criticised for this. The Tribunal found Eddie Marrett acted objectively and actively listened to what the claimant had to say with a view to resolving her grievance.

321 There was an issue with the claimant as to whether Lesley Biddiscome was interviewed as no notes were taken and there was no reference to her in the grievance outcome. Whilst Eddie Marrett can be criticised for not keeping notes of his discussions with these individuals, the Tribunal accepted his evidence that these discussions had taken place. The grievance outcome meeting took place on the 28 April 2017 following the further investigation.

Reconvened disciplinary hearing

322 Notes were taken which the Tribunal has read in detail, and it has noted the following:

322.1 A timeline was produced showing the claimant's absences and discounting the 15 disputed days absence between November 2015 to October 2016. The undisputed absence amounted to 55 days over 23 periods of absence and the claimant was informed **“this isn't really about the amount of sickness, it's more about compliance with the working hours agreement i.e., if you are not going to be in by 11am then you should let your manager know. Also, the excessive amount of homeworking over and above what was intended in the revised terms and conditions...This is around your conduct. I know you can't help the sickness. It's about how we can jointly help – the company has tried to be flexible but there is a degree of compliance to the agreement, so I think this warrants a 3-month warning. In future, working from home will be by exception only”** {the Tribunal's emphasis}.

322.2 The claimant's response was that there was nothing in the contract.

- 322.3 The claimant was informed her normal place at work was the Warrington office and not at home. The contract “definitely doesn’t start a percentage of time. **It’s about the intention to work together to allow you to make most contribution to the business. From a business perspective it makes it difficult to interact with everyone else when you are at home. The business intention is to seek to minimise the amount of homeworking. It shouldn’t be the normal arrangement. Should be more of an exception. If you are too ill to make the journey, are you really too ill to work...it wasn’t about how much effort Tina Jaine was putting in...no one is saying that Tina Jaine is swinging the lead by taking time off. We agreed in the flexible working arrangement and if she can’t make it she needs to let her manager know by 11:00am. But the issue is about that not happening even when she showed us her own records she was late**” [the Tribunal’s emphasis].
- 322.4 It was made clear to the claimant “**in order for us to manage the work of the team and team working you can’t discharge that from home.** Can do solo work there. I’ve talked to Loise Wood and she said you’re doing a good job. We’re not saying there is a dispute about quality of that work. **Just conform to the process.**”
- 322.5 A discussion took place around the fact that the claimant had done more homeworking than in the office in the last month to which the claimant responded “working from home she has the opportunity to work well, she has been on the phone etc.” It was pointed out to her “that does not help the team, for example, if someone wants a quick chat and you’re not there. Teaming is so very important in engineering, this can be bad for business...**some days people don’t know if you’re well or not, so they don’t get in touch with you, so it’s important to have a physical presence**” [the Tribunal’s emphasis].
- 322.6 It was made clear to the claimant there were two issues “one was the absence; the other was Tina Jaine’s failure to stick to the flexible working agreement. Ability to deploy on tasks is restricted from a teaming point of view. **A lot of new work is work in submarines in the secure room, you can’t do that from home. Also required to coach more junior team members. Face to face interactions gives the best quality. There was a concern, so we put a flexible working policy in place, but our expectation is that homeworking is the exception. So we do want you to work in the office more than you are currently doing.**” [the Tribunal’s emphasis].
- 322.7 The claimant’s response was recorded as; “her concern is that this is an instruction to be ill less.” When it was put to her that “we put some flexible

working provisions in place and we want them to be adhered to” the claimant responded, “a consequence might be that she is unable to do any work though.” As a result of that comment Lesley Biddiscome suggested “maybe we need to review the flexible working arrangement and we are more than willing to do this to get the best out of you” to which the claimant agreed she was “open to” such a suggestion.

323 The claimant was advised she had the right to appeal the three-month warning within 7-days of the meeting, and she was aware that the flexible working arrangement could be reviewed if she wanted to go down that route.

324 The claimant was found guilty of misconduct, and the Tribunal found this had no bearing on her allegations of discrimination. The disputed dates which gave rise to the discrimination complaint had been discounted and not taken into account when the finding of misconduct was made. The finding of misconduct was based on factual information before Bob Callender that was undisputed by the claimant and to which the claimant had contributed, for example, emails sent in breach of the flexible working arrangement. The claimant did not question the fact she was working at home more than in the office despite the agreement and the adjustment to her start time from 9:30am to 1:00pm if her condition had flared up.

Disciplinary outcome: verbal warning

325 The verbal warning was confirmed in a letter signed by Bob Callender dated 8 March 2017 emailed to the claimant at 10:38 that day. The letter confirmed “this disciplinary action is your failure to adhere consistently to the arrangements for notification of absence and homeworking detailed in the Part-Time Working offer of 12 September 2016.” Reference was made to adjusted sickness absence and telephone records submitted by the claimant and Bob Callender’s conclusion that:

- (1) There were many instances where you had failed to notify your manager or a nominated deputy by 11am of your inability to come into the office.
- (2) The level of homeworking is far greater than that intended by the offer and is inhibiting your ability to fully support operational services by reducing the opportunity to interact with other staff in your role of Senior Principal Safety engineer.

326 The outcome letter confirmed “it was agreed at the hearing that you’d make sure that there was no further misconduct on your part and you would adhere to the requirements to inform your manager or nominated deputy by 11:am if you were unable to come into the office...you were also told that a repeat of similar misconduct or any further breach of any kind...within 3 months of the 6 March

- 2017 may lead to further investigation and potentially disciplinary action.” The right of appeal was set out and the deadline date 13 March 2017.
- 327 Contrary to the claimant’s allegation that she had been informed homeworking was limited to 2-days per month she was informed “the amount of homeworking should be significantly reduced” and so the Tribunal found.
- 328 The claimant did not appeal or raise any issues about the outcome letter, or appeal date.
- 329 At the disciplinary hearing Bob Callender did not set a home working limit of 2 days per month, as punishment for disciplinary action removing the agreed reasonable adjustments as now alleged by the claimant, who was less than credible when she raised this allegation unsupported by any contemporaneous documents. It was made clear to the claimant the amount of homeworking should be significantly reduced and so the Tribunal found, preferring Bob Callender’s evidence to that of the claimant’s which was not supported by the contemporaneous evidence. Bob Callender’s evidence was supported by the notes of the meeting and outcome letter the contents of which the claimant did not dispute or appeal at the time. The discrepancy in the evidence raised again issues of credibility on the part of the claimant; the Tribunal found her to have been an inaccurate historian who exaggerated what had been said to her at the reconvened disciplinary meeting.
- 330 On the evidence before it the Tribunal found the claimant was advised of right to appeal on 6 and 8 March 2017 by Lesley Biddiscombe and by Bob Callender in the 8 March outcome letter. The deadline for appeal was the 13 March 2017, a period of 7-days from the hearing, 5-days from the outcome letter, and at no stage did the claimant request an extension of time. She was aware the expectation was for homeworking to be the exception, and this was had been repeated more than once to her during the disciplinary process, and therefore it was not unreasonable for the respondent to assume by the fact she did not appeal that she had accepted homeworking was to be the exception.
- 331 By an email sent on 14 March 2017 from the head of engineering people, tools, and submarines, who had previously given positive feedback on the claimant as discussed at the reconvened disciplinary hearing, was trying to find out where the claimant was, and whether she “had been off ill or on holiday. She hasn’t replied to emails...requesting her input to the monthly progress reports...”
- 332 The claimant was signed off “for the rest of the week” by her doctor and she emailed Helen Seals to this effect at 10:20am on 16 March 2017.

333 By an email sent on 21 March 2017 at 13.27 the claimant informed Helen Seals she was not coming in that day but working at home.

334 In an email sent 21 March 2016 Helen Seals informed the claimant that it was the third working day at home she had worked in that month i.e., a period of 3 weeks.

335 Helen Seals sought the involvement of occupational health, and Lesley Biddiscome requested a medical report on the 21 March 2017 referencing the claimant “has been working at home on more occasions than she has been in the office, in fact, in February, she was hardly in the office at all. This is not acceptable in the job as she teamworking and being available for the team is very important and is not what was intended by the homeworking adjustment. In addition, we have agreed to alter Tina Jaine’s working patten so that she doesn’t start work until later in the day to accommodate her illness...**is it reasonable to expect Tina-Jaine to attend the office for a few hours per day with only occasional working from home as and when required? Has Tina-Jaine’s illness deteriorated since the beginning of 2017 which means we are now expected to put in place additional adjustments?**” [the Tribunal’s emphasis].

The claimant’s responsibility for UDG safety management.

336 By email sent on 31 March 2017 Helen Seals reported to Lesley Biddiscome that the claimant’s attendance had improved in March over February’s attendance, and as per the discussion in the PDR “I am also looking to increase her technical workload and have given her responsibility for UDG safety management as promised in the 2016 End of Year Performance Review.”

337 On the 26 April 2017 at 11:07pm the claimant emailed Helen Seals “I’m still too ill to work today.”

338 Helen Seals recorded the claimant’s movements from 10 March 2017 which revealed the claimant was not always notifying her of her whereabouts on 10, 21 22, 23 24, 27, 29 and 30 March 2017. For example, on 31 March “no notification she’d be coming in late. Had some emails in the morning so assume some work at home. The claimant accepted this evidence.

339 The Tribunal finds on the evidence before it there was still an issue with the claimant complying with the flexible working agreement and the claimant would have understood this to have been the case and the consequences of her failing to comply with the oral warning. Her resignation must be looked at in this context and in the light of the information the claimant provided to occupational health as recorded below.

340 On 26 April 2017 at 14.34 Lesley Biddiscombe emailed Helen Seals, “There are numerous occasions since 6 March where Tina-Jaine has either not contacted us before 11:00am to say she wouldn’t be in or has not come into the office before 1:00pm. Therefore, she is not meeting the requirements of the warning. When you have a RTW meeting with her, please say that you are disappointed that she continues to fail to contact you when she isn’t going to be in within the allotted timescales, and you have no alternative but to escalate this for an investigation.”

341 On 25 April 2017 the claimant was absent due to sickness and re-organised the occupational health appointment, remaining absent until 27 April 2017 informing Helen Seals at 11.36 that she was “still struggling with symptoms, but trying to come in this afternoon.” The claimant did not indicate at any stage that she found it difficult to communicate such information to Helen Seals via email. The claimant throughout her employment, had access to emails of other employees, including managers, and used the email system for work from home.

15 April 2017 occupational health consultation report produced on 8 May 2017 and disclosed to the respondent on that date with the claimant’s consent.

342 The claimant took part in a telephone consultation on the 8 May 2017, and prior to her resignation on the 4 May 2017 the claimant was aware of the contents.

343 The report confirmed a diagnosis of irritable bowel syndrome and depression. Reference was made to the claimant as follows; “She reduced her hours but does not feel this has been sufficient to make a difference...she would like to reduce her hours further nearer to half time, perhaps in the region of 20-hours per week. Whilst this is something which may allow her to manage her condition, this is clearly something that will need to be discussed with management, and decisions made with regard to operational feasibility.”

344 The occupational health report confirmed “**I am told she works one or two days a week from home** and that management have requested that this be decreased to one or two days per month...it may be worth considering if this is operationally **possible for her to continue as before, working one or two days a week from home**. Management will need to consider if it is reasonably practicable.” Dr Bennett concluded “**I do not feel she will benefit from additional investigating or treatment**” [the Tribunal’s emphasis]. Reference had been made earlier in the report to the therapy the claimant had received through the occupational health department, and Dr Bennett’s advice supported the respondent’s decision not to pay for more than 20 therapy sessions.

27 April 2017 claimant’s return to work

345 Helen Seals spoke with the claimant regarding her not meeting the requirements of the warning, and feedback was given on the occupational health telephone

appointment with the claimant stating she had mentioned amending her hours further. Helen Seals in an email to Lesley Biddiscombe "I suppose we wait for their recommendations on this issue."

Grievance outcome meeting 26 April 2017

Allegation 101: Co find themselves not guilty of discrimination. Eddie & Leslie choose to believe Jimmy's evidence which contains several lies & inaccuracies. Eddie says they did not find any evidence of discrimination. Leslie blames limited opportunity to investigate on Jimmy leaving. Tina-Jaine questions several aspects of the judgement, including how they could "not find evidence" given the extensive evidence she provided. She questions why the investigation about discrimination did not start sooner, after complaint to Leslie in November. She asks Leslie why Helen's inability to access the submarines room (due to nationality) was not seen as a hindrance to her progress, whereas Tina-Jaine's occasional working at home (due to disability), which might limit the amount of time she could spend in the subs room, was seen as prohibitive. Tina-Jaine requests for the false sick leave records to be corrected – allowing continuing situation.

346 The further investigation carried out since 6 March and outcome was discussed with the claimant. Reference was made by Eddie Marrett to interviews with Jimmy Thompson on 14 February, Ingolf Kirsten on 10 March, Helen Seals on 14 March and Lesley Biddiscombe on 13 March 2016. As indicated previously, no notes of the meetings were taken, which was unfortunate.

347 The claimant indicated her grievance "wasn't against Jimmy Thompson, it was against the company...if the decision is made that Jimmy Thompson did discriminate, but now he's gone so there is no action, then that's not OK" a statement Eddie Marrett did not accept for good reason, as he had made his decision based on the fact the grievance was against Jimmy Thompson. He had taken all that the claimant had said into account "hence why he had to go to talk to other people."

348 Eddie Marrett took the claimant through the points of her grievance, the responses of the witnesses including Jimmy Thompson, and a discussion took place with the claimant explaining her position, including alleging Jimmy Thompson in making numerous references in his interview to her working at home was discrimination because she was not in the office. Later in the meeting the claimant explained "she had never volunteered to go on a secondment because she knew she wouldn't be able to do this" and at no point did she say she had made a request to be considered a replacement for the team leader. The claimant stated, "I would probably have been a candidate." It is clear from the evidence at no point did the claimant ask to be considered for the team leader role even when she knew a

vacancy existed as a result of Jimmy Thompson's resignation, and so the Tribunal found.

349 With reference to the evidence on the return to work meetings and the amendments to records Eddie Marrett stated that "after speaking to Lesley, it was unfortunate that Jimmy Thompson had left the business and we had not been able to carry out a full investigation, however, if he had remained there would have been no doubt an investigation would have been started into Jim Thompson's conduct" and it was accepted the 15 days in issue were discounted in the disciplinary process. The outcome of any investigation was unknown, because Jimmy Thompson had left. Eddie Marrett expressed the following view "the business had gone over and above, e.g., 18 sessions had been when 6 was the normal number. The business gave TJ a flexible working contract. There is no proof that there was any falsification of dates, and it appears Jimmy Thompson was working with the best intentions. Sadly, the company was unable to follow up all aspects for TJ...he appreciated that things happened, and he believed this was a result over time of a breakdown between Jimmy Thompson and TJ, but he did not believe there was any prejudice against TJ because of her disability...the company had allowed TJ flexible hours, OH had supported her and now the company was providing her with work commensurate with the skills which would support her ongoing development."

350 It is not disputed that the claimant had been working on a project commensurate with her skills during this period and so the Tribunal found.

351 It is notable the claimant's union representative speaking on behalf of the claimant made the following observations:

351.1 The respondent had provided informal and formal support to the claimant due to her medical condition,

351.2 The flexible working agreement allowed for "too much flexibility for both the company and TJ."

351.3 When an individual has a medical condition they may not require to be in work as fully as others [the Tribunal's emphasis].

351.4 there was "some misinterpretation of absence records and when this was raised in November, this should have been investigated and resolved at that point and could have been nipped in the bud."

352 Eddie Marrett referred to the absences that were looked into, and the conclusion that "there was no malicious intent against TJ, it was accidental, it did not appear to be malicious, but he could not deny or agree because Jimmy Thompson isn't

here to ask further.” Lesley Biddiscombe indicated she would check whether there was an email from her to Jimmy Thompson advising him what to do about the sick leave, which she looked for after the meeting and this resulted in an exchange of emails with the claimant which followed.

353 The claimant was informed of her right to an appeal, which she did not take up.

Written grievance outcome 3 May 2017

Allegation 102: grievance outcome emailed to claimant – S.13 EqA & allowing continuing situation.

354 The grievance outcome letter dated 3 May 2017 was sent by email to the claimant at 17.02 along with the grievance hearing notes in the form of a Grievance Outcome Report. The outcome was that which had already been communicated to the claimant on 28 April 2017 that her grievance was not upheld. The claimant was again advised of her right to appeal. There was no evidence of an ongoing situation, and the Tribunal reiterates its findings above, including observations on the burden of proof.

Resignation 4 May 2017

Allegation 103: claimant emails resignation – s.20-21 EqA.

355 On 4 May 2017 in an email sent 00.02 by the claimant to Helen Seals the claimant resigned with notice expiring 31 May 2017 and no reason was given. In oral evidence the claimant referred to home working being limited to twice a month and by “exception only” as one of the reasons for her resignation. As indicated above, the Tribunal found the position had always been working from home by “exception” and there was no limit placed on the number of times as alleged by the claimant. Accordingly, she cannot have resigned for this reason.

Allegation 104: 5 May 2017 Email from Leslie shows HR continue to assume that I did not work a full day while at home, even when there is proof that I was working – S.15 EqA.

356 Lesley followed up the grievance meeting by sending the claimant a copy of the email she had sent Jimmy Thompson on 16 November 2016 at 13.37 pasting an extract from Your HR. In the email Lesley Biddiscombe wrote “I advised him of the correct way to record your absence when you didn’t do a full day and he asked where this was written down. I looked at the intranet and found the words which I sent on to him. See attached.”

357 The claimant responded at 17.15pm that “this is not relevant to our discussions. None of the disputes concerned days when I went home early or did not do a full day’s work due to illness. They concern days when I did a full day’s work at home but Jimmy insisted it was recorded as a full day sick leave, irrespective of the fact I was working. Just to be clear, Jimmy and I discussed such dates...he did not deny I was working. He said he would record it as sick leave irrespective of whether I was working a full day at home or did not work at all...you said that you had instructed Jimmy to make corrections of the disputed dates where I had worked from home.”

358 The Tribunal found Lesley Biddiscome did not continue to assume the claimant did not work a full day while at home as the claimant alleged. The issue related to the claimant’s inability, due to her medical condition to come into work into the office by 1pm, coupled with her refusal to inform management of her whereabouts and intentions. Lesley Biddiscome’s understanding from her discussions with the claimant and Jimmy Thompson was the issue centred around the claimant not well enough to come into the office by 1pm, three and a half hours later than her original contractual start time and three hours later than the agreed start of 10am in the flexible working agreement. If the claimant carried out work at home and yet was not well enough to attend the office or contact her manager as per the flexible working agreement, Jimmy Thompson took the view that she was not working at home.

359 It is notable in her cross examination of Jimmy Thompson, the claimant gave examples to Jimmy Thompson of her working a few hours a day, and the claimant was unable to point Jimmy Thompson to any independent evidence showing she worked all her contractual hours, and a number of her arguments and objections related to her inability to in work the office as a result of the Lone Working Policy. The amount of work the claimant carried out remained an issue for Jimmy Thompson who never got to grips with managing her output, and the evidence on what actual work she had carried out was most unsatisfactory. In short, Jimmy Thompson could not “keep tabs” on the claimant, she refused to accept his management, this resulted in a breakdown of communication and ultimately the manager/employee relationship, and so the Tribunal found.

The occupational health report

360 On the 8 May 2017 the respondent received the medical report which referenced the claimant’s report that “she works one or two days a week from home and that management have requested for this to be decreased to one to two days a month.” Occupational health found the claimant “on the whole” fit enough to attend work.” It is notable the claimant informed occupational health that the respondent had requested home working to be decreased by one or two days per month when the case before the Tribunal was two days per month only.

361 On the 9 May 2017 Lesley Biddiscome emailed the claimant at 9.20 in response to the claimant's 5 May 2017 email with reference to the information she provided Jimmy Thompson with as follows; "The email that I sent to Jimmy was a result of him asking me how to record the days when you worked at home and did a few hours work. These are the same incidents that you queried at the disciplinary hearing – they are on the spreadsheet that you sent over where you said you had evidence that you had worked and showed what the evidence was. In the conversation with Jimmy, he queried why I was advising him to record these absences in this way and I said I'd seen it on the intranet somewhere. My email is confirmation of where I found that evidence and whether this is an instruction or guidance is up to interpretation, but I told him what the Company's policy is on this matter."

Allegation 105: late May 2017 HR endorse false sick leave records – S.15, S.111 (inducing) & s.112 (aiding).

362 There was no evidence before the Tribunal that in late May HR "endorsed" the false sick records; the disputed records had long been resolved by this date, were not used as a basis for disciplinary action and the claimant had not disputed at the 6 March 2017 grievance hearing 15-days had been removed from her absence record.

363 The claimant did not cross-examine any of the respondent's allegations on the issue of knowingly helping to another to do anything that contravenes the Equality Act, and no submissions were made with the effect that this complaint was far from clear and had no basis if the alleged contravention relied upon was the sick notes records which HR did not endorse as the claimant alleges.

Allegation 106: exit meeting – S.20 EqA,

364 An exit meeting took place on the 12 May 2017 with Helen Seals to discuss the "lessons for RR Civil Nuclear" with the claimant, that included the claimant stating **"managing the lull in work could have been handled differently. Feels like just waited for people to get bored and leave- not ideal"** [the Tribunal's emphasis].

365 The claimant's projects were discussed. With reference to project EA the confirmed she had started working on it 6-months previously and the claimant referred to advising "top tier personnel on the strategic level including threat to national security, the parties involved including the respondent and key players in national security and submarines. With reference to another project GDA the claimant confirmed she was responsible for defining the safety case strategy, and the claimant raised the issues the resolution of which in her view required "regular briefings between design team and safety case team – keeping everyone informed of what they were working on." It is clear there was no issue with the

type of work provided to and carried out by the claimant prior to her resignation and so the Tribunal found.

Allegation 107: False sick records remain – s.15 EqA.

366 The evidence before the Tribunal was that the sickness records had been discounted, and the claimant was made aware at the reconvened disciplinary hearing the 15 disputed days absence had been discounted and there was no evidence produced by her to the effect that they were not.

367 The effective date of termination was the 31 May 2017. The Tribunal on the balance of probabilities found the claimant resigned because she wanted to work at home twice a week and reduce her hours to twenty as reported to occupational health, and she took the view the role and responsibilities of a principal engineer was unlikely to be accommodated because of teamworking responsibilities and the requirement to work in highly confidential environment on submarine projects that could not be carried out from home. She had not put the proposals discussed with occupational health to the respondent, and nobody can state with any certainty what the respondent's reaction would have been, and whether some form of amendment to the existing flexible working agreement would have been reached as suggested by Lesley Biddiscome to the claimant when it became clear the original terms agreed had not been met by her. The claimant was also aware that she continued to breach the terms of the flexible working agreement in respect of informing her manager by 11am of whether or not she intended to turn up to the office to work by 1:00pm following the written warning that lay on her file for three-months.

The law

Constructive unfair dismissal

368 Section 95(1)(c) of the Employment Rights Act 1996, as amended (“the ERA”) states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.

369 The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: Was there a fundamental breach on the part of the employer? Did the claimant terminate the contract by resigning? Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation? Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end? The Court of Appeal “made it clear that questions of

constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of ‘reasonable conduct by the employer.’”

The implied term of trust and confidence

370 There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer’s conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of Paul Buckland V Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test.

371 The House of Lords in Malik v Bank of Credit; Mahmud v Bank of Credit [1997] UKHL 23, held that the breach occurs when the proscribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which “a balance has to be struck between an employer’s interests in managing his business as he sees fit, and the employee’s interest in not being unfairly and improperly exploited,” and to the impact of the employer’s conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

Last straw

372 A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a “last straw” incident. The last straw itself does not need to amount to a breach – Lewis v Motorworld Garages Limited [1986] ICR 157 CA. Glidewell LJ said at para 169F “The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In particular, in such a case the last action of the employer which leads to the employee leaving

need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?"

373 In Omilaju v Waltham Forest London Borough Council [2005] ICR 481 the Court of Appeal held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive on his or her own trust and confidence in the employer.

Employee must resign in response to repudiatory breach

374 The employee must leave in response to a breach committed by the employer. This breach may be an actual breach or an anticipatory breach ... it is not enough that the employee expects the employer to repudiate the contract and leaves in anticipation.

Waiver of breach

375 Weston Excavating cited above; The employee "must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged".

376 In the well-known EAT case of W.E. Cox Toner (International) Ltd v. Crook [1981] ICR 823 IRLR 443, EAT an employee censured by employer in July 1980 for taking leave without previously advising the employer. He demanded the withdrawal of the censure letter. He was informed on 6 February 1981 that the letter would not be withdrawn. He left four weeks later. The EAT held that he was precluded from claiming for unfair dismissal because he had remained for four weeks after it had become clear that his grievance would not be remedied and consequently must be taken to have affirmed the contract.

377 Da'Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR 19, an EAT decision also relevant to whether a delay in resigning following a repudiatory breach may indicate that the claimant has affirmed the contract. It may alternatively indicate that the repudiatory breach is not the effective cause of the resignation. In Da'Bell the EAT upheld an employment tribunal's finding that an

employee had not been constructively dismissed when she resigned three months after her employer's fundamental breach of contract. The EAT reasoned: '[A] person who reacts to offensive conduct by an employer by writing a letter the next day will easily be adjudged to have acted by reason of it. But someone who leaves it for a year, who will not let bygones be bygones, who digs it up again, is likely to be acting for a reason which is not directly related to the breach. Those are matters of fact for an employment tribunal, to determine what the reason was.'

Discrimination

Direct discrimination

378 S.13(1) EqA provides that direct discrimination occurs where "a person (A) discriminates against another (B) if, because of a protected characteristic [race] A treats B less favourably than A treats or would treat others.

379 An actual or hypothetical comparator is required who does not share the claimant's protected characteristic and is in not materially different circumstances from him. Para 3.23 of the EHRC Employment Code makes it clear that the circumstances of the claimant and comparator need not be identical in every way, what matter is that the circumstances "which are relevant to the [claimant's treatment] are the same or nearly the same for the [claimant] and the comparator."

380 In Chief Constable of West Yorkshire v Vento (No.3) [2003] ICR 318 CA the tribunal considered the circumstances of four other police constables (not all of whom were male) whose situations were not identical but were not wholly dissimilar either. It concluded that the claimant had been treated less favourably than a hypothetical male comparator. The EAT held that this was a permissible way of constructing a picture of how a hypothetical male comparator would have been treated. This approach was later approved by the House of Lords in the well-known case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL.

381 Section 13 EqA requires not just consideration of the comparison (the less favourable treatment) but the reason for that treatment and whether it was because of the relevant proscribed ground. These two questions can be considered separately and in stages; or they can have intertwined: the less favourable treatment issue cannot be resolved without deciding the reason why issue. As was observed by Lord Nicholls in Shamoon at paragraph 11: "...tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? ... If the former, there will ... usually be

no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.”

382 A Tribunal should not assume a finding of unlawful discrimination from a finding that an employer acted unreasonably; there may be other explanations (if only simply human error): Bahl v Law Society [2004] IRLR 799 CA. More is required than simply a finding of less favourable treatment and a difference in the relevant protected characteristic. Where there is a comparator, the ‘something more’ might be established in circumstances where there is no explanation for the unreasonable treatment of the complainant as compared to that comparator; see per Sedley LJ in Anya v University of Oxford [2001] ICR 847 CA, and the discussion of those dicta in Bahl, per Maurice Kay LJ, observing (paragraph 101) that the inference of discrimination would not then arise from the unreasonable treatment but from the absence of explanation. This is relevant to the claimant’s allegation against Jimmy Thompson in respect of the sickness records, and the Tribunal finding he was inexperienced in matters involving sickness absence recording and had made a mistake.

Disability discrimination arising from disability

383 Section 15(1) of the EqA provides-

(1) A person (A) discriminates against a disabled person (B) if –

- (a) A treats B less favourably because of something arising in consequence of B’s disability, and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

384 Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person’s treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

384.1 In order for the claimant to succeed in her claims under s.15, the following must be made out: there must be unfavourable treatment.

384.2 there must be something that arises in consequence of claimant’s disability;

384.3 the unfavourable treatment must be because of (i.e., caused by) the something that arises in consequence of the disability.

384.4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

385 Unfavourable treatment is not the same as detriment. The test is whether a reasonable worker would consider that the treatment is unfavourable. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs Justice Simler in the well-known case of Pnaiser v NHS England and anor [2016] IRLR, EAT:

385.1 “A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

385.2 The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The “something” that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. The Tribunal examined closely the conscious and unconscious thought process of the respondent’s witnesses, particularly Jimmy Thompson and Lesley Biddiscome, who gave evidence before it, concluding the explanations they gave were untainted by disability discrimination.

385.3 Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A’s motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises...”

385.4 The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely, to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability

of a justification defence, the causal link between the something that causes unfavourable treatment, and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

385.5 This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

386 With regard to the objective justification test, when assessing proportionality, the Tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer: Hensman v Ministry of Defence UKEAT/0067/14/DM.

Disability discrimination – failure to make reasonable adjustments

387 The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 (“EqA”). Section 20(3) sets out the first requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA. The Code states that a PCP should be construed widely to include, for example, informal policies, rules, practices, arrangements, criteria, conditions and so on.

388 The EHRC's Employment Code states that the term PCP 'should be construed widely to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A PCP may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a “one-off” or discretionary decision' -para 4.5. The protective nature of the legislation meant that when identifying the PCP, a Tribunal should adopt a liberal rather than an overly technical or narrow in order to identify what it is about the employer's operation that causes disadvantage to the disabled employee.

389 In the well-known case Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the

employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

Indirect discrimination section 19 EqA

390 In order for the Claimants to succeed in establishing indirect discrimination it is necessary for them to establish the following elements pursuant to s.19 EqA 2010:

- a. The alleged conduct amounted to a provision, criterion or practice ("PCP");
- b. The Respondent applied or would apply the PCP to persons whom the individual Claimants do not share their respective protective characteristics of age or disability;
- c. The PCP puts, or would put, persons who each respective Claimant shares the characteristic at a disadvantage when compared to persons with whom the Claimants do not share such characteristics;
- d. That PCP was applied to the Claimants;
- e. The PCP put, or would put, the Claimants at that disadvantage; and
- f. The Respondent cannot show the PCP to be a proportionate means of achieving a legitimate aim.

391 In identifying the appropriate pool for comparison, it is important to note that there must be no material difference between the circumstances relating to each case; s.23(1) EqA 2010.

392 The EHRC Employment Code states at para 4.9 that 'disadvantage' is to be construed as 'something that a reasonable person would complain about'. Consequently, an unjustified sense of grievance would not qualify.

393 In Shamoon cited above, the House of Lords held that the test of disadvantage was whether 'a reasonable worker would or might take the view that he had... been disadvantaged in the circumstances in which he had thereafter to work'.

Harassment

394 The EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour, including spoken or written words or facial expressions' para 7.7. Where there is disagreement between the parties, it is

important that an Employment Tribunal makes clear findings as to what conduct actually took place.

395 Section 26 EqA covers three forms of prohibited behaviour. In the claimant's case the Tribunal is concerned with conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) It states that a person (A) harasses another (B) if:

A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and

•the conduct has the purpose or effect of (i) violating B's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B — S.26(1)(b).

396 The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited' confirmed by the EHRC Employment Code at para 7.8. Unwanted conduct means conduct that is unwanted by the employee assessed subjectively.

397 S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had.

Burden of proof

398 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

399 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v CityLink Ltd [2018] ICR 748 are relevant. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination

unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Conclusion – applying the law to the facts set out above.

Constructive unfair dismissal

400 With reference to the first issue, namely, did the events detailed at rows 15, 17 to 18, 20 to 24, 28, 31 to 36, 38 to 53, 56 to 58, 63 to 68, 71 to 81, 84 to 85, 87, 89 to 93, 95 to 97, 99, 101 to 107 of the Scott Schedule, to the extent not admitted by the Respondent, take place as alleged by the Claimant, the Tribunal found on balance of probabilities the claimant's complaints were not well-founded:

400.1 **Allegation 15:** Ingolf Kirsten did instruct the claimant to reduce her sick leave. The Tribunal concluded this claim was out of time with reference to the disability discrimination complaints, it was not a continuing/cumulative act and there was no causal connection with the claimant's resignation for the respondent's alleged breach of the implied term of trust and confidence.

400.2 **Allegation 17 and 18:** Jimmy Thompson was promoted, and the claimant gave no indication to the respondent she was seeking a leadership role, unlike Jimmy Thompson who applied for the role and was initially unsuccessful. The claimant did not apply. Allegations 17 & 18 have no basis for the reasons set out in the findings of fact above. The Tribunal concluded the discrimination claim was out of time, it was not a continuing/cumulative act, and there was no causal connection with the claimant's resignation for the respondent's alleged breach of the implied term of trust and confidence.

400.3 **Allegation 20 & 21:** The work distributed between the department was limited and as confirmed by the claimant in her exit interview, people were under-resourced, bored and resigned as a result. For a period of approximately 6-months before her resignation the department was generating more work and the claimant carried out the work available commensurate with her position. There was no evidence other people in the department were treated any differently from the claimant apart from secondments and transfers which the claimant did not seek. The Tribunal

concluded this claim had no basis, and there was no causal connection with the claimant's resignation.

400.4 Allegation 22 & 23: The claimant was not refused reasonable adjustments by Jimmy Thompson. The evidence before the Tribunal was that the claimant continued to come in to work and worked at home on a regular basis resentful of any managerial control on her Jimmy Thompson attempted to impose. These allegations had no basis.

400.5 At the meeting of 9 June 2015, a later start at 10:00am was agreed. The claimant's medical condition had not changed from when the adjustments had been agreed with Ingolf Kirsten earlier. The claimant also agreed to contact Jimmy Thompson by 10am if she was unable to attend work as a result of her disability. As found by the Tribunal above, the contemporaneous documents reflect in the main the difficulties Jimmy Thompson had managing the claimant, a highly qualified high performing professional who held a pivotal role within the team, who did not want to be managed and took the view that she should not be managed by Jimmy Thompson or anybody else and this remained the case up to and beyond her resignation.

400.6 Allegation 24: All the evidence pointed to Jimmy Thompson believing the claimant about her condition and so the Tribunal found. Taking into account the adjustments made including full payment of wages when the claimant was not working her contractual hours, coupled with the sensitivity by which Jimmy Thompson treated the claimant, the Tribunal on the balance of probabilities did not accept the referral to occupational health implied Jimmy Thompson did believe the claimant. All of the evidence points to Jimmy Thompson seeking to understand why her attendance was so poor when reasonable adjustments had been agreed and whether additional adjustments were necessary in order that the claimant could perform her role. It is notable the claimant has not repeated this allegation in respect of later referrals to occupational health. The alleged incident took place on 21 July 2015. The claim has not made out and in any event is out of time.

400.7 Allegation 28: The Tribunal found Jimmy Thompson did apply unreasonable "constant" pressure or excessive scrutiny, and he did not say the claimant could not be trusted due to her sickness absence, and she must improve her sick leave. Jimmy Thompson was attempting to establish what adjustments were reasonable and necessary. The claimant was not happy being managed; excessive scrutiny was not applied to the claimant; there were several issues regarding her management, and this required resolution whether the claimant liked it or not, particularly when she was questioned about being in Asda supermarket for a lengthy period of time

during the working day. The alleged incident took place on 21 July 2015. The claim was not made out, and in any event out of time.

400.8 **Allegation 31:** With reference to this allegation the Tribunal concluded on the balance of probabilities: Jimmy Thompson did not provide the claimant with both a mobile phone and laptop in 2015. It is undisputed that by 2016 both had been provided, and in the meantime the claimant worked using her own phone and laptop. She would have been assisted had a company phone and laptop both been provided in 2015, however she did continue to work from home with access to a mobile phone and laptop, albeit her own IT equipment.

400.9 The alleged incident took place on 22 July 2015 the Tribunal concluded this claim was out of time taking into account the claimant was provided with a mobile phone and laptop at a later unknown date in 2016, and it was not a continuing/cumulative act and had no causal connection with the reasons for the claimant's resignation.

400.10 The clear evidence before the Tribunal was that working from home was not compatible with working in the secure submarines room. The Tribunal accepted that on no account could any person work from home on confidential MOD work which required a separate internet line, separate phones, a secure sound-proofed room referred to as the "submarine room" and employees were unable to discuss what took place when working confidentially, outside the submarine room. These conditions were set by the MOD and all relevant employees were required to obtain security clearance, which the claimant had not due to her own default, and this remained the case for a substantial period that could not be established at this hearing. The aim of the respondent when it employed the claimant was for her to work on highly confidential nuclear safety cases, and when that became available, it could not be done at home. On non-secure work the evidence before the Tribunal was the claimant worked at home and in the office. It was key to her role that she was contactable with the manager and the team when working at home.

400.11 **Allegation 32:** The Tribunal finds Jimmy Thompson did not tell the claimant he was unable to give her suitable/more challenging work because of her medical condition. Jimmy Thompson had to look overall at the work available; some members of the team went on secondments (the claimant accepted she was unable to go on secondment because of her health), some employees left, and he made sure the claimant was given meaningful work as recorded by the Tribunal in its findings of facts. In any event, this allegation took place in quarter 3 of 2015, some 6-months before her resignation when the claimant accepted she was given "meaningful work" as indicated above. The claim was not made out.

- 400.12 **Allegation 33:** The Tribunal found on the balance of probabilities Jimmy Thompson did not threatened disciplinary action which would lead to dismissal. A reference to “escalate it if there is no improvement” in the claimant’s attendance is not the same as a threat of disciplinary action. This allegation took place in late 2015, some 6-months before her resignation the claimant was given “meaningful work” as indicated above. The claim was not made out.
- 400.13 **Allegations 34, 35 and 36:** The Tribunal found the claimant was not “stripped of her deputy role” as she alleges. Helen Seals was not appointed deputy team leader “over” the claimant. The Tribunal found there was an informal arrangement between the claimant and Ingolf Kirsten to the effect that in his earlier absence she would be the contact point for safety related technical questions as found by the Tribunal above, and an informal arrangement existed between Jimmy Thompson and Helen Seals. Had this been an issue for the claimant she would have said so at the time and did not. This allegation took place late 2015 before Helen Seals was made team leader. The claim was not made out.
- 400.14 **Allegation 38:** The Tribunal found the Lone Working Policy did not prevent late working. The Policy provided lone working was possible by exception only. Lone working must not be carried out beyond the normal closing time of 6.30pm unless agreed on each occasion by your line manager and must not be undertaken beyond 8pm.” There were no instances when the claimant sought the agreement of Jimmy Thompson or any other manager to lone work between 6.30 and 8pm. The claim was not made out.
- 400.15 **Allegation 39:** The Tribunal repeats its observations above and found Jimmy Thompson did not refuse to give the claimant challenging and relevant technical work because of her health condition; the work was not there and there was no reference to her disability. The claim was not made out.
- 400.16 **Allegation 40:** The Tribunal found Jimmy Thompson did not refuse reasonable adjustments and nor did he threaten the claimant disciplinary action over sick leave “again” either on that occasion or earlier. At some unknown date in 2016 it is undisputed evidence the claimant was provided with a laptop and a company phone. The claim was not made out.
- 400.17 **Allegation 41 & 42:** There was no breach of confidentiality. Jimmy Thompson, Dr Ephraim and Lesley Biddiscome were involved in dealing with the claimant’s health, and it is not unusual for a case conference to be convened when possibly reasonable adjustments are explored and considered, which they were during the meeting. There was

no need for the claimant to take part, as she would have little input if any into what adjustments the respondent could make taking into account the business imperatives. The claim was not made out.

400.18 **Allegations 43, 44, 45 & 46:** The Tribunal found the following:

400.19 The claimant did volunteer for technical tasks and there was no satisfactory evidence challenging tasks were given to less qualified colleagues. The claimant was given the work available, and it is notable throughout the 852-page trial bundle and raft of emails from the claimant, there was no communication from her to Jimmy Thompson complaining about the work she was carrying out and more suitable work that was available. The claimant has never pinned down who the less qualified colleagues were, and the work allocated to them that would have been more suitable for her. The claim was not made out.

400.20 The claimant made vague allegations on this issue without any contemporaneous supporting evidence, when the evidence before the Tribunal pointed strongly to the work not being available and the work in the submarine room discounted because the claimant did not have the security clearance and/or she could not carry out that work at home when the work became available. At no stage did the claimant inform the Tribunal of the period when she was given work which she considered to be suitable, and it transpired that as the work in the department built up (after several people had left due to lack of work) and the department sustained a serious loss of one to two million pounds, the claimant for a period of 6-months before she resigned was provided with a nuclear security project. The Tribunal found the claimant's evidence concerning the alleged failure to provide her with suitable work to have been intentionally vague and misleading. The claim was not made out.

400.21 **Allegation 47:** The Tribunal found the claimant was not told off by Alex Warren as alleged for working late. There is no reference to this alleged meeting in quarter 2 by the claimant in her witness statement; she referred to quarter 1. Alex Warren disputes the meeting took place, but admits a meeting took on the 13 September 2016 (which is not disputed) concerning the flexible working arrangement and it was possibly, at that meeting, concerns raised about the claimant working late in Warrington. The witness evidence and contemporaneous documents do not reflect the allegation as set out at 47 in the Scott Schedule, and the Tribunal found on the balance of probabilities, the incident did not take place as described by the claimant. The claim was not made out.

400.22 **Allegation 48 & 49:** The letter dated 9 March 2016 merely set out possibilities for discussion, and it was the door which opened further

discussion that culminated in all the claimant's flexible working proposals being accepted by Jimmy Thompson, which firmly points away from any attempt on his part to suggest and/put in place inadequate arrangement/adjustments. During this period Jimmy Thompson was attempting to find a suitable way of working and remove obstacles for the claimant in order in order that she could work to the best of her ability; it was the claimant who requested the flexible working on the terms finally agreed not Jimmy Thompson, and the fact the claimant created problems over this was a source of frustration for him until his resignation. The claim was not made out.

400.23 **Allegation 51:** The End of Year Review was sent to the claimant on 10 February 2016 and acknowledged by the claimant on 18 March 2016. No amendments were made and there was no reference to any of the allegations that there was suitable work for the claimant to undertake that was not allocated to her. The work in the submarines department which had MOD restricted access was not available to the claimant as she did not have security clearance. The respondent's main customers were Rolls-Royce Submarines and EDF, and the EDF work was "considerably less" than anticipated. It was accepted by the claimant in her oral evidence on cross-examination that the amount of work was "lower." The Tribunal concluded the technical work that could be allocated to the claimant was affected by lack of availability and security constraints. The claim was not made out.

400.24 **Allegation 52:** Helen Seals was made deputy team leader during Jimmy Thompson's holiday in the same way the claimant had been, although it was not a formalised position in either case. The cogent evidence before the Tribunal was that Helen Seals was earmarked as management potential when the claimant was not as the claimant had poor people skills. Helen Seals was looking after the team she was responsible for when the claimant did not have that responsibility.

400.25 **Allegation 53 & 56:** The Tribunal found the claimant was not a credible witness on this issue, and the fact her flexible working proposal was accepted wholesale immediately by Jimmy Thompson contradicted the allegation that Jimmy Thompson refused to make the adjustments requested by the claimant, and he showed "a lack of care or belief" which was far from the case. Jimmy Thompson clearly accepted the claimant's medical condition, which formed the basis of her flexible working proposal, and the prospect of a very late 1pm start in the office with working from home commencing at 10am instead of the office at 9.30am (the original contractual start time), and he was working towards the flexible working agreement prior to it being formalised in a written change to the contract. The claim was not made out.

- 400.26 The sequence of events reflect Jimmy Thompson positively approached the resolution of a difficult issue, to the detriment of the department because in an ideal world, had not the claimant been disabled, she would have been working with the teams from 9.30am in the office. Had she managed to obtain security clearance she could have worked in the submarine room on high profile lucrative confidential work involving nuclear submarine engines when it became available. The fact that he agreed all of the adjustments proposed by the claimant against a backdrop of the department substantially underperforming both in respect of the quality of work available and revenue, showed a great deal of care towards the claimant and belief in what she was saying to him. In the Tribunal's view this was a central issue in the case, and a watershed because after this agreement, when the claimant refused to comply with her side of the bargain, the relationship deteriorated, and this was down to the claimant's actions and not those of Jimmy Thompson. The claim was not made out.
- 400.27 Allegations 53 and 56 are contradicted by the contemporaneous documentation, without which this case would have been difficult to resolve due to the long passage of time, poor recollection of witnesses who had moved on from the claimant in their lives, and the unfortunate delay in these proceedings. This cannot however account for the version of events put forward by the claimant, found to be an inaccurate historian by the Tribunal, whose credibility was undermined by her allegations at paragraphs 53 and 56. This raised a further question mark over the claimant's evidence in this case, and there were other instances when her credibility was called into issue. The claim was not made out.
- 400.28 **Allegation 57:** The Tribunal repeats its observations above. It preferred the respondent's evidence that this was one of the most difficult complex projects the department was dealing with, and it required the expertise of someone at the claimant's level with her qualifications and experience. In short, it was not a HR project, and a HR professional would have been incapable of carrying it out. The claim was not made out.
- 400.29 **Allegation 58:** It is notable that by this stage the claimant accepts she was provided with a laptop and mobile phone. There was no indication in the evidence before the Tribunal Jimmy Thompson did not intend to follow the flexible working agreement; the reality was that the claimant was working from home a great deal and not informing Jimmy Thompson of this in accordance with her agreement, by the stated deadline time of 11:00am despite the late start of 1:00pm agreed to ensure the claimant came into the office at least for the afternoon bearing in mind the claimant's indication to the respondent that her medical condition was worse early in the morning. It was the claimant who was not complying with the flexible working agreement and Jimmy Thompson attempted to proactively manage

this much to the chagrin of the claimant, who as the Tribunal have notes previously, did not see why someone in her position should be managed and in cross-examination of the respondent's witnesses she described as "petty". The claim was not made out.

400.30 The claimant was made aware that adjustments had been made to the number of absences which would trigger a capability investigation, increased from three to six occasions following a discussion with Jimmy Thompson on the 9 March 2016 which she did not question. The claimant's allegation that the trigger points and the adjustments made in her favour was found not to be credible, and yet another attempt by the claimant to undermine the extent to which Jimmy Thompson attempted to support her during the period of his management until their relationship irretrievably broke down. The claim was not made out.

400.31 **Allegations 63, 64, 65, 66, 72, 73, 78, 105 & 107.** The allegation regarding the sick leave records concerned the Tribunal as it was apparent from the evidence produced by the claimant that she had worked at home on at least two-days in October 2016. The dates relied upon by the claimant were the 14 and 21 October 2016. The Tribunal accepted the claimant's evidence that she had had carried out some work at home and yet these days had been recorded by Jimmy Thompson as sick leave days, and the claimant had asked him to correct them which he had not.

400.32 Taking all the evidence, including Jimmy Thompson's oral evidence and Lesley Biddiscome's communications with Jimmy Thompson on 16 November 2016, the Tribunal on the balance of probabilities, concluded the sick leave records were not "false" as alleged by the claimant. The claimant was not treated aggressively by Jimmy Thompson as she alleges, and when the claimant stated she was not sick but working his reaction was not "he doesn't care" insisting it should be recorded as sick leave. The Tribunal accepted that Jimmy Thompson incorrectly understood that disputed days when the claimant was off sick/working from home for a minimum period even if she had only worked one hour, should be recorded as sick leave until he was advised by Lesley Biddiscome to the contrary. The claim was not made out.

400.33 After the meeting with the claimant Lesley Biddiscome discussed the sick pay position with Jimmy Thompson and took the view that he was unaware of the correct process to follow when an employee worked part of a day, even if it was one hour. She informed him that the claimant, in such circumstances, should not be recorded as having taken sick leave but classed as working. Following their meeting Lesley Biddiscome researched the position further and wrote to Jimmy Thompson with the relevant section from "Your Hr" confirming if an employee worked part of a day there was no

need to record it as an absence on Workday. After being told this Jimmy Thompson did not change the record, rather he left it for the investigation to sort out, which is what happened as none of the disputed dates went through to a disciplinary hearing, and there were no further instances when Jimmy Thompson recorded the claimant as being on sick leave when she had worked some hours at home, had failed to inform him of her intentions regarding work and not turned into the office.

400.34 The evidence before the Tribunal was that there were days when the claimant had omitted to her record her sickness absence and she was required to remedy this. It appears to the Tribunal that the position was confusing for a manager who had no experience, and it was not for Jimmy Thompson to go searching for evidence that the claimant had worked on a particular day, as suggested by the claimant in this hearing. The fact the claimant had been communicating via her email does not necessarily denote she is working, and it was for the claimant to have kept Jimmy Thompson informed in accordance with the flexible working agreement, which she did not on numerous occasions, with the result that rightly or wrongly, Jimmy Thompson took the view the claimant was not working. There was genuine confusion on the part of Jimmy Thompson, and this was accepted by the Tribunal on the balance of probabilities. Jimmy Thompson's confusion had no causal link with the claimant's disability, and the Tribunal found he was concerned, as the claimant's manager, with not been kept informed by her, not knowing one day to another, if the claimant was working on a particular day and at a particular time, if she was available for team contact and if she was meeting deadlines and achieving "deliverables. "All of these matters had no connection with the claimant's disability; and were part and parcel of managing a team and individual employees within that team. The claim was not made out.

400.35 There was no evidence before the Tribunal that the claimant's "false sick records" as described by her, had not been amended by the effective date of termination, and had this been the case (which it was not according to the Tribunal's findings above) given the fact no action was taken against the claimant in respect of the disputed absences it is difficult to see where the prejudice to the claimant lies especially given the fact that there were days the claimant had not recorded as properly as sick leave and no action was taken against her.

400.36 **Allegation 67:** There was no satisfactory evidence supporting the claimant's allegation, and the Tribunal would have expected to have seen some form of contemporaneous complaint at the time alleged, October 2016 onwards, and yet the claimant did not raise a grievance until 2017. No specifics of the alleged bullying were set out, and the Tribunal who did not find the claimant a credible witness, preferred the evidence given by Jimmy

Thompson on the balance of probabilities, that the claimant was not bullied. Any attempt at managing the claimant would be perceived by her as an act of bullying, especially by someone who she considered to be less qualified, with less experience and who was holding his first management position. The claim was not made out.

400.37 **Allegation 68:** Lesley Biddiscome consulted with occupational health, the claimant had received 18 session of treatment, 12 more session that any other employee, and occupational health advised her the claimant should go to the NHS. Additional secessions were refused, with good reason and based on medical advice. Contrary to the claimant's allegation, occupational health had not recommended or supported her request for additional treatment, and there was no evidence any additional sessions were reasonable adjustments that would any positive effect on the way in which the claimant could work or comply with her part of the flexible working agreement. The claim was not made out.

400.38 **Allegations 71 & 72:** The Tribunal has already dealt with allegation 72 as far as the sickness record was concerned as set above; in respect of the allegation that no step was taken after the claimant had made three complaints of discrimination. The Tribunal did not accept on the balance of probabilities the claimant raised the issue of disability discrimination with Jimmy Thompson orally as she alleges. It does accept the claimant's contemporaneous emails makes such a reference as found above. It is not the case that no steps were taken. The discrimination alleged at the time was narrow, involving Jimmy Thompson not accepting the claimant was working when she was at home and the related sick leave records. Lesley Biddiscome discussed the issue with Jimmy Thompson in November 2016, sent him the relevant HR Policy and she expected the records to be changed to reflect days when the claimant was working at home, albeit for a minimum of one hour or more.

400.39 The claimant did not allege after the initial dispute/confusion over sick leave, Jimmy Thompson continued to treat working from home, even for a very short time or the contractual day, as sick leave. This is persuasive evidence Jimmy Thompson misunderstood the position, as he explained on cross-examination, he was put right by Lesley Biddiscome and then followed the correct procedure. Mistaking the correct process is not tantamount to disability discrimination, and the Tribunal finds there was no continuing act as alleged by the claimant. The fact Jimmy Thompson left the disputed dates to be resolved at the disciplinary investigation stage does not assist the claimant, as he took the view they should be independently investigated and had "washed his hands of the situation". Jimmy Thompson had left the business by 17 February 2017, and it was clear from his emotional response when given evidence the issues he had

with the claimant was partly instrumental in his decision to resign and take up employment with another company.

400.40 **Allegation 74:** HR acted on Jimmy Thompson's complaint because there were issues to be resolved, and as result of the proactive steps several allegations were dropped and only two allegations remained to be explored at the disciplinary hearing. Had HR delayed the claimant would have criticised this. Lesley Biddiscome can be criticised for not reporting to the claimant in good time the fact she had held a discussion with Jimmy Thompson, she had provided him with advice and come to the view that his behaviour was down to inexperience and not malicious acts of discrimination aimed at getting the claimant into trouble. The fact that Lesley Biddiscome did not take this step, resulted in the claimant reasonably believing no action had been taken when it had. Allegations of discrimination in the workplace are serious, whether they are made informally or via a written formal grievance, and it was encumberant on Lesley Biddiscome, a HR professional, to keep the claimant informed.

400.41 Lesley Biddiscome was inundated with work. There was a lot going on with the claimant at the time, including advising Jimmy Thompson on HR matters during a period when the employee/manager relationship had completely broken down. Lesley Biddiscombe was not a decision maker, and she knew that whatever decision was made by management in respect of the claimant, this would be met by a flurry of complaints because the whole situation verged on the unmanageable and so the Tribunal found on the balance of probabilities. Had the claimant complied with her part of the flexible working agreement by keeping Jimmy Thompson informed (which she was able to do as evidenced by her actions following the oral warning despite being unwell) the situation could have been avoided. All that was needed was a short email or phone call on the part of the claimant which was eminently achievable because that is what precisely happened for a short while after the oral warning was given.

400.42 **Allegation 75:** There was no evidence HR supported the "mis-recording of work at home days" as alleged, and the guidance given to Jimmy Thompson was in accordance with the respondent's HR Policy. It is difficult to understand the claimant's complaint in this regard given Jimmy Thompson's position of treating work at home as sick leave was not supported by HR or Leslie Biddiscome and the claimant was aware of this shortly after the event, and allegation 75 has not basis whatsoever in the reality skewed by the claimant's perception of events through the lens of litigation with the passage of time. The claim was not made out.

- 400.43 **Allegation 76:** Jimmy Thompson took the view until he was told otherwise, the swipe card was a valid way of recording who was in the office because he believed it showed the time when an employee entered the office. Taken in tandem with the fire register signed by employees, Jimmy Thompson reasonably believed it reflected when an employee entered and left the office, and that was the process he had been used to and continued using as there was no formal time recording system and Jimmy Thompson was not informed otherwise. The claim was not made out.
- 400.44 **Allegation 77:** The claimant was notified there was to be an investigation, and there were issues to be investigated. Lesley Biddiscome did not say the investigation cannot consider the claimant's repeat of her discrimination complaint; it was made clear to the claimant it would be looked at and if discrimination was found, it would be dealt with separately. The claimant was found not to be a credible witness on this point; her evidence was undermined by the contemporaneous notes as set out above. The claim was not made out.
- 400.45 **Allegation 79:** The claimant did not adduce any evidence that "several team members do not have access to the submarines room but are given relevant work in the nuclear sector" and the Tribunal finds on the balance of probabilities, the claimant was not told by Jimmy Thompson she could be trusted because of her condition in late 2016/early 2017. The claim was not made out.
- 400.46 By this date all trust and confidence Jimmy Thompson had in the claimant had gone, and visa versa. The prospect of litigation was on the horizon and Jimmy Thompson was careful with how he handled the claimant, what he said and did, preferring not to meet the claimant by himself, if possible, always with HR present. Even if Jimmy Thompson thought by this stage of the process the claimant could not be trusted because of the way she behaved as opposed to the effect of her disability, he would not have said so because he knew he would end up having to give evidence under oath at an Employment Tribunal hearing. The view of Anne-Marie Schilling was that employees had a better chance of succeeding in comparison to employers in discrimination complaints before an Employment Tribunal and care was taken in how the claimant was dealt with given the anticipated litigation.
- 400.47 **Allegation 81 & 89:** Helen Seals was promoted, but not over the claimant as alleged. The claimant did not apply and gave no indication she was interested in an interim team leader position pending a reorganisation, and she did not apply when the vacancy came up and Helen Seals was successful in her application. Had the claimant been genuinely interested

she would have actively explored her options, especially when she believed Helen Seals had been appointed on an interim basis. Looking at the factual matrix, by this stage the claimant was struggling, she wanted to work at home at least 2-days a week and as reflected in the final occupational health report, cut her hours by fifty percent. The Tribunal concluded on the balance of probabilities that it did not occur to the claimant to apply for a team leader role that would require her to be in the office on a full-time contract, and the fact Helen Seals was promoted gave the claimant the opportunity to strengthen her discrimination complaint when she had no intention of applying or taking on the role of interim or permanent team leader. The claim was not made out.

400.48 **Allegation 84:** The invite letter was a proforma and the claimant was left in no doubt by Lesley Biddiscome that she would not be facing dismissal. This was made clear to the claimant at the disciplinary hearing. The claimant had the opportunity to put forward her defence in full and challenge any inaccuracies in the evidence and investigation report, which she did including raising issues with the “illegally obtained swipe card.” The claimant’s allegation that the swipe card was illegally obtained did not make sense to the Tribunal. The claim was not made out.

400.49 **Allegation 85:** The disciplinary hearing was not held before the grievance hearing. Both took place on the same day, however, there was no grievance outcome before the disciplinary hearing. In some cases, hearing the disciplinary before the grievance outcome could result in a detriment and possibly discrimination; in the claimant’s case it made no difference. The evidence that had been produced allegedly as a result of the “malicious discriminatory actions” of Jimmy Thompson was discounted in its entirety. Had it not discounted; the claimant may well have had a stronger case. The allegations that formed the basis against the claimant at the disciplinary hearing had no connection to any alleged discrimination and were an attempt to manage an employee who had become unmanageable in the hope that a warning would assist in future management of the claimant and her refusal to comply with a reasonable management instruction that was not tainted by unlawful discrimination. The claim was not made out.

400.50 **Allegation 87:** The Tribunal found there was no misinterpretation; the issue for the respondent was that the claimant was not complying with informing managers of her whereabouts by the agreed time in accordance with the agreement she had reached. The claim was not made out.

400.51 **Allegation 90 & 93:** The alleged sick days and car park swipe records were discounted and did not form part of the disciplinary hearing. The claimant during the disciplinary hearing and this liability hearing ignored the fact that (a) she was allegedly working at the same time as

being unable to communicate her whereabouts to her manager, (b) this undermined her argument that because of her medical condition she was unable to make contact on time, and (c) the claimant had agreed to the 11am deadline presumably on the understanding that it was achievable. The claimant was not being asked to phone in and provide an explanation, she was merely to make brief contact either by phone or email, which she was able to do after the oral written warning, even when she was unwell. As indicated earlier, Bob Calender did not limit the homeworking to 2-days per month as alleged by the claimant. These claims were not made out.

400.52 **Allegation 95 and 96;** the claimant supported by the union did not seek an extension of time for filing her appeal, and there was no suggestion from her or the union there was insufficient time to appeal either before or after the appeal deadline date. There was no evidence the claimant was “unable to appeal” as alleged by her; she was involved in extensive and regular party to party communications during this period and had sought advice prior to the disciplinary hearing. The claims are not made out.

400.53 **Allegation 97 & 99:** there were no “new limits on homeworking” as alleged. Helen Seals commented on the claimant working at home 3 days in 3 weeks and not one month as alleged, which was a matter of fact and no action in terms of managing her capability was taken against the claimant. The claimant worked at home was against a backdrop of the claimant being required to come into office by 1pm and if she was too unwell to come into work by 9.30/10. She was also offered the facility by which she could explore the possibility of a new second flexible working agreement, which the claimant did not take up with the respondent. The claim was not made out.

400.54 **Allegation 101 & 102.** The claimant did not appeal the outcome of the grievance hearing. A grievance hearing is not required to be perfect. Eddie Marrett could have pushed Jimmy Thompson at the first and only grievance investigation meeting that took place before Jimmy Thompson left the business, especially on the issue of the sick records and disputed dates when the claimant worked at home and was marked as being off sick. Lesley Biddiscome had discussed the matter with Jimmy Thompson earlier as indicated above, which resulted in Jimmy Thompson changing the sickness absence recording process. The problem for the respondent was that the meeting with the claimant, which Lesley Biddiscome had tried to arrange as a matter of urgency, had not taken place before Jimmy Thompson left the business, partly as a result of the claimant’s unavailability. When the meeting took place with Jimmy Thompson it was based on solely the written grievance. No further clarification had been provided by the claimant, with the result that Eddie Marrett was in a difficult position, doing the best he could with the information before him. It is clear

from the contemporaneous notes that were taken he covered the claimant's written grievance allegation by allegation, except for the one matter that was the subject of the disciplinary hearing that was to take place the afternoon after the grievance hearing. The problem for the respondent was that once Jimmy Thompson had left the organisation it was difficult to carry out a further investigation as to Jimmy Thompson's motives and reasons. The claim was not made out.

400.55 Eddie Marrett was entitled to take the full history of the claimant's behaviour and the flexible working arrangement she had proposed and agreed coupled with the pivotal part played by Jimmy Thompson, into his assessment whether discrimination had taken place or not.

400.56 The claimant criticised the respondent's delay; it was clear from the contemporaneous documents in the bundle, that there was delay on the claimant's part due to her not being in work and as a result of her union repetitive not being available, and there was no inactivity on the part of the respondent once the formal grievance had been lodged. The claims are not made out.

400.57 **Allegation 103:** The claimant resigned by email, and the Tribunal fails to understand how her act of resignation in this regard amounted to a failure on the respondent's part in its duty to make reasonable adjustments. The claim was not made out.

400.58 **Allegation 104 to 107;** the Tribunal has dealt with these allegations above and does not intend to repeat its findings. Turning to the exit meeting, the claimant has not adduced any evidence that the respondent was in breach of its duty to make reasonable adjustments at that meeting, and her discrimination claim is confused and confusing, along with the constructive unfair dismissal claim made after she had resigned on the 4 May 2017. The claimant's version of what she said at the exist meeting is contradicted by the notes taken, and it is notable that neither the claimant nor her union representative attempted to put these matters on record in any way. The Tribunal on balance prefers to rely on the contemporaneous notes and not the description set out in the claimant's Scott Schedule produced after the event with this litigation in mind. The Tribunal did not accept there was any satisfactory evidence before it (or Jimmy Thompson) that the claimant worked full-time from home; she did send emails throughout the day at times which is not necessarily incontrovertible evidence she was working "full-time." In any event, according to the information provided to Jimmy Thompson by HR, the claimant was not required to work a full day as one hour of working was sufficient for that day not to be recorded as sickness absence.

- 400.59 The Tribunal found on the balance of probabilities as set out in the matrix above, there was no “withdrawal of reasonable adjustments” as alleged by the claimant and the position since the flexible working arrangement was that the claimant could work at home if too unwell to travel into the office, but she was expected to attend the office by 1pm, three and a half hours later than the original start time agreed as a reasonable adjustment on the basis that the claimant’s condition was worse in the mornings. These adjustments did not change. The claim was not made out.
- 400.60 With reference to allegation 107 this has been dealt with above.
- 401 With reference to the issue, if so, did any or all or a combination of the above acts amount to a repudiatory breach of the implied term of trust and confidence, the Tribunal found there was no repudiatory beach of the implied term of trust and confidence on the part of the respondent.
- 402 Turning to the issue concerning acting team leader, and the opportunities given to other employees who were allegedly more suitable with better people skills than those possessed by the claimant, a repudiatory breach of the implied term of trust and confidence could have occurred, but did not, as a result of the way this was managed.
- 403 The claimant as a senior employee should have been informed of the vacancy when Ingolf Kirsten moved to another department and Jimmy Thompson resigned. She was not informed, and she was not invited to apply, and after the event at no stage did the claimant indicate she would have applied for the position had the opportunity been given, and the reason for this is that she would not have done so as found by the Tribunal above. The claimant’s objective was to work more from home, and she would not have wanted the responsibility of coming into the office to carry out team leader duties.
- 404 Having found that there was no breach of contract, there is no requirement for the Tribunal to consider the remaining issues.
- 405 In the alternative, had a breach been found (which it was not) as set out in Buckland above, the “vital question” was whether the impact of the respondent’s conduct on the claimant was such that, viewed objectively, the claimant could properly conclude that the respondent was repudiating the contract. Objective assessed the Tribunal did not find this was the case, either in respect of (a) sickness absence, (b) team leader positions or (c) the flexible working agreement and how it was applied, taking the respondent’s conduct from the time the claimant had sickness absence soon after she commenced employment through to the date of resignation and beyond to the effective date of termination.

406 Taking into account the guidance set out in Malik Lord Steyn referred to the implied obligation covering a diversity of situations in which “a balance has to be struck between an employer’s interests in managing his business as he sees fit, and the employee’s interest in not being unfairly and improperly exploited.” In the claimant’s case it was a matter of the claimant being managed within the business, and her interest in not being unfairly and improperly treated as a result of her disability. The Tribunal has made some criticism of the respondent, however taking into account the complex factual matrix before it as found above, objectively assessed, the respondent’s conduct was not likely to destroy or cause serious damage to the relationship between it and the claimant in the difficult circumstances encompassing a downturn in work and staff, anticipated income being reduced between one to two million, highly confidential work provided by the MOD limited to the submarine room, the business requirement of face-to-face team working, training juniors, mentoring and management and the substantial adjustment made to the claimant’s working hours whilst continuing to pay the claimant her full salary when she was unable to meet her contractual hours of work.

407 The Tribunal found on the balance of probabilities there was no cumulative breach of contract and no cumulative series of acts taken together amounting to a breach of the implied term; Omilaju and Lewis above.

408 If the Tribunal is wrong in its objective assessment that the respondent’s attitude concerning the claimant’s unsuitability for the role of team leader was tainted by the effects of her disability in the workplace, it did not breach the implied term of trust and confidence on the basis that the claimant had not intention of applying for the role. In the alternative, it would have found the claimant had waived the breach: Weston Excavating and W.E. Cox Toner (International) Ltd. The claimant was aware Helen Seals was to replace Jimmy Thompson and she took not steps until much later.

409 The claimant waived any breach and continued in her role through to a resignation in the knowledge from late 2016 that Helen Seals was to take over Jimmy Thompson’s position as team leader, she had taken over the claimant’s management before Jimmy Thompson had left, had carried out the claimant’s 2016 End of Year Review and had worked with the claimant proactively by ensuring that as the department work available for employees increased, and the claimant was provided with projects that fitted her skills as they became available. It is notable the exchange at the Review was positive, the claimant took on other projects and just under 3-months later, on the 4 May 2017, resigned.

410 With reference to the issue, if there was a repudiatory breach of the Claimant’s contract (which the Tribunal found there was not), did the Claimant resign in

response to it, the Tribunal found she had not and the reason for her resignation was that she suspected (without exploring any possibilities with the respondent) that she would be unable to carry out her role working a reduction of 50% of the original contractual hours with 2-days a week at home given the pivotal nature of her key responsibility for nuclear safety and the requirement for team working and mentoring less experienced members of the team in and outside the office which required her to be present in the workplace more than at home. It is notable that these were suggestions raised by the claimant with occupational health, which she never aired with the respondent despite an invitation by it to look again at the flexible working agreement with a view to exploring a workable resolution for the claimant and at the same time meet the respondent's business needs.

411 With reference to the issue, namely, did the Claimant affirm the contract and/or waive the breach, for the reasons set out above, the Tribunal found the claimant had waived the breach. There is no requirement for the Tribunal to consider the issue of contribution, and whether the compensatory award be reduced or extinguished, to reflect the Claimant's culpable and/or blameworthy conduct which caused or contributed to her dismissal, pursuant to s123(6) of the Employment Rights Act 1996. The Tribunal records that the claimant's conduct was a real issue in this case, as it appears she intentionally took the step of non-compliance with the flexible working agreement to suit her own means and cause problems for managers by disregarding reasonable management instructions.

412 Finally, the claimant chose not to follow the ACAS Code by not appealing the disciplinary outcome or the grievance outcome before resigning, and her reasons for not doing as argued before this Tribunal have no basis in reality. There was no satisfactory evidence the claimant's disability prevented her from appealing in time, and neither she nor her union representative requested an extension of time on any basis.

413 In conclusion, the claimant was not constructively unfairly dismissed, her claim for unfair dismissal is not well founded and is dismissed.

Disability Discrimination

Whether Claimant was a disabled person

414 It is agreed that, at the material times, the Claimant was a disabled person within the meaning of the Equality Act 2010, her disability being irritable bowel syndrome ("IBS"). It became clear to the Tribunal as the case progressed that the claimant did not discuss the specifics of her medical condition with managers, for understandable reasons; it made her feel uneasy and she was embarrassed. Managers, therefore, largely relied upon the occupational health reports for guidance. These were before the Tribunal and have been set out above.

415 In written and oral submissions, the claimant asked the Tribunal to re-read her impact statement and medical records in the bundle in order that it would understand why she was unable to comply with the flexible working agreement. The first point to note is that the Tribunal was not taken to any of the medical records throughout the entire trial of this case, and more importantly, the respondent was unaware of the medical records and reports during the relevant period and therefore they could have played no part in the decision-making process of the relevant managers/HR. The history set out in the medical reports as related by the claimant, for example, the 9 January 2018 report, cannot be relied upon without more information. It is notable the claimant confirmed in that report she could only work at home as it was impossible to leave the house and there is no reference to the claimant's inability to communicate with the respondent by text, email or telephone on or before 11am

416 The 9 January 2018 report recorded: "During the period 2016 to 2017 she took approximately forty days off work due to her condition. She advised that she had been allowed to commence work at 11am with a note that she needed to book in the time she arrived for work [paragraph 5.6] ...I am advised that in spring 2017 she was subject to disciplinary action for failing to comply with the certification of her being able to start work at 11am and documenting her time of arrival..."

417 As can be seen from the findings of Facts above, the information provided by the claimant to the consultant medical expert was incorrect; the claimant was not disciplined for failing to start work at 11am and documenting her time of arrival, she was disciplined for "failure to adhere to the new flexible working arrangements" that required her to inform the respondent if she intended working at home in the morning/office and if not, whether she intended to be in the office at 1pm, a substantially more generous arrangement than starting work at 11am. It is also notable the claimant acknowledged she had taken 40-days absence, and she has downplayed in this litigation Jimmy Thompson offering to increase the absence rate from three occurrences in a 12-month period to 6, and starting with a "clean sheet" from the date of the flexible working agreement as a reasonable adjustment in the hope that the claimant would establish a more regular working pattern. There was no mention of this adjustment to the consultant.

418 Turning to the claimant's disability statements numbered 1 and 2, the claimant deals with the difficulties she had leaving the house and travelling, referring to being "afraid of going to work because of the scrutiny my boss would make about the time of arrival." There was no evidence before the Tribunal to this effect; the scrutiny to which the claimant was subjected to arose out of the fact she had recorded her arrival time earlier than it was which resulted her exaggerating the time in which she had been working. Throughout this litigation the claimant has attributed her inability to leaving the house to the effects of her disability, and yet in the disability statement the reason given is "afraid of going to work

419 There was no satisfactory cogent evidence before the Tribunal (or the respondent's managers during the relevant period) that the claimant was unable to make email or telephone contact in compliance with the flexible working agreement, and her assertion that she was unable to do so was undermined by the fact that she did after the oral warning was issued. There were occasions when the claimant sent work-related emails and communications but still did not comply with her agreement to communicate her intentions to managers. The claimant's evidence in impact statement 2 that she "regularly called the office to reach my boss, Jimmy, but he was often away from his desk, due to working in submarines room where phones were not allowed..." was disingenuous and undermined by the contemporaneous evidence which reflected the fact the claimant could communicate by email with Jimmy Thompson when he was in the submarines room, and did so on a number of occasions but not in relation to her whereabouts on a specific day or intention as to whether she would be turning up to work in the office at 1pm. This was the key issue for Jimmy Thompson that resulted in him referring the claimant for an independent investigation, as he was unable to manage her attendance whether it be in the office or working at home.

Direct discrimination: Equality Act 2010 s13

Burden of Proof

420 With reference to the burden of proof, the claimant has proved, on the balance of probabilities, some facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent subjected her to the discrimination alleged: Madarassy v Nomura International Plc [2007] ICR 867.

421 The Tribunal found the burden had shifted in respect of allegation 72 brought under section 13 and the section 15 discrimination EqA complaint only, nevertheless it has considered all the facts in this case and the explanations given on behalf of the respondent as set out in the findings of facts with reference to all the disability discrimination complaints brought by the claimant. It found the explanations given by the respondent's witnesses were untainted by disability discrimination, except for disability discrimination arising from disability found to have been objectively justifiable for the reasons set out below.

422 The Claimant alleges that the Respondent did the things listed at allegations numbered 17, 18, 20, 21, 24, 28, 32, 33, 34, 35, 36, 39, 43, 44, 45, 46, 51, 52, 56, 57, 67, 72, 79, 81, 89 and 102 of the Scott Schedule, which constituted direct disability discrimination. The Tribunal's findings are as follows:

422.1 **Allegation 17 and 18:** Jimmy Thompson was not promoted "over" the claimant which suggests she applied for the role of team leader; she did not, and on the balance of probabilities the Tribunal found she had no intention of applying for the position at any stage during her employment for

the reason. The Tribunal concluded this claim was out of time and was not a continuing act. The complaint is dismissed.

422.2 Allegation 20, 21 & 57: There was no evidence adduced by the claimant concerning the existence of an actual or hypothetical comparator who did not share the claimant's protected characteristic who was not in materially different circumstances: Para 3.23 of the EHRC Employment Code A comparator "relevant to the claimant's treatment" would be a principal safety engineer who was not disabled with IBS or similar that resulted in substantial sickness absences and a requirement to attend work later i.e. by 1pm, or not at all and work from home with responsibility for integrating a multi-disciplinary team of highly qualified professionals, if available to work on confidential MOD submarine projects providing clearance had been obtained, that could not be discussed outside a designated sound-proofed room and if he or she was unable to attend work by 9.30am was required to contact the line manager beforehand. Working from home restricted the comparator's ability to supervise, train and support more junior team members.

422.3 There was no evidence other people in the department (including the three principal engineers) were treated any differently from the claimant except for secondments and transfers which the claimant did not seek. As indicated above, there was no satisfactory evidence the claimant was given trivial work that someone of a lower grade could do, and on the balance of probabilities the Tribunal found the limited available work was given to the claimant except for confidential MOD work which she had not obtained clearance for although she was expected to do this work. For several months prior to the claimant's resignation the claimant continued to be given work appropriate to her grade, which she carried out without complaint. The Tribunal concluded a hypothetical comparator would have been treated no differently than the claimant was, this claim was in any event received out of time, was not a continuing and the complaint is dismissed.

422.4 Allegation 24: The Tribunal found this did not take place as described by the claimant, and the claim is dismissed.

422.5 Allegation 28: The Tribunal found Jimmy Thompson did apply unreasonable "constant" pressure or excessive scrutiny, and he did not say the claimant could not be trusted due to her sickness absence, and she must improve her sick leave. The complaint is dismissed. The Tribunal concluded this claim was out of time and was not a continuing act.

- 422.6 **Allegation 32:** The Tribunal finds Jimmy Thompson did not tell the claimant he was unable to give her suitable/more challenging work because of her medical condition. The complaint is dismissed. In any event, this allegation took place in quarter 3 of 2015, some 6-months before her resignation the claimant was given “meaningful work” as indicated above. Further Helen Seals was not an appropriate comparator as she actively sought advancement into the role when the claimant had not, and she had good people skills in comparison to the claimant against whom complaints had been made by team members. In any event, the claim is out of time and was not a continuing act.
- 422.7 **Allegation 33:** The Tribunal found on the balance of probabilities Jimmy Thompson did not threatened disciplinary action which would lead to dismissal and the complaint is dismissed. This allegation took place in late 2015, is out of time and not a continuing act.
- 422.8 **Allegation 34, 35, 36 & 52:** The Tribunal found the claimant was not “stripped of her deputy role” as she alleges, and repeats its observations above. Helen Seals, the actual comparator, was not appointed deputy team leader “over” the claimant in late 2015 and the complaint is dismissed. Further, it is out of time and any continuing act assuming there was a link with Helen Seals being chosen to take over Jimmy Thompson’s team leader role in late 2018, time stopped then or in the alternative, by 17 February 2019 when Helen Seals was the team leader although she had already started managing the claimant in her team leader role before that date. The Tribunal concluded this claim was out of time and was not a continuing act.
- 422.9 **Allegation 39:** The Tribunal repeats its observations above and found Jimmy Thompson did not refuse to give the claimant challenging and relevant technical work because of her health condition; the work was not there and there was no reference to her disability. This claim is dismissed. It is also out of time and not a continuing act given the fact Jimmy Thompson left the business on 17 February 2017 and Helen Seals provided the claimant with relevant work in the months leading to her resignation as and when it became available in the department.
- 422.10 **Allegations 43, 44, 45, 46 & 51:** The Tribunal repeats its findings and conclusions above. The claimant did not give any evidence concerning who the less qualified colleagues were and the work allocated to them that would have been more suitable for her. She made a number of vague allegations without substantiating them with contemporaneous evidence and given the Tribunal’s analysis that the claimant could not always be relied upon and was on occasion, intentionally vague and misleading, it found the events set out within allegations 44, 45, 46 and 51 did not take

place and are dismissed. The claim is out of time and there is no continuing act.

422.11 **Allegation 56:** The Tribunal found on the balance of probabilities that the incident as alleged did not take place and the claim is dismissed. The claimant was found not a credible witness in relation to allegations 53, and her credibility in relation to allegation 56 was undermined by fact her flexible working proposal was accepted wholesale immediately by Jimmy Thompson, and the complaint is dismissed for the reasons already set out above. The complaint is out of time and there is no continuing act.

422.12 **Allegation 67:** There was no satisfactory evidence supporting the claimant's allegation, and the Tribunal, who did not find the claimant a credible witness on this issue, preferred the evidence given by Jimmy Thompson on the balance of probabilities. This claim is dismissed for the reasons already stated above. The complaint is out of time and there is no continuing act.

422.13 **Allegation 72:** In respect of the allegation 72 the Tribunal accepts the claimant's evidence that she made complaints (two not three) of discrimination concerning Jimmy Thompson's recording of sick leave, and she emailed Jimmy Thompson on 11 November 2016. It is not the case that no steps were taken, and these have been set out above. The Tribunal found the claimant had raised the issue of working days being recorded as sick leave and Lesley Biddiscome, said she would investigate it, which she did. Jimmy Thompson was in a position to change the Workday record when Lesley Biddiscome was not.

422.14 The Tribunal found the burden of proof has shifted from the claimant to respondent in relation to allegation 72, disregarding any exculpatory explanation by the respondent. The claimant having proved primary facts from which inferences of unlawful discrimination can be drawn, the burden shifted to the respondent who provided an explanation untainted by disability. Lesley Biddiscome provided an explanation to the effect that she believed it was sufficient for her to put Jimmy Thompson right on the correct procedure and due to his ignorance of it, took the view he was not acting in a discriminatory way taking into account the positive manner in which he had treated the claimant including agreeing to all the terms of the flexible working contract she had proposed. When the dust of battle has settled it is easy to be critical of Lesley Biddiscome, but if we go back to the November 2016 managing the claimant was a confrontational uphill task and it was easier for Jimmy Thompson to leave the disputed dates to the disciplinary hearing. Lesley Biddiscome and Jimmy Thompson

believed the position had been resolved with Jimmy Thompson applying the correct procedures and that was the end of the matter.

422.15 It is unfortunate that the claimant was not kept informed, however the Tribunal should not assume a finding of unlawful discrimination from a concluding that Lesley Biddiscome and Jimmy Thompson should have kept the claimant informed as to the steps that were taken, sooner than she was. Jimmy Thompson took the view at the time he should distance himself, and left the matter to be dealt with by others during the investigation, despite the fact that he was responsible for line managing the claimant and had made a mistake in that at least two days sickness absence were recorded when the claimant had worked at least one hour worked during a working day and she was entitled to be treated as working for the whole day and not absent through sickness.

422.16 The Tribunal took the view that by the 11 November 2016 Jimmy Thompson was effectively distancing himself from the claimant; he had taken the decision to resign partly as a result of the difficulties he had in managing her and resolved that someone else should take responsibility for sorting out the position i.e., via an independent investigation. It was encumberant on him as her line manager to at the very least apologise and make good for dealing with the time she had spent working at home as sickness absence and he failed to do so because she was difficulty to manage, had previously inaccurately recorded days worked when she was absent through sickness and refused to contact him in accordance with the flexible working agreement. In short, the working relationship had collapsed, and the claimant was subjected to a detriment by the very fact Jimmy Thompson did not explain to her that he had inadvertently made a mistake.

422.17 To conclude discrimination had taken place, more is required, and the claimant has not established she was treated less favourably than an actual or hypothetical comparator with no material difference between the circumstance other than the relevant protected characteristic. If the Tribunal is wrong, it would have gone onto find the claim was out of time for the reasons set out below.

422.18 **Allegation 79:** The claimant did not adduce any evidence that "several team members do not have access to the submarines room but are given relevant work in the nuclear sector, the claimant was not told by Jimmy Thompson she could be trusted because of her condition in late 2016/early 2017 and this claim is dismissed. The claim was lodged outside the primary limitation period and there is no continuing act.

- 422.19 **Allegation 81:** Helen Seals was promoted, but not over the claimant as found by the Tribunal above. The claimant did not apply and was not interested in a team leader position which would require her to be in the office on a full-time contract. The claim is dismissed. The claim was lodged outside the primary limitation period and there is no continuing act.
- 422.20 **Allegation 102:** The claimant did not appeal the outcome of the grievance hearing, and the reasons she gave for not doing so are not credible as explored by the Tribunal above. Eddie Marrett was entitled to reach the conclusions he did, on all the information before him. He can be criticised for not pushing Jimmy Thompson at investigation meeting that took place on the issue of the sick records and disputed dates, to satisfy himself if Jimmy Thompson had a discriminatory motive in relation to the sickness records, or if it was down to his lack of knowledge and experience as a manager. He can be criticised for not recording the additional evidence taken after the grievance hearing. In reaching the conclusion that the claimant's grievance had not basis, Eddie Marrett took all the facts into account, including the claimant's lack of adherence to a generous flexible working arrangement accepted by Jimmy Thompson in addition to the oral evidence he had heard from both, and his assessment that discrimination had not taken place was untainted by disability discrimination. The fact the claimant did not agree with his analysis and outcome is insufficient to establish a claim for direct discrimination, and she has not satisfied the Tribunal that a hypothetical comparator would have been treated differently. The claimant was not treated as she was on the proscribed grounds, but because Eddie Marrett believed on the evidence before him there had been no discrimination. The claim is dismissed. The claim is also out of time for the reasons set out above in relation to allegation 72, and there was no continuing act.

Whether Claimant subjected to a relevant detriment

- 423 With reference to the issue did the Respondent or, where relevant, its representatives, do the things referred to at point 7 above (where not already admitted by the Respondent), the Tribunal concluded that in relation to **allegation 72 the claimant was subjected to a detriment because she believed her complaint was being ignored when it was not.** Lesley Biddiscome had discussed the sick leave records with Jimmy Thompson which resulted in him changing his practice with regards to sick leave. However, she did not inform the claimant of this, or the view she had taken that Jimmy Thompson had acted through ignorance of the correct procedure and his actions were not, in her assessment, discriminatory. The claimant was concerned her working days had been falsified as sickness absence days, and had she been informed at an early stage that Jimmy Thompson had misunderstood the process, and had she received an explanation about how Jimmy Thompson would deal with working

from home/sickness absence going into the future, this may have assuaged her concerns. It is undisputed that after the disputed sickness dates raised by the claimant were explored with Jimmy Thompson by Lesley Biddiscome, Jimmy Thompson complied with the respondent's procedure and there were no further issues.

424 The Tribunal was not satisfied on the balance of probabilities that the detriment/less favourable treatment of not informing the claimant sooner was because of her disability. The claimant has adduced no comparator or hypothetical comparator, and it accepted Lesley Biddiscome's evidence was untainted by disability discrimination that once the absence recording issue had been resolved with Jimmy Thompson, she believed that was the end of the matter, and this was reinforced when the sickness absence records did not proceed to a disciplinary hearing.

Whether claim(s) in time

425 Has the Claimant brought her claim within the time limit set by Section 123(1) of the Equality Act 2010? This gives rise to the following sub-issues:

425.1 What was the date of the acts to which the complaint relates? With reference to **allegation 72** the relevant date was 11 November 2016 and proceedings were issued on 25 September 2017 after ACAS early conciliation between 27 July to 28 August 2017. Taking into account the fact that the disputed dates were discounted at disciplinary stage, the Tribunal does not accept the claimant's submission that the less favourable treatment continued and there existed a continuing act. As indicated above, there was no evidence before the Tribunal that in late May 2017 HR "endorsed" the false sick records, and the claimant had not disputed at the 6 March 2017 grievance hearing 15-days had been removed from her absence record.

425.2 Allegation 72 is out of time. The complaint is against Jimmy Thompson who left the business on 17 February 2017, and there is no continuing act. The primary time limit expired on 10 March 2017 after Jimmy Thompson had left and there is no evidence of an "ongoing situation" as alleged by the claimant. The Tribunal preferred the submissions made by Mr French-Williams that any claim in relation to Jimmy Thompson's alleged discriminatory actions should have been brought by 16 June 2017 at the latest, and there has been no evidence which suggests the conduct extended over a period under section 123(3) EqA.

425.3 The claimant was aware of her employment rights, the limitation period and statutory time limits for discrimination claims. She had access to the internet and support of the union, and her disability did not prevent her from issuing proceedings. It is not just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to

section 123(1)(b) of the Equality Act 2010, taking into account the amount of time that has lapsed, and the fact Jimmy Thompson left the business. The claimant has given no coherent explanation as to why proceedings were not issued within the statutory time limit and given the Tribunal's finding that there was no conduct extending over a period, allegation numbered 72 is dismissed.

Whether treatment was less favourable

426 In doing the acts complained of at rows 18, 34 and 89 of the Scott Schedule (that is, failing to promote the Claimant to the Team Leader role), did the Respondent treat the Claimant less favourably than it treated Dr Jimmy Thomson and / or Helen Seals, as set out above the Tribunal found she was not for the reasons already stated above.

427 In doing the acts complained of at rows 17, 20, 21, 24, 28, 32, 33, 34, 35, 36, 39, 43, 44, 45, 46, 51, 52, 56, 57, 67, 72, 79, 81, 102 of the Scott Schedule, did the Respondent treat the Claimant less favourably than it treated non-disabled employees ("hypothetical comparators") in relation to home-working, sick leave and allocation of work, the Tribunal found it had not for the reasons already stated.

Reason for less favourable treatment

428 If the Respondent treated the Claimant less favourably, was this because of the Claimant's disability, the Tribunal found with reference to allegation 72 Jimmy Thompson treated the claimant in the way he did, as described above, because of the total breakdown in their relationship, and not because of her disability.

Discrimination arising from disability: Equality Act 2010 s15

429 The Claimant alleges that the Respondent did the things listed at rows 15, 24, 28, 33, 41, 42, 47, 56, 63, 64, 65, 66, 73, 74, 76, 77, 78, 79, 81, 84, 85, 89, 90, 93, 95, 96, 97, 99, 104, 105 and 107 of the Scott Schedule which constituted discrimination under section 15 of the Equality Act 2010.

430 In the well-known EAT decision in Secretary of State for Justice and anor v Dunn EAT 0234/16 the EAT (presided over by Mrs Justice Simler, President) identified the following four elements that must be made out in order for the claimant to succeed:

there must be unfavourable treatment

there must be something that arises in consequence of the claimant's disability

the unfavourable treatment must be because of (i.e., caused by) the something that arises in consequence of the disability, and

the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

431 The Tribunal has dealt with allegations **24, 28, 33, 56, 79 and 81** above, which it does not intend to repeat.

432 With reference to allegation **15** Ingolf Kirsten did instruct the claimant to reduce her sick leave in or around 12 November 2014. This was not a continuing act.

433 With reference to allegation **41 & 42** there was no breach of confidentiality, and this complaint is dismissed.

434 With reference to allegation **47**, the claimant was not told off by Alex Warren and Jimmy Thompson. The complaint is dismissed.

435 With reference to allegation **56** the alleged incident did not take place, and the complaint is dismissed.

436 With reference to allegation **63, 64 and 65** the claimant did ask Jimmy Thompson to correct incorrect records on the Workday system entered when the claimant worked at home. The Tribunal did find that Jimmy Thompson had instructed the claimant to fill in a sick leave form with the disputed dates because he believed she had not worked on those days and did not understand that even if the claimant worked one hour and she was unable to comply with the flexible working agreement, she was to be treated as if she had worked the whole day.

437 As indicated above, his main concern was where the claimant was and what she was doing against the flexible working agreement, and this needed an investigation. Jimmy Thompson was not concerned if the claimant was legitimately off work ill, and her disability had no bearing on his attempt to control her failure to make contact and let him know what she was doing.

438 The evidence before the Tribunal was that there were days when the claimant had omitted to her record her sickness absence and she was required to remedy this. It appears to the Tribunal that the position was confusing for a manager who had no experience. There was genuine confusion on the part of Jimmy Thompson, and this was accepted by the Tribunal on the balance of probabilities. Jimmy Thompson's confusion had no causal link with the claimant's disability, and the Tribunal found he was concerned, as the claimant's manager, with not been kept informed by her, not knowing, one day to another, if the claimant was working on

a particular day and at a particular time, if she was available for team contact and if she was meeting deadlines and achieving “deliverables. “

439 For the reasons set out above, the Tribunal did not find on the balance of probabilities Jimmy Thompson’s behaviour was “very aggressive” or that he “did not care” when the claimant told him she was not off sick but working, and these complaints are dismissed.

440 There was no evidence before the Tribunal that the claimant’s “false sick records” as described by her, had not been amended by the effective date of termination, and had this been the case given the fact no action was taken against the claimant in respect of the disputed absences it is difficult to see where the prejudice to the claimant lies especially given the fact that there were days the claimant had not recorded as sick leave when she should have done and no action was taken against her.

441 Allegation **66** has not been made out as Jimmy Thompson correctly understood the effect of the flexible working agreement and he had not deliberately falsified the claimant’s sickness records as alleged by the claimant. The complaint is dismissed.

442 With reference to allegations **73, 74, 77 and 78** Jimmy Thompson did raise a conduct issue regarding several matters including the claimant’s sick leave records and her refusal to comply with the flexible working agreement, which was his primary concern with good reason as the claimant had become difficult to manage. The remaining allegations have been dealt with above, which the Tribunal does not intend to repeat.

443 With reference to allegation **79** the Tribunal refers to its findings above, and the complaint is dismissed.

444 With reference to allegation **81** the Tribunal refers to its findings above, and the complaint is dismissed.

445 With reference to allegation **84** the claimant was invited to a disciplinary hearing on the 2 February 2017. There was no “allowing ongoing situation” in respect of the disability complaint regarding sickness absence recording as alleged by the claimant. Of the four original allegations investigated only two remained. The claimant was made aware time recording and sickness absence records would not proceed to a disciplinary, and they were not. There was a real issue with the claimant’s compliance to the flexible working arrangements she had agreed that required resolution via an investigation independent to Jimmy Thompson, which took place, and an independent disciplinary hearing, which also took place. Any “ongoing situation” ceased as of 2 February 2017 and the complaint is out of time.

446 With reference to allegation **85** the Tribunal repeats its findings above, the claim is out of time and there was no “ongoing situation” as submitted by the claimant, who was aware the grievance hearing took place before the reconvened disciplinary hearing following the adjournment on 17 February 2017 to allow for further investigation.

447 With reference to allegation **89** as indicated above the claimant was not “promoted over Tina-Jaine” for the reasons already stated. The claim is out of time and there was no continuing act.

448 With reference to allegations **90, 93** and **95** the claimant essentially brings into question the outcome of the disciplinary hearing. The Tribunal found as a matter-of-fact Bob Calendar had not set a 2-day per month limit to working from home, and this claim is dismissed. The disciplinary hearing took place on 17 February and reconvened on 6 March 2017. The claimant was aware that the “crux” of the matter was non-compliance with the flexible working agreement that included an excessive amount of homeworking which should be “the exception” and “not the rule.” The claimant was issued with a formal verbal warning confirmed in a letter dated 8 March 2019, based on factual information before Bob Cullender that was undisputed by the claimant and to which the claimant had contributed, for example, emails sent in breach of the flexible working arrangement. The claimant did not question the fact she was working at home more than in the office despite the agreement and the adjustment to her start time from 9:30am to 1:00pm if her condition had flared up.

449 With reference to allegation **96**, as set out above, the Tribunal found the claimant was able to appeal, and was not prevented from doing so as a result of her disability. The claimant relies on to timescales being too short to seek legal advice as the act of discrimination, and yet at no stage did she or her union representative request an extension of time.

450 With reference to allegation **97** there were no “new” limits to homeworking as alleged by the claimant. At the reconvened disciplinary hearing held on 6 March 2017 the requirements under the flexible working agreement was re-enforced, including working at home being the exception and not the rule, and should be “significantly reduced.” On the 7 February 2017 Helen Seals emailed the claimant “formally confirming” the flexible working agreement allows “additional flexibility...to work from home when her symptoms are such that she would not make it into the office by 10 am. In these instances, Tina-Jaine is expected to contact Helen Seals or the nominated deputy (Carlo Henry) to make them aware that she was having difficulty by 11 am. In instances where Tina-Jaine has difficulty, modified core hours in the office would commence at 13.00pm in the afternoon.” Helen Seals had a subsequent discussion with the claimant to the

effect that she could work at home when she was unable to travel to the office due to her condition, providing deliverables of work completed were provided, but this was to be an exception. There is no satisfactory evidence that Helen Seals informed the claimant that working from home above a “new limit” was not allowed in early March 2017 or at all, as alleged by the claimant. The complaint is dismissed.

451 With reference to allegation **99**, in an email sent 21 March 2016 Helen Seals informed the claimant that it was the third working day at home she had worked in that month i.e., a period of 3 weeks.

452 With reference to allegation **104** Lesley Biddiscombe did not continue to assume the claimant did not work a full day while at home as the claimant alleged and had in February 2017 advised Helen Seals to discuss deliverables with the claimant when she was working at home. The 5 May 2017 email made reference to Lesley Biddiscombe advising Jimmy Thompson “of the correct way to record your absence when you didn’t do a full day.” On a straightforward interpretation of the words used, it does not mean Lesley Biddiscombe assumed she had not worked a full day. On a common-sense interpretation Lesley Biddiscombe had advised on the correct procedure when a team leader’s understanding was that the claimant had not worked a full day when working at home. The complaint is dismissed.

453 With reference to allegations **105** and **107** the claimant adduced no satisfactory evidence that there were “false sick records” on her file. There was no evidence before the Tribunal that HR “endorsed” the false sick records; the disputed records had long been resolved by disciplinary hearing stage, were not used as a basis for disciplinary action and the claimant had not disputed at the 6 March 2019 grievance hearing 15-days had been removed from her absence record. The complaint is dismissed.

Whether Claimant treated unfavourably

454 Did the Respondent or, where relevant, its representatives, do the things referred to at point 15 above (where not already admitted by the Respondent), the Tribunal the detrimental action relied upon by the claimant is established as follows:

454.1 Allegation **63 and 64**. The claimant did ask Jimmy Thompson to correct incorrect records on the Workday system entered when she had worked at home. Jimmy Thompson had instructed the claimant to fill in a sick leave form with the disputed dates because he believed she had not worked on those days and did not understand that even if the claimant worked one hour and she was unable to comply with the flexible working agreement, she was to be treated as if she had worked the whole day.

454.2 Allegations **73, 74, 77 and 78** Jimmy Thompson did raise conduct as an issue regarding the claimant’s sick leave records.

454.3 Allegations **90, 93** and **95** relating to the disciplinary matters and the oral verbal warning outcome of the disciplinary hearing following the claimant's non-compliance with the flexible working agreement that included an excessive amount of homeworking which should be "the exception" and "not the rule." The claimant was issued with a formal verbal warning confirmed in a letter dated 8 March 2019 partly because she had been working more at home more than in the office despite the agreement and the adjustment to her start time from 9:30am to 1:00pm if her condition had flared up and had failed to report within the timescales agreed.

454.4 Allegation **99** in an email sent 21 March 2016 Helen Seals informed the claimant that it was the third working day at home she had worked in that month i.e., a period of 3 weeks. The claimant was aware that working from home was an exception.

If so, was this unfavourable treatment?

455 As set out above, paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

456 Taking into account the guidance set out in Paisner referred to above, the Tribunal found Jimmy Thompson's method of dealing with the claimant absence recording when she was working from home was unfavourable treatment in that once he knew he had made a mistake, steps should have been taken to address it. It was not sufficient to leave it to an independent investigation and for it to remain included as a potential conduct issue to be investigated.

457 The Tribunal focused on Jimmy Thompson's conscious and unconscious thought process, concluding in his mind he did not believe the claimant was actually working a full day from home, and he based this belief on the fact that the claimant was difficult to manage, refused to comply with the flexible working agreement and specifically, he could not understand how the claimant asserted on the one hand she was working and on the other was not well enough to make contact with him by deadline times that had been agreed. In short, Jimmy Thompson took the view that all the claimant's requirements as set out in the flexible working agreement had been agreed, and yet he was no closer to line managing her into the office where her skills were required as opposed to at home. The detriment to the claimant was that she had carried out work at home and this was not recognised if she had failed to contact Jimmy Thompson or a deputy, and/or had failed to come in to work the afternoon in the office. The claimant working from home, and the substantial time out of the office had a

significant influence on Jimmy Thompson's method of dealing with absence recording and was the effective cause of it.

458 The claimant's inability to attend the office and work from home arose in consequence of her disability. There is no satisfactory evidence, apart from the claimant's say so, that her inability to keep her managers informed by 11am of her movements including whether she was well enough to work either at home and/or attend the office in the afternoon, arose in consequence of her disability taking into account the factual matrix and the claimant's ability to send a short email when she was too ill to work after she had been issued with an oral warning.

459 The disciplinary hearing did not constitute unfavourable treatment taking into account the claimant's intentional non-compliance with the flexible working agreement in connection with its reporting provisions. However, limiting the claimant's ability to work from home as an exception and not the rule" does constitute unfavourable treatment if the claimant, as a result of her disability, cannot travel but she could work from home nearer to a toilet if her condition flared up. The Tribunal examined the conscious and unconscious thought process of Bob Callender who was not concerned with the claimant's sickness absence and took the view the claimant was not complying with the flexible working agreement particularly not keeping the respondent informed and excessive homeworking when she was contractually required to be in the office and had agreed to attend by 1pm at the latest. Bob Callender was concerned with the claimant being unable to come into the office from a "business perspective." He believed if the claimant was too ill to come into the office in the afternoon, then she was too ill to work, and this belief was factored into his decision-making process when he came to issue the claimant with an oral warning with a view to reining in the substantial time she had spent away from the office.

460 Allegation **99** in an email sent 21 March 2016 Helen Seals informed the claimant that it was the third working day at home she had worked in that month i.e., a period of 3 weeks. The claimant was aware that working from home was to be an exception, and Helen Seals thought process was that if the claimant was working from home more than anticipated, she should be informed. This put pressure on the claimant, who could not always control of when she was well enough to travel and attend the office.

Has the Claimant brought her claim within the time limit set by Section 123(1) of the Equality Act 2010? This gives rise to the following sub-issues:

What was the date of the act to which the complaint relates?

461 With reference to allegations involving Jimmy Thompson set out in 63, **64, 73, 74, 77 and 78** these are all out of time for the reasons explored above, and there is

no element of conduct extending beyond the date Jimmy Thompson resigned from his employment.

462 With reference to allegation **90, 93** and **95** the disciplinary outcome was communicated to the claimant on the 6 March 2017, which is the date for the cause of action. The claimant did not appeal. With reference to the act to which the complaint relates there was no element of conduct extending over a period beyond this date. The primary limitation period expired on 5 June 2017, before ACAS early conciliation commenced on 27 July 2017 and it was received outside the 3-month time limit.

463 It is not just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010 for the reasons already stated above. If the Tribunal is wrong on the time limit point it would have gone on to find the following:

Reason for treatment

464 With reference to the issue, was the unfavourable treatment because of something arising in consequence of the claimant's disability the Tribunal found the unfavourable treatment was because of the claimant's sick leave, working hours, home working, failure to communicate with the respondent, difficulty with travelling, symptoms in the morning and unpredictable nature of the symptoms. It was not because of anxiety over discussing health issues and pain causing distractions. The Tribunal accepts the claimant's disability resulted in flare ups with occasional traveling difficulties, symptoms in the morning and the unpredictable nature of those symptoms, that resulted in claimant's: -home working. The Tribunal found the claimant's failure to communicate with the respondent did not arise in consequence of the claimant's disability and it stemmed from the claimant adopting the position that she need not communicate her whereabouts or intention.

Whether Respondent had knowledge of disability

465 There is no dispute concerning the claimant's disability status.

Whether treatment justified: objective justification

466 With reference to the issue was the treatment a means of achieving a legitimate aim, the Tribunal found it was taking into account the guidance set out in Hensman above, bearing in mind the key role held by the claimant in relation to the business and the team, and the requirement that she worked on highly secure projects that could not be carried out beyond a securely locked "submarine room" in addition to face-to-face mentoring and training of junior colleagues and

teamworking. The claimant's role was vital to the future business of the respondent, she was pivotal to the team and generating new business and her attendance in the office was a legitimate aim. She was a senior employee, second only to the team leader working in a department that was losing substantial amounts of money, attempting to attract complex technical work in the nuclear industry. The claimant was initially employed full-time, but she did not work full-time hours and was paid for hours not worked out of a separate budget, she reduced her hours and her sickness absence and failure to attend the office was substantial. To ensure the claimant was at least in the office for some hours in the day, she was not required to attend work in the core morning hours and could start her working day at home with the proviso that she would be in the office by 1pm in order that she could efficiently run the team and provide the mentoring and training to junior members when they were all working together on the project. The Tribunal accept that it was difficult for mentoring and training to take place remotely by video, email or phone. It was impossible for highly confidential work to be carried out at home.

467 The EHRC Employment Code provides guidance on objective justification that the aim pursued should be legal, should not be discriminatory and must represent a real, objective consideration. The Tribunal is required to objectively balance the needs of the business against the discriminatory effect of requiring the claimant to work in the office and limiting the number of times she could do so, managing her office attendance and requiring her to comply with reasonable management instructions.

468 The respondent had over a considerable period of time considered the issue of the claimant working at home, making concession in the terms suggested by the claimant that resulted in the flexible working agreement and it is difficult to see what else the respondent could have done, bearing in mind it invited to claimant to revisit the agreement, she informed occupational health that she wanted to reduce her hours to 20 per week, working from home 2 of those days (which would have resulted in very little time in the office) and yet chose not to put the suggestions to the respondent, despite the fact that the medical report was released after she had handed in her resignation.

469 Requiring the claimant to work in the office and not at home was a legitimate aim key to the success of the underperforming department and teams for the reasons already stated.

470 If so, was it objectively assessed a proportionate means of achieving that aim, the Tribunal found it was taking into account the fact the claimant had proposed a flexible working agreement under which she could work at home in the morning and attend work in the office after 1pm on the understanding that the claimant would advise management of her intentions by 11am in order that the team were aware of the times when she could be contactable at home and expected to be in

to work. It was also expected there would be occasions when the claimant worked at home when her disability flared up but given the nature of the adjustments and the fact that the claimant's condition affected her in the mornings coupled with the therapy that had been put in place to assist the claimant manage her IBS, it was proportionate for the respondent to monitor and control the claimant. It is conceivable that the claimant's inability to work in the office could have resulted in capability procedures as she was unable to carry out key aspects of her role ranging from training and mentoring through to working on highly confidential projects in the submarine room.

471 The respondent did all that it could to facilitate the claimant working, the respondent also arranged meetings to take place in the office in the afternoon to facilitate the claimant's afternoon attendance, and there were occasions when the claimant was unable to attend (when the respondent expected her to), and she was unable to do so from home due to her IT issues. The reasonable adjustments provided to the claimant were proportional taking into account the business needs, and the treatment of the claimant justified taking into account the factual matrix set out above.

Disability related harassment: Equality Act 2010 s26

472 The Claimant alleges that the Respondent did the things listed at rows 28 and 41 of the Scott Schedule which constituted disability related harassment.

Whether incidents/events complained of occurred

473 Did the Respondent or, where relevant, its representatives, do the things referred to at point 30 above, the Tribunal found in relation to allegation **28** it did not take place for the reasons set out above. Jimmy Thompson did not engage in unwanted conduct that violated the claimant's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment. The conduct did not have the purpose or effect and the claimant was silent on this point at the time, as found by the Tribunal in its findings of facts. The meeting has since become an issue following litigation being in the claimant's sight, and at the very highest objectively assessed, attempts at managing the claimant who did not want to be managed, does not necessary mean that an act of harassment had objectively taken place despite her subjective view by the time she came to raise a grievance, that it had.

474 The relevant date for the limitation period is 22 July 2015.

475 In relation to allegation **41** the Tribunal found there was no breach of confidentiality, and there was no evidence Jimmy Thompson, Lesley Biddiscome or Dr Ephraim (over whose action the respondent had no control over and did not

attract vicarious liability) held a meeting which had the purpose or effect of violating the claimant's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment -S.26(1)(b). The meeting was aimed at assisting the claimant to improve her attendance in the office, a key requirement for the respondent, and meeting her needs and those of the business by exploring reasonable adjustments in order to improve attendance.

476 The relevant date for the limitation period is 29 February 2017.

477 The primary limitation period expired on 5 June 2017, before ACAS early conciliation commenced on 27 July 2017 and it was received outside the 3-month time limit.

Whether claim(s) in time

478 Has the Claimant brought her claim within the time limit set by Section 123(1) of the Equality Act 2010, the Tribunal found that she had not. The primary limitation period expired on 22 July 2015 in respect of allegation 28 and 5 June 2017 in respect of allegation 41, before ACAS early conciliation commenced on 27 July 2017 and both claims were received outside the 3-month time limit. Neither act alleged amounted to conduct extending over a period of for the time.

479 For the reasons already stated above, it is not just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010, and the complaints are dismissed.

Indirect Discrimination: Equality Act 2010 s19

480 The Claimant alleges that the Respondent did the things listed at row 38 of the Scott Schedule, that is introduced a Lone Working Policy at the Warrington site requiring employees to leave the office by 6.30pm, which constituted indirect disability discrimination. The Tribunal found as a fact the Lone Working Policy was reviewed and came into force in November 2015. Contrary to the claimant's allegation at 38 it did not "prevent late working" and did not prevent employees working beyond 6.30pm. It did prevent employees from working beyond 8pm. The claim has no basis, and had it been received in time which it was not, would have been dismissed.

Whether claim(s) in time

481 With reference to the issue, has the Claimant brought her claim within the time limit set by Section 123(1) of the Equality Act 2010, the date of the act to which the complaint relates is November 2016 and the claim is out of time and there was no continuing act, for reasons already stated in relation to other claims. The Tribunal does not accept the claimant's submission that as she was unable to work late and the Lone Working Policy was a continuing act. It is not just and

equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010 for reasons already stated.

482 In the alternative, had the claim been brought in time the Tribunal would have found the PCP justified for the reasons set out below.

Whether Respondent applied a PCP

483 With reference to the issue, did the Respondent apply a provision, criteria or practice (PCP) of requiring employees to leave the office by 6.30pm, the Tribunal found for the reasons already stated, employees were required to leave the office by 6.30pm as a rule, although lone working was allowed beyond that time to 8pm. The claimant's PCP is not correct.

484 With reference to the issue, did the Respondent apply the PCP in question to the Claimant, the Tribunal found that it did providing the PCP was changed to include the correct times and not the incorrect times relied upon by the claimant.

485 With reference to the issue, did the Respondent apply, or would the Respondent have applied, the PCP in question to people who did not have the same disability as the Claimant, the Tribunal found that it did.

Whether PCP caused disadvantage

486 Did the PCP in question put, or would it have put, people who have the same disability as the Claimant at a particular disadvantage when compared with people who do not have the same disability as the Claimant, the Tribunal was not satisfied that it did bearing in mind the claimant's case, which was that her symptoms were worse in the morning and she would be able to work in the afternoon with the result that the claimant, on such occasions when her working day started later in the morning at home, and at 1pm in the afternoon, could have worked in the office until 8pm (7-hours) providing she put in place the safety procedures laid out in the Lone Working Policy. The difficulty for the claimant is that at no stage did she seek any agreement to work between 6.30 and 8.00pm and she never put in place any of the safe working processes including liaising with line managers and colleagues.

487 Did the PCP in question put, or would it have put, the Claimant at that disadvantage, the Tribunal found that it did not for the reasons already stated.

Whether PCP justified

488 With reference to the issue, was the PCP a means of achieving a legitimate aim, the Tribunal repeats its observations in respect of objective justification set out above, objectively assessed it found that it was as it underlined the respondent's genuine health and safety concerns and was not aimed solely at prejudicing the claimant, as submitted by her.

489 It was a proportionate means of achieving that aim taking into account the proviso that employees could work until 8pm with safety measures in place.

Duty to make reasonable adjustments: Equality Act 2010 s21

490 The Claimant alleges that the Respondent failed to comply with a duty to make reasonable adjustments as detailed at rows **22, 23, 31, 40, 48, 49, 53, 58, 66, 68, 87, 93, 103 and 106** of the Scott Schedule. In particular, the claimant alleges that the respondent failed to –

- 490.1 Allow the claimant sufficient opportunity and means to work from home,
- 490.2 Make sufficient adjustments to the claimant's hours,
- 490.3 Provide sufficient funding for medical treatment, and
- 490.4 Adequately amend the sickness absence triggers.

491 Turning to the individual allegations, with reference to allegation **22, 23, 31, 40, 48, 49 and 53** the Tribunal found before and after 9 June 2015 (allegation 22) reasonable adjustment were made, ranging from a later start to the working day with the claimant informing Jimmy Thompson if she was unable to make it into work. The fact of the matter is that the claimant, before and after 9 June 2015 regularly arrived at the office later, attending work as and when she saw fit evidenced by the Asda incident on 16 June 2015, and worked from home. By the 5 August 2016 the position was formalised in the flexible working agreement proposed by the claimant, under which the claimant could work from home if she was having a "flare up" but was expected to attend the office by 1pm. The flexibility around the time of the claimant's arrival at work was a reasonable adjustment and the requirement that the claimant communicate her whereabouts and intentions concerning her working pattern that day was put back to 11am, which was a reasonable adjustment.

492 Had there been any failure by the respondent in its duty to make reasonable adjustments from 2015 to 5 August 2016, which the Tribunal did not accept, by 5 August 2016 any ongoing failure stopped. In other words, the causal link was broken by the flexible working agreement.

- 493 With reference to allegations **58, 66, 68, 87, 93, 103** and **106** by some date in 2016 the claimant had been provided with all the necessary IT equipment to work from home, which in any event she had possessed beforehand albeit not supplied by the respondent. Contrary to the claimant's claim at allegation 58, there were no trigger points for disciplinary action resulting from sickness absence. The trigger points related to sickness management and not disciplinary action, and reasonable adjustments were made to the number of days the claimant could be absent before the sickness absence procedure took effect and her substantial absence record was wiped clean . It is notable that despite the considerable number of sickness days taken by the claimant, she was not subjected to absence management, and this was largely down the actions of Jimmy Thompson who instructed HR not to proceed down this route as a reasonable adjustment to the claimant as he did not want to put any pressure on her.
- 494 With reference to allegation **66**, the Tribunal did not find Jimmy Thompson deliberately falsify sick records and interpret the claimant's contract to limit working at home. The agreement reached was that the claimant should contact him or a designated person concerning her intentions by 11am, she did not breach the flexible working arrangement which made it difficult for the work and team to be managed. The requirement was straightforward and easily achievable, and so the Tribunal found despite the claimant's protestations throughout this hearing. All that was required was for the claimant to email a short sentence from her iPhone, and no reasonable adjustment was necessary in respect of this. The requirement to make contact is the nub of the case, as Jimmy Thompson had taken the view if the claimant was unable to take this step, how was she able to work from home?
- 495 The Tribunal did not accept the claimant's proposition which is essentially from 2015 through to her resignation a reasonable adjustment was to allow her carte blanche to work from home without any managerial control or accountability for when she worked and how she worked.
- 496 With reference to allegation **68**, the Tribunal found occupational health confirmed the claimant had already undergone 18 sessions and was unable to recommend the claimant underwent more sessions, contrary to the claimant's statement that occupational health had recommended more sessions. The claimant had undergone 12 more sessions that employees were usually paid for, and they had no effect. The respondent took the view additional sessions would not result in any improvement in how the claimant was managing her attendance in the office, and there was no satisfactory evidence that paying for additional sessions were reasonable adjustments which would assist the claimant continuing to carry out her role. The evidence does point to them having no affect on the claimant's attendance in the office taking into account the information provided to the occupational health consultant in the last medical report whereby the claimant

would spend very little time in the office, when the agreement was that the claimant working from home was the exception and not the norm.

497 With reference to allegation **87**, the Tribunal did not find Lesley Biddiscome misinterpreted the agreed adjustments when she held that the claimant working from home was the exception rather than the norm, and if it became untenable, the flexible working agreement would require a review and the claimant referred to occupational health.

498 With reference to allegation **93** the claimant alleges she was punished by setting the homeworking limit to 2 per month and “the main basis on which she is found guilty is failure to contact her boss within the agreed timescale to inform them when she may be late at work due to her disability.” For the reason already stated the Tribunal found Bob Calendar had not set home working to twice a month as alleged, and it was not a reasonable adjustment for the claimant to contact the respondent outside the timescales set out in the flexible working agreement.

499 With reference to allegation **103** the claimant has not put forward any evidence as to why the fact she emailed her resignation on the 4 May 2017 was a breach of the respondent’s duty to make reasonable adjustment, and this complaint is dismissed.

500 With reference to allegation **106** the claimant has not put forward any evidence as to why the exit meeting held on 12 May 2017 was a duty to make reasonable adjustments, and this complaint was dismissed. The claimant appears to be complaining that the reasonable adjustment allowing her to work from home when her symptoms were such that she could not come into the office had been withdrawn, when this was found not to have been the case by the Tribunal. The issue for the claimant was she could not work from home whenever she wanted to and working from home was not predicated on the occasions when the claimant’s disability flared up to such an extent that she was unable to work in the office from 1pm.

501 Through to the claimant’s flexible working agreement taking effect, the claimant was allowed sufficient opportunity and means to work from home, and she did. Her hours of work were adjusted until finally, she could start working at home in the mornings and turn into work at the office by 1pm and/or work at home if her condition flared up and she was unable to travel. By 2016, the claimant had been provided with a laptop and iPhone, prior to this date she had worked from home using her own laptop. She was able to keep the respondent informed as to the state of her health and when she expected to work from home and/or attend the office.

502 Taking into account the adjustments that were made in the light of the claimant's statement, medical advice that her disability was worse in the morning, and the key role she held with team and mentoring responsibilities in addition to the projects involving a high degree of confidentiality which the claimant could not have been involved in when working from home, sufficient adjustments were made to the Claimant's hours of work, she was provide with sufficient funding for medical treatment and her sickness absence triggers were adequately amended to such an extent that her record was expunged and the respondent's sickness absence procedure was never instigated against her despite the fact that she had exceeded the triggers since 2015.

Whether claim(s) in time

503 With reference to the issue has the Claimant brought her claim within the time limit set by Section 123(1) of the Equality Act 2010, the Tribunal found she had not for all claims that had allegedly taken place before the flexible working agreement was actioned, namely, 5 August 2016 as adjustments were in action prior to and after that date i.e., the claimant working from home and coming into the office later in the morning. Thereafter, the claimant alleges a continuing act on the basis that the respondent remained in breach of its duty under section 20-21 of the EqA until the exit interview, which the Tribunal did not accept was the case.

Whether Respondent had knowledge of disability

504 There is no issue with knowledge.

Whether Claimant disadvantaged by a PCP

505 With reference to the issue did the Respondent apply any or all of the following provision, criteria or practice (PCP) the Tribunal found the following: -

505.1 Office based working; there was a PCP to the effect that the claimant's contract was to attend the office.

505.2 Normal working hours were not between 9.30am and 5.30pm. they were between 8am and 6.30pm. The claimant's revised contractual working hours were 10.00am to 18.00pm Monday to Thursday, 10.00am to 15.00pm Friday with work an additional hour on Fridays to 16.00pm to accrue 6 lieu days. There will be some flexibility around her time of arrival, but she was expected to be in the office by 1.00pm.

505.3 Employees were required to leave the office by 6.30pm but could stay until 8pm.

505.4 There was a requirement to phone and inform line management if an employee would be late. The claimant was required to ring by 11am as a reasonable adjustment, other employees earlier.

506 Did the PCP(s) in question put the Claimant at a substantial disadvantage in comparison with persons who are not disabled, the Tribunal found that 505.1 and 505.2 may have disadvantaged the claimant had not reasonable adjustments been made which resulted in the claimant not being disadvantaged as she could start her work in the office at 1pm and work at home in the mornings or when she had a flare up in her condition and was unable to travel providing working from home was “not excessive.”

507 With reference to 505.3 the claimant was not put at a substantial disadvantage as she could work in the office until 8pm and chose not to do so.

508 With reference to 505.4 the claimant could and managed by 11am to phone her line manager and chose not to do so because she did not believe management, particularly Jimmy Thompson was entitled to insist on this provision, even though she had agreed to it.

Whether Respondent had knowledge of disadvantage caused by PCP

509 With reference to the issue did the Respondent know that the PCP in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the Respondent, the Tribunal found it was aware of 505.1 and 505.2, and reasonable adjustments were made.

510 With reference to 505.3 the respondent was aware the claimant complained of disadvantage; however, her complaint had no basis as she did not seek to work until 8pm with her line manager’s approval and the safety measures put into place under the Lone Working Procedure. In short, it was open for the claimant to work until 8pm but not on a regular basis, and she did not.

511 With reference to 505.4 the respondent was aware the claimant relied upon her disability as an explanation for failing to communicate whether she intended to work in the office, at or a combination of both on a particular day by 11am, but it did not accept that this was the case.

Whether Respondent took reasonable steps to avoid disadvantage caused by PCP

512 With reference to the issue did the respondent take such steps as it was reasonable to have to take to avoid the disadvantage caused by the PCP, on the balance of probabilities the Tribunal found it did take into account all the reasonable adjustments that were made to assist the claimant in her role for the reasons already stated. It was not a reasonable step for the claimant to work from home whenever she wanted, taking into account the key position she held in the team, mentoring responsibilities and confidentiality as explored above and the claims brought under section 120-121 of the EqA are dismissed.

Victimisation: Equality Act 2010 s27

- 513 The Claimant alleges that the Respondent did the following things listed at rows 67, 73 and 77 of the Scott Schedule which constituted victimisation. As set out above, the Tribunal found allegation 67 had not taken place and that claim is dismissed.
- 514 With reference to allegation **73** Jimmy Thompson did not raise conduct allegations relating to sick leave and HR matters. His complaint to Alex Warren on the 21 October 2016 concerned the claimant's failure to contact him when she was absent, and he took it that she was not at work in the office or at home because he was unaware of the respondent's procedure that if an employee works for a minimum time i.e., one hour, he or she is to be recorded as working and not on sick leave.
- 515 With reference to allegation **77** the claimant was invited to a disciplinary investigation meeting on the 22 November 2016 during which the claimant put her explanations forward regarded several matters that had been legitimately raised and ongoing before the claimant had made the protected acts, for example, her failure to contact Jimmy Thompson. It is notable that following the disciplinary investigation the disciplinary allegations finally put to the claimant did not relate to her sickness absence or the sickness absence records. The reconvened disciplinary hearing took place on 6 March 2017 which was concerned about the claimant's compliance with the flexible working agreement and not the amount of her sickness absence.

Whether Claimant did a protected act

- 516 With reference to the issue did the Claimant allege that someone had contravened the Equality Act 2010, the Tribunal found she did on 11 November 2016 to Lesley Biddiscome and by email to Jimmy Thompson copied to Lesley Biddiscome and Alex Warren on 11 November 2015. Both acts constitute protected acts.
- 517 The Tribunal did not find the claimant made an allegation of discrimination to Jimmy Thompson on the 21 October 2016 as she alleges.
- 518 With reference to the issue was the allegation made by the Claimant that someone had contravened the Equality Act 2010 false and made in bad faith, the Tribunal found that it was not. The claimant believed Jimmy Thompson had disregarded work she had carried out at home, and he had instructed her to fill in self-certification forms for the days she had worked at home and was not sick. The claimant believed in good faith Jimmy Thompson had contravened the EqA and she was unaware for some time that Jimmy Thompson had made a genuine mistake about the correct process since this was his first management position and no one from HR had informed him until the claimant raised the issue and Lesley Biddiscome put Jimmy Thompson right.

Whether Claimant subjected to a detriment

- 519 Did the Respondent do the things referred to at point 62 above (allegations 67, 73 and 77 of the Scott Schedule), the Tribunal finds it did not in relation to allegation 73. Jimmy Thompson did not bully the claimant in private (allegation 67). Jimmy Thompson did raise conduct allegation regarding sick leave and related matters with HR (allegation 73). A disciplinary investigation into these matters did take place on the 22 November 2017 (allegation 77) but neither of these matters had any causal connection with the protected act relied upon by the claimant.
- 520 With reference to the issue, did the act complained of constitute a detriment to the Claimant, the Tribunal found it did regarding allegations 73 and 77 because as a result of Jimmy Thompson raising the conduct issues, when claimant was investigated under the disciplinary procedure, she was worried. However, several matters investigated had substance and required investigation except for the disputed sickness absence forms relevant to when the claimant was working at home because it became apparent to Lesley Biddiscome when she investigated and discussed the issue with Jimmy Thompson that he had made a mistake through ignorance.

Whether claim(s) in time

- 521 With reference to the issue has the Claimant brought her claim within the time limit set by Section 123(1) of the Equality Act 2010, the Tribunal finds that she had not. This gives rise to the following sub-issues:
- 521.1 With reference to the issue what was the date of the act to which the complaint relates, the last act was the investigation meeting on 22 November 2016 on the basis that after that date the claimant's sickness absence records were discounted and did not proceed to a disciplinary hearing. The claimant would have been aware of the position when she received the disciplinary invite letter dated 2 February 2017 when of the four original allegations only two remained.
- 521.2 With reference to the issue was the act to which the complaint relates an element of conduct extending over a period, the Tribunal found that it was not, and it ended soon after the 22 November 2016 investigation when a decision was made not to proceed with the issue concerning sick leave records.
- 521.3 If relevant, is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010, the Tribunal found it was not for the reasons already stated when dealing with time limits?

Reason for detrimental treatment

- 522 With reference to the issue did the respondent subject the claimant to a detriment because the claimant had done a protected act or because the respondent believed the claimant had done or may do a protected act, the Tribunal found that it had not on the balance of probabilities.

- 197 Jimmy Thompson raised conduct allegation regarding sick leave and related matters with HR (allegation 73) because there were genuine issues to be resolved, and he had not understood that even in the event of the claimant failing to contact him and/or late on a day when she was not in the office and she worked, even if it was for one hour, that day was not recorded as sickness absence. Jimmy Thompson did not raise the conduct allegation for them to be investigated independently to him because the claimant had accused him of discrimination by the way he had dealt with her sickness records. There were legitimate issues with the claimant's sickness records, which she had to put right, in addition to attendance issues and time keeping, and Jimmy Thompson did not feel equipped to deal with resolving issues that had been ongoing for a lengthy period and took advice before referring them for an independent investigation.
- 198 Jimmy Thompson emailed Alex Warren raising conduct allegations on the 21 October 2016 prior to the claimant raising the issue of discrimination and therefore there was no causal connection between the two events.
- 199 The protected act was not a factor and had no influence on Jimmy Thompson's actions, the test being as Lord Nicholls indicated in Nagarajan v London Regional Transport [1999] ICR 877, HL (a race discrimination claim), if protected acts have a 'significant influence' on the employer's decision making, discrimination will be made out, and Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases [2005] ICR 931, CA, (a sex discrimination case). In that case Lord Justice Peter Gibson held for an influence to be 'significant' it does not have to be of great importance. A significant influence is rather 'an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial.'
- 200 The victimisation complaint was received outside the statutory three-month time limit, and all claims are dismissed. In the alternative, had the claims being received in time (which they were not) the claimant was not subjected to unlawful victimisation, her claims are not well-founded and are dismissed.
- 201 In conclusion:
- 201.1 The respondent did not unlawfully discriminate against the claimant on the grounds of her disability, and the claimant's complaints of disability discrimination brought under section 13, 15, 19, 20-21, 26 and 27 of the Equality Act 2010 are not well-founded and are dismissed.
- 201.2 All allegations involving Jimmy Thompson and Ingolf Kirsten were received outside the three-month statutory limitation period. It was not the conduct extending over a period under section 123(3). It is not just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010, the

Tribunal does not have the jurisdiction to consider the allegations which are dismissed.

- 201.3 Allegation 72 brought under section 13 of the Equality Act 2010 dated 11 November 2016 was received out of time and was not the conduct extending over a period under section 123(3). It is not just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010, and the Tribunal does not have the jurisdiction to consider the allegation 72 which is dismissed.
- 201.4 Allegations 63, 64, 73, 74, 77, 78 90, 93 and 95 brought under section 15 of the Equality Act 2010 were received outside the 3-month time limit. It is not just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010, the Tribunal does not have the jurisdiction to consider the complaints which are dismissed.
- 201.5 Allegations 28 and 41 brought under section 26 of the Equality Act 2010 were not received within the time limit set by Section 123(1) of the Equality Act 2010. Neither act alleged amounted to conduct extending over a period of for the time. It is not just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010, the Tribunal does not have the jurisdiction to consider the complaints which are dismissed.
- 201.6 Allegations 67, 73 and 77 brought under section 27 of the Equality Act 2010 were not received within the time limit set by Section 123(1) of the Equality Act 2010. Neither act alleged amounted to conduct extending over a period of for the time. It is not just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010, the Tribunal does not have the jurisdiction to consider the complaints which are dismissed.
- 201.7 The respondent was not in breach of its duty to make reasonable adjustments. The claimant's claims brought under section 120-121 of the Equality Act 2010 are not well-founded and are dismissed.
- 201.8 The respondent was not in breach of the implied term of trust and confidence sufficiently serious to amount to a fundamental breach of contract. The claimant was not unfairly dismissed and her claim for constructive unfair dismissal is not well-founded and is dismissed.
- 201.9 The claimant was not wrongfully dismissed and her claim for notice pay is not well-founded and is dismissed.

24.10.21

Employment Judge Shotter

**RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON**

4 November 2021

FOR THE TRIBUNAL OFFICE