**Case No: 2206237/2018**

# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs R Wright-Turner

**Respondents:** London Borough of Hammersmith and Fulham (1)

Ms K Dero (2)

**Heard at:** London Central (by video using Cloud Video Platform)

**On:** 13-16, 19, 21-23, 26-29 April 2021

**In chambers:** 30 April, 5 May, 1, 3 & 9 June 2021

**Before:** Employment Judge Khan
Ms S Plummer
Mr D Kendall

**Representation**
Claimant: Mr B Collins QC, Counsel
Respondent: Mr D Basu QC, Counsel

# JUDGMENT

The unanimous judgment of the tribunal is that:

(1) At all relevant times, the claimant was disabled by reference to ADHD and PSTD / other psychological symptoms and the respondents had knowledge of the same.
(2) The harassment complaint succeeds in part (paras 37(1)(a), (c) & (d) POC)
(3) The direct discrimination complaint succeeds in part (paras 37(2) & (5) POC)
(4) The discrimination arising from disability complaint succeeds in part (paras 39(1) & (4) POC).
(5) The first respondent failed unreasonably to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.
(6) All the other complaints fail and are dismissed.

# REASONS

1. By a claim presented on 28 September 2018 the claimant brought complaints of disability discrimination, detriment and automatic unfair dismissal (protected disclosures) and unauthorised deductions / breach of contract. The respondents resisted these complaints.

2. The description of disability which the claimant relied on was amended by agreement on day one of the hearing as set out below.

## The issues

3. We were required to determine the issues listed below which were agreed by the parties in advance and refined following discussion with them during the final hearing.

### A. Disability (section 6 & Schedule 1 of the Equality Act 2010 ("EQA"))

1. Did the claimant suffer from a mental impairment at the relevant times by reason of (i) ADHD and/or (ii) PTSD / other psychological symptoms identified in the Joint Statement of the expert psychiatrists?

2. Did the impairment/s have a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities? In particular:

   (1) was the effect of the impairment/s (taken in the absence of treatment or other measures) more than trivial?

   (2) did the impairment/s last, or were they likely to last, at least 12 months?

3. Did the first and/or the second respondent know, or could they reasonably be expected to have known, that the claimant was disabled?

### B. Direct discrimination (section 13 EQA)

4. Did the treatment alleged by the claimant at paras 37(1) – (6) of the particulars of claim ("POC") occur? The alleged treatment is alleged to have been carried out by both respondents.

   Paras 37(1) – (6) POC

   (1) In the course of the meeting on 2 May 2018:

      a. Repeating to the claimant the suggestion that her brain "doesn't work like other people's".
      b. Suggesting that the claimant's actions in sending the email in question were inappropriate or irrational, and

that someone who did not have ADHD would not have sent the email.

c. Telling the claimant that she did not realise she was being serious when discussing ADHD.
d. Accusing the claimant of failing to declare her disabilities to the first respondent during the recruitment process.
e. When the claimant attempted to explain her conditions, taking no interest in learning about them.
f. Asking about reasonable adjustments when the circumstances did not disclose a need for that enquiry.
g. Suggesting that the claimant was incapable of performing her role.
h. Conveying to the claimant that, in light of her disabilities, she regretted her appointment.
i. Informing the claimant (without prior discussion) that the HR Director would be appointed a "buddy" to support the claimant, when no such buddy was required.

(2) Informing the claimant that her probation period had been extended by three months (by letter dated 10 May, postmarked 17 May and received by the claimant on 19 May 2018). Furthermore, doing so:

a. without giving her the opportunity to discuss or comment on the decision before it was taken;
b. without having provided feedback on her performance in accordance with the first respondent's policy or at all;
c. after (by both the second respondent and Mr Grimley) having described the claimant's in positive terms;
d. without explaining which areas of performance required improvement; and
e. when she was on sick leave.

The respondents accept (a) & (e) and deny (b) – (d).

(3) Making repeated attempts to meet with the claimant while she was on disability-related sick leave i.e. on 24 May and 24 July 2018.

(4) Refusing to deal with the claimant's grievance as sent by her solicitors on 1 August 2018.

(5) Dismissing the claimant with effect on 9 August 2018. The claimant says this decision was taken on 2 August. The respondents say this decision was taken around 23 July with a final discussion between the second respondent and Mark Grimley on 30 July 2018. Furthermore, doing so without giving her:

a. the opportunity to be heard before the decision to dismiss was taken;
b. any warning that she was at risk of dismissal; or
c. any opportunity to appeal.

(6) Failing to respond adequately or at all to the claimant's further grievance and request for an appeal sent by her solicitors on 15 August 2015.

5. Was the claimant thereby treated less favourably than a hypothetical non-disabled comparator because of her alleged disability/ies?

## C. Discrimination arising from disability (section 15 EQA)

6. Did the treatment alleged by the claimant at paras 39(1) – (5) POC occur?

Paras 39(1) – (5) POC

(1) Informing the claimant that her probation period had been extended by three months (by letter dated 10 May, postmarked 17 May and received by the claimant on 19 May 2018). Furthermore, doing so:

   a. without giving her the opportunity to discuss or comment on the decision before it was taken;
   b. without having provided feedback on her performance in accordance with the first respondent's policy or at all;
   c. after (by both the second respondent and Mr Grimley) having described the claimant's in positive terms;
   d. without explaining which areas of performance required improvement; and
   e. when she was on sick leave.

(2) Making repeated attempts to meet with the claimant while she was on disability-related sick leave i.e. on 24 May and 24 July 2018.

(3) Refusing to deal with the claimant's grievance as sent by her solicitors on 1 August 2018.

(4) Dismissing the claimant. Furthermore, doing so without giving her:

   a. the opportunity to be heard before the decision to dismiss was taken;
   b. any warning that she was at risk of dismissal; or
   c. any opportunity to appeal.

(5) Failing to respond adequately or at all to the claimant's further grievance and request for an appeal sent by her solicitors on 15 August 2015.

7. Was the claimant thereby treated unfavourably because of her actual and/or alleged disability-related sickness absence?

8. Was the claimant's actual and/or alleged sickness absence something arising in consequence of her alleged disability/ies?

9. Can the first or second respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondents rely on para 34 of the amended grounds of resistance ("GOR").

   Para 34 amended GOR

   As to justification:

   (i) It was both reasonable and standard practice for the first respondent to extend the probationary period of an employee, where that period had not been satisfactorily completed owing to performance issues.
   (ii) In the circumstances, it was reasonable for the respondents to try to maintain some level of contact with the claimant while she was absent with what the respondents understood to be work-related stress.
   (iii) The letter referred of 1 August indicated that the claimant intended bringing a grievance; the first respondent was entitled to respond as it did.
   (iv) The first respondent was entitled to dismiss the claimant in circumstances where her probationary period had been extended and there were ongoing performance issues and to do so without involving her in that decision.
   (v) The first respondent's response to the claimant's solicitor's letter of 15 August was adequate in the circumstances.

**D. Failure to make reasonable adjustments (section 20 & 21 EQA)**

10. Did the respondents operate the provisions, criteria or practices ("PCPs") at paras 41(1) – (7) POC[1]?

    Paras 41(1) – (7) POC

    (1) Informing an employee of a decision to extend probation while she is absent on disability-related sick leave.

    (2) Failing to give an employee who is absent on disability-related sick leave:

        a. the opportunity to discuss or comment on a decision to extend probation before it was taken;
        b. proper and timely feedback on her performance (in accordance with the first respondent's Probation Policy or at all);
        c. an explanation as to which areas of performance required improvement.

    (3) Attempting to hold meetings with an employee when she is absent on disability-related sick leave.

    (4) Refusing to deal with a grievance filed by solicitors.

[1] There is no para 41(5)

(6) Dismissing an employee while on disability-related sick leave and without giving:

a. the opportunity to be heard before the decision to dismiss was taken;
b. any warning that she was at risk of dismissal;
c. any opportunity to appeal.

(7) Failing to respond adequately or at all to a further grievance and request for an appeal sent by an employee who is absent on disability-related sick leave.

11. If so, did those PCPs put the claimant at a substantial disadvantage in comparison with a non-disabled employee?

12. Was it reasonable for the respondents to take the steps at paras 42(1) – (9) POC[2] in order to avoid the disadvantage to the claimant?

<u>Paras 42(1) – (9) POC</u>

(1) Ensuring no decision was taken to extend her probation while she was absent on disability-related sick leave

(2) Ensuring that the claimant was given, at a time when she was not on disability-related sick leave:

a. the opportunity to discuss or comment on a decision to extend probation before it was taken;
b. proper and timely feedback on her performance (in accordance with the first respondent's policy or at all).
c. an explanation as to which areas of performance required improvement.

(3) Waiting for the claimant's return to work before holdings meetings with her.

(4) Dealing with the claimant's grievance which was filed by her solicitors.

(8) Ensuring that a decision to dismiss was not taken when the claimant was on sick leave and without giving:

a. the opportunity to be heard before the decision to dismiss was taken;
b. any warning that she was at risk of dismissal;
c. any opportunity to appeal.

(9) Responding appropriately to the claimant's further grievance and request for an appeal.

13. Were those steps taken?

[2] There are no paras 42(5) – (7)

**E. Harassment (section 26 EQA)**

14. Did the conduct alleged at paras 37 – 41 POC occur?

15. Was it unwanted conduct?

16. Was it conduct related to the claimant's alleged disability/ies namely her actual / perceived disability-related sickness absence?

17. Did that conduct:

    (1) Have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

    (2) Have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

**F. Victimisation (section 27 EQA)**

18. It is accepted that the sending of the claimant's letter of grievance dated 1 August 2018 was a protected act within the meaning of s.27(1) EQA.

19. Was the claimant dismissed because she sent the said letter?

**G. Protected disclosures (sections 43A – H & 47B of the Employment Act 1996 ("ERA))**

20. Did the claimant make disclosures of information to her employer as alleged at paras 46(1) – (8) POC and, specifically, by reference to the documents enumerated in Appendix 1 of the claimant's closing submissions?

    (1) She raised concerns about contractual arrangements and governance for shared services.

    (2) She raised issues with the PSR Budget and risks including the non-delivery of statutory services and third party contracts.

    (3) She raised concerns about member behaviour, the member Code of Conduct, the first respondent's constitution and scheme of delegation.

    (4) She raised concerns about GDPR compliance in third party arrangements.

    (5) She raised concerns about the waiving of notice periods in breach of contract thereby risking delivery of statutory duties, service quality and management.

(6) She raised concerns about the first respondent's employment duties and duty of care to employees.

(7) She raised concerns regarding facilities management, and, in particular, health and safety corporate responsibilities.

(8) She raised allegations of disability discrimination.

21. If so, did the claimant make the disclosures in the reasonable belief that:

    (1) the information tended to show that a breach of a legal obligation had occurred; and

    (2) the disclosures were in the public interest?

22. Did the treatment alleged by the claimant at paras 37(1) – (6) POC occur?

23. Was the claimant subjected to that treatment by the first and/or the second respondent on the ground that she had made one or more of the disclosures?

24. Did the second respondent decide that the claimant should be dismissed?

25. If so, was the claimant dismissed as a consequence of that decision?

26. Did the second respondent take that decision on the ground that the claimant had made one or more of the disclosures?

27. Was the second respondent at the relevant times another worker of the first respondent?

28. Was the reason or the principal reason for the claimant's dismissal by the first respondent that she had made one or more of the disclosures set out as issue 23 above?

## H. Unauthorised deductions from wages / Breach of contract

29. Was the sum of £15,133.58 deducted from the claimant's pay by the first respondent?

30. Did that deduction amount to:

    (1) An unauthorised deduction from the claimant's wages in contravention of section 13 ERA?

    (2) A breach of the claimant's contract?

## I. ACAS Code of Practice

31. Did the matters alleged at paras 53(1) – (3) POC occur?

Paras 53(1) – (3) POC

(1) the refusal to deal with the claimant's grievance;

(2) the failure to follow any procedure in dismissing the claimant, and in particular:

a. the lack of warning;
b. the lack of opportunity to make representations, orally or in writing;
c. the failure to give reasons;

(3) the failure to give any right of appeal.

32. Was the first respondent in breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures?

33. If so, what is the uplift which should be awarded pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992?

## Relevant legal principles

### *Disability*

4. Disability is defined by section 6 EQA:

> *(1) A person (P) has a disability if— (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
>
> *…*
> *(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)— (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*
>
> *(6) Schedule 1 (disability: supplementary provision) has effect.*

5. Section 212 EQA defines 'substantial' as meaning more than minor or trivial.

6. Paragraph 2 of schedule 1 EQA provides, in respect of 'long-term' effects:

> *(1) The effect of an impairment is long-term if— (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected.*
>
> *(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.*

7. 'Likely' means that it could well happen (see SCA Packaging Ltd v Boyle [2009] ICR 1056; and also the EQA Guidance on matters to be taken into account in determining questions relating to the definition of disability).

***Direct discrimination***

8. Section 13(1) EQA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

9. The protected characteristic need not be the only reason for the treatment but it must have been a substantial or "effective cause". The basic question is "What, out of the whole complex of facts before the tribunal, is the 'effective and predominant cause' or the 'real or efficient cause' of the act complained of?" (O'Neill v Governors of St Thomas More RC Voluntarily Aided Upper School and anor 1997 ICR 33, EAT).

10. The test is what was the putative discriminator's conscious or subconscious reason for the impugned treatment (see Nagarajan v London Regional Transport 1999 ICR 877, HL).

11. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. Under section 23(2), where the protected characteristic is disability, the circumstances relating to a case include a person's abilities.

***Discrimination arising from disability***

12. Under section 15(1) EQA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

13. Unfavourable treatment is not defined, the EHRC Code of Practice of Employment says "must have been put at a disadvantage". There is no need for a comparator.

14. The unfavourable treatment must be shown by the claimant to be "because of something arising in consequence of his [or her] disability". The tribunal must ask what the reason for this alleged treatment was. This need not be the sole reason but it must be a significant or at least more than trivial reason (see Secretary of State for Justice and anor v Dunn UKEAT/0234/16/DM). If this is not obvious then the tribunal must enquire about mental processes – conscious or subconscious – of the alleged discriminator (see R (on the application of E) v Governing Body of JFS and The Admissions Appeal Panel of JFS and Ors [2010] IRLR, 136, SC).

15. In Pnaiser v NHS England [2016] IRLR 170 Mrs Justice Simler set out the following guidance:

    (1) A tribunal must first identify whether there was unfavourable treatment and by whom.

(2) The tribunal must determine the reason for or cause of the impugned treatment. This will require an examination of the conscious or unconscious thought processes of the putative discriminator. 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 amount to an effective reason for or cause of it. Motive is irrelevant. The focus of this part of the enquiry is on the reason for or cause of the impugned treatment.
(3) The tribunal must determine whether the reason or cause is something arising in consequence of B's disability. The causal link between the something that causes the unfavourable treatment and the disability may include more than one link. The more links in the chain the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
(4) The "because of" enquiry therefore involves two stages: firstly, A's explanation for the treatment (and conscious or unconscious reasons for it) and secondly, whether (as a matter of fact rather than belief) the "something" was a consequence of the disability. It does not matter precisely in which order these questions are addressed.

16. The employer will escape liability if it is able to objectively justify the unfavourable treatment that has been found to arise in consequence of the disability. The aim pursued by the employer must be legal, it should not be discriminatory in itself and must represent a real, and objective consideration. As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only way of achieving the aim being relied on but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

***Harassment***

17. Section 26(4) EQA provides that:

> *(1) A person (A) harasses another (B) if –*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of –*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
> *…*
> *(4) In deciding whether conduct has the effect referred to in section (1)(b), each of the following must be taken into account –*
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect.*

18. In deciding whether the conduct "related to" a protected characteristic consideration must be given to the mental processes of the putative harasser (see GMB v Henderson [2016] IRLR 340, CA).

19. In Pemberton v Inwood [2018] IRLR 542, CA Underhill LJ re-formulated his earlier guidance in Richmond Pharmacology v Dhaliwal [2009] IRLR 336, EAT, as follows:

> *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."*

20. The claimant's subjective perception of the offence must therefore be objectively reasonable.

***Reasonable adjustments***

21. The duty to make reasonable adjustments is set out in sections 20 – 21 EQA. Where a provision, criterion or practice ("PCP") of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage.

22. Under Schedule 8, paragraph 5(1), a 'relevant matter' is either deciding to whom to offer employment or the employment of the complainant.

23. Section 212(1) defines 'substantial disadvantage' as one that is more than minor or trivial.

24. Under Schedule 8, paragraph 20(1), an employer has a defence to a claim for breach of the statutory duty if it does not know and could not reasonably be expected to know that the disabled person is disabled *and* is likely to be placed at a substantial disadvantage by the PCP, physical feature or, as the case may be, lack of auxiliary aid. A tribunal can find that the employer had constructive (as opposed to actual) knowledge both of the disability and of the likelihood that the disabled employee would be placed at a disadvantage. In this case, the question is what objectively the employer could reasonably have known following reasonable enquiry.

25. In Environment Agency v Rowan [2008] IRLR 20 (approved by the Court of Appeal in Newham Sixth Form College v Sanders [2014] EWCA Civ 734) the EAT said that in considering a claim for a failure to make adjustments the tribunal must identify the following matters without which it cannot go on to assess whether any proposed adjustments are reasonable:

    (1) the PCP applied by / on behalf of the employer, or

(2) the physical feature of the premises occupied by the employer, or
(3) the identity of non-disabled comparators where appropriate, and
(4) the nature and extent of the substantial disadvantage suffered by the claimant

26. The onus is on the claimant to show that the duty arises i.e. that a PCP has been applied which operates to their substantial disadvantage when compared to persons who are not so disabled. The onus also falls on the claimant to identify in broad terms at least the nature of the adjustment that is said will alleviate the disadvantage. The burden then shifts to the employer to show that the disadvantage would not have been eliminated or alleviated by the adjustment identified, or that it would not have been reasonably practicable to have made that adjustment. If the claimant is unable to show that the PCP has put her at such a substantial disadvantage the respondent will not be under a duty to make any adjustments in relation to that PCP.

27. The question of whether the employer has complied with its duty to make adjustments is an objective test (see Tarbuck v Sainsbury's Supermarkets [2006] IRLR 664). Ultimately, the tribunal must consider what is reasonable (see Smith v Churchills Stairlifts Plc [2006] ICR 524). The focus is the reasonableness of the adjustment not the process by which the employer reached its decision about the proposed adjustment.

28. The tribunal must consider the guidance contained in the EHRC Code of Practice on Employment 2011, and in particular the following six factors it enumerates, when considering the reasonableness of an adjustment:

(1) Whether taking any particular steps would be effective in preventing the substantial disadvantage
(2) The practicability of the step
(3) The financial and other costs of making the adjustment and the extent of any disruption caused
(4) The extent of the employer's financial or other resources
(5) The availability to the employer of financial or other assistance to help make an adjustment (such as through Access to Work)
(6) The type and size of the employer

***Victimisation***

29. Section 27(1) EQA provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes B has done, or may do a protected act.

30. Section 27(2) EQA enumerates the four types of protected act which include making an allegation (whether or not express) that A or another person has contravened this Act.

31. As to causation, the tribunal must apply the same test to that which applies to direct discrimination i.e. whether the protected act is an effective or substantial cause of the employer's detrimental actions.

32. In a victimisation complaint, as essential element of the prima facie case is that the claimant must show that the putative discriminator knew about the protected act on which the complaint is based or believed that a protected act was done by the claimant (see Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16/RN).

***Detriment***

33. Section 39(2) EQA provides that:

    *An employer (A) must not discriminate against an employee of A's (B) –*
    *…*

    *(a) by subjecting him to any other detriment.*

34. A complainant seeking to establish detriment is not required to show that she has suffered a physical or economic consequence. It is sufficient to show that a reasonable employee would or might take the view that they had been disadvantaged, although an unjustified sense of a grievance cannot amount to a detriment (see Shamoon v Chief Constable of RUC [2003] IRLR 285, HL).

35. The EHRC Employment Code provides that "generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage".

36. Any alleged detriment must be capable of being regarded objectively as such (see St Helens MBC v Derbyshire [2007] ICR 841).

***Discrimination – Burden of proof***

37. Section 136 EQA provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

38. Section 136 accordingly envisages a two-stage approach. Where this approach is adopted a claimant must establish a prima facie case at the first stage. This requires the claimant to prove facts from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination. This requires something more than a mere difference in status and treatment (see Madarassy v Nomura International plc [2007] ICR 867, CA). If the burden shifts, it is for the respondent to show an adequate i.e. non-discriminatory reason for the treatment. This explanation does not have to be reasonable or sensible provided it has nothing to do with the protected characteristic relied on (see Laing v Manchester Council [2006] ICR 1519).

39. The two-stage approach envisaged by section 136 is not obligatory and in many cases it will be appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatsoever in the adverse treatment, the complaint fails (see Bowler). Accordingly, the burden of proof provisions

have no role to play where a tribunal can make positive findings of fact (see Hewage v Grampian Health Board [2012] IRLR 870, SC).

40. In exercising its discretion to draw inferences a tribunal must do so based on proper findings of fact (see Anya v University of Oxford [2001] IRLR 377, [2001] ICR 847, CA).

41. Tribunals must be careful to avoid too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground (see Igen Ltd v Wong [2005] IRLR 258, CA).

***Mutually exclusive complaints under the EQA***

42. A tribunal cannot find both direct discrimination under section 13 EQA and harassment under section 26 in respect of the same treatment. This is because section 212(1) provides that:

> *'detriment' does not, subject to subsection (5) include conduct which amounts to harassment*

***Protected disclosure***

43. For there to be a protected disclosure, a worker must make a qualifying disclosure, as defined by section 43B ERA, and do so in accordance with sections 43C – 43H, where relevant.

44. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following six prescribed categories of wrongdoing:

> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> *(c) that a miscarriage of justice has occurred is occurring or is likely to occur,*
> *(d) that the health and safety of any individual has been, is being or is likely to be endangered,*
> *(e) that the environment has been, is being or is likely to be damaged, or*
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.*

45. Section 43L(3) provides that where the information is already known to the recipient, the reference to the disclosure of information shall be treated as a reference to bringing the information to the attention of the recipient.

46. As has been recently restated in Williams v Michelle Brown UKEAT/0044/19/OO, a qualifying disclosure must have the following elements:

(1) It is a disclosure of information (taking account of section 43L(3), if relevant). This requires the communication to be of sufficient factual content or specificity to be capable of tending to show a relevant failure; whether this standard is met is a matter of evaluative judgment for a tribunal in light of all the facts of the case (see Kilraine v Wandsworth LBC [2018] ICR 1850, CA).

(2) The worker has a reasonable belief that this information tends to show a relevant failure. This has both a subjective and objective element so that the worker must have a subjective belief and this belief must be reasonably held (see Kilraine). In considering this the tribunal must take account of the individual characteristics of the worker (see Korashi v Abertawe Bro Morgannwg Local Health Board [2012] IRLR 4, EAT). In making an assessment as to the reasonableness of the worker's belief that a legal obligation has not been complied with a tribunal must firstly identify the source of the legal obligation that the worker believes has been breached (see Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT).

(3) The worker also has a reasonable belief that the disclosure is made in the public interest. A tribunal must first ask whether the worker believed that the disclosure was in the public interest, at the time that it was made, and if so, whether that belief was reasonably held (see Chesterton Global Ltd v Nurmohamed [2017] IRLR 837, CA). There is no legal definition of "public interest" in this context. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case. Relevant factors could include: the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer (see Chesterton). Public interest need not be the only motivation for making the disclosure.

45. Whether the information amounts to a disclosure and whether the worker had a reasonable belief that this information tended to show a relevant failure must be considered separately by a tribunal but these issues are likely to be closely aligned (see Kilraine). If a statement has sufficient factual content and specificity such that it is capable of tending to show a relevant failure then it is likely that the worker's subjective belief in the same will be reasonable. The reverse is equally applicable. However, it will often be necessary for a tribunal to consider the wider context in which the information has been disclosed, where relevant.

46. A qualifying disclosure is protected if it is made to the employer (section 43C).

***Protected disclosure – Detriment***

47. Section 47B ERA provides that a worker has a right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker made a protected disclosure.

48. Once it is established that a worker has made a protected disclosure and that he was subjected to a detriment, it is for the employer to show the ground on which any act, or deliberate failure to act, was done (section 48(2)).

49. The correct approach on causation is for the tribunal to consider whether the making of the detriment materially influenced, in the sense of being a more than trivial influence, the employer's treatment of the worker (see NHS Manchester v Fecitt [2012] IRLR 64, CA).

50. In Timis and anor v Osipov (Protect Intervening) [2019] ICR 655, CA the Court of Appeal held that an employee was not precluded under section 47B(2) ERA from bringing a detriment complaint under section 47B(1A) against a co-worker for subjecting him to the detriment in the form of dismissal. The corollary of this is that such a detriment complaint can also be brought against the employer who will be liable for that detriment under section 47B(1B) subject to the employer's reliance on the reasonable steps defence available under section 47(1D).

***Dismissal***

51. As the claimant does not have the requisite qualifying service i.e. two years of continuous employment to bring a claim for ordinary unfair dismissal the burden is on her to show that the reason or principal reason for her dismissal was that she made a protected disclosure (see Ross v Eddie Stobart Ltd UKEAT/0068/13/RN).

52. The focus of the tribunal's enquiry must be the factors that operated on the employer's mind so as to cause him to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, Cairns LJ said this (at p. 330 B-C):

> *"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."*

This guidance was approved by Underhill LJ in Beatt v Croydon Health Services NHS Trust [2017] IRLR 748:

> *"As I observed in Hazel v Manchester College [2014] EWCA Civ 72, [2014] ICR 989, (see para. 23, at p. 1000 F-H), Cairns LJ's precise wording was directed to the particular issue before the Court, and it may not be perfectly apt in every case; but the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it sometimes put, what 'motivates' them to do so…"*

**Discussion – Bias**

53. Justice must not only be done but seen to be done. The rule providing for the disqualification or recusal of a judge / tribunal non-legal members is one which provides litigants with protection against bias. There are three categories of bias which are capable of undermining the impartiality of a tribunal (see Locabail (UK) Ltd v Bayfield Properties Ltd [2000] IRLR 96, CA):

    (1) Actual bias which will apply where a judge allows his or her decision to be influenced by partiality or prejudice.

(2) Automatic disqualification which will arise where a judge is shown to have an interest in the outcome of the case.
(3) Where there is a real possibility of bias, the test for which was set out by the House of Lords in Porter v Magill [2002] UKHL 67 as follows: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

54. At the start of day four of this hearing, Mr Basu, for the respondents, enumerated several "grave concerns" about my conduct of the proceedings to date, namely that:

    (1) I had entered into the arena with an intervention relating to the use of the term "paranoid" in a GP letter [2737] during his cross-examination of the claimant.
    (2) I had given the impression that I had either made up my mind in relation to the claimant's credibility or failed to understand that questions of credibility in cross-examination were permissible; if my concern related to proportionality then that was a matter for submissions; I had been "at pains to insist to ensure" that the claimant completed her answers.
    (3) I had allowed Mr Collins to "wind down the clock" in permitting him to make "numerous lengthy objections" which had not resulted in a single line of his questioning being stopped.
    (4) I had shown an "almost immediate hostility" to the respondents' case in referring to the overriding objective and putting the respondents on notice that their position on disability in relation to ADHD was misconceived and in asking Mr Basu several times to clarify the respondents' case on justification in relation to the section 15 EQA complaint.
    (5) There was a "serious concern" that his cross-examination of the claimant would be guillotined. This would be injurious to a fair trial. He referred to another case when he had had to raise this issue with the tribunal.

    Having made these representations, Mr Basu did not say that these concerns meant that I or the tribunal were biased or there was a real possibility of bias nor that the proceedings to date had been unfair nor that a fair trial was no longer possible. He expressly reserved the respondents' position on whether I could continue to hear this case and requested that the tribunal took no action at this stage.

55. Mr Collins, for the claimant, responded as follows (as numbered above):

    (1) The tribunal had been entitled to raise concerns about the way that the question had been put by Mr Basu in cross-examination.
    (2) Mr Basu had not understood my question. I had not asked him to explain how credibility was relevant to cross-examination *per se* but had asked him to clarify how the line of questioning being put to the claimant was relevant to the *issue of* credibility.
    (3) The objections which he had made in relation to Mr Basu's cross-examination were valid. Some had been sustained by the tribunal and others had not. The respondents had been allocated two and a half days

to cross-examine the claimant. If they wanted to focus on credibility rather than issues of substance that was a matter for them.

(4) It was appropriate for a tribunal to identify the overriding objective and raise any concerns which were potentially misconceived. Advocates should expect to be robustly questioned in relation to their pleaded cases.

(5) It was agreed that the parties had a right to a fair trial. There was nothing in this proposition and it was not one which should be left unresolved. The respondents had not, despite expressing these concerns, made a recusal application. If it proceeded with such an application the same would be resisted by the claimant.

56. I ensured that Mr Basu was given the opportunity to make such an application on behalf of the respondents which he declined. He said that no one was questioning the honesty of the tribunal; most cases involved unconscious bias or the appearance of bias; and usually these concerns grew over time, and that was why he had raised them now. He did not say that there was unconscious bias or the appearance of bias.

57. Having already explained that I had allowed the claimant to answer her questions in full because she contended that she was disabled by reference to one or more mental impairment(s) and emphasised that the tribunal would be astute to ensure that each witness was afforded the latitude they required, I responded to the first two of Mr Basu's concerns:

(1) In relation to my intervention regarding the GP letter [2737], I explained that when Mr Basu was cross-examining the claimant and questioning her in relation to the use of the word paranoid, I intervened because I was unclear as to the weight that Mr Basu was seeking to attach to this letter. I clarified my understanding that a GP was not the same as a mental health practitioner which was a distinction with an important difference in terms of the scope of practice and level of expertise, and therefore to the weight that should be attached to the medical opinion in question. I was satisfied that this was not entering into the arena.

(2) In relation to my intervention on credibility, my recollection was close to that articulated by Mr Collins'.[3] I added that this intervention was also relevant to proportionality, as Mr Basu had correctly anticipated, and the objective of ensuring that he was able to complete his cross-examination within the time allotted.

58. Notwithstanding the absence of any application, the tribunal adjourned to enable the parties to take a break (one had been requested by the claimant) and to consider what we had heard. Having done so, we were satisfied that there was no basis for recusal. For my part, I was satisfied that I had acted with impartiality and without prejudice, I had no interest in the outcome of these proceedings and a fair-minded and informed observer would not conclude that there was a real possibility of bias from the way in which these

[3] A review of my note confirmed this. In the afternoon of day three, and the second day of the claimant's cross-examination, Mr Collins objected to a line of questioning which Mr Basu explained related to the claimant's credibility. When I asked Mr Basu to explain how this was relevant, he replied that he was astonished by my question. I clarified that I wanted to understand how these questions were relevant to the issue of credibility. It seems that Mr Basu either misheard or misunderstood my query as one asking him to explain how the issue of credibility was relevant. That was not the question I put to him.

proceedings had been conducted. When we resumed, I therefore explained that we had considered the parties' representations and were satisfied that there was no reasonable basis for recusal. I briefly addressed the remaining concerns which Mr Basu had raised (these follow the same numbering as above, for ease of reference):

(3) The tribunal was bound to deal with any interventions or objections made by a party as they arose and the same approach would be applied when the respondents' evidence was heard.

(4) In relation to the pleadings and list of issues, it was appropriate and necessary for the tribunal to put a party on notice of a potentially misconceived argument or position. It was also inappropriate to seek clarity in relation to the pleaded cases. In both cases the object was to ensure that the list of issues was fully operative and there was a sound basis to proceed before the tribunal began to hear evidence. Mr Basu had been invited to clarify the respondents' case in relation to disability status and also justification in relation to the section 15 EQA complaint. He was correct to note that I did at one point wish to move the discussion on. However, I heard Mr Basu's intervention, listened carefully to his representations and he was allowed to provide a full response. [4]

(5) I assured the parties that the tribunal regarded fairness to both parties as the cornerstone of these proceedings.

59. Mr Basu made no further submissions in relation to bias or fairness nor made a recusal application during the remainder of the hearing.

**<u>The evidence</u>**

60. The hearing was a remote public hearing, conducted using the Cloud Video Platform (CVP) under rule 46. In accordance with rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal.

61. For the claimant, we heard evidence from the claimant herself and also:

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[4] When we resumed after lunch on day two, I spent some time with the parties reviewing the list of issues. In relation to the issue of disability, I questioned whether the respondents' position on ADHD was misconceived and within the overriding objective because the statement of the joint experts (from which the respondents did not resile) agreed that this was a mental impairment which had had an adverse and substantial long-term effect on the claimant's day-to-day activities. As such, this statement confirmed, in relation to ADHD, that the claimant satisfied the statutory test for disability status. I therefore invited Mr Basu to address the tribunal on this. Conceding that it would not be at all surprising if we found that ADHD was a disability, Mr Basu explained that the respondents sought a determination on the ways in which ADHD affected the claimant. He said that the respondents did not "actively dispute" disability but put the claimant to proof. Although this did not address the fact that whilst such findings were necessary to establish substantial disadvantage and the efficacy of any potential adjustments (under section 20 EQA) and also the operative disability-related factors (under section 15 EQA) they were not necessarily required to establish disability status, given the terms of the joint expert statement, nor in relation to the complaints of direct discrimination or harassment. In relation to the section 15 EQA complaint, I invited Mr Basu to explain the respondents' justification defence. Mr Basu referred me to paragraph 34 of the amended grounds of resistance. I invited Mr Basu two further times to explain the respondents' position. I considered this was necessary for fairness to give the respondents every opportunity at this early stage to explain its justification defence because paragraph 34 did not appear to state, in every case, the aim being relied on, or if it did, this was neither obvious nor apparent as a matter of common sense.

(1) Christian Rogers, formerly Director for the Commercial Ethical Debt Collections and Business Intelligence Services;
(2) Sarah Thomas, formerly Acting Director of Delivery and Value and Assistant Director for Public Services Reform ("PSR").
(3) Barry Quirk, Chief Executive of the Royal Borough of Kensington & Chelsea;
(4) Alix Cordell, formerly an interim consultant in PSR;
(5) Chris Barrett, formerly an interim consultant in PSR;
(6) Dave McNamara, formerly Tri-borough Director of Finance and Resources in Children's Services;
(7) Jessica Pezzolesi, formerly Executive PA to the claimant;
(8) Michael Hainge, formerly Commercial Director;
(9) Andy Rennison, formerly Tri-borough Assistant Director for Children's Services and latterly Director of 3BM.

62. For the respondents, we heard from:

(1) Kim Dero (now Smith), the second respondent and Head of Paid Service (i.e. the Chief Executive);
(2) Hitesh Jolapara, formerly Strategic Director of Governance and Finance and section 151 Officer;
(3) Mark Grimley, formerly Interim Director for HR (June 2017 – June 2018) and Director for Corporate Services (June 2018 – May 2019);
(4) Rhian Davies, Director of Resources and Monitoring Officer, formerly the Borough Solicitor;
(5) Emily Hill, Director of Finance and formerly Assistant Director, Corporate Finance;
(6) David Hughes, Director of Audit, Fraud, Risk and Insurance;
(7) Tina Dempsey, formerly Head of People and Talent;
(8) Jessica Watts, Executive PA to the second respondent.
(9) Lisa Redfern, Strategic Director of Social Care.

63. Mr McNamara, Mr Hainge and Mr Rennison gave evidence pursuant to witness orders made under rule 32 on 16 April 2021. By agreement, the claimant relied on a supplemental statement provided by Ms Pezzolesi and the respondent relied on a statement provided by Jane Watts neither of which had been produced nor exchanged prior to this hearing.

64. There was a hearing bundle which exceeded 4,600 pages. By agreement, we also admitted into evidence a supplemental bundle of 155 pages which the claimant relied on. We read the pages to which we were referred.

65. We considered the written and oral submissions made by both parties.

66. References below to [25], [25S] and [X/25] are to the primary and supplemental bundles and witness statements, respectively.

## The facts

67. Having considered all the evidence, we make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

68. The first respondent is a local authority for which the second respondent has been the Head of Paid Service i.e. the Chief Executive since April 2017.

69. The claimant was employed by the first respondent for less than nine months from 13 November 2017 until 9 August 2018 as Director of Public Services Reform ("PSR"). Prior to this she was employed by the Royal Borough of Kensington & Chelsea ("RBKC") as Tri-borough Director of Commissioning for Children's Services.

70. The Tri-borough was a shared services arrangement between the first respondent, RBKH, and Westminster City Council ("WCC"). The services under this agreement were disaggregated on 1 April 2018. The impending repatriation of sovereign services to the first respondent led to the formation of a new PSR Department and the creation of the claimant's role.

71. The claimant was offered and accepted this post in July 2017. By this date the claimant had been seconded by RBKC as the Humanitarian Assistance Lead Officer supporting its response to the Grenfell Tower fire in June 2017. The claimant extended this secondment which meant she did not take up her post with the first respondent until 13 November 2017.

72. The claimant was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") in November 2016. The claimant manages this condition with daily medication.

73. The claimant was affected by her work dealing with the immediate aftermath of the Grenfell Tower fire, and was diagnosed with Post Traumatic Stress Disorder ("PTSD") in October 2017. She began to exhibit symptoms in August 2017 and experienced a panic attack later that month which she reported to her employer (RBKC). This diagnosis resulted from the screening process for employees which involved standardised questions relating to trauma, anxiety and depression [AK/3] and an initial consultation to determine whether intervention was required. The claimant was assessed and referred for therapy to Agnes Kocsis, Consultant Psychologist, and Head of Clinical Health Psychology at St Mary's Hospital. Their first appointment was in October 2017. She was in no doubt that the claimant had PTSD. This therapy included EMDR (i.e. Eye Movement Desensitisation and Reprocessing Therapy). These therapy sessions continued intermittently until late 2018. RBKC paid for these sessions and agreed to fund further counselling if it was needed.

74. Prior to taking up this post with the first respondent, the claimant completed an Employment Health Assessment Form ("EHQ") on 31 October 2017 [2632-7]. This form stated that its contents would be treated confidentially and would not be disclosed to anyone outside the Occupational Health Unit ("OHU") without the employee's written consent and the OHU "will retain this form and will uphold the principles of the Data Protection Act 1998." In this form the claimant declared that she was taking medication for ADHD and against the section headed "Mental illness (including depression, nervous breakdown, anxiety, panic attacks or eating disorder)" she wrote

> "No. Episode of PTSD following Grenfell debrief. Received therapy through NHS Grenfell support for staff".

The claimant also confirmed that there were no other illnesses which "may be adversely affected by your work or may affect your working" nor that she considered that she had a disability or any illness or impairment which might affect her work, nor required any adjustments nor had any illness, impairment or disability "which may have been caused or made worse by your work". In her oral evidence, which we accept, the claimant said in completing this form she used "episode" instead of panic attack to describe her PTSD flashbacks. She understood this to be an episodic occurrence or reaction to events and not something that was inherently "wrong with me" or an impairment. Because she was unsure whether she was describing this correctly she provided the OHU with medical notes and she discussed this with an OHU nurse on 1 November. From the handwritten note made by the nurse on the EHQ this appears to have been a brief discussion when the claimant reiterated that she was managing the conditions she had referred to by medication (ADHD) and counselling (PTSD). At the end of this note, the nurse wrote "Fit for post". In her oral evidence, the claimant said that she did not require any adjustments before 2 May 2018.

75. The claimant's role of Director of PSR was created following the decision to disaggregate the Tri-borough shared services arrangement and the return of the Adults' Social Care (ASC"), Public Health and Children's Social Care ("CSC") services to the first respondent. 12 months' notice of disaggregation was served on 1 April 2017. Selected services would continue to be provided by RBKC and WCC under a Bi-borough arrangement. The new PSR Department would be responsible for a strategic reform agenda incorporating adult and children's social care commissioning, public health, commercial services, procurement and policy. Phase one was to design and deliver this new service and structure. The claimant would be responsible for setting up the new department and the systems and staff to be operational from 1 April 2018 when these sovereign services would go live. Elected cabinet members decreed that the budget for the PSR Department was limited to existing budgets, not including any one-off transition costs.

76. It was envisaged that the claimant and the other newly appointed directors for Children's and Adults' Social Care would start in September 2017. They would have seven months to re-establish these sovereign services. Although she was keen for the claimant to start work in September 2017, the second respondent agreed reluctantly to the claimant's request to delay her start to November 2017 because of her Grenfell work. It is likely that one reason for this delay was the claimant's doubts about taking up this new position.

77. As a director, the claimant would be part of the second respondent's Senior Leadership Team ("SLT"). In her oral evidence, the claimant agreed that she was reluctant to take up this appointment because she was concerned about the second respondent whom she felt was an inexperienced leader who related poorly to her SLT. She agreed that she had therefore formed a view about what it would be like to be in the second respondent's team before she started. The claimant also understood that she had been foisted on the second respondent by the Leader of the Council. She had been the only person to be interviewed for this position. From her discussions with the second respondent the claimant knew that this was a pressurised and high-profile role with the need to deliver results. We find that despite her

reservations about the second respondent, the claimant was committed to this role once she was in it. She was ambitious, this was a highly visible role and one which she was determined to make a success to showcase her talents. This is consistent with the evidence of Barry Quirk, Chief Executive, RBKC, which we accept, that he told her that this role would make her well-placed for more senior roles in local government.

78. Before taking up her post, the claimant began working on the new design for PSR and identified several budgetary issues. In an email dated 20 October 2017 [3457] she queried her ability to fit the ASC commissioning and transformation service costs within the allotted £840,000 budget. A third share of the current workforce costs for ASC commissioning across Tri-borough was £1.3m. This did not include senior management posts, transformation and project management costs or infrastructure costs supporting commissioning operations. A further issue was that permanent posts in ASC commissioning were currently being funded from a wider transformation reserve which was time-limited and this would leave a funding gap when the service was repatriated. The data showed that the first respondent employed around 40 of the 82 posts in ASC commissioning in Tri-borough at a cost of £2m. The total workforce cost across Tri-borough for ASC, Children's Services and Public Health commissioning and transformation was over £15m and included 262 staff. The claimant said that she would continue to work on PSR structures to meet the service requirements, however, she concluded that the budget for ASC commissioning "presents service risks and safety impact for PSR and consequently those supported by ASC, CHS and PH departments". This is not relied on by the claimant as a protected disclosure. (As will be seen, the claimant sent another email on 31 October 2017 about this issue, which is relied on as a protected disclosure.) Lisa Redfern, Strategic Director of Social Care, replied on the same date, 20 October 2017, to agree that this needed to be resolved. This email chain was copied in to several colleagues, including Mr Jolapara and the second respondent.

79. The project of migrating services back to the first respondent was known as the Moving On ("MO") programme. The MO Programme Board made strategic decisions for the programme. It included the second respondent and the SLT. In a text dated 25 October 2017, the second respondent made the budget position very clear to the claimant in the following terms [289]:

> "Had a discussion with the Leader about Moving On costs and you need to fit the budget envelop[e]…"

The Leader of the Council had made a public commitment that the disaggregation of shared services would be achieved with no additional cost, save for one-off transitional costs. The claimant understood that the efficiencies resulting from the shared service model would be lost when services were repatriated; and disaggregation would inevitably lead to diseconomies of scale and additional cost in providing these sovereign services. The aim was to create efficiencies by the combining services under a new service design in the PSR department. This were would also be a revenue-raising function.

80. We accept the claimant's unchallenged evidence [C/25] that she was tasked with creating a new department with an annual budget of around £3.5m

which was substantially less than the first respondent's budget of almost £6m for the same services being provided under the Tri-borough arrangement. By fitting within this smaller financial envelope the new service model would result in a reduction in service capacity. To achieve this reduction, the claimant felt that a "reality check" was required. In a text dated 10 January 2018 the claimant highlighted the scale of the challenge she faced in in the following terms:

> "there is a lot of work to be done to reconnect them [the Council] to the true state of both the budget and services…Asc commissioning is a mess. But the gap between expectations and reality is one of the largest I've seen and we are approaching a crisis once clear of the local elections and the need to balance the accounts materialises…"

81. We accept the evidence of Sarah Thomas, then Acting Director of Delivery and Value, that it was apparent from early on that there were significant issues with finance and budget for the new department. We also accepted the evidence of Dave McNamara, the Tri-borough Director of Finance and Resources for Children's Services until its disaggregation in March 2018, that the claimant inherited a service which did not meet service needs and lacked adequate resources to rectify this funding shortfall. We also accept the evidence of Alix Cordell, who was employed as an interim consultant from September 2017 to March 2018 and worked alongside the claimant in the development phase setting up the new department, that there were constant changes to the budget and a lack of engagement from the corporate HR team. The new department was much smaller in size and resources than the constituent parts that were being repatriated had been when they were separate service areas.

<u>The claimant's first day on 13 November 2017</u>

82. On her first day in her new role, 13 November 2017, the claimant met with the second respondent. Although the second respondent denied this, we prefer the claimant's evidence that she was that she was told that she was an outsider, her new colleagues in the SLT did not trust her, she was not seen as a team player and Councillor Ben Coleman, the new cabinet member responsible for Adult Services and Public Health, had not "bought in" to her appointment. We prefer the claimant's evidence because she referred to these comments in a text she sent to a former colleague later that day [4496]. We also accept her evidence that she felt these issues were more to do with perceptions and politics and she decided against challenging the second respondent in the first hour of her first day at work.

83. The claimant told the second respondent that she had secondary PTSD as a result her Grenfell work and she was having counselling for this. The second respondent referred to another colleague who had been involved in the Grenfell response who was being treated for PTSD, discussed the details of a harrowing YouTube video of the fire, and her own experience of being evacuated from her home at night by the fire service. Although the claimant felt that her new line manager was being insensitive we accept the second respondent's evidence that she wanted to show empathy. When she discussed the video, the claimant became distressed. The claimant's unchallenged evidence is that she started weeping and cried profusely and was very upset and shaken. The second respondent suggested that the

claimant worked from home for the next fortnight and was mindful that the impending Christmas holidays would offer further respite. As the second respondent put in when giving evidence, having waited several months for the claimant to start, she had not anticipated that they would be discussing the claimant's mental health at their first meet and greet. She was struck by the claimant's apparent fragility. As a result of this discussion, she understood that the claimant had secondary PTSD and that this had not been limited to a one-off episode and was therefore an ongoing condition which the claimant was managing with counselling. The claimant did not refer to ADHD during this meeting.

84. Later that day, the claimant returned from a counselling session at 1pm and was in a meeting which Ms Thomas interrupted to ask her to join a meeting with the second respondent and Cllr Coleman. The claimant decided instead to continue with her meeting because she had not been given any warning of the other meeting and felt that the way she engaged with the second respondent on her first day would set the norms and boundaries for their working relationship. At 2.23pm the claimant sent a text to the second respondent to explain that she lacked access to a diary, email or executive support [290]. In her reply at 9.09pm, the second respondent told the claimant that she should have attended the meeting and asked her to send an apology to Cllr Coleman copying her in. The claimant questioned this reiterating that she had not been given any details of this meeting. However, when she later clarified that Ms Thomas had told her about the meeting at around 1pm but she had not been given any background information or notice of this meeting, the second respondent felt that this conflicted with the initial reason she had given for her non-attendance and now felt distrustful of the claimant. She also felt that the claimant's response was too forthright and brusque. The claimant also referred to this issue in the text to her former colleague to which we have already referred when she concluded "I will be surprised to survive the week – feels like a complete set up" [4496]. The working relationship between the claimant and second respondent had not got off to a good start.

85. The claimant emailed Cllr Coleman to apologise the next day [1791]. The second respondent was copied in to this correspondence and replied "Perfect!". The claimant felt undermined and patronised by this.

86. In January 2018, PSR took over responsibility for the MO programme. Kate Evangeli, MO Programme Manager, and Ms Thomas, having reverted to her substantive role of Assistant Director (now of PSR), were closely involved in managing this programme. In a text sent to the second respondent before this handover, on 19 December 2017, the claimant told her that the MO programme lacked the resources to deliver on the next phase and she had discussed this issue with Mr Jolapara and Mr Grimley [1773].

87. The claimant did not have an Executive Support Officer until January 2018, when Jessica Pezzolesi started in this role. Ms Pezzolesi knew the claimant well, having supported her in a similar role at RBKC since 2014. We accept her evidence that she saw that the department was extremely understaffed with around 40 – 50 vacancies to fill. It was clear to her that the claimant had not been given enough resources. In addition to being understaffed, the

claimant was being constantly interrupted in the open plan office where she was based. Ms Pezzolesi knew that the claimant was working long hours and staying in her London flat on week nights to get more work done.

93. In a text dated 23 February 2018 the claimant referred to her department "of one [which] is certainly leading to some Grenfell-esque hours" [4385].

88. Christian Rogers, Director for the Commercial Ethical Debt Collections and Business Intelligence Services, sat opposite the claimant in the same open plan office as the SLT. He became increasingly concerned about the claimant's wellbeing from around December 2017 and over the next three to four months. His evidence, which we accept, was that the claimant appeared stressed and on occasion, distressed, and her physical state deteriorated. He discussed this with Ms Thomas who agreed. He understood that this was related to the claimant's work. When the claimant became his line manager in March 2017, following the departure of Mr Hainge that month, Mr Rogers realised that she had a heavy workload and was working long hours late into the night for a sustained period. He overheard discussions the claimant was having in relation to resources and budget and also meetings with Mr Jolapara about the financing of her service areas. He overheard the claimant complain that the level of funding allocated was insufficient. We accept his evidence that these discussions could become heated.

89. Ms Pezzolesi also observed from close quarters that the claimant was becoming more subdued by late March 2018. The pressure and working hours were taking their toll and the claimant did not appear to be happy. On one occasion the claimant told her that she was feeling shaky and her heart rate was elevated. When she measured her heart rate using a colleague's smart watch it exceeded 100 BPM.

90. The claimant also brought in Chris Barrett as in interim consultant to conduct a review of the Public Health services which were transferring to the first respondent and also a risk assessment. They had worked together before as part of the Grenfell response. We accept his evidence that when he began in late March / early April 2018 there were not enough staff to carry out the department's work and the situation was very messy.

91. We therefore find that the claimant was under-resourced in her role, in which she was faced with the challenge of establishing a department and staff structure from scratch, recruiting into around two-thirds of all posts and managing the transition of formerly shared services within a limited and potentially unsustainable financial envelope. She worked increasingly excessive hours as the April 2018 go live date approached.

<u>Cabinet Member Decisions</u>

92. A Cabinet Member Decision ("CMD") is one requiring executive approval. To obtain such approval, the cabinet member(s) with responsibility for the relevant portfolio must be provided with a decision report setting out the rationale for approval. We accept the second respondent's evidence that draft decision reports were usually circulated amongst the SLT before being sent to a member for sign-off. She emailed the claimant and Mr Jolapara on 5 January 2018 to remind them about this [380]. In her evidence, the second

respondent said that this was not a significant issue although she felt that the claimant had been somewhat cavalier in by-passing the SLT. However, we were not taken to any contemporaneous or any other documents in which she gave the claimant this feedback.

Interview panel on 26 January 2018

94. The claimant was scheduled to chair an interview panel alongside Cllr Coleman on 26 January 2018 to fill the vacant position of Director of Public Health. We accept her evidence that she was unable to attend work in time to take part because she had an episode of urinary incontinence on her way into work. She attended a private walk-in consultation in central London when she was diagnosed as having two antibiotic-resistant UTIs. The claimant contacted the second respondent to explain that she would be unable to make the interview because she needed to attend a medical appointment. Ms Redfern who had been responsible for Public Health under the previous shared services arrangement, stepped in to chair the interview panel. Ms Redfern concluded that the claimant's failure to chair the panel was unprofessional, although was not in possession of the full facts at the time.

Concerns raised about member behaviour

95. The claimant says that she made protected disclosures when she raised concerns about member conduct.

    (1) On 26 January 2018, the claimant forwarded an email to the second respondent she had sent to Cllr Coleman about the interviews that day and also about his request that Ms Redfearn take part in the interviews for PSR commissioning posts [1951]. She told the second respondent that she would follow up this email and encourage "some open discussion" and explained that she needed to reinforce her own leadership and would not accept "this type of undermining /interference from either officers or members". When, two days later, Cllr Coleman responded to advocate for Ms Redfern's involvement, the claimant forwarded this to the second respondent to say that she was not happy to proceed in this way and complain that Cllr Coleman should not be involved in this way (and also that other colleagues should neither suggest nor support this approach). She wrote "The message here is that I can't be trusted to make decisions that support ASC or PH interests, and it's very damaging" [1956]. We find that the claimant was raising a concern that her leadership was being undermined by Cllr Coleman with Ms Redfern's support. Her email did not refer to a legal obligation nor was one obvious.
    (2) On 16 April 2018, the claimant sent an email to Adewumi Keyode and others, including Ms Pezzolesi, about the need to establish a clear mechanism within PSR before reports were sent out for sign-off [109S]. She noted that she had flagged this issue before and the process needed to be tightened to ensure that PSR approval for all reports sent out was clearly evidenced. Excluding Ms Pezzolesi, the roles and responsibilities of Ms Keyode and the other recipients of this email were neither apparent from this email nor were they explained. This email did not refer to a legal obligation.

96. The claimant referred to ADHD at an SLT training session on 7 February 2018 when she accidentally knocked over the facilitator, who used a walking stick to mobilise, and said "don't mind me, it's my ADHD". Although we accept that the claimant was being literal and was therefore alluding to her diagnosed condition, the second respondent was not cognisant of this and understood that she made this comment to make light of an embarrassing situation.

97. The second respondent was cognisant that the claimant had what she understood to be secondary PTSD. Although she said that the claimant had not completed the training, on 15 February, necessary to cover the emergency Gold cover rota, in her oral evidence, the second respondent also said that she was had questioned whether the claimant had the resilience because of her PTSD to manage the Council's response to major emergencies.

98. The claimant emailed Mark Grimley, then Interim Director of HR, and Tina Dempsey, Head of People and Talent, on 22 February 2018, [2081] in relation to some interim changes she had made to the PSR structure and the funding for two assistant director vacancies from the allocated budget.

99. The second respondent replied to an email from the claimant, copied to all recipients, including Mr Quick and Stuart Love, Chief Executive of WCC, on 28 February 2018 [2074] in which she instructed the claimant to amend the job title 'Lead Director' to 'Director' in the signature block of her email. In her response, sent to the second respondent only, the claimant complained about this "unnecessary and humiliating" rebuke and stated:

    > "I'm working like a dog for lbhf at the moment often around then clock and this type of powerplay isn't amenable to a productive working relationship between us" [2076].

    The second respondent called the claimant and sent her a "whole-hearted apology" when she emphasised "What's important here is a good working relationship so please continue to share any concerns when they arise" and stated "I continue to value your role in SLT" to which the claimant replied "No problem – We're good, you can rely on me…" The second respondent then emailed Mr Quick and Mr Love [2074]:

    > "Barry, Stuart…you shouldn't be sighted on my poor taste standing joke with Rachel – she's amazing which is why I worked really hard to secure her!"

    Although the claimant says that the second respondent deliberately rebuked and undermined her we find the second respondent included the wider group inadvertently and this was an error for which she apologised when she took the opportunity to praise the claimant. We find that this praise was genuine.

<u>Concerns raised about PSR budget, including the delivery of statutory services</u>

100. The claimant says she made protected disclosures when she raised concerns about the PSR budget and the impact on the delivery of statutory

services and also about third party contracts between 31 October 2017 and 2 February 2018.

(1) On 31 October 2017, the claimant emailed Mr Jolapara about the ASC commissioning budget which she described as “a nonsense” when she remarked that the current budget and capacity was much higher than the proposed service level and queried whether the first respondent could “accommodate such a reduction in capacity managing sensitive service functions and activity in just a few months time?” [1741].
(2) On 23 January 2018, the claimant emailed Mr Jolapara and the second respondent in which she forwarded an email chain to support her view that the underlying budgetary assumptions in relation to commissioning and transformation strategies needed to be reset [397]. There was a variance between budget and spend and the latter would need to be reduced by around 15-20% whilst at the same time building on the investment strategy to meet demand.
(3) On 29 and 30 January 2018, the claimant had an exchange of emails with one of her direct reports, copied to Mr Jolapara, Emily Hill then Assistant Director, Corporate Finance, and Ms Redfern, about contract renewals and the budget process [1975-9]. In essence, the claimant was saying that more work was required to assess affordability before a report was forwarded to members for sign-off.
(4) On 31 January 2018, the claimant emailed members, including Cllr Coleman, as well as other colleagues including Ms Redfern, about service contract renewals and governance [417]. She explained that further work was needed to establish affordability without which there was a risk that funding would not be available for this provision. The claimant forwarded this email to Mr Jolapara and others including Ms Hill, on the need to develop an holistic and shared approach [416].
(5) On 2 February 2018, the claimant emailed the second respondent in which she forwarded an email chain related to ASC commissioning and referred to a number of “potential risks” of funding shortfalls and work capacity for services [1989].

101. We do not find that the claimant was saying in her emails on 31 October 2017 or 23 January 2018 that it was likely that statutory services would not be delivered, she was asserting the need for a reset of current assumptions. Notably, neither of these emails were written in the somewhat starker terms of the claimant’s text of 10 January 2018. Nor do we find, that the claimant was raising this concern in relation to contract renewals in her emails dated 29 to 31 January, because she agreed that further work was required to establish this. She was taking steps to avoid this outcome. As she explained in an email dated 29 January [1977-8]:

> “I do recognise and appreciate service pressures, and we will need to look at how we ensure that any process or potential change is managed appropriately and with sufficient notice. But I am confident that there are ways to achieve this together. There are choices available to us to cover this risk and sustain service delivery for an interim time whilst we work through the strategic position and context…”

and also on 31 January [417]:

> “It is highly likely that assumptions are being made in individual projects or

> decision papers that funding is available, and a significant risk that it is not. I am advising Commissioners that I will support them to sustain service provision or manage risks during the interim period…"

We do not therefore find that the claimant was reporting that it was likely that the first respondent was going to be in breach of a legal obligation but she was identifying risks which she was taking steps to resolve. Similarly, as Mr Jolapara said when giving oral evidence, the claimant raised queries or concerns in the context of debating and resolving these issues at SLT level.

93. In her email to the second respondent on 2 February, the claimant was clearly highlighting the risk of a funding shortfall in relation to three specific services.

<u>Concerns raised in relation to GDPR compliance, employment duties, and health and safety.</u>

102. The claimant also says that she made protected disclosures when she raised concerns about: GDPR compliance in third party arrangements at SLT meetings in February and March 2018; the first respondent's employment duties and duty of care to employees to Mr Grimley and Mr Jolapara between 28 February and 1 May 2018; facilities management and health and safety to the second respondent and Mr Jolapara in April 2018. There was no documentary evidence to substantiate what these concerns were nor did the claimant lead any other evidence on this.

<u>Concerns raised about contractual arrangements and governance for shared services</u>

103. The claimant also says she made protected disclosures when she raised concerns about contractual arrangements and governance:

    (1) On 27 February 2018, the claimant emailed the legal team, including Rhian Davies, then Borough Solicitor and Monitoring Officer, and also Mr Grimley about the delay in concluding a collaboration agreement for shared services with Bi-borough. This was agreed by the Leader on 29 March and sealed on 5 April.
    (2) Also on 27 February 2018, the claimant emailed Mr Jolapara and Ms Hill to request assistance with coordinating finance teams as there was limited capacity in the project team to do this work [489-90].
    (3) On 13 March 2018, the claimant emailed Ms Hill to make an urgent request for a Head of Finance to work with her across PSR instead of the current "unwieldy" arrangement of working with four or five separate finance leads [798]. She also requested that PH finance was repatriated.

104. Although the claimant was self-evidently raising issues about the delay in securing the collaboration agreement and the lack of resources her department had in relation to finance work, she failed to identify any wrongdoing or failures and nor was this patent.

105. As a result of the second respondent's reorganisation of her SLT and the redistribution of responsibilities across what was now a smaller team, the

claimant's base salary was increased to £125,000 from 1 March 2018. In a letter confirming this contract variation dated 20 March 2018 [1624], the second respondent thanked the claimant "for your continued energy, leadership and support".

106. In the same month, the former Commercial Department was transferred into the PSR department.

107. In March 2018, the second respondent told the claimant that Ms Thomas and Ms Evangeli were taking on the burden of the disaggregation work, the claimant was not visible and she asked her to start attending weekly MO meetings. The claimant disagreed and felt this demonstrated the second respondent's lack of knowledge about what work was being done and by whom. She did not accept that she was over-delegating and she attended MO meetings unless there was an exceptional reason not to.

108. The claimant denied that the second respondent also discussed issues around governance and recruitment with her in February and March. We were not taken to any contemporaneous documents in which the second respondent referred to this issue.

109. The second respondent says that she also told the claimant that she needed to work with SLT colleagues constructively and transparently to reallocate budget resource and workforce across three departments and felt she was having to referee between the claimant and her SLT colleagues. The claimant denied that Mr Jolapara told her that her financial management was not acceptable and we were not taken to any contemporaneous documents which corroborated this. As we have noted, for Mr Jolapara, the budget issues which the claimant raised with him were part of an ongoing discussion in the context of debating and resolving issues and it is likely that this applied both ways. In the absence of a service or budget, the focus of the discussions in February and March 2018 was ensuring that the new service model was costed within the available budget. This was a paper exercise. The claimant needed to know what budgets would be available when PSR went live on 1 April. This was a moveable feast: the migration of departments, portfolios and services to PSR meant that the costs of the service model needed to be readjusted. A related issue, which the claimant had flagged, was that PSR lacked a dedicated finance lead to coordinate this exercise.

110. Mr Grimley said he and the claimant had a cordial but occasionally antagonistic relationship due to their respective roles as a result of which there was an in-built tension between them [MG/30]. Whereas the claimant was responsible for establishing a new service model, Mr Grimley was responsible for coordinating the arrangements for the disaggregation of the shared services which were returning to the Council. He also oversaw the control of workforce expenditure and recruitment. Although he had several criticisms of the claimant including that she did not did not always accept the limits of her authority or scrutiny [MG/31] and of her style which he says was to fight and not to resolve [MG/32] he agreed that there was a lack of clarity in relation to the budget limits to which the claimant was working. His evidence was also that concerns were escalated to him about the claimant exceeding or side-stepping limits for grades [MG/30] although we do not

find that this is corroborated by the documents we were taken to which he was aware of at the time and we note, in any event, that Mr Grimley's evidence was also that on each occasion he and the claimant agreed on a practical way forward.

PSR goes live on 1 April 2018

111. The PSR Department became operational on 1 April 2018 when it assumed responsibility for Children's and Adults' Services Commissioning, and Public Health operations. We accept the claimant's evidence that she had been regularly working 12 hours or more each day, evenings and weekends and her working hours increased in April.

112. The second respondent says that the claimant did not follow the agreed procedural routes in terms of governance and audit: she had sought retrospective approval to fund PSR posts, she had not been sighted on these reports. She says she was also frustrated that this had taken place when the claimant was on leave. The claimant sent six decision reports to the Leader of the Council, Cllr Stephen Cowan, on 6 April 2021 to obtain urgent sign-off for a batch of CMDs [2199]. In forwarding these reports, the claimant explained that she had initially understood that they were within Cllr Max Schmid's portfolio, they had been discussed at the Finance Board and also agreed at SLT. An award report had already been sent to and agreed by Cllrs Schmid and Sue Macmillan on 28 March 2018 [1059]. Having been copied in to the claimant's email, the second respondent's reply on 9 April 2018, was not critical but constructive. Although she alluded to the number of reports which required urgent sign-off, she queried whether the claimant was advising Leader Cllr Cowan directly as she had not been sighted on these reports and she asked Cllr Schmid to discuss them with the Leader to ensure sign-off. As noted above, the claimant emailed her team on 16 April 2018 about the need to establish a clear mechanism within PSR before reports were sent out for sign-off [109S]. She was therefore cognisant that her internal governance process needed to be improved and took action to rectify this.

113. An ongoing issue for PSR was that there was no facility to allocate separate budget codes on the Agresso system which meant that the new staff structure could not be uploaded. This was one of the issues that Ms Evangeli identified in an email dated 7 March 2018 sent to the second respondent, Ms Redfern, Mr Jolapara, Mr Grimley and others [2104].

114. Office space was another issue which Ms Evangeli flagged in the same email. The claimant emailed Nigel Brown, a member of the Facilities Management team, about this issue on 17 April 2018 [1091] when she requested an update and noted that her staff were spread out across nine locations and three buildings and with very limited management capacity, and there was a lack of desks for new team members. She noted that a planned move of staff from another team which would free up space was no longer going ahead. She explained:

> "Many staff will be in a situation where they have a vacancy for their immediate line manager or even post above for several more weeks and months, and the service will remain fragile until it reaches capacity. It is not yet robust enough to easily withstand the additional complexity these

> interim conditions are producing."

The second respondent followed this up with an email to Mr Brown in which she noted that she had already requested an update meeting and floor plans and she acknowledged that "the Moving On issue is not easily resolved in the short term" [1091]. The second respondent's evidence [R2/32] was that she was concerned that the claimant had raised this issue at this late stage and she also says that she discussed this with the claimant on two occasions. We were not taken to any contemporaneous documents which substantiated these concerns or discussions. This issue had already been raised by Ms Evangeli on 7 March 2018 and in an email to her team, dated 16 April 2018, the claimant summarised the position "It is likely that this is not well known or understood yet, as office space has been unavailable and a moving feast throughout" [33S].

115. As the claimant explained in an email to Cllr Coleman on 9 April 2018 [51S], the Agresso issue also meant that the team were unable to raise new purchase orders that were necessary for more than 300 contracts which needed to be set up now that PSR was live. A related issue was the need to reconcile the handover details from Tri-borough with the data held on the Council's systems.

116. In an email to her team on 18 April 2018 [35-6S], the claimant alluded to "some turbulence and practical challenges" which the formation of PSR presented especially without IT finance and HR systems being in place and with her team scattered across locations. She remained mindful of the need to establish processes and systems to safeguard governance and oversight [36S]:

> "…with manual processes in place wherever our backoffice arrangements such as Aggresso continue to present risks. This means ensuring we have an accurate and total view of all contracts and providers, and that all of these have been contacted to confirm contact details for the team and a link officer. It means ensuring we can and have raised Purchase orders. It means we know who is on annual leave. It means we know who is working from home, and that everyone has the right kit to do their job. It means having an understanding of our budgets, and business plans. It means understanding and managing our risks…"

It was therefore necessary to create a weekly spreadsheet as "a failsafe and basic management tool" in the interim [34S].

<u>One-to-one meeting between the claimant and the second respondent on 18 April 2018</u>

117. The claimant had a one-to-one meeting with the second respondent on 18 April 2018. The issue of cabinet member reports was discussed. It is agreed that the second respondent told the claimant that she needed to plan more efficiently and show leadership.

118. This was meant to be an appraisal, however, the second respondent did not proceed with one because the claimant seemed downbeat and upset. When she asked the claimant, at the start of this meeting, how she was feeling on a scale of 1 – 10, the claimant said "3". Although the claimant referred to

this in a text sent that evening and commented "that might have put her off – lol x" [4352] we do not find that this connotes a deliberate intention by her to deflect the second respondent but reflected the second respondent's decision to change tack because of the response the claimant had given. Nor do we find that this text illustrates that the claimant's response was not a genuine one. It is notable that in several texts we were taken to the claimant made light of difficult matters and displayed what she described in oral evidence as her "self-deprecating" humour. She also said that her mood and state of mind could change throughout the day.

119. We also accept Ms Pezzolesi's evidence that the claimant had been apprehensive going into this appraisal because of the lack of feedback to date from the second respondent and when they discussed this meeting afterwards, the claimant told her that the second respondent had been very positive and was pleased with her performance. We do not therefore find that the claimant came away from this meeting with the impression that the second respondent had any serious concerns about her performance.

Concerns raised in relation to breach of contract (notice periods)

120. One of the issues which the claimant and the second respondent discussed at their one-to-one was the movement of staff between boroughs in breach of contractual notice periods. The claimant says that she made protected disclosures when she raised the following concerns about this issue:

(1) On 6 April 2018, the claimant emailed Mr Grimley and others about staff transfers between the first respondent and Bi-Borough and queried whether the first respondent should also ignore notice periods for incoming staff or insist on a week's notice [87S].
(2) On 17 April 2018, the claimant forwarded an email she had sent to another colleague about this issue, to the second respondent, which she said presented the risk for ongoing service collaboration and partnership working between the boroughs [2208-9]. The claimant identified this as an operational issue for discussion at their next one-to-one. She said that it "should be a mere irritant – but which may have the potential to bubble and expand". When they discussed this issue, the second respondent agreed that the claimant should email the other boroughs to send a firm response. She told her to ruffle feathers and threaten to send them an invoice for the cost of staff used to backfill the vacant posts.
(3) On 19 April 2018, the claimant followed this instruction with an email to Mr Grimley and others, including the second respondent, Mr Quirk and Mr Love headed 'The Sporting news – Hide and Seek" [1106-7] in which she complained about the lack of collaboration and "fair play" from some officers within Bi-borough. She cited the example of one ex-colleague whose notice had been waived by Bi-borough without discussion. This had impacted on the workload and capacity of her team, and the first respondent had incurred costs to backfill this vacancy. The claimant queried whether contracts, notice periods and collaboration were now regarded by their counterparts as being out of date or optional.

121. The claimant was clearly complaining that Bi-borough had unilaterally waived contractual notice periods for incoming staff leaving the Council

which impacted on its capacity and costs although she was not saying that this meant that it was likely to result in the first respondent not fulfilling its statutory functions. As she had noted in her email of 17 April, this was "a mere irritant" but had the potential to expand. In her email of 19 April, she suggested that this could work both ways and the second respondent followed this up the next day with an email to her fellow chief executives to suggest that it was "in none of our interests to appear lawless to staff" [1106]. Although the second respondent agreed that this was an issue for the Council and one that warranted a robust approach she was critical of the claimant's email which she felt was sarcastic, overfamiliar and had been copied to a junior colleague. We find that these were genuinely held concerns, which the second respondent discussed with her counterparts on 20 April.

'The Sporting news' email

122. The second respondent discussed this email with Mr Quirk and Mr Love when they attended a Chief Executives London Committee meeting at Guildhall on 20 April 2017.

123. In his oral evidence, which we accept, Mr Quirk said that although the claimant's email contained evocative language and an element of sarcasm he did not feel that it had been inappropriate nor was it of any consequence.

124. The second respondent and Mr Quirk then had a separate discussion about the claimant. She knew that they had worked together before. Mr Quirk told the second respondent that he had a high regard for the claimant's professional competence, he referred to her Grenfell work and to her related counselling support. He also referred to the claimant's ADHD which he said explained her creativity and drive. In his oral evidence, which we accept, he said that when the claimant first told him that she had ADHD in November 2017 this made sense because it explained many of her positive personal qualities at work including her character, drive, creativity and energy. It is clear that Mr Quirk assumed that the second respondent was not already cognisant that the claimant had ADHD because he thought hard about sharing this information with her and in doing so was concerned to allay any misunderstanding she might have about this condition and put it in a positive light. Although he could not recall saying that the claimant's "brain did not operate in the same way" as he felt that this was a very crude and crass way of explaining ADHD he did not deny that this was possible. We also accept the claimant's evidence that when she later met with Mr Quirk he told her that he had discussed her ADHD with the second respondent in these terms. Given his opinion of the claimant in general, his understanding that some of her positive qualities were attributable to ADHD and the relationship of trust between them, it is likely that he used words to this effect to explain this condition to the second respondent.

125. Although we find that the claimant discussed her mental health with colleagues, including the second respondent, we find that this was the first time the second respondent was made aware that she had ADHD. There was no evidence to suggest that the second respondent knew about this at an earlier date. This is also consistent with the claimant's solicitors' letter dated 1 August 2018 [2449-51] in which they asserted that the claimant had

discussed her PTSD diagnosis with colleagues and also with the second respondent on 13 November 2017 whereas no assertion was made they had discussed her ADHD before May 2018.

126. Mr Grimley gave contradictory evidence in relation to when he first became aware that the claimant had ADHD: in his witness statement he said July [MG/19] and in oral evidence, which we accept, he was first made aware that the claimant had ADHD by the second respondent around 20 April following her discussion with Mr Quirk. We find it likely that the second respondent was blind-sided by Mr Quirk's disclosure and would have shared this revelation with her close colleague without delay.

127. A week after their one-to-one meeting on 18 April 2018, the second respondent told the claimant "Some people around her need to remember they're on probation" to which the claimant replied "If you're not happy I will move on then" [C/45]. The second respondent drew a dot on a piece of paper with a larger circle around it. Although the second respondent denies this, we prefer the claimant's evidence that the second respondent told her to accept this feedback "everything else is brilliant" and the claimant would be working for the Council for a long time. This is in fact consistent with the second respondent's evidence that she felt that the claimant needed a lot of positive affirmation [R2/37]. We also find the claimant's evidence was more credible and reliable than the second respondent's for the reasons set out below.

128. The claimant took leave on 22 – 25 April 2018 to attend an Ernst & Young conference in Amsterdam. She had been invited to take part in this event in 2017 before she took up her role with the first respondent. We accept Ms Pezzolesi's evidence that the claimant instructed her to declare this conference in the first respondent's Gifts and Hospitality Register. The second respondent was not aware that the claimant attended this conference until related correspondence was disclosed for the purposes of these proceedings.

129. By late April, the claimant was facing external pressures on several fronts: one of her children was struggling at school and she was having marital conflict.

130. In a text sent by the claimant on 28 April 2018, she said that felt a "bit tight-chested" although her pulse was normal and she was taking aspirin twice a day as a precaution [4724].

131. Later that afternoon, some nine days after the claimant sent 'The Sporting news' email, and without discussing this with her, the second respondent emailed the claimant [1106] to complain about her use of sarcasm, her overfamiliarity with the chief executives and her inclusion of a junior officer in this email. Alluding to Mr Quick and Mr Love, she wrote "we all thought that, as a director you were wrong to write in this way". As we have noted, Mr Quirk felt that this email was of no consequence, although we accept the second respondent's oral evidence that Mr Quirk told her that he was not offended by this email but agreed with her suggestion that it had been inappropriate to copy in a junior officer. We therefore find that her email was misleading because it suggested that he also agreed that her use of

sarcasm and overfamiliarity were "wrong".

132. The second respondent emailed the claimant and Mr Jolapara on the same date to request a report about the Council's commercial strategy when she complained that she "felt like a broken record in trying to get a more strategic approach to financing nailed down" [1112]. She noted that she would be making similar requests to the SLT in other areas. We therefore find that this criticism applied equally to Mr Jolapara and the other members of the SLT.

133. An hour later, the second respondent emailed two other officers copied to the claimant and Mr Grimley and others with a query about website content relating to the Public Sector Equality Duty. The claimant updated her and the second respondent asked her to send the new content to her directly instead of waiting for the next SLT [1127].

134. The claimant's probation was due to end on 11 May 2018. In April, she discussed her probation with Mr Grimley. Although the Mr Grimley says that the claimant told him that she was anxious about the possible extension of this probation, we prefer the claimant's evidence that she was not at all concerned by this prospect or at least not by reference to her performance which she felt she had no reason to be concerned about. She felt that it was unusual and inappropriate for her to be on probation because she had been a senior officer who had moved across to another local authority. It is also likely that she felt as a director that this was demeaning. We find that any anxiety the claimant had in relation to her probation related to her health: she was working long hours, she was experiencing an exacerbation in her anxiety and depressive symptoms, and was concerned to avoid taking any significant time off because of this, for fear that her employment would be terminated. She wanted to take leave but wanted to wait until her probation had been confirmed. This is consistent with what the claimant told to Dr David Oyewole, Consultant Psychiatrist, when she was interviewed by him in relation to an expert report he prepared on her behalf for these proceedings [2774]. We also find the claimant's evidence was more credible and reliable than Mr Grimley's for the reasons set out below.

135. On Mr Grimley's evidence, whilst he and the second respondent routinely discussed the performance of other members of the SLT, including the claimant's, they did not discuss extending the claimant's probation before May 2018 [MG/42].

136. When the claimant texted the second respondent on 30 April 2018 to query some interim changes to leadership in Bi-borough and Policy [1784], she replied the next day "let's meet up tomorrow for coffee – Jane [Watts] arranging – we don't see enough of each other…" This meeting was scheduled on 2 May. We find from this contemporaneous exchange that this was an ad hoc meeting over coffee to discuss this leadership issue and also to catch up. This is also consistent with an email sent by Mr Grimley at 30 April 2018 to confirm that the second respondent had time to meet her on 2 May, Ms Watts would send an invite and he would keep his diary free if he was needed [146S]. This was likely to be about the handover of the Programme Management Office ("PMO").

137. Ms Pezzolesi drafted an agenda for this meeting [2246]. Although the second respondent did not recall seeing this document, we find that was a working agenda which Ms Pezzolesi drafted to incorporate items to be discussed whenever the claimant and second respondent had their next one-to-one. The agenda had four items: three of which the claimant had flagged in emails dated 17 April [116S], 18 April [2249] and 2 May 2018 [2251] which the second respondent had seen; and the second respondent agreed that the fourth item was a live issue at the time. The agenda did not refer to the claimant's probation.

<u>The Probationary Procedure</u>

138. The second respondent was familiar with the Probationary Procedure [3311-3312]. Although this Procedure did not apply to the claimant because she was a chief officer, as provided by paragraph 1.3, the second respondent's evidence is that she followed the spirit of this procedure in relation to her.

139. The Probationary Procedure provides for the following steps to be taken: a programme of review meetings shall be scheduled and confirmed in writing (paragraph 2.1); there will be a minimum of three meetings, with a final meeting no later than the end of the fifth month (paragraph 2.2); these meetings shall be recorded and any concerns identified so that the employee is made aware of the standards required of them that they are not meeting and with any further support or training identified and the same confirmed in writing (paragraph 2.4); where the manager proposes at the final meeting to terminate or extend the probationary period, the employee shall be given at least five working days' notice of this and given the right to attend with a colleague or trade union representative, and the reasons for any dismissal shall be confirmed in writing and they must be allowed to appeal (paragraph 2.6).

140. As will be seen, the second respondent failed to take any of these steps when she extended the claimant's probation.

141. For example, although the second respondent says that she had three review meetings with the claimant, in February, March and May 2018 we do not accept this evidence because there are no records of these discussions, we have found that the meeting on 2 May 2018 was an ad hoc meeting over coffee and which was neither scheduled nor conducted to review the claimant's performance or discuss her probation. We also find, for the reasons set out below, that the second respondent's evidence on this point was neither credible nor reliable.

<u>The meeting between the claimant and the second respondent on 2 May 2018</u>

142. It is likely that this ad hoc meeting was relatively brief. The second respondent was focused on the Council elections which were taking place the next day when she would be the Chief Returning Officer and overseeing the ballot count.

143. The second respondent reiterated the points she had made in her previous

email about 'The Sporting news' email. The claimant did not accept this criticism which she felt was unfair and taken out of context. It is likely that she felt she was being criticised for following the second respondent's instructions. We have found that these criticisms were genuinely held by the second respondent and preceded her knowledge that the claimant had ADHD and we do not therefore find that she was suggesting that someone with ADHD would not have sent this email, as is contended.

144. The focus of the remainder of this meeting was the claimant's ADHD. The second respondent told the claimant that Mr Quirk had disclosed that she had ADHD. We find that the second respondent did comment that the claimant's brain "doesn't work like other people's". We find that the second respondent was repeating or paraphrasing words used by Mr Quirk to describe the claimant's ADHD. We find that this revealed her lack of knowledge about ADHD. We accept her evidence that she felt awkward about raising this subject. We also find that in the circumstances in which she did not hold the claimant in the same regard as Mr Quirk, and in which there was a more difficult working relationship and less trust between them, these words were likely to have had a very different effect on the claimant than had Mr Quirk used them. It is likely that the claimant found this comment both humiliating and offensive.

145. We also find that the second respondent queried why she had not been made aware that the claimant had ADHD before and she also questioned whether the claimant had disclosed this condition during the pre- and post-employment screening process. We have found that the second respondent had been blind-sided by Mr Quirk's disclosure. We also find that the second respondent's reaction revealed that this was of significance and concern. It is likely that she was not only disappointed with the claimant for not discussing this with her directly but now questioned whether the claimant had also failed to disclose her ADHD to OHU. This was also consistent with: her instruction to Mr Grimley to check the claimant's OHU file to establish whether she had disclosed ADHD during pre-employment screening; the claimant's evidence, which we accept, that she told the second respondent that she had declared both PTSD and ADHD to OHU; and the evidence of Ms Dempsey that the claimant reiterated this to colleagues later that day. The claimant therefore understood that she was being accused of deliberately concealing her ADHD. It is likely that the claimant found this both humiliating and offensive. As will be seen, she continued to be exercised by this issue and discussed it with colleagues later that day.

146. When the claimant alluded to her comment about ADHD on 7 February, we find that the second respondent told her that she had not understood that the claimant was "being serious". Although we do not find that the second respondent was suggesting that the claimant had been making fun of this condition but was instead conveying what she had understood at the time i.e. that the claimant had made this comment to alleviate an embarrassing situation, in the context of this discussion about the claimant's ADHD in which the second respondent had made the other offensive comments we have found, we conclude that the claimant found this humiliating and offensive.

147. The second respondent asked the claimant whether she needed any

adjustments. The claimant said she needed none. We find that this was a reasonable enquiry because, as we have found, having been made aware that the claimant had ADHD on 20 April, this was the first time the second respondent discussed this condition and potential disability with the claimant. We do not find the second respondent was suggesting that the claimant was incapable of performing her role because she had ADHD although this is exactly what the claimant now understood and felt insulted by this.

148. The claimant was told that she and Mr Grimley would be paired as buddies. We find that the second respondent had discussed a new buddying arrangement with the other directors at the last SLT meeting which the claimant had not attended. The claimant was therefore unaware of this and in the context of this discussion understood that she was being singled-out as having this need for additional support and also scrutiny by Mr Grimley. Whilst the claimant felt that a buddy was not required, this requirement was being applied to the other members of the SLT.

149. We find that as a result of this discussion in which the second respondent focused on her ADHD, paraphrased Mr Quirk's description of ADHD, challenged her about her failure to disclose this condition, asked her whether she required any adjustments and told her that she would be paired with Mr Grimley, the claimant now understood that because of her ADHD, the second respondent viewed her as someone who had "special needs" who required adjustments and a buddy. We do not find that the second respondent conveyed that she regretted the claimant's appointment for reasons connected with either of PTSD or ADHD, although we accept that this is what the claimant now understood.

150. Although the claimant says she tried to explain her ADHD and the second respondent was not interested, we find that there was no detailed discussion about ADHD as a result of this fraught interaction. The claimant who was by now feeling extremely uncomfortable, told the second respondent that she was lucky to have a "genius" in her SLT. We find it likely she used this description as a retort to what she now understood to be the second respondent's perception that she had "special needs" and also a deliberately grandiose statement made to lighten the tension. The second respondent understood that the claimant was being literal.

151. During this meeting, they also discussed the PSR structure and where the service was, a month in. It is likely that they also discussed the transfer of the PMO to Mr Grimley. We do not find that the second respondent specified any areas of performance which required improvement and nor did she refer to the claimant's probation or its extension and we do not therefore accept the second respondent's evidence to the contrary, for the following reasons:

(1) The second respondent had not discussed extending the claimant's probation with Mr Grimley.
(2) It is agreed that the claimant was given no warning in advance of this meeting that her probationary period would be discussed or extended.
(3) This meeting had in fact been arranged at short notice to be a brief catch up meeting over coffee.
(4) The agenda prepared by Ms Pezzolesi made no reference to probation.

(5) The second respondent made no note of this meeting. We do not find that the decision to extend the claimant's probation is equivalent to the exchange between the claimant and the second respondent on the claimant's first day which the second respondent failed to document so that it does not follow that the latter omission makes it any more likely that the second respondent failed to record a decision she says she made on 2 May.

(6) We find that the second respondent's evidence is inconsistent with the terms of the letter dated 10 May confirming her decision to extend the claimant's probation, in which she wrote "we are unable to have the conversation about the areas of progress and as such I have decided to increase your probationary period" [1626] (and also the terms of the termination letter dated 31 July [1266]).

(7) We find, for the reasons set out below, that: the claimant did not refer to the extension of her probation when she was with colleagues, including Ms Hill and Ms Grimley, later that day and nor did she refer to this in any of her communications around this date with the second respondent; she first knew that her probation had been extended on 19 May 2018.

152. We have not therefore accepted the second respondent's evidence that she made and conveyed her decision to extend the claimant's probation on 2 May. In this respect and in relation to a central issue of factual dispute between the parties we have found the second respondent's evidence to be unreliable. As we set out below, we also find that in giving evidence in these proceedings which contradicted his near-contemporaneous account of the relevant events on 2 May, Mr Grimley was an unreliable witness. Unlike, Ms Dempsey whose collateral evidence in relation to this issue we also find to be unreliable, we conclude that the second respondent and Mr Grimley gave evidence under oath which they knew to be untrue. As will be seen, we also come to the same conclusion in relation to evidence they gave in respect of other central factual issues.

153. In oral evidence, the second respondent agreed that there were no documents to substantiate the feedback she says she gave the claimant in relation to her performance which she has set out in her witness statement nor of any of the discussions she says she had with Mr Grimley about the claimant's performance before 2 May 2018. She also agreed that she did not apply the formal appraisal procedure to the claimant. We have also found that she praised the claimant in late February, and gave her positive feedback in the second half of April. Given the lack of any contemporaneous documents, and our findings in relation to the credibility and reliability of these witnesses we do not find it likely that the second respondent had raised serious concerns about the claimant's performance or critical areas of the claimant's responsibility which required demonstrable improvement and warranted an extension of her probationary period nor that she had any intention of extending the claimant's probation on this date.

154. We therefore find that whatever concerns the second respondent did have in relation to the claimant's performance she did not view them as being serious enough to warrant this step. In circumstances in which the second respondent had not already raised such concerns about the claimant's performance nor conducted any performance review meetings in

accordance with or in the spirit of the Probationary Procedure nor put the claimant on notice that she was contemplating or intending to extend her probation nor scheduled a formal meeting with the claimant to discuss her probation in the limited time remaining of the probation period, and with the Council elections taking place within the same period, we also find that but for the claimant's sickness absence from 3 May it is likely that the claimant's probation would have been confirmed on 11 May.

<u>The Hampshire Hog pub incident</u>

155. At around 4.30pm, the claimant went to the Hampshire Hog, a pub close to the Town Hall, with Emily Hill, Assistant Director of Finance. In a statement completed on 5 June 2018 [1567-8], Ms Hill explained that she bumped into the claimant as the latter was leaving the building looking harassed and they agreed to go to the pub so that the claimant could eat. She said that her main concern was the claimant's welfare. During their discussion, the claimant made no reference to probation. Ms Hill left at around 6.30pm.

156. Mr Grimley was also in the pub having a meeting with Ms Dempsey and another colleague. The claimant joined them. She recounted details of her meeting with the second respondent: she said that they had discussed her ADHD and the second respondent was treating her unfairly and like she had "special needs" because of this and she had been accused of not disclosing her ADHD during the recruitment process. The claimant also complained about buddying.

157. Mr Barrett was seated nearby. We accept his evidence that he overheard the claimant telling her colleagues that she was exhausted and stressed, and there was a chronic shortage of staff in PSR. The claimant said that she needed a break and referred to The Priory. She was struggling with her mental health and she referred to marital difficulties. We accept her evidence that she did not refer to her probation having been extended. She was not concerned about her performance but about the consequences of taking sick leave before she reached the six-month milestone. However, she now felt that the second respondent was questioning her abilities because she had ADHD. It is likely that she told her colleagues that she would not be able to pay her children's school fees if she did not remain in post. This financial issue was also related to the breakdown of her marriage. We find that she was expressing her anxiety about the potential repercussions of taking sick leave before she completed her probation.

158. Although he denied this, we find that it is likely that Mr Grimley attempted to reassure and placate the claimant and told her that no one would consider her performance was an issue. He could see that the claimant was becoming upset. He was uncomfortable that the claimant was openly discussing the second respondent in what he felt was a sarcastic and disparaging way. His aim was to de-escalate. We also prefer the claimant's evidence to Mr Grimley because we find the latter was not at all times a credible and reliable witness. The claimant felt that Mr Grimley was being dismissive of her concerns. As will be seen, Mr Grimley had the mistaken belief that the claimant was becoming intoxicated.

159. Although we accept the evidence of Mr Grimley and Ms Dempsey that

before the claimant joined them, Mr Grimley was recalled to the Town Hall by the second respondent, before returning to the pub, we do not accept Mr Grimley's evidence that this is when the second respondent told him that she had extended the claimant's probation and asked him to draft a letter to confirm this decision. This is because in a statement prepared later that month by Mr Grimley, about these events, for the purposes of an internal fact-finding exercise (and not these proceedings) [1563], he made no reference to this meeting with the second respondent, he did not recollect that the claimant told him that her probation had been extended at the pub, and he confirmed that he had only subsequently become aware of this extension. We therefore find that Mr Grimley gave evidence in these proceedings which contradicted this near-contemporaneous account. Notably, in neither account did Mr Grimley say that the claimant referred to her probation being extended at the pub. We have found that the claimant did not refer to her probation being extended. We find it highly likely that had the second respondent conveyed this decision to her earlier that day, the claimant would have complained about this to her colleagues at the pub, including Mr Grimley with whom she had a close working relationship, in addition to the others matters she had discussed with them. As for Ms Dempsey's evidence, although the account she gave on 21 May to the fact-finding exercise [1565] and for these proceedings was consistent in that she says that the claimant referred to her probationary extension at the pub, we find that this part of her evidence is neither credible nor reliable. She was the only witness who was able apparently to recall that the claimant said this at the pub. We find that Ms Dempsey's recollection is erroneous: she heard the claimant complain about the imposition of a buddy by which the claimant understood that the second respondent now felt that she was incapable of doing her job because of her mental health, the claimant had expressed her anxiety about completing her probation (for the reasons we have set out above), and it is likely that by the date she gave her account on 21 May, Ms Dempsey knew that the claimant's probation had been extended. Her recollection fitted with the narrative that the decision to extend the claimant's probation had been made and communicated to the claimant on 2 May and before she went on sick leave the following day. Although this narrative was one which supported the respondents' case we do not find, unlike the second respondent and Mr Grimley, that Ms Dempsey deliberately gave a false account but rather that she recounted a genuinely held but mistaken belief.

160. They were then joined by Ms Thomas and Mr Rogers. We find that Mr Rogers brought a bottle of champagne with him as recounted by the claimant, Ms Thomas and Ms Dempsey, and it was not the claimant, as Mr Grimley recalled in his evidence. Not long after they sat down, the claimant began to have a panic attack with flashbacks in response to her discussion with Mr Grimley. We accept the claimant's evidence that whilst she recognised that her reaction to Mr Grimley was disproportionate, their interaction triggered a Grenfell-related flashback. She was becoming overwhelmed and confused. Her heart was racing and she felt sick. She stood up and went to the toilet accompanied by Ms Thomas.

161. Ms Thomas' evidence, which we accept, was that the claimant did not appear to her to be drunk, or to have consumed much alcohol. The claimant broke down in the toilet. They remained there for some time. Ms Dempsey

joined them. The claimant was seated in a cubicle. She became incoherent, was hyperventilating and refusing to leave. Although Ms Dempsey says that the claimant sent texts to the second respondent we find that the claimant sent only one text to the second respondent later that evening. After some time had passed, Mr Grimley said that he would try to coax the claimant out, we do not accept his evidence that he was asked to do this but find that he acted on his own volition because he was unable to identify who he said asked him to intervene. He understood that the claimant had been upset by their discussion and was now concerned about her welfare. When he came into the ladies' toilets and tried to approach the claimant his path was blocked by Ms Thomas and he was ushered out.

162. Still distressed but calmer, the claimant was helped out of the toilets and outside the pub. Ms Thomas remained at her side and they were accompanied by Mr Rogers who by this time had booked a taxi. Although the claimant was largely incoherent they understood from what she was saying that there was a risk of self-harm, even suicide. They decided to take her to the A&E Department at Charing Cross Hospital where Ms Thomas remained with the claimant. The claimant texted the second respondent en route at 8.22pm to say that "I'm sorry not to appear grateful and I was too paranoid to say earlier, but my "buddy" isn't a safe buddy for me…This needs a rethink. I can move on if this isn't fixable" [328]. The claimant's focus was on being paired with Mr Grimley and she made no reference to her probation which we find she would have done had this been discussed with her that day.

163. Ms Thomas sat in on the initial assessment when the claimant reported that she had had between one and two glasses of wine between 4 – 6pm. The claimant was assessed as being depressed, suicidal and traumatised and not intoxicated [2645]. Treatment options including in-patient psychiatric care or a specialist clinic were discussed. The claimant was discharged with medication and it was agreed that she would return later that day for a review.

164. Some time after the claimant had left the pub, Mr Grimley texted the second respondent at 9.03pm to report that the claimant had "booked herself into A&E, but don't worry. She's ok. It's not an emergency she's had a lot to drink" [3503]. This was inaccurate in several respects. The claimant had not booked herself into A&E, she was not drunk but had had a panic attack and was feeling suicidal. Mr Grimley and the second respondent also had a brief telephone discussion later that night and again the next morning. In oral evidence, he agreed that he told the second respondent that the claimant had been intoxicated and wanted to be sectioned.

<u>The decision to extend the claimant's probation</u>

165. The claimant texted the second respondent at 6.34am that morning [328]. She said that she was not well, had spent much of the previous night at A&E and would be returning to hospital to be reviewed later that day. She anticipated she would need time off and would keep the second respondent updated.

166. We accept Ms Thomas' evidence that Mr Grimley told colleagues that day

about this incident which he put down to the claimant having had too much to drink. This is consistent with what he told the second respondent. It is very likely that colleagues discussed and speculated about the events the night before. This included the rumour that Mr Grimley had kicked down a door in the ladies' toilets to gain access to the claimant because she was suicidal.

167. Having spoken to colleagues, the second respondent understood that the claimant had been intoxicated, was upset about her marriage, had made disparaging remarks about her and their meeting on 2 May, and wanted to be sectioned. She had been on duty as Returning Officer from 6am and would be working overnight overseeing the ballot count. At around 11.16am, she texted Mr Grimley to instruct him to draft a letter extending the claimant's probation in the following terms [3503]:

> "Can you draft letter to extend probationary period for me to sign today – can discuss but it's the right thing to do"

We find that this text is inconsistent with there having been any prior discussion between them about this issue. We have found that the second respondent did not discuss the claimant's probation with her the day before. We find that the second respondent did not take this decision until the morning on 3 May 2018 when she knew that it was likely that the claimant would be on sick leave for the remainder of her probation. We also find that the second respondent understood that there had been a deterioration in the claimant's mental health which was or could have been related to both conditions of which she was now cognisant.

168. Having seen the Crisis Intervention Team at Charing Cross Hospital at 1pm, the claimant, accompanied by her husband, met with Jo Rowlands, Strategic Director of Economy, at the Town Hall extension to collect some personal belongings, to debrief her on the events the night before and to discuss handover of the PSR work although it is likely that this handover was a cursory one because of the claimant's health and her text later that day in which she agreed to send a handover note to Ms Rowlands. Ms Thomas was also in attendance for part of this meeting. In her oral evidence, which we accept, the claimant said that Ms Rowlands tried to manage her expectations when she told her she was likely be absent for several months because she had been to A&E and was feeling suicidal. Ms Rowlands updated the second respondent on this meeting when she explained that the claimant had not wanted to come into the Town Hall itself.

169. The claimant texted Ms Rowlands later that day to confirm that she had been assessed as having "PTSD plus acute anxiety" and was not fit to work for at least one month "as have reached total breakdown" [4621]. The plan was that she would have medication, ongoing therapy and weekly medical reviews.

170. The claimant forwarded her statement of fitness for work ("fit note") to Ms Dempsey and Mr Grimley, which was copied to the second respondent, the next day, on 4 May 2018, when she confirmed that her GP had advised her to take a "complete break and no contact with/from work" [1165]. The fit note confirmed that she had been certified as unfit for work for one month because of "Post-traumatic Stress Disorder/Acute anxiety" [2356]. In her

oral evidence, the second respondent agreed that she was therefore aware that the claimant's absence was related to PTSD. She also said that when writing her witness statement in which she referred to neither PTSD nor ADHD but to "work-related stress" she had in mind the claimant's ADHD. She therefore understood the claimant's sickness absence was also related to ADHD.

Fact-finding investigation

171. On 3 May 2018, the second respondent commissioned a fact-finding investigation in relation to the events in the Hampshire Hog the previous day. She did so following her telephone discussion with Mr Grimley that morning and his advice to obtain statements from witnesses without delay so that the first respondent would have near contemporaneous accounts if a full investigation became necessary. As he said in evidence, this was a defensive strategy. The second respondent also discussed this with Ms Davies whose evidence, which we accept, was that the second respondent told her that she was particularly concerned about potential reputational issues and particularly the rumour that Mr Grimley had kicked down a toilet door. Although Mr Grimley denied this, we do not find it credible was he was neither aware of this rumour nor discussed this with the second respondent. He was a trusted aide to the second respondent and it is likely that she would have discussed this very serious allegation with him if only to reassure herself that there was nothing in it.

172. Reg Davies, who was known to the second respondent and Mr Grimley, was appointed to investigate. Neither was able to recall who instructed him or on what basis. There were no terms of reference or if there were these were not disclosed. Although the second respondent's evidence was that fact-finding was needed in order to establish whether there were any reputational issues for the Council particularly in relation to Mr Grimley we find that the principal focus of this fact-finding was the claimant's conduct.

173. Ms Thomas was asked by the second respondent and Mr Grimley to complete an incident report in relation to the events on 2 May 2018. She felt that the second respondent had accepted Mr Grimley's version of events. Although Ms Thomas says that the second respondent and Mr Grimley discussed implementing a disciplinary process in relation to the claimant, we do not find that they used these words but this is what she understood to be the purpose of this exercise. When she met with Mr Davies on 21 May, he confirmed that this fact-finding exercise was being conducted outside any formal process and she described it as a "witch-hunt" [1561-2].

174. Mr Davies also interviewed Ms Dempsey on the same date [1565-6]. She told Mr Davies that the claimant had told her that her probation had been extended during a "monologue" she gave at the pub. For the reasons we have given we do not find that this recollection is reliable. Ms Dempsey was neither asked about nor volunteered any information relating to the interaction between Mr Grimley and the claimant in the ladies' toilets.

175. Mr Grimley was interviewed on 30 May when he provided a statement he had prepared in relation to the events on 2 May (which was not disclosed). In relation to the claimant's probation Mr Grimley was recorded as saying

this [1563]:

> "RWT had been anxious about her probation for some weeks but could not recall that she had talked about any proposed extension of her probation in his presence that night. MG was now aware that her probation had been extended".

Mr Grimley also stated in relation to the claimant's alcohol consumption [1564]:

> "could have influenced her reaction to their conversation. MG felt that in relation to alcohol, RWT can have problem with limits – been known to move onto 'shots' during social events".

This was mistaken and misleading. In his oral evidence, Mr Grimley explained that this related to a one-off example. It is clear from the note of this interview that the focus of the questions was the claimant's and not Mr Grimley's conduct. He was not asked about the rumour that he had kicked the toilet door down.

176. When Ms Hill was interviewed on 5 June, the focus was again on the claimant.

177. No final report was completed and Ms Davies had no involvement in this process. Nor did the claimant. As will be seen, the second respondent did not follow-up on this exercise until late July 2018 when she was on the verge of dismissing the claimant. We find that the lack of urgency to conclude this fact-finding, the second respondent's lack of oversight of this process, the actual focus of the fact-finding conducted by Mr Davies and the fact that Mr Grimley remained in situ throughout this period, are inconsistent with the second respondent's evidence that this fact-finding was necessary because of reputational concerns which related primarily to Mr Grimley.

<u>Confirmation of the decision to extend the claimant's probation</u>

178. The second respondent emailed cabinet members on 10 May 2018 to explain that the claimant was unwell, needed rest and her GP had requested no contact [1172]. She also stated that the claimant would be absent until at least late June, although the claimant's fit note expired on 3 June. The second respondent also confirmed that Mike Boyle, Bi-borough Director of Integrated Commissioning, would cover the claimant's role in the interim from 21 May, although he had already begun to attend key meetings. The second respondent evidently assumed that the claimant would require an extended period of sick leave. She said that this was informed by the discussion she had with Ms Rowlands about the claimant on 3 May.

179. By a letter also dated 10 May 2018 [1626], the claimant was informed that her probationary period had been extended by three months to 9 August in the following terms:

> "…You will understand from our previous discussions that there are areas of performance that I would like to see improve. Given your current absence, we are unable to have the conversation about the areas for progress and as such I have decided to increase your probationary

period…

> "Under the Council's Probationary Policy, I will arrange a formal meeting to discuss the extension when you are fit to attend work. The meeting will cover specifically the reasons for the extension and the objectives that will need to be met during the extended period. You are entitled to be accompanied at this meeting….
>
> "When you are well enough to attend work, we will discuss in detail the areas of focus and delivery during the extension period…"

The second respondent therefore acknowledged that there had not been a formal meeting with the claimant to discuss her extension to explain the reasons for this decision or to identify the standards she was required to meet during this period. We have found that this is inconsistent with her evidence that she told the claimant that she was extending her probation on 2 May and notably, there is no reference to this meeting in the letter. In oral evidence, the second respondent was unable to explain this omission. Her letter also confirmed that the reason for this extension was because the claimant's sick leave had intervened to prevent such a meeting from taking place. As Mr Grimley agreed in oral evidence, it was necessary to extend the claimant's probation because she would otherwise have been outside her probationary period because of her fit note. He also agreed that a discussion about extending the claimant's probation should have taken place before the end of the fifth month of probation but had not. This letter did not identify the areas of performance which required improvement.

180. This letter was postmarked 17 May 2018 and received by the claimant on 19 May. In view of this time-lag the second respondent conceded that there may have been a delay in her signing this letter because of other commitments. We heard there were four internal post collections during the day at the Town Hall. It is therefore likely that the letter was collected and posted on the same day that it was signed. We therefore find that the second respondent signed this letter on 17 May. We do not find it likely that it took the second respondent a week to sign this letter and we conclude that this letter was completed and printed after 10 May and therefore back-dated. We do not therefore accept the second respondent's evidence to the contrary which we find she knew to be untrue. Not only did the second respondent sign this letter knowing that it was back-dated, it is likely that she either instructed that this letter was back-dated or she sanctioned this decision. She was the Chief Executive, it was her letter and signature. Although we have found that she decided to extend the claimant's probation on 3 May, the second respondent therefore acted to deliberately mislead the claimant by concealing the fact that the letter had not been finalised and signed before 11 May when her probation was due to end.

181. Upon receipt of this letter the claimant sent a text to Ms Rowlands [4621]:

> "…just received a letter from Kim and HR where she has extended my probation and referred to areas of poor performance. This has not been discussed with me before now, other than the minor cmd issues I picked up from sarah t [sic]. Do I need proper legal representation now as this is not feeling secure at all, and I don't see that my return is part of the game plan here…"

We find that this was the first time the claimant was informed that her probation had been extended. The claimant now felt that the second respondent wanted to dismiss her. This impacted on her mental health. She had a panic attack.

<u>The second respondent's contact with the claimant on 24 May 2018</u>

182. In oral evidence, Mr Grimley agreed that the Managing Sickness Absence Policy [3094-100] applied to the claimant. This policy provides that a manager should "normally" arrange an OHU appointment for an employee who has been absent for 20 working days or more (section 12.1) and also emphasises the need for managers to be "particularly alert" to disability-related absences and, where applicable, to obtain HR or OHU advice (section 13.3). The second respondent's oral evidence was that although she did not consult with OHU she relied on Mr Grimley, with whom she did consult about the claimant's absence. She also said that she decided against an OHU referral initially because the GP had requested no contact. Whilst we accept that was her initial view, we find that there was an inexplicable failure to refer the claimant to OHU for the entire three-month period of her sickness absence.

183. The second respondent sent a WhatsApp message to the claimant on 24 May 2018 noting that her fit note was coming to an end and suggesting a meeting in central London "to have a chat about how things are going and how you're feeling about return [sic]" [1193]. The claimant replied that she was due to see her GP when it was unlikely that she would be deemed unfit for work. She agreed to provide an update.

184. We accept the second respondent's evidence that she made contact in order to check on the claimant's welfare. It is also likely that she wanted to gain a clearer understanding of the claimant's prognosis to enable her to plan cover in the longer term because Mr Boyle had been engaged on an interim basis. As her line manager, and with the claimant in a key role and responsible for the delivery of statutory services this was appropriate. As was her suggestion to meet in central London. We do not therefore find that this was because of or related to the claimant's ADHD or PTSD. Overall, we find that the second respondent acted reasonably and proportionately when she made contact on this date. She did not contact the claimant again for two months.

185. The claimant forwarded a fit note dated 30 May 2018 in which she was certified as remaining unfit to work for another month because of PTSD and acute anxiety [2357].

186. The claimant's GP wrote to her treating psychiatrist the next day when she referred to "flash-backs…feelings of intense anxiety, paranoid and persecutory thoughts regarding her husband and people from work" [2637]. We accept the claimant's oral evidence that her GP was summarising what she had described. By 'paranoid' the claimant meant feeling insecure and unsafe. She agreed that she had persecutory thoughts which related to the events at work. She had referred to the first respondent as 'little Argentina' and says that former colleagues were often referred to as "The Disappeared". She saw her dismissal as being a confirmation of these fears.

Interim arrangements in PSR

187. It was agreed that Ms Redfern would act as Joint Director of Social Care / PSR when Mr Boyle left at the end of June. The second respondent emailed colleagues on 1 June to confirm these arrangements when she noted that the claimant had been signed off work for another month [1178].

188. In the meantime, Mr Boyle completed a review of the PSR department on 11 June 2018. Although this highlighted budgetary and workforce challenges, the size of the projected overspend was revised downwards.

189. Danielle Wragg, Finance Business Partner, costed the new PSR business structure and emailed Mr Jolapara and Mr Grimley about this on 25 May [3405] when she identified a PSR staffing cost shortfall of approximately £850,00. Ms Hill who was also involved in this discussion, says that this initial work identified an underlying structural pressure of £1.7m and a decision was taken by the SLT to freeze all further recruitment into the new structure, which was expected to achieve savings of £1m and result in an yearly overspend of £700,000. Her evidence was that the claimant recruited into posts for which there was no approved budget and some of these were expensive interim positions. However, the proportion of the staff cost this was said to account for was not identified.

190. An updated forecast showed an expected underlying structural overspend of £1.1M. In an undated budget note produced by Ms Hill [3677A-B] she confirmed that none of the overspend reported at month 2 was attributable to the claimant and went on to explain:

> "as Director responsible should have been working to make progress on these but it was early on in the year and no detailed plans for income likely to have been handed over and we know the Council has subsequently considered these not achievable and has written off."

We accept Mr Jolapara's evidence that this related solely to the commercial activities because in this part of her report, Ms Hill focused on the non-delivery of Business Intelligence and Ethical Debt sales (£1.8m) and Contract Management savings (£0.5m). Ms Hill then went on to deal with the projected staffing overspend. She referred to the initial figure of £0.7m and identified an underlying structural overspend of £1.1m plus £0.2m "additional costs of the team treated separately" plus £0.5m budget transfer to support PMO. She reported that this overspend was "exacerbated by high cost interim arrangements needed to be mitigated in-year". She emphasised that computing this headline figure had been "a very complicated and detailed piece of work" and, like Ms Wragg, she had made several assumptions including costing salaries at mid-point where these salaries were unknown.

191. When Ms Evangeli conducted this exercise using actual salary costs for staff in post from 1 April, she computed a total staff cost of £2.6m excluding interims. She set out her calculations in an email to Mr Boyle dated 15 June 2018 [4774-5], when she concluded that PSR would not be overspent unless the costs of interims was £1.88m. This was unlikely. When Mr Boyle forwarded these figures to Ms Redfern, Mr Grimley and Mr Jolapara, the latter replied "we agreed that one version of the truth needs to be held by

Danielle and can we please stick to that" [4774]. We infer from this that Mr Jolapara had already decided on the version of the truth to be used and was resistant to altering this view. Mr Boyle clarified that whilst Ms Wragg and Ms Evangeli had used the same structure chart (and salaries), Ms Wragg had made the incorrect assumption that where names were assigned to this structure these staff were in post. In a subsequent email in the same chain of correspondence to which Ms Redfern and Mr Grimley were copied, Mr Boyle agreed to commit to a nil overspend by year end "given the level of vacancies and the current freeze" [4773].

192. In his witness statement, Mr Jolapara tabulated the cumulative monthly overspend for PSR in 2018/19. The figure at May 2018 when the claimant went on sick leave was £1.86m. In his oral evidence, he agreed that this was the overall debt figure for the department that did not identify which part of this debt was attributable to the claimant. He said that at the point when the services transferred to a director they needed to start taking action. As we have noted, when the claimant commenced sick leave PSR had been operational for one month, and as we have found, there was a underlying structural overspend in month 2 of £1.1m which was not attributable to her. At the end of 2018/19, some 11 months after the claimant had last been actively in post, there was an overspend of £442,000 relating to staffing costs. There was no evidence to show to what extent this was attributable to the claimant. The claimant was not given any opportunity to make any representations about this overspend.

193. The claimant submitted another fit note dated 20 June 2018 in which she was signed off work until 23 July because of an "Acute stress reaction" [2533].

<u>The second respondent's contact with the claimant on 24 July 2018</u>

194. The second respondent contacted the claimant for the second time since she had commenced sick leave on 3 May 2018 and two months after her initial contact. The claimant's fit note expired on 23 July 2018. The second respondent texted the claimant the next day when she noted this and requested that they met that week [378]. The claimant replied around an hour later to say that she had been to her GP and would forward the latest fit note.

195. The claimant's medical notes show that she did not in fact obtain another (back-dated) fit note until 24 August, however, these records also show that she had reported a domestic abuse incident to the police on 10 July which she discussed with her GP a week later, in the following terms: "ongoing issues with high levels of stress relating to marriage and dispute with work…" [2674] and her GP agreed that she remained unfit to work; and also noted that a child safeguarding referral was required. Although the claimant did not therefore comply with the requirement to provide her employer with a timely fit note for this ongoing period of sick leave, this was not a factor which the second respondent took into consideration when she subsequently decided to dismiss the claimant. However, we find that the second respondent now understood that the claimant remained unfit to work and was likely to be signed-off for at least another month in line with her previous fit notes. In her oral evidence, the second respondent said that she

did not know whether the claimant would remain absent for one, two or three month(s).

196. The second respondent replied to thank the claimant for the update and she said that she would still like to meet up that week. When the claimant did not respond, the second respondent made no further contact. As with her first attempt to contact the claimant two months earlier, we find that the second respondent acted reasonably and proportionately when she made contact on this date. In her oral evidence, she said the reason for making this contact was related to the claimant's welfare and also her status i.e. to establish when she was likely to return. Whilst we accept that these were both factors, we find that the principal factor was that the second respondent was keen to discuss the claimant's probationary extension. The claimant had been absent for almost three months, her probationary extension was due to end and because the second respondent was due to go on leave on 1 August she had limited time to make a decision about the claimant's ongoing employment. As we have found, she had discussed this with Mr Grimley the day before. We have accepted Mr Grimley's evidence that in corresponding with the claimant on this date, the second respondent was trying to engage with the claimant and she wanted to rule out all options before she made a decision. We do not therefore find that this was because of the claimant's ADHD or PTSD.

<u>The decision to dismiss the claimant</u>

197. We also accept Mr Grimley's evidence that in their discussions about the claimant's ongoing employment, he and the second respondent were mindful of the "high-pressure nature" of the role, the duty of care owed to the claimant and whether "the pressure would be too much" for her to succeed [MG/77]. However, the respondents did not consider obtaining OHU input in relation any potential adjustments. Nor did they seek OHU advice on the claimant's fitness to deal with these pressures nor the likelihood of when she would be fit to return to work.

198. Mr Grimley's evidence was also that the second respondent's initial view was that the claimant should be given the opportunity to continue in her role in recognition of her accomplishments in delivery, particularly in regard to contract negotiations, her problem-solving and her rapport with the cabinet and be given greater support although she wanted the claimant to be more transparent about her plans for improving the service [MG/74]; and the second respondent became increasingly concerned about how the claimant would be able to return to work satisfactorily [MG/76].

199. He reminded the second respondent on 23 July that the claimant's extended probation was due to end on 9 August. There was limited time to decide on what action to take as the second respondent would be on annual leave from 1-13 August. Theoretically, the respondents had three options: to confirm the claimant in post, to dismiss her or to extend her probation for a further period. However, even had the respondents wanted to performance manage the claimant in the interim, her ongoing sickness absence precluded this, so the reality was that there were only two options: dismissal or a further extension to her probation.

200. The second respondent's evidence was that by 23 July 2018 it was evident that there were staff divisions in PSR, budget issues and concerns regarding Early Years' provision. In addition, a new cabinet member for PSR was appointed in May 2018 and keen to make progress. She said that Mr Boyle's review had revealed that the new department was neither dynamic nor transformative and there was a top-heavy structure with too many senior posts. She was concerned about the viability of this new flagship department to achieve the necessary reforms. She said she reviewed Mr Boyles' review in mid-July and sought the views of SLT members and concluded that these concerns would remain unresolved were the claimant to return to work. In his evidence, Mr Grimley said that because of the issues which had become apparent during her sickness absence, bringing the claimant back to work would have exposed the respondent to unmitigated risk and a breakdown of governance.

201. We found Ms Redfern's evidence particularly illustrative in that it revealed to us the lack of any engagement between the respondents and the claimant in relation to these issues and the failure to take account of the fact that not only was this a newly formed department but that when Ms Redfern took over responsibility for PSR in July 2018, it had been without leadership for two months; as Mr Boyle had had an oversight role and was required to deal with urgent matters, and was not therefore engaged to provide leadership for the department. Her witness statement enumerates various criticisms relating to the state of PSR: the department was dysfunctional and in chaos [LF/6]; there was a considerable overspend on staff, there was no overall leadership and staff management [LF/7]; an HR consultant had been recruited outwith the usual governance arrangements [LF/9]; and there was a lack of accountability and governance systems in place [LF/13]. There is an absence of any detail in her evidence about which of these concerns she conveyed to the second respondent and when. Nor did the second respondent's evidence deal with this. Mr Grimley's evidence was that Ms Redfern conducted several reviews and reconciliations [MG/72] although we were not taken to any specific documents. He says that this confirmed the second respondent's concerns about the budget position, the lack of clarity around roles and the recruitment process.

202. In her oral evidence, Ms Redfern acknowledged that she did not know where the claimant was working from day-to-day; she had very limited contact with the claimant over the six months she was at work; she was not aware of the Agresso issue in relation to HR and finance systems or the issue with accommodation. Although Ms Redfern did not agree entirely that operational processes and procedures could only start with staff in place because she said other colleagues including herself were available to step in, she was not aware that prior to April the claimant had asked for people to be released to assist her and this request was refused. Ms Redfern said that there was a lack of cohesion within the department in that there were no workplans in place, staff did not appear to understand their roles and had not been formally introduced to each other, and there were no systems in place. However, when she assumed responsibility in July the claimant had been absent for two out of the three months in which PSR had been operational and some of these staff had joined during her absence. Ms Redfern was unable to dispute the assertion that the HR consultant whom she alleged had been recruited "privately" had in fact been recruited by the

MO team when the second respondent's was at the helm and on a date before the claimant began in post. Nor was she able to dispute the contention that the claimant had brought in consultants to provide short-term cover for essential work pending the recruitment of permanent staff because she said that her focus was not what they did but on reducing the staffing budget. Ms Redfern cited a issue in relation to Family Services ("FS") which she said placed the Council at serious clinical and financial risk but was unable to challenge the assertion that the claimant did not have commissioning capability because she lacked the staff and the five staff who were working on FS contract came into post after the claimant went on sick leave. We therefore find that whilst Ms Redfern was genuinely concerned about the state of the PSR department she took over her conclusion that this "could only have resulted from incompetent leadership and management" [LF/19] was based on an incomplete set of facts and without the claimant being given an opportunity to address any of these issues.

203. We find that it is likely that the second respondent was concerned about the PSR structure and its ability to deliver the reforms it had been set up to achieve. However, there was no corroborative evidence to show what, if any, performance concerns the second respondent had in mind when she decided to dismiss the claimant. We were not taken to any document in which the second respondent or Mr Grimley recorded the concerns they had about the claimant's performance at around this time or the basis for the decision to terminate her employment. In relation to the recruitment process which the claimant conducted, much of the material we were taken to was disclosed for the purposes of these proceedings and was not therefore in the respondents' possession and knowledge at the relevant time.

204. Following their discussion on 23 July, Mr Grimley made initial enquiries with the legal team about a draft termination letter [3461]. We do not accept that this is when a decision was made to dismiss the claimant and we find that in giving evidence to the contrary the second respondent and Mr Grimley sought to rely on facts which they knew to be untrue. We find that a final decision had yet to be made because on his own evidence Mr Grimley said that in corresponding with the claimant on 24 July, the second respondent wanted to engage with the claimant [MG/81] and she also wanted to explore all options before making a final decision [MG/82]. As will be seen, there were also a number of outstanding queries which needed to be resolved before a decision could be made.

205. Mr Grimley emailed the second respondent on 26 July. We were not taken to the contents of this email. The second respondent replied on 29 July, a Sunday, as follows [1265A]:

> "I need Susan [Walsh, Senior Employment and Litigation Solicitor] to be precise – the Secondary PTS[D] <u>and ADHD</u> might form RWT's argument that she is treated unfairly especially as I discussed this with her prior to her going off sick (Please confirm Susan is aware of ADHD as she does not mention this).
>
> I would like to see all of the Interviews which Reg Davies undertook into the events before she went on leave – this is outstanding, and I'd like to meet with you and Susan tomorrow.
> I'm hugely disappointed that we have left this so late in the day – so my

> options to act before 9th August are limited as my AL is on 1 – 13th August. I think that I should formalise my request to meet her first before issuing any final letters – please draft a letter with Susan.
>
> Can I have confirmation on the continuous service issue – does it apply to someone on probation and does it give rise to unfair dismissal? Surely that means that no one could be released on probation if they were underperformed in a new area but they had continuous service from a previous [sic]?"

206. We make the following observations and findings in relation to this letter:

(1) The second respondent was mindful of the conditions which the claimant relies on as disabilities and the risk that the claimant would assert that she had been treated unfairly particularly in relation to ADHD because of the discussion on 2 May.
(2) At this stage when the second respondent was on the verge of dismissing the claimant she regarded the fact-finding investigation which we have found related to the claimant's actions and not a reputational issue relating to Mr Grimley's conduct, as a potentially relevant consideration.
(3) The limited time available meant that fewer options were available to the second respondent with the implication being that she would have had more options if there was more time in which to make a decision. This contemporaneous document is wholly inconsistent with the second respondent's evidence [R2/68] that she had given consideration to possible outcomes over the previous two and a half months.
(4) It is clear from this email that termination of the claimant's employment was being considered, however, it is equally apparent that the second respondent had not made this decision at this date. She had raised several queries – in relation to the claimant's PTSD and ADHD, Mr Davies' factfinding, and the claimant's continuous service – which needed to be addressed before she would be in a position to make a final decision. She also instructed that a letter was drafted to formalise her request to meet the claimant.
(5) Although the second respondent referred to underperformance in a new area there is a lack of any detail in relation to any specific areas of poor performance.

207. Mr Grimley reviewed the claimant's OHU records in response to this email. He did this to establish whether the claimant had disclosed her ADHD before commencing her role. As we have found, the second respondent was concerned that the claimant had failed initially to disclose this. We do not find that another aim was to check for adjustments because neither the second respondent nor Mr Grimley considered making an OHU referral, throughout the extended period of the claimant's sickness absence. It is striking that neither had any concern that Mr Grimley's actions breached the claimant's medical confidentiality and data protection rights.

208. Mr Grimley and the second respondent discussed these queries the next day when Mr Grimley confirmed that Legal were aware that the claimant had ADHD, it was unnecessary to formalise the request to meet the claimant and the latter did not have continuity of service from her previous local government employment. As the second respondent's query had made

clear, the implication was that the claimant lacked the requisite service to bring a claim of 'ordinary' unfair dismissal. We were not taken to any documents substantiating this discussion. However, as the second respondent had underlined the day before, time was critical because she was due to go on leave on 1 August. She would also be out of the office the next day on business which meant that this was her last day in the office before the claimant's probationary extension expired. We do not find it likely that the second respondent, evidently mindful of the limited window she had, would have left this issue unresolved before she went on leave. The second respondent's evidence was that she agreed that a letter of termination could be sent to the claimant. She says she did not have a final copy of this letter to hand to sign herself so she instructed that Mr Jolapara who had authority to act on her behalf, signed this letter as she would be on leave. Mr Grimley says that they agreed on some amendments to a draft termination letter. We were not taken to any correspondence between them in which Mr Grimley forwarded this termination letter to the second respondent. We find that it is likely that they agreed that Mr Grimley would make some amendments and Mr Jolapara would sign the final version by which time the second respondent would be on leave.

209. The second respondent's evidence was that she decided on dismissal instead of extending the claimant's probation because the claimant had been unable to improve her performance as she was on sick leave, there was no end in sight in respect of this sick leave; there had been no contact from the claimant in the intervening period; and she took advice from Mr Grimley. The claimant was in a high profile role, there were expectations on her department to deliver and she could not countenance an open-ended continuation of this status quo.

210. The termination letter which was sent to the claimant was dated 31 July 2018 [1266]. It was signed by Mr Jolapara on 2 August 2018. We were taken to a document recording the metadata for a Word document entitled "180730 RWT End Probation Final" [1271]. This metadata shows that this document was created by Sheelagh Conway, about whom no evidence was given, and last modified by Mr Grimley. It had been printed on 27 July and last modified on 2 August at 1.18pm. Mr Grimley emailed this document to Jane Watts, the second respondent's Executive PA, three minutes later, at 1.21pm [1271A].

211. This letter confirmed that the claimant's employment would end on 9 August 2018 on the expiry of her extended probation. This was a relatively short letter of four substantive paragraphs, the first two of which dealt with the extension of the claimant's probation and the summary reasons for her dismissal in the following terms:

> "On 10th May, I wrote to you setting out that your probationary period would be extended to 9th August 2018, a 3-month extension beyond the usual probationary period. This followed our meeting on the 2nd May 2018 when we again discussed the development and pace of delivery within Public Services Reform (PSR) and your leadership and management of the service.
>
> I have had an opportunity to review the PSR service and the current and future challenges it faces, particularly the budget and within the required

> timescales. This leads me to conclude that you will not be able to complete your probationary period satisfactorily. Because of this, I cannot confirm your employment as Director of Public Services Reform as required in your Statement of Particulars."

212. As with the probationary extension letter dated 10 May, the second respondent did not assert in this letter that she had discussed extending the claimant's probation on 2 May 2018, as is now contended. We find that is further evidence that it was not discussed at that meeting.

213. As we have found, the respondents had two options: to extend the claimant's probation for a further period or to terminate her employment. This letter failed to explain why the second respondent had decided against extending the claimant's probation. As for the decision to dismiss the claimant, the second respondent provided a little detail. Although she referred to the budget, her letter did not refer to the staffing structure, service provision or governance in relation to hiring and pay. As we have found, none of these issues had been discussed with the claimant.

214. Nor did this letter make any reference to the claimant's sickness absence which had spanned the entire duration of the extended probationary period. Taking into account the second respondent's query about the claimant's PTSD and ADHD on 29 July, we find that the absence of any reference to the claimant's sickness absence or the conditions which she relies on as disabilities, was a deliberate omission to avoid any inference that this decision was in any way connected with the claimant's mental health or related sickness absence. The obvious fact was that the claimant's sickness absence was a factor which precluded the claimant's extended probation being signed off and its open-ended nature militated against a further extension. Mr Grimley's evidence was that the second respondent was mindful that the claimant had not an opportunity to address the performance concerns to date. As he agreed in oral evidence, but for the claimant's sick leave she would have been entitled to a formal meeting, accompanied, to discuss an extension to her probation to set performance targets which would be recorded in writing. Instead the claimant had not been told what performance concerns warranted an extension of her probation nor had any objectives been agreed. The fact that she had been on sick leave meant that she had not had such a meeting to discuss her performance nor an opportunity to demonstrate her capability.

215. Nor had the claimant been invited to a formal meeting to discus her potential dismissal on performance grounds. In his evidence, Mr Grimley said that he felt that it was not appropriate to raise performance issues with the claimant whilst she was on PTSD-related sick leave as this would compound her absence although this view was informed by input from OHU. Nor did Mr Grimley advise the second respondent to follow the Sickness Absence Policy and to write to the claimant to warn her that she was at risk of dismissal because of her ongoing sickness absence and give her an opportunity to make representations at a meeting with a companion. As Mr Grimley conceded, he was not aware of any other employees who had been dismissed without warning and without the opportunity to make representations. He was well placed to know this as former Interim Director of HR.

216. This letter also confirmed that the claimant would receive a month's pay in lieu of notice. She was told that the balance of the outstanding overpayment would be recovered in her final salary unless alternative repayment arrangements were made.

The claimant's holding grievance dated 1 August 2018

217. In the meantime, the claimant's solicitors emailed the respondents on 1 August at 4.52pm attaching a document entitled "holding grievance" [2453 & 1267-9] which put them on notice of the claimant's intention to submit a formal grievance. This letter referred to the claimant's PTSD and ADHD and her belief that she had been subjected to disability discrimination and harassment. This was said to include the meeting on 2 May 2018 when it was alleged the second respondent had "focused only on our client's ADHD and commented on her performance" and also the decision to extend the claimant's probation allegedly "because of her disabilities and the perception that she can no longer perform her role, as was suggested by Kim Dero in the meeting on 2 May…" as well as the text messages sent by the second respondent to arrange a meeting with the claimant. This letter also alluded to a "whistleblowing" complaint without providing any detail. The claimant's solicitors requested that no further action was taken pending the completion of grievance proceedings and confirmed that the claimant had commenced the ACAS early conciliation procedure. The respondents' accept that this letter amounts to a protected act for the purposes of the Equality Act 2010.

218. Ms Watts texted the second respondent to alert her to this letter at a time recorded as 4.19pm [4772] which is likely to be related to the 1-hour time difference between the UK and the second respondent's location. She noted that it was marked "private and confidential" and had not opened it but "can see the first few words, hence this text". She therefore understood that this was an important letter which the second respondent needed urgently to see. The second respondent replied at 8.21pm initially to thank Ms Watts and then remarked "unbelievable – i'm really furious". She forwarded this letter to Mr Grimley and Ms Davies at 8.28pm without comment [3507]. Mr Grimley replied at 9.01pm [3505] to confirm that he would instruct Legal the next day. Ms Davies forwarded this letter to the in-house employment team the next morning.

219. Mr Grimley responded to the 1 August letter the next day [2454], to confirm that the first respondent would not be engaging with the claimant's solicitors in the following terms:

> "You will know that this matter is an internal one between the employee and employer. We have established policies and procedures for dealing with such issues.
>
> "Therefore, we shall not be engaging in any corresponding in any correspondence with you with respect to our internal procedures."

Signing-off on the dismissal letter on 2 August 2018

220. The second respondent called Mr Grimley in the morning on 2 August when they discussed the claimant's solicitors' letter and Mr Grimley confirmed that

the termination letter had not been sent [R2/79]. (Mr Grimley made no reference to this discussion in his witness statement.) We accept the second respondent's evidence that she was disappointed by this although it is likely that in the circumstances her reaction was considerably stronger and in keeping with her text to Ms Watts. It was now imperative to avoid any further delay. Another imperative was to avoid the impression that the decision to dismiss the claimant had been made in response to the 1 August letter.

221. Mr Grimley emailed the termination letter dated 31 July to Ms Watts at 1.21pm on 2 August. As we have found, the metadata shows that this document was last modified before it was emailed at 1.18pm. It is likely that Mr Grimley made some amendments to this letter before forwarding it to Ms Watts. The delay between his morning call with the second respondent and his email to Ms Wats is also consistent with the need for him to make amendments to this letter before it was printed and signed. Ms Watts' evidence, which we accept, is that Mr Grimley came to see her in her office and asked her to amend this letter, print it and take it to Mr Jolapara to sign. We find that this amendment was to back-date the letter, for the reasons below. The email he sent to her had no content other than the attached letter and we infer from this that Mr Grimley had given these instructions to Ms Watts verbally.

222. Ms Watts took this letter to Mr Jolapara to sign. Although his evidence was that Ms Watts told him that the second respondent had agreed to send this letter before she went on leave we do not find she said this because of our finding below that Ms Watts was genuinely concerned about the back-dating of this letter. Before signing this letter, Mr Jolapara sought advice from Ms Davies and he also checked this with Mr Grimley. Mr Grimley provided immediate confirmation that this letter had been authorised by the second respondent. Ms Davies took longer to provide this assurance. She had not seen this letter before although Ms Walsh had told her earlier that day that she had advised Mr Grimley about a termination letter concerning the claimant. She therefore contacted the second respondent, unaware that she was on leave. During their brief discussion, the second respondent confirmed that she had approved the termination decision and letter. Ms Davies then told Mr Jolapara he could sign it. Although Ms Davies' says that she understood that this letter was dated 31 July because it had been printed before Ms Smith went on leave, it is unclear how she arrived at this conclusion and she failed to consider why Mr Jolapara had not been asked to sign this letter before 2 August, which is when we have found this letter was printed. Like the second respondent and Mr Grimley, Ms Davies knew about the 1 August letter.

223. Mr Jolapara signed this letter on the second respondent's behalf on 2 August [1266].

224. We find that Ms Watts discussed this letter with Ms Thomas on 2 August 2018 because Ms Watts agreed that she had often confided in Ms Thomas in the corridor outside her office and we accept the evidence of Ms Thomas and Ms Pezzolesi that the former asked the latter to go down to the post room and check whether the letter had been sent out that day [JP/11]. When she did, Ms Pezzolesi was, quite properly, denied access to this information.

We find that Ms Thomas would not have known about this letter unless Ms Watts had told her about it. We also find that Ms Watts would not have confided in Ms Thomas unless she had been concerned about this letter. We also find that Ms Thomas would not have asked Ms Pezzolesi to take the action she did unless what she had been told by Ms Watts caused her alarm. We accept Ms Thomas' evidence that Ms Watts told her that she had been asked to backdate the letter so that it appeared to predate the grievance which Ms Watts knew about. We do not find that Ms Watts told her that she had been told to backdate the termination letter by the second respondent, as Ms Thomas says, because of our finding that these instructions came directly from Mr Grimley, although Ms Watts would have understood that he was acting on the second respondent's authority. We therefore find that Ms Watts felt conflicted about what she had been asked to do by Mr Grimley.

225. The claimant received this letter which was postmarked 2 August 2018, on 4 August 2018.

226. This letter had therefore been amended and printed on 2 August and backdated to 31 July. We do not find it likely that Mr Grimley acted without the second respondent's authority. They had therefore acted together to deceive the claimant and her solicitors to maintain the fiction that the termination letter had been finalised and sent on a date before the respondents received the 1 August letter. This was the second time in which the second respondent acted to deliberately mislead the claimant in this way. Although Mr Jolapara was not cognisant of the 1 August letter he knowingly signed the termination letter dated 31 July, on 2 August. It mattered not that Ms Davies advised him to sign the letter, he was her senior officer, the director responsible for governance as well as finance, and Section 151 Officer (i.e. with responsibility for overseeing the administration of the Council's finances). For her part, Ms Davies who was not only the Borough Solicitor but Monitoring Officer (i.e. with responsibility for reporting illegality, maladministration, governance and the conduct of councillors and officers) was content for Mr Jolapara to sign a letter two days after it was dated and which predated the 1 August letter that she had seen. We therefore find that the Council's Chief Executive, Interim Head of Corporate Services, Strategic Director of Governance and Finance and Section 151 Officer and the Borough Solicitor and Monitoring Officer were involved in this deception.

227. The claimant's solicitors wrote to Mr Grimley on 3 August, in response to his letter the day before, to complain about the refusal to engage with them and to request the "reasonable adjustment" of enabling them to communicate on the claimant's behalf in relation to her "employment and grievance" [2457]. They explained that the claimant was "concerned that direct contact with LBHF will result in further discriminatory treatment, and/or will serve to exacerbate her disabilities and delay her recovery". The respondents did not respond to this request.

<u>The claimant's appeal and grievance dated 15 August 2018</u>

228. The claimant submitted an appeal against her dismissal and grievance via her solicitors on 15 August 2018. Her employment had ended by this date.

229. In her grievance, the claimant asserted that the second respondent had not raised any significant concerns about her performance or capability.

230. In appealing against dismissal, the claimant complained that this decision was an act of discrimination and victimisation and that:

  a. No procedure had been followed.
  b. The reasons given for her dismissal i.e. budget and timescales “are completely out of the blue”.
  c. She was not given an opportunity to engage with the budget issue.
  d. She was not given a right of appeal.

231. The claimant also alleged that the dismissal letter had been backdated upon receipt of the letter of 1 August 2018 and this was part of the same pattern in which the letter extending her probation had also been backdated. She alleged that this “raises serious concerns about the internal governance, accountability and conduct of senior post holders within LBHF.” We have found that both letters were back-dated.

232. Although the respondents’ amended grounds of resistance refer to ongoing correspondence with the claimant in relation to this, and, the second respondent’s evidence was that she took advice from HR and Legal and decided to deal with this under the modified grievance procedure as a post-employment grievance, we were not taken to any documents substantiating this and we find that the respondents did not deal with the claimant’s grievance or appeal. Nor did they adduce any evidence to explain this failure.

<u>The claimant’s pay in August 2018</u>

233. As the dismissal letter had warned, the first respondent recovered an outstanding overpayment from her final salary. This meant that the claimant did not receive any pay in her final month.

234. In March 2018 the claimant received a delayed payment for overtime and reimbursement of expenses from RBKC. Mr Grimley emailed her on 6 April to explain that this had been paid via the Council’s payroll. He advised the claimant that both councils would need to make adjustments to HMRC under their respective employer codes and the claimant would need to check her P45 / 60s for the 2017/18 tax year, there was a risk that HMRC would assume that she had been paid the same amount twice i.e. by each employer and this could also impact on her tax code. The claimant replied that she had been in regular contact with HMRC, they had made this assumption, her tax code had been affected and she needed help understanding the figures in order to resolve this issue with HMRC. Mr Grimley replied that the claimant had been paid the correct amount and in relation to the “tax code / correct tax issue” the best thing to do was to complete her tax return for 2017/18. The email exchange between the claimant and Mr Grimley was amicable and he offered support.

235. A second pay issue related to the market supplement. The claimant was entitled to an one-off annual payment of £5,800. She was instead paid this amount in each month from February to May 2018 (the February pay

included back-payments of this supplement for November 2017 to January 2018). This resulted in a total net overpayment of market supplement of £15,133.58. Although the claimant did not have access to her payslips at the time, this overpayment was confirmed by the first respondent on 27 June 2018 [2440].

236. The claimant replied on 6 July 2018 [2444-5] to explain that there remained inconsistencies in relation to data on earnings and tax. She suggested that her earnings had been overstated by the first respondent with the tax office so that she had been overtaxed and/or had an excessive tax liability. There were overpayments in both tax years and the payment for the additional hours worked at RBKC impacted on these calculations. At 2.54pm Mr Grimley emailed the claimant to offer to pause this overpayment issue until she returned.

237. The claimant does not dispute this market supplement overpayment but says that because of the lack of clarity in relation to earnings and tax she was unable to understand definitively what the correct pay position was. The claimant did not say what sum was properly payable to her in her final salary payment.

238. We find that there was an overpayment of £15,133.58 which exceeded the claimant's final salary in August 2018 based on a date of termination of 9 August and a payment in lieu of one month's notice and her monthly gross pay of £10,416.67.

## Conclusions

### Disability

239. We find that the claimant was disabled by reason of ADHD and PTSD / other psychological symptoms at all relevant times. These were mental impairments which had a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities.

240. The parties instructed their own medical experts: Dr David Oyewole, Consultant Psychiatrist, for the claimant; Dr Michael Isaac, Consultant Psychiatrist, for the respondents. These experts produced a Joint Statement. We considered this Joint Statement, the individual expert reports of Dr Oyewole and Dr Isaac, the claimant's disability impact statement, the evidence given by Dr Kocsis and the medical documents we were taken to.

<u>ADHD</u>

241. In their Joint Statement, the experts agree that the claimant's ADHD is a mental impairment which has had an adverse and substantial long-term effect on the claimant's day to day activities [2912]. The claimant was diagnosed as having ADHD in November 2016. It is a lifelong condition which she has managed since her diagnosis with medication and by having regular reviews at an Outpatients Clinic.

242. We accept the claimant's unchallenged evidence in her disability impact

statement [2745-54] that this mental impairment affects her concentration, focus, short-term memory, her ability to manage emotions, her appetite and sleep, and social relationships.

PTSD / other psychological symptoms

243. The claimant was diagnosed with PTSD in October 2017 when she began talking therapy and EMDR which continued for around 12 months. We have found that the claimant told the second respondent that she had "secondary PTSD" on 13 November 2017. In a letter dated 25 November 2019 Dr Kocsis referred to "complex PTSD" [2790-1]. We remind ourselves that it is necessary for the claimant to identify and prove a mental impairment and not a particular clinical diagnosis or label.

244. Whilst they do not agree that the claimant has PTSD the experts agree [2912] that she has reported symptoms that echo PTSD and the

> "adverse psychological reaction" to events related to the Grenfell Tower fire has "incorporated depressive symptoms and represented a pathologically amplified psychological reaction to the claimant's predicament".

They note that this condition has improved "to a degree and that she has been prescribed an antidepressant" [2913].

245. The claimant's disability impact statement does not deal with PTSD because of the respondents' initial concession on disability status which was subsequently withdrawn. We accept the claimant's evidence that she has had panic attacks since August 2017. We find that from this date she had a mental impairment which had a substantial adverse impact on her daily activities which was likely to last for more than 12 months. We find from that date, the claimant had a predisposition to a "pathologically amplified reaction" to triggers which has resulted in panic attacks, flashbacks and intrusive thoughts. We find that during this flashbacks the claimant is overwhelmed and ceases to function in her normal way. We accept Dr Oyewole's opinion that [2779]:

> "Symptoms of PTSD, anxiety and depression would have affected her ability to concentrate, be organised and be productive, deal with her parental requirements, with feelings of being overwhelmed by the activities she would normally have handled."

Knowledge of disability

246. We find that the first respondent had knowledge of the claimant's disabilities when she completed the EHQ on 31 October 2017 and discussed them with OHU the next day. We find that the second respondent had knowledge of the claimant's PTSD / psychological symptoms on 13 November 2017 and ADHD on 20 April 2018.

**Disability discrimination, harassment, victimisation**

The meeting on 2 May 2018

*Direct discrimination (para 37(1)) / Harassment*

247. We uphold the harassment complaint in relation to issues (a), (c) and (d).

248. We have found that issues (b), (e) – (i) fail on the facts.

249. We have found that (a), (c) and (d) occurred. We find that this was unwanted conduct which was related to the claimant's ADHD. We have found that the claimant felt she had suffered the proscribed effect as a result of this conduct; she felt humiliated and offended. We find in the circumstances of the discussion on 2 May it was reasonable for the conduct to be regarded by her as creating an adverse environment for her. For completeness, whilst we have found that the second respondent's conduct had this effect we do not find that she acted deliberately to harass the claimant.

250. It is not therefore necessary for us to make findings in relation to the direct discrimination complaint.

The probationary extension

*Direct discrimination (para 37(2))*

251. We uphold this complaint.

252. It is agreed that the claimant's probation was extended by three months. This was a detriment. The factual issues (a) and (e) are agreed. We have found that issues (c) and (d) also occurred. In relation to (b) we have found that the second respondent provided the claimant with limited feedback which was neither in accordance with the Probationary Policy nor warranted an extension of the claimant's probation. Therefore, issue (b) is also upheld.

253. We have found that the claimant first knew about this extension on 19 May 2018.

254. We find that the claimant has established a prima facie case that this treatment could have been because of her disabilities:

    (1) We have found that the second respondent did not discuss the claimant's probation with her on 2 May.
    (2) There was no documentary evidence which substantiated the second respondent's case to the contrary. In fact, we have found that the terms of the extension letter dated 10 May and the termination letter dated 31 July are more consistent with the absence of any discussion about the claimant's probation and extension on 2 May.
    (3) We have also found that on 2 May, the second respondent had neither decided or intended to extend the claimant's probation.
    (4) We have also found that the second respondent had not scheduled a formal meeting with the claimant to discuss her probation in the limited time remaining of the probation period.

(5) We found that the second respondent failed to follow the provisions or spirit of the Probationary Procedure in relation to the claimant.

(6) We also found that the second respondent took this decision on 3 May, following the commencement of the claimant's sick leave which she knew was likely to extend beyond the date when the probationary period was due to end.

(7) We have found that the second respondent was concerned on 1 November 2017 about the claimant's apparent fragility in relation to PTSD. She also queried whether the claimant had the resilience because of her PTSD to the deal with the Council's response to major emergencies.

(8) The second respondent's focus on ADHD and the comments she made to the claimant about this on 2 May revealed her lack of knowledge and understanding about this condition and her concern about it.

(9) It is likely that when she made the decision to extend the claimant's probation on 3 May the second respondent understood that the claimant's attendance at A&E and sick leave were or could have been related to PTSD and ADHD.

(10) We have found that in giving evidence to the contrary, particularly, that she told the claimant she was extending her probation on 2 May, the second respondent sought to rely on facts which she knew not to be true. We draw an adverse inference from this.

(11) We have also found that in giving evidence to support the second respondent's narrative in contradiction to his own near-contemporaneous account, Mr Grimley also sought to rely on facts which he knew not to be true. We draw an adverse inference from this.

(12) We take account of our findings that the extension and termination letters were back-dated and in both cases this was deliberately misleading because it concealed the actual date when each letter was competed and signed. We have found these steps were taken by or on the second respondent's behalf with her knowledge and consent. We have also found that she gave deliberately misleading evidence in relation to these facts. We draw an adverse inference from this.

(13) We also take account of our finding that the termination letter deliberately omitted any reference to the claimant's sick leave or her disabilities in the termination letter in circumstances in which the second respondent was evidently concerned about the prospect of the claimant complaining that this was linked to her PTSD or ADHD. We draw an adverse inference from this.

255. In these circumstances the burden shifts to the respondents to establish that this decision was in no sense whatsoever because of one or both of the claimant's disabilities. Because of our findings that the second respondent had neither decided nor intended to extend the claimant's probation on 2 May we do not accept the respondents' evidence that this decision, made on 3 May, was because of concerns about the claimant's performance. We have found that but for the claimant's disability-related sickness absence from 3 May, the second respondent would have confirmed the claimant in post on 11 May because there were no performance concerns which warranted a probationary extension. The respondents have not therefore

discharged this burden.

*Harassment*

256. It is not therefore necessary for us to make findings in relation to the harassment complaint.

*Discrimination arising from disability (para 39(1))*

257. We also uphold this complaint. We find that the decision to extend the claimant's probation was unfavourable treatment which was related to the claimant's disability-related sickness absence. We have found that the second respondent had neither intended nor decided to take this step on or before 2 May. We have found that but for the claimant's disability-related sickness absence from 3 May, the second respondent would have confirmed the claimant in post on 11 May. We have also found that the reason for this extension was not because of the claimant's performance and we do not therefore find that the aim relied on by the respondent was applicable.

<u>The second respondent's repeated attempts to meet with the claimant</u>

*Direct discrimination (para 37(3))*

258. This complaint fails because we have found that the respondents have provided cogent non-discriminatory reasons for this treatment. We have found that the second respondent contacted the claimant on 24 May and twice on 24 July 2018 to arrange a meeting with her because the claimant was on sick leave for an extended period and the claimant was a member of the SLT, and the director of a newly established and high-profile department, and she had not initiated contact in the intervening period. In respect of the second date of contact, we have also found that this related to the intention to discuss the claimant's ongoing employment because she was coming to the end of her extended probationary period. We find that the second respondent would have acted in the same way towards another person who was in materially the same circumstances as the claimant save for the claimant's disabilities.

*Discrimination arising from disability (para 39(2))*

259. This complaint fails. Although we find that this was unfavourable treatment which was related to the claimant's disability-related sickness absence, we also find that the aim of this treatment was to maintain contact with the claimant during her sickness absence which was a legitimate one. We find that the steps taken by the second respondent to contact the claimant to arrange a meeting were a proportionate means of achieving this aim.

*Failure to make adjustments (paras 41(3) & 42(3))*

260. This complaint fails. Although we find that the PCP at para 41(3) was operative and applied to the claimant, we do not find that the claimant has established that this put her a substantial comparative disadvantage. Even had we concluded this, we would not have found that the adjustment

contended for at para 42(3) was a reasonable one because of the open-ended and therefore indeterminate nature of it. The practical effect of the proposed adjustment would have meant that the respondents could not arrange to meet the claimant whilst she remained on sick leave regardless of its duration. It was also relevant that the claimant was in a senior role with responsibility for a high-profile and newly established department. We do not therefore find that the step contended for was practicable in the circumstances.

*Harassment*

261. This complaint fails because we do not find that the second respondent's conduct (para 37(3)) or the failure to make the adjustment contended for (para 42(3)) were related to the claimant's disabilities. Nor, had we been required to make findings on this, would we have concluded that this conduct had the purpose or effect of violating the claimant's dignity or of creating an adverse i.e. harassing environment for her.

<u>The refusal to deal with the claimant's grievance dated 1 August 2018</u>

*Direct discrimination (para 37(4)) / Discrimination arising from disability (para 39(3)) / Failure to make adjustments (paras 41(4) & 42(4)) / Harassment*

262. These complaints fail on the facts because the 1 August 2018 letter was not a grievance. Although it was headed "holding grievance" it had the express purpose of putting the respondents on notice that the claimant intended to submit a formal grievance at a later date and to request that the status quo was protected in the meantime. This letter did not therefore require the respondents to address the complaints it alluded to.

<u>The claimant's dismissal</u>

*Direct discrimination (para 37(5))*

263. This complaint is upheld.

264. We have found that the second respondent made the decision to dismiss the claimant on 31 July. The claimant was neither warned that she was at risk of dismissal nor given any opportunity to make representations before this decision was taken. Nor was she given any opportunity to appeal. The dismissal letter made no reference to a right of appeal and when the claimant submitted one it was not dealt with.

265. We find that the claimant has established a prima facie because our findings that:

    (1) The second respondent was concerned on 1 November 2017 about the claimant's apparent fragility in relation to PTSD. She also queried whether the claimant had the resilience because of her PTSD to the deal with the Council's response to major emergencies.
    (2) The second respondent's focus on ADHD and the comments she made to the claimant on 2 May revealed her lack of knowledge and

understanding, and her concern about this condition.

(3) The second respondent understood that the claimant's attendance at A&E on 2 May and subsequent sick leave related to her disabilities.

(4) The decision to extend the claimant's probation was because of and arose from her disabilities.

(5) Mindful of the high-pressure nature of the role, the second respondent and Mr Grimley questioned whether the pressure would be too great for the claimant if she returned to work.

(6) Mr Grimley also concluded that raising any performance issues with the claimant would be likely to exacerbate her mental health.

(7) Before deciding to dismiss the claimant, the second respondent instructed Mr Grimley to review the claimant's OHU file for references to her disabilities and noted the risk that the claimant would complain about her dismissal because of their discussion on 2 May.

(8) The failure to follow any formal process including with reference to the Probationary Policy and Sickness Absence Policy.

(9) The adverse inferences we have drawn in relation to the evidence given by the second respondent and also Mr Grimley, the back-dating of the probationary extension and dismissal letters and the deliberate omission of any reference to the claimant's sick leave or disabilities in the termination letter.

266. In these circumstances the burden shifts to the respondents to establish that this decision was in no sense whatsoever because of one or both of the claimant's disabilities. Whilst we have accepted that the second respondent did have concerns about the PSR department by the date she decided to dismiss the claimant we do not find that this was the sole reason or the only significant or effective reason for this decision. We take account of the absence of any contemporaneous evidence substantiating what these performance concerns were at the relevant time, the lack of process, the failure to communicate with the claimant, and the limited reasons set out in the termination letter and the adverse inferences we have made in relation to the second respondent's and Mr Grimley's evidence. We find that the respondents have not discharged this burden. We find that a hypothetical comparator who did not have the claimant's disabilities would not have been dismissed in the same circumstances.

*Harassment*

267. It is not therefore necessary for us to make findings in relation to the harassment complaint.

*Discrimination arising from disability (para 39(4))*

268. We uphold this complaint.

269. We find that dismissal was unfavourable treatment which was related to the claimant's disability-related sickness absence. We find that the reason why the respondents dismissed the claimant without any formal process was because she was on sick leave. As Mr Grimley conceded, the claimant's probation would not have been extended without any discussion or formal process if she had not been on sick leave. We find that the same is

applicable to the claimant's dismissal. She was neither warned that she was at risk of dismissal nor given any opportunity to make representations before this decision was taken. Nor was she given any opportunity to appeal. A second factor was the uncertainty about the duration of the claimant's ongoing disability-related sickness absence which we have found meant that the respondents discounted the option of a further extension to the probationary period. They did so without input from OH or the claimant's doctors and therefore without establishing the claimant's prognosis, the likely duration of her sickness absence and her ability to return to her role with or without adjustments. Had the claimant remained at work, it is likely the claimant would have had the opportunity to address any concerns about the PSR department or her performance and the second respondent would have been required to identify which areas of the claimant's performance required improvement together with agreed objectives and timelines. None of this happened because the claimant was on sick leave and the prognosis remained unclear.

270. As to proportionality, the respondents failed to give adequate consideration to the alternative option of extending the claimant's probation for a further period. As the second respondent noted in her email of 29 July, she had little time to make a decision which limited her options. They have not therefore discharged the burden on justification.

*Failure to make adjustments (paras 41(6) & 42(8))*

271. This complaint fails because we have found that the decision to dismiss the claimant was because of and arose from her disabilities. The PCP contended for was not therefore operative.

*Victimisation (para 45)*

272. This complaint fails because of our finding that the first respondent made the decision to dismiss the claimant before she went on leave on 31 July which predated the claimant's protected act on 1 August.

<u>The failure to respond to the claimant's further grievance and appeal dated 15 August 2018</u>

*Direct discrimination (para 37(6))*

273. This complaint fails. Although we have found that the respondents' failed to respond to the claimant's grievance and appeal we do not find that the claimant has established a prima facie case that this detrimental treatment could have been because of one or both of the claimant's disabilities. The claimant was no longer employed by the first respondent and the first respondent had already refused to correspond to her solicitors. We find that a hypothetical comparator would have been treated in the same way.

*Discrimination arising from disability (para 39(5))*

274. This complaint is fails because the claimant was no longer on sick leave on 15 August 2018.

*Failure to make adjustments (paras 41(7) & 42(9))*

275. This complaint fails because the claimant has failed to show that the PCP was applied to her because she was no longer on sick leave on the relevant date.

*Harassment*

276. This complaint fails because we do not find the second respondent's conduct (para 37(6)) or the failure to make the adjustment contended for (para 42(3)) were related to the claimant's disabilities.

**Protected disclosures, detriment and dismissal**

277. This complaint fails.

278. We do not find that the concerns which the claimant says she raised in relation to GDPR compliance, employment duties and health and safety amounted to qualifying disclosures because the claimant has failed to establish that these were disclosures of information. We were not taken to any documents nor did the claimant lead any evidence on this.

279. Nor do we find that the concerns which the claimant raised about member behaviour, contractual arrangements and governance for shared services, amounted to qualifying disclosures because: we have found that the information disclosed did not identify any legal obligations and nor was this patent; the claimant did not lead any evidence on her subjective belief that this information tended to show that the first respondent was likely to fail to comply with a legal obligation (or that she made this disclosure in the public interest); we do not infer from the content of these disclosures that the claimant had a subjective belief that they tended to show this likely failure; and even had we found that the claimant had such a belief we would not have concluded that this was reasonably held because this information did not identify a legal obligation.

280. In relation to the concerns which the claimant raised about breach of contract and notice periods, we find that these were disclosures of information in which the claimant was identifying potential breaches of contract by Bi-borough and not by the first respondent. We do not find that these disclosures tended to show that the first respondent was likely to fail to comply with a legal obligation. Once again, the claimant did not lead evidence on her subjective belief. For the same reasoning set out above in paragraph 279, we do not find that she had a subjective belief and even had we found this we would not have concluded it was reasonably held.

281. In relation to the concerns which the claimant raised with the PSR budget, whilst we have found that the claimant was concerned about the funding shortfall and the capacity of PSR to deliver the same services that it had provided under the Tri-borough arrangement, we have found that in only one of the disclosures relied on, dated 2 February 2018, did she identify with sufficient specificity that there was a risk of a funding shortfall for services. We therefore find that the claimant had a subjective belief that this disclosure tended to show that the first respondent was likely to fail to

comply with a legal obligation and we also find it likely that the claimant felt that this was made in the public interest. We find in both cases that this subjective belief was reasonable. In relation to the other disclosures, even had the claimant such a subjective belief we would not have found that this was reasonable (for the same reasoning set out above in paragraph 279). In respect of the 2 February 2018 email which we find to be a protected disclosure in that it was a qualifying disclosure which was made to the second respondent, and for completeness, the other disclosures in this category which the claimant also relies on, we do not find that she has shown that they were causative of the impugned conduct we have upheld. Although the claimant says that because she raised these concerns she was viewed as confrontational and lacking in collegiality, she did not say in what way, each of the specific disclosures which are relied was causative of the conduct we have upheld and she did not put her case to the respondents' witnesses on causation.

282. For completeness, we also deal with the 1 August letter although this was not listed at paragraph 44 of the claimant's witness statement nor Appendix 1 of the claimant's closing submissions because it was not formally withdrawn. The claimant led no evidence on her subjective belief and nor did she put her case to the respondents' witnesses on causation. However, even were we to find that this was a protected disclosure, the impugned conduct we have upheld preceded this letter and it cannot therefore be causative of this conduct.

**Unauthorised deductions from wages / Breach of contract**

283. This complaint fails because:

   a. We have found that there was an overpayment which exceeded the claimant's final salary in August 2018.
   b. Notwithstanding the lack of clarity around the claimant's tax liability, this deduction amounted to an excepted deduction for the purposes of section 14(1)(a) ERA.
   c. The first respondent did not breach the claimant's contract when it made this deduction to clawback the outstanding overpayment.

**ACAS Code of Practice**

284. We have found that the first respondent failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures in relation to the claimant's dismissal and her appeal against dismissal dated 15 August 2018, and grievance of the same date. The first respondent failed to deal with the grievance. In relation to dismissal, the claimant was not informed of the alleged poor performance under consideration nor warned that she faced dismissal nor invited to a meeting nor given any opportunity to make representations nor afforded the right to appeal. We have also found that the reasons given for this decision were limited and unclear. The respondents failed to provide an explanation for these comprehensive failures. We therefore find that this non-compliance was unreasonable.

285. The issue of whether it is just and equitable to increase any relevant compensatory award made, and if so, by what percentage, under section

207A of the Trade Union & Labour Relations (Consolidation) Act 1992, shall be determined at the remedy hearing.

## Remedy

286. A preliminary hearing will be held to list a remedy hearing and make any necessary case management orders.

287. I would like to apologise to the parties for the lengthy delay in promulgating this reserved judgment.

_______________________________________

**Employment Judge Khan**

**05.11.2021**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

05/11/2021.

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FOR EMPLOYMENT TRIBUNALS