EMPLOYMENT TRIBUNALS

Claimant:	Ms X
Respondent:	Wellspring Academy Trust
Heard at:	Leeds Employment Tribunal
Before:	Employment Judge Deeley, Mrs V Griggs and Mr A Senior
On:	29 and 30 November and 1, 2 and 3 December 2021
Representation	
Claimant:	Days 1 and 2: Mr D Barmby (Claimant's partner) Days 3-5: In person
Respondent:	Mrs A Gray (Solicitor)

RESERVED JUDGMENT

(ANONYMISED VERSION – 6 JANUARY 2022)

1. The claimant's claim of unfair dismissal under s98 of the Employment Rights Act 1996 succeeds and is upheld.
2. The claimant's claim of direct race discrimination under s13 Equality Act 2010 fails and is dismissed.
3. The claimant's claim of harassment relating to race under s26 Equality Act 2010 is fails and is dismissed.
4. The claimant's claim of failure to make reasonable adjustments under s20 and s21 Equality Act 2010 fails and is dismissed.
5. The claimant's claim of victimisation under s27 Equality Act 2010 fails and is dismissed.

INTRODUCTION

Tribunal proceedings

1. This claim was case managed by Employment Judge Little at two Preliminary Hearings on 22 July 2020 and 22 January 2021. Employment Judge Little decided that the time limit for the claimant's first Employment Tribunal claim (relating to race and disability discrimination) would be extended such that the time limit ran from 25 September 2019.
2. We considered the following evidence during the hearing:
   2.1 a joint file of documents and the additional documents referred to below;
   2.2 witness statements and oral evidence from:
      2.2.1 the claimant; and
      2.2.2 the respondents' witnesses:

Name	Role at the relevant time
1) Mrs Sue Wadsworth	HR Manager until July 2018, then Senior Office Manager
2) Ms Molly Selwood	Apprentice
3) Mrs Andrea Wilcock	HR Business Partner
4) Ms Sarah Wilson	Headteacher of Joseph Norton Academy until 1 April 2020, then Executive Principal of Greenacre School

3. The respondent also submitted a witness statement from Ms Rachel Scargill, however Ms Scargill did not attend the hearing. We understand that this was because Ms Scargill no longer works for the respondent.
4. We also considered the written submissions provided by the respondent's representative and oral submissions from both representatives.
5. We asked both parties if they wished to make any applications under Rule 50 of the Tribunal Rules (and explained what those might consist of e.g. applications for anonymity and restricted reporting orders), due to the nature of the claimant's medical information that may be included in this Judgment. We asked that any applications were made within 7 days of the final day of the hearing.

Adjustments and events during the hearing

6. We asked the parties if they wished us to consider any adjustments to these proceedings. Neither requested any adjustments. We also noted that the parties and the witnesses could request additional breaks at any time.
7. Various unfortunate and unexpected events took place during the hearing:
   7.1 this hearing was originally due to last four days. It quickly became apparent on the first day of the hearing that additional time would be required. The

parties and their representatives confirmed that they were available on the morning of Friday 3 December 2021 (the respondent's representative was not available that afternoon due to another Tribunal hearing). We extended the hearing time for this claim by an additional day (with the provision that the afternoon would be reserved for the Tribunal panel's deliberations);

7.2 the claimant and Mr Barmby's daughter was ill during the hearing and we adjusted the timings of the first day of the hearing to enable them to make alternative childcare arrangements;

7.3 Mr Barmby represented the claimant for the first two days of the hearing. Unfortunately Mr Barmby fell ill and it was not clear at that point in time whether he would be able to represent the claimant for the remainder of the hearing. The claimant said that she would prefer Mr Barmby to represent her but was willing to represent herself in his absence from the next day. The respondent said that they would prefer to continue with the hearing. We considered matters and the risk that additional delay may prevent us from completing the evidence and submissions during the week. We decided to provide the claimant a three hour break on the morning of the third day of the hearing to provide her with time to prepare for her cross-examination of the respondent's witnesses that afternoon. The parties agreed with this course of action; and

7.4 the claimant informed the Tribunal on the afternoon of Friday 3 December 2021 (i.e. after the parties had concluded their submissions and the Tribunal panel were carrying out their deliberations) that her father was sadly taken ill on the evening of Thursday 2 December 2021 which had affected her ability to prepare for the closing submissions. The claimant stated that she did not want to mention this issue during the hearing and did not raise any further points regarding the respondent's written submissions. We noted that we provided the claimant with additional time on the morning of Friday 3 December 2021 to read the respondent's written submissions and that the claimant was able to provide around 20 minutes of oral submissions.

CLAIMS AND ISSUES

8. The claimant describes herself as being of Eastern European ethnic origin for the purposes of her race discrimination and harassment complaints.

9. The respondent accepted that the claimant is disabled for the purposes of s6 of the Equality Act 2010. However, the respondent disputed knowledge of her disability at the material times.

10. The claimant brings complaints of:

10.1 direct race discrimination;

10.2 harassment relating to race;

10.3 failure to make reasonable adjustments;

10.4 victimisation (relating to her dismissal); and

10.5 ordinary unfair dismissal.

ISSUES

11. Employment Judge Little set out a list of issues in his preliminary hearing summary of 22 January 2021.

12. We provided the parties with an amended draft list of issues at the start of this hearing. We discussed this with the parties in detail at the start of the hearing and provided them with an updated draft list of issues which was agreed on the afternoon of the first day of the hearing.

13. **The agreed list of issues is set out at Annex 1 to this Judgment.**

FINDINGS OF FACT

Context

14. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

15. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the *Gestmin* case:

> *"Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

16. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

17. The respondent is a Multi-Academy education trust, responsible for around 23 schools in the Barnsley and other areas. The claimant was initially employed as a Teaching Assistant by Barnsley Council from 4 February 2013, working at Greenacre School. Her employment transferred to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 in 2017. The claimant

was dismissed by the respondent with payment in lieu of notice with effect from 23 July 2020.

18. The respondent's staff and managers relevant to this claim included:

Name	Role at the relevant time
1) Mrs Sue Wadsworth	HR Manager until July 2018, then Senior Office Manager (and claimant's line manager)
2) SS	Claimant's original line manager
3) AP	Claimant's line manager from around 2015 until July 2018, then Operations Manager
4) Ms Molly Selwood	Apprentice – employed by respondent from 1 January 2019 onwards
5) Ms Rachel Scargill	Cover Supervisor
6) LL	Claimant's maternity cover from September 2017 to June 2018, General Administrator (part time working Wednesday to Friday) from June 2018 to October 2018, Programme Administrator from November 2018 to May 2019
7) TM	Programme Administrator
8) DL	Receptionist
9) VS	Supporting receptionist
10) MR	Supporting receptionist
11) TB	Supporting receptionist
12) JG and MW	Business Managers
13) SP	Assistant Headteacher, Greenacre School
14) DT	Assistant Headteacher, Greenacre School
15) Ms Sarah Wilson	Headteacher of Joseph Norton Academy until 1 April 2020, then Executive Principal of Greenacre School
16) Mrs Andrea Wilcock	HR Business Partner

Claimant's redeployment to Greenacre's office

19. The claimant suffered an injury to her back during 2014 which she stated related to restraining a pupil at Greenacre. She was redeployed on a temporary basis into Greenacre's office, carrying out administrative duties. Greenacre offered the claimant a permanent administrative role with effect from 1 April 2015. The claimant's statement of written particulars stated:

"You have been appointed to the post of General Administrator with effect from 01.04.15.

Your standard hours of work are 33 during term time…

The substantive grade for your job is within Grade 2. You are appointed on point 11.

Employees who are eligible will be awarded incremental progression annually, currently on 1st April until they reach the top of their grade…The decision in respect of incremental progression will be made by the Governing Body…"

20. The claimant was paid at a Grade 2 (SCP11) rate for her role. She worked 33 hours per week during term times. By way of contrast, full time administrative staff who were recruited directly into the role worked 37 hours per week and were required to work for three weeks of the school holidays during each school year. The claimant did not receive a job description for her role at any time during her employment.

21. The claimant reduced her working hours on two occasions. The second occasion was after her maternity leave in 2018. She returned to work and worked 12.5 hours over two days per week (initially on Thursdays and Fridays, but later on Mondays and Tuesdays from 2019).

22. We note that the claimant had multiple absences due to back pain from 2014 to 2018. We note that her absence total may have been higher, but for the fact that the claimant worked reduced hours. For example, the claimant stated in her return to work form in September 2018 that her symptoms lasted for around a week.

23. We were also provided with documents in the hearing file during which the claimant discussed the following symptoms with the respondent.

Event (date)	**Information disclosed**
Fit notes (early 2014)	States claimant's absence due to low back pain and sciatica and suggests amended duties on return to work.
Occupational health report (31 March 2014)	***Description of relevant medical Issues:*** *[X] reports a history of low back pain and sciatic like symptoms in her left leg as a possible consequence of work activity. [X] is currently treating symptoms with simple analgesia with only a moderate effect at this time…* ***Current capacity:*** *On attendance [X] is describing symptoms and demonstrating a restricted range of movement at her trunk consistent with the nature of her condition. Whilst issues of pain management and impaired movement and function remain I would anticipate that [X] will be unfit to return to her usual role.* ***Outlook:*** *I have advised [X] to obtain from her General Practitioner a prescription for stronger analgesia. [X] would also benefit from early referral to physiotherapy for further functional intervention. I*

	understand that referral to physiotherapy is available from her employer and would be grateful for your cooperation in making that referral. [X]'s condition should not necessarily bar her from returning to work activity once her pain is manageable and her core strength and stability improve and reasonable adjustments can be made to help facilitate her return to work. ***Adaptations:*** *[X] is presently employed as a Level 1 Teaching Assistant …Many of the students in [X]'s groups may require assistance with complex needs or physical cares requiring handling equipment such as hoists and mobility frames and other aids. Many of [X]'s students may demonstrate challenging behaviours requiring some form of team teaching or restraint.* *It is possible that a return to such work may contribute to further exacerbation of symptoms…[X] should certainly avoid any participation in physical restraint procedures whilst experiencing any acute symptoms and until fuller recovery occurs. I would also advise that [X] avoids any work activity that may require to assume awkward or sustained or static postures or movements outside of her current comfortable range of movement until fuller recovery occurs.*
Respondent's letter of 19 May 2014	Offers the claimant 'medical redeployment' to the admin team, following on from the claimant's four week period of light duties.
Return to work form (28 April 2014)	*"I hurt my lower back and ended up with sciatic pain which ran from my back down to the toes. I was unable to walk properly, lift or do anything strenuous. It started in Jan 2014 and is only just improving…* *[X] is currently on a phased return Mon-Fri doing light duties…"*
Letter from JG at the respondent re the claimant's health (20 June 2014)	*"You are presently working within the administrative team at Greenacre as part of a medical redeployment…* *You made* [it] *clear that you continue to experience back pain through working in this role, but explained that you experienced this pain irrespective of your working environment.* *We discussed the upcoming medical telephone appointment…and the MRI scan you hoped would follow.* *In light of your preference to continue this redeployment, it was agreed to extend this to 31 October 2014…*

	IN the meantime, please continue to discuss your workload and medical position with myself and SS. We will seek to adjust your duties to ensure variety of activity within the course of a given day/week. *Please do remember that…you may use Greenacre's Faith Room to undertake stretching and other pain-relieving exercises. If you feel additional physiotherapy treatment would assist your condition, do inform me…"*
Return to work form (30 June 2014)	Refers to *"ongoing back problems, sciatica, leg/toes went number, was limping in pain, back was inflamed".*
Fit note (17 March 2015)	Refers to low back pain and sciatica.
Return to work form (23 March 2015)	Refers to *"ongoing back problems and sciatica, inflammation of the lower back, strong painkillers causing drowsiness…* *…I was experiencing acute back pain throughout the week commencing 9.3.15 and when I woke up the next morning I couldn't straighten my back, had severe pain, restricting my movement for several days"*.
Fit note (26 September 2016	Refers to back pain.
Return to work form (11 October 2016)	Refers to back pain and sciatica. Also refers to: *"Experienced severe back pain and sciatica down left leg. Symptoms got worse – losing feeling in both legs. Stronger painkillers prescribed, awaiting physio….Referring for X-ray and physio…"*
DSE assessment arranged by Mrs Wadsworth (December 2016)	Cover letter dated 1 December 2016: *"As you know [X] has a longstanding history of low back pain and sciatic symptoms in her left leg currently treated conservatively. [X] would not be considered unfit for work provided she remains mindful of her current limitations and capabilities, is prepared to modify certain movements and behaviours in order to reduce risk and if certain reasonable adjustments can be made to help maintain her at work. It is unlikely that the Equality Act will apply but that would be for a court of law alone to determine."* Report refers to equipment required (specific chair and stepladder with handrail) to avoid exacerbating claimant's symptoms. Report also suggests that the claimant avoids filing whilst seated due to the twisting that this would involve.

2017 and 2018	Further fit notes and return to work forms and sickness absence meeting re back pain – please refer to findings set out below.

2015 – 'alphabet/degree' comment

24. The parties agree that Mrs Wadsworth made a comment to the claimant in front of their colleagues in the office during 2015 using the wording: *"Can't you even do the alphabet right, I thought you had a degree?"*. Mrs Wadsworth did not recall using the words 'even' and 'right' as part of that comment. However, we have concluded that claimant's recollection of the comments was correct because it was consistent with the note of this complaint in the grievance hearing.

25. The claimant did not raise this matter until she was asked to give an example of Mrs Wadsworth's conduct towards her during the grievance hearing on 13 March 2020 (which we consider in more detail later on in this judgment).

26. Mrs Wadsworth stated that she was aware that the claimant had a psychology degree from the same University as JG (Business Manager) because they had discussed their university experience whilst she was in the office. Mrs Wadsworth said that the context of the comment was as follows:

    26.1 the claimant had been asked to re-order the filing cabinets, to make room for new files. The claimant was moving pupils' files across and re-labelling the cabinets, but had misplaced some of the files;

    26.2 the senior leadership team had urgently requested a pupil's document from the file and Mrs Wadsworth was unable to find the file;

    26.3 all of the office, including the claimant, helped Mrs Wadsworth to look for the file;

    26.4 the claimant became upset and her colleagues sought to reassure her, saying that they all made mistakes;

    26.5 Mrs Wadsworth then made a joke, using the words alleged, in an effort to lighten the mood. The claimant and her colleagues laughed along;

    26.6 Mrs Wadsworth did not speak to the claimant's manager or take any other action because the matter had been resolved.

27. Mrs Wadsworth stated during her evidence that it was an 'ill-advised' joke and that she would have explained that to the claimant if the matter had been raised.

28. The claimant disagreed with Mrs Wadsworth's evidence and stated that:

    28.1 she had never told Mrs Wadsworth about her degree;

    28.2 the claimant believed that the reason that Mrs Wadsworth made this comment was related to her race and, in particular, the fact that English was not her first language and that the English (i.e. the Roman) alphabet was not her first alphabet (i.e. the Cyrillic alphabet); and

28.3 she did not state during her grievance hearing that she thought Mrs Wadsworth's comment was linked to her race because she was 'so nervous' during the hearing.

29. We concluded that Mrs Wadsworth was aware that the claimant had undertaken a degree because she had overheard the claimant's discussions with JG in the office. The claimant did not dispute the fact that she had discussed with JG their experiences of attending the same University. We also accepted Mrs Wadsworth's evidence that the comment was an ill-advised joke and that she was not aware that the claimant's first alphabet was the Cyrillic alphabet.

Claimant's duties

30. The claimant's main duties in her role of General Administrator included:

30.1 filing of documents relating to pupils, staff and other school matters;

30.2 answering the office phone;

30.3 receiving and distributing mail;

30.4 franking and recording outgoing post;

30.5 monitoring, replenishing and ordering stationary;

30.6 ensuring school forms were kept up to date and stocked in class and staff rooms;

30.7 assisting with arrangements for school trips, events etc.;

30.8 ad hoc reception duties; and

30.9 general administration tasks eg photocopying, faxing and emailing.

31. The claimant also assisted the respondent by acting as a Russian interpreter for families attending Greenacre if needed.

32. The claimant accepted during her oral evidence that she did not carry out many of the duties or tasks of Grade 3 or 4 administrators, such as:

32.1 finance or budget support;

32.2 clerking for governors or other meetings;

32.3 annual reviews; and

32.4 end of term reports.

33. From the time when she first worked in Greenacre's office in 2014 to early 2018, the claimant initially reported to SS and then later to AP from around 2015. At that time, Mrs Wadsworth was Greenacre's HR Manager and she was based in the same office as the claimant. The claimant was on maternity leave from 6 June 2017 and returned to work in June 2018. During the claimant's maternity leave, the respondent changed the way in which it organised its administration. The administrators were split into two offices. The claimant was based in the upstairs office. In addition, Mrs

Wadsworth had been appointed Senior Office Manager and was the claimant's line manager from September 2018 until her employment ended.

Claimant's back condition

34. The claimant suffered from pre-existing back problems when she started working for the respondent. Her back problems were exacerbated during an incident in 2014, during which she had to restrain a pupil. The claimant was redeployed to work in Greenacre's office on administrative tasks (initially on a temporary basis and later on a permanent basis from 2015 as set out earlier in this Judgment).

35. The respondent arranged for the claimant to have a DSE assessment in December 2016. The DSE assessment stated:

    35.1 a recommendation for an adjustable chair (which the respondent later obtained);

    35.2 changing the set up of the claimant's computer monitor;

    35.3 avoiding protracted periods of work at the computer;

    35.4 standing, squatting or kneeling to carry out filing rather than bending and twisting from a chair; and

    35.5 using a library step device with integrated handrail (rather than an elephant's foot device) to retrieve files from shelves (which the respondent later obtained).

36. The respondent carried out an informal sickness absence meeting with the claimant on 9 February 2017. The letter recording that meeting from DG stated:

    "The main points from the meeting were that you suffer from a bulging disc to your back and this leads to sciatic pain The pain is normally well controlled by yourself, you do the appropriate exercises and self-manage the pain but occasionally you do have to just rest. You have recently completed a course of physiotherapy organised by the school and currently you are also accessing physiotherapy through the NHS

    You have recently had a workplace assessment and during the assessment you were advised to kneel to file instead of sitting on a chair or bending. You have tried this but feel this causes you more pain, therefore you have been back in contact with Occupational Health who have advised that the report is a recommendation only and you have to continue with what you find comfortable The most effective way you have found to work is to stretch before filing and file for short periods of time enabling you have the time and space to stretch and stand when needed."

37. The claimant suffered from further short periods of back pain and sciatica in March and April 2017. AP completed a risk assessment with the claimant in March 2017 which stated: that the claimant would sit and rest if she needed a break from her work. The assessment recorded that she knew her "own limitations", that she should inform AP if she was having any difficulties and that she should not work at height. The respondent completed another maternity risk assessment in May 2017. The

assessment concluded that: *"[X] will contact [occupational health] regarding her chair".*

38. The claimant had one day's sickness absence on 20 July 2018 due to sciatica pain, shortly before Greenacre's summer holidays started. Mrs Wilcock held a return to work meeting with the claimant in September 2018 because this was the earliest time that the meeting could be arranged. They filled in a return to work form together. The claimant commented in the form:

    "Symptoms lasted approximately 1 week, however due to the pain medication, would have been fit for work as of Monday 23/7/18".

39. Mrs Wilcock commented:

    "[X] suffers flare-ups of pain associated with her sciatica and has been presented medication for this.

    We discussed triggers and the formal absence meeting process.

    Has previously been referred for OH assessment and knows limitations."

40. The claimant did not take any other absence due to back pain before she went on sick leave in September 2019. However, we accept her evidence that this was because she took medication to deal with any back pain and that she worked part time (two days per week) and was able to rest during the remainder of the week.

Early 2017 – grade review and new Grade 3 role

41. The claimant stated that she discussed a possible review of her job grade with her line manager (AP), in January or February 2017. The claimant said that she wrote a letter dated 23 January 2017, addressed to the clerk of governors, asking for her role to be re-graded. The claimant also prepared a list of her duties in February 2017 as part of this exercise. The claimant said that AP told her that she had spoken with Mrs Wadsworth and that any application for a re-grade would have to be considered first by HR.

42. Mrs Wadsworth that she had never seen the claimant's letter and that the respondent did not have a copy of the claimant's letter, whether on her personnel file or elsewhere. Mrs Wadsworth also stated that the letter would need to be considered by the governors' HR sub-committee and that the decision whether or not to review the claimant's job grade was not a decision that she would take.

43. We note that the claimant did not chase for a response to her letter to the governors with the clerk to the governors, AP, Mrs Wadsworth or anyone else. We accepted Mrs Wadsworth's evidence that she did not see a copy of the claimant's letter because it was not addressed to her and the claimant did not speak directly with her about the letter.

44. We note that the claimant referred in her evidence to an email from MW regarding a new grade three role. The claimant was not a party to this email, but Mrs Wadsworth forwarded it to the claimant when she asked the claimant to make arrangements for advertising the role. MW stated in that email:

"…we need to ensure there is sufficient differentiation to what we are pulling together compared to [X] on grade 2 or we quite rightly risk a challenge from her. We could reference providing assistance to annual review process and cover for function as required. Ideally we want them to cover any role across both offices."

45. The claimant was the only member of office staff employed on a grade 2 role throughout her employment, apart from LL (who was brought in as the claimant's maternity cover – please refer to our findings set out below). We note that the respondent subsequently advertised the new grade three role. The claimant could have applied for this role but chose not to because she was about to go on maternity leave. The claimant also felt that MW's email suggested that she would not be able to demonstrate the necessary experience required for the grade 3 role. However, the claimant did not speak to AP, MW, Mrs Wadsworth or anyone else about the role.

46. We concluded that the claimant could have applied for the new grade 3 role if she had wished to do so. If she had any concerns about her potential application, then she could have discussed these with AP or with another manager.

School administration staff and claimant's filing duties

47. The General Administrator employed prior to the claimant was classed as a Grade 3 role. The claimant was the only General Administrator working in the office during her employment at Greenacre, apart from LL. LL was originally employed as the claimant's maternity leave cover. The claimant applied successfully to reduce her working hours to two days per week (Thursdays and Fridays) on her return from maternity leave in June 2018. The claimant later changed to working one of those two days per week on reception from April 2019 onwards (as set out in more detail later on in this Judgment).

48. LL continued to work for the respondent after the claimant returned from maternity leave in June 2018. LL covered the claimant's duties on Mondays, Tuesdays and Wednesdays from June to November 2018.

49. LL then was successful in applying for a Grade 4 (Programme Administrator) maternity leave cover for TM's role, which started in November 2018. The respondent advertised this position by sending it to all staff by email and putting it on their website, but the claimant chose not to apply for the role. The claimant stated during her evidence that she did not receive the job advertisement. However, we accept Mrs Wadsworth's evidence that the job was advertised using Greenacre's normal channels (i.e. online and via an email to all staff). The claimant was included in the 'all staff' group email address and had received previous job advertisements.

50. The respondent did not seek to appoint anyone else to carry out LL's existing General Administrator duties. Instead, they employed Miss Selwood as an apprentice with effect from 1 January 2019. Miss Selwood worked at Greenacre School on a full time basis as part of her studies for a Level 2 business apprenticeship qualification. She did not work during school holidays and was paid at the apprenticeship rate (which was significantly lower than that paid to other office staff).

51. We accept that C carried out more filing than usual during November and December 2018. However, other administrative staff helped out with the filing when they had time to do so. For example, Mrs Wadsworth stated that she and RS undertook most of the HR filing on the claimant's non-working days. In addition, the Programme Administrators dealt with filing when they could.

52. Miss Selwood carried out the bulk of the filing during 2019 because she worked in the office full time, whereas the claimant was working on Thursdays and Fridays only at that point in time. We accept Miss Selwood's evidence that filing usually took around 30 minutes per day, if it was dealt with on a daily basis. We accept Miss Selwood's evidence that if filing piled up, Mrs Wadsworth would tell them to deal with it because this was consistent with the claimant's account. We also note that if filing was not done on a regular basis, this would have caused administrative difficulties (e.g. if the senior leadership team required a document to be retrieved urgently).

Claimant's allegation re stationery stock checks and filing

53. The claimant alleged that on 19 July 2018, Mrs Wadsworth stopped her from carrying out a check of the stationery stock and told her to continue filing. The claimant states that she was checking the stationery stock in the store room when Mrs Wadsworth approached her. The claimant said that she told Mrs Wadsworth that she wanted to finish the stationery order and Mrs Wadsworth said that it would take 10 minutes, but that the filing needed to be done. The claimant said it would not be 10 minutes because she had not checked it since her return to work from maternity leave. The claimant then asked if LL could come to the store room with her but Mrs Wadsworth stopped LL and told LL to return to her desk.

54. Mrs Wadsworth stated that the stationery order had already been dealt with by another colleague. Mrs Wadsworth said that she told the claimant that she did not to check the stationery stock that day and told her to continue filing instead. Mrs Wadsworth said that when she later went to reception, she saw the claimant was checking stationery stock in the store room again. Mrs Wadsworth also said that as the claimant's manager, she needed to direct the claimant to carry out the tasks that she saw as a priority.

55. Mrs Wadsworth accepts that she did stop the claimant from carrying out a check of the stationary stock. However, we accept Mrs Wadsworth's evidence that she instructed the claimant to continue filing was because the stationary order had already been completed.

Claimant's reviews – September 2018 and February 2019

56. The claimant emailed Mrs Wadsworth (in her capacity as HR Manager at that time) on 26 July 2018 and stated:

"After coming back to work from maternity leave on 8th June I'm considering my options. Please could you confirm the date I would need to put my notice in writing with it being school holidays…"

57. Mrs Wadsworth responded and confirmed the dates on which the claimant could provide notice if she did not wish to continue working after the school holidays ended.

She also confirmed that the claimant would not need to repay her maternity pay. The claimant responded saying:

"Thanks for the advice, as I say I'm keeping an open mind."

58. The claimant did not state in her email why she was considering leaving the respondent.

59. The respondent carried out twice yearly reviews with staff. Mrs Wadsworth became the claimant's line manager in the Summer of 2018. The claimant and Mrs Wadsworth met in September 2018 as part of the respondent's normal review process and the review form was signed on 13 September 2018.

60. The claimant stated in her review form:

"I have come back from Maternity Leave in June 2018 and have tried to do all my jobs the best I can and fit back into the working environment. There have been lots changes in the office since I've come back and I am getting used to it all.

…

I continue to have back problems which unfortunately have resulted me being off work with sciatica.

Prolonged and repetitive tasks such as filing aggravate my symptoms. I have spoken to my manager regarding coping strategies and being allowed to have breaks from these tasks and move onto other jobs. [sic]

…

Since I've come back from maternity leave I have felt that filing has become my main job role. This may have resulted due to me only working Thursday and Friday and it had been piling up throughout the week. This has left me anxious as it affects my work performance (see above) letting the team down.

…

I very much enjoy learning new skills and would like to be given an opportunity to do something more challenging to be able to contribute to the school as a whole- such as interpreting which I enjoy, family team tasks, HR or anything else useful to the office and my career progression.

…

61. The claimant's targets for 2018/2019 were recorded as:

- "Be more confident

- Organise my 2 working days to fit all the tasks in

- Work towards getting trained up in other areas of the Admin Team if the opportunity arises"

62. The claimant had a further review on 28 February 2019 (the form for which was signed on 2 April 2019 by the claimant and by Mrs Wadsworth). The claimant stated on the review form (with our emphasis added in underlining):

"Update from the set targets above

Since my last review there has been a few changes which have contributed to me feeling more confident and upbeat. I have organised my 2 working days to fit all the jobs which I have completed, I had no big issues since arranging an agreement with my manager where I could stop for breaks from filing when needed. This was a big help in terms of managing my back problems. There were more good things approaching! Last term we had appointed an apprentice who has been a great asset to the team and she has taken over the admin filing and some of my other duties. I have been helping with Family Team Filing and at times logging cause for concerns as well as new tasks such as some HR and working on data. I would like to expand on these tasks as I've enjoyed learning something new and felt like I could do these tasks well.

I will be required to work on Reception on Mondays from April which would bring a different working experience. I am looking forward to the new role especially interacting with pupils and visitors.

The main point of reflecting on my performance review is that I appreciate positive changes which are happening for me with the initiative and input from my manager and by feeling positive I feel I can give more to the school as a whole."

63. We found that the reference to the update on the 'set targets above' was a reference to the September 2018 targets. The claimant stated that a front sheet was missing from the form. However, there was no evidence of any such sheet and the claimant was unable to provide any dates for another review between September 2018 and February 2019 where targets were set.

64. The claimant said that the changes that she discussed with Mrs Wadsworth were implemented but proved to be short-lived. However, we note that the claimant completed the form on 28 February 2019 and then both she and Mrs Wadsworth signed it on 2 April 2019. We therefore concluded that the claimant was happy in her role from September 2018 to at least April 2019. We also note that the claimant was able to manage her back pain during that time (please refer to the underlined wording in the quote from the review above).

Reception duties – April 2019

65. In February 2019, the claimant was offered the opportunity to work on the respondent's reception desk for one day each week with effect from 1 April 2019. The claimant agreed to this and agreed to change her working days to Mondays and Tuesdays, because the existing receptionist (VS) no longer worked on Mondays. Greenacre provided the claimant with a letter confirming the change to the claimant's working days, which stated:

"Variation to contract

I am delighted to confirm the following amendment to your current contract of employment:

• Permanent change to working hours. Monday 8 30am to 4pm and Tuesday 8.30am to 2.50pm.

All other terms and conditions apart from those above are unaffected."

66. The respondent's staff who normally dealt with reception duties included:

    66.1 DL – Communication Lead (a Grade 5 role); and

    66.2 VS, MR and TB – Grade 3 Administrators.

67. In addition, all other administrative staff (including Mrs Wadsworth) would cover reception on an ad hoc basis.

68. Mrs Wadsworth stated that it was agreed that VS could reduce her working days, provided that she carried out her Grade 3 tasks on her remaining working days. The Grade 3 tasks included:

    68.1 invoicing;

    68.2 milk returns;

    68.3 liaising with external lettings;

    68.4 dealing with the out of hours calendar.

69. The claimant stated that DL was training her to carry out reception tasks. DL stated that the claimant was doing well at picking up the reception tasks and that she was enjoying it. The claimant told Mrs Wadsworth at their meeting on 24 September 2019 that she had not been fully trained on all of the basic reception tasks (which we refer to in more detail later in this judgment). We also note that the claimant was not asked to cover reception duties on her own until 23 September 2019.

70. The claimant confirmed that she did not carry out any 'Grade 3 tasks' from 1 April 2019 onwards. She noted that she only worked on reception on Mondays and that she had only done so for a limited number of working days before 23 September 2019, because she did not work during the school holidays. The claimant's evidence was that she still needed additional training on the basic reception duties.

71. We concluded that there was no basis for the claimant's claim that her role should have been re-graded to Grade 3 for the reception work that she carried out on Mondays and/or that she should have paid for Mondays' reception duties at the Grade 3 rate. The claimant did not carry out any Grade 3 tasks as part of her reception duties on Mondays from April 2019 onwards.

July 2019 – claimant's duties

72. Mrs Wadsworth noted that there were some difficulties in the working relationship between the claimant and Miss Selwood. She thought that this was in part caused by a confusion between the claimant and Miss Selwood as to their respective duties. Miss Selwood confirmed that this was a problem. Miss Selwood stated that sometimes she and the claimant would duplicate work, but at other times neither of them would complete a task because they thought that the other had already completed it. Ms Scargill asked the claimant and Miss Selwood to produce a list of

their key duties so that the respondent could clarify which duties each should perform.

73. Mrs Wadsworth stated that she had become concerned about the claimant's performance of her duties in July 2019. Following discussions with DG, Mrs Wadsworth started to keep a list of her concerns regarding the claimant from 3 September 2019 onwards. She stated that she decided to ask Ms Scargill to support her in managing the claimant. Mrs Wadsworth said that this was because Ms Scargill had a better working relationship with the claimant than she did. However, we have concluded that Mrs Wadsworth involved Ms Scargill in order to act as a witness to their meetings, rather than to help her manage the claimant. We note that Ms Scargill did not play an active role in the meetings.

Events during September 2019

74. The claimant stated that she was 'scared' of and 'intimidated' by Mrs Wadsworth because she accused her of things that she had not done without first checking. For example, during her grievance, the claimant stated she was 'scared of losing her job' and of things 'being made worse' if she had complained about Mrs Wadsworth's conduct at an earlier stage. The claimant said during her grievance that she had confided in AP when AP was her line manager, but she had not raised a complaint previously about Mrs Wadsworth because:

"I was scared, things could have escalated and [I was] *scared I would not have been believed. Sue is such a forceful person and she can easily manipulate a situation. I didn't think I stood a chance."*

"I wanted to go to higher management but was scared due to Sue's position, and her capability of lying and manipulating I do not know what she wanted to gain. I'm lower on the hierarchy, I have been grade 2 for last 5 years, I feel worthless, that all I have done for the school has been for nothing".

75. However, we accept Miss Selwood's evidence that Mrs Wadsworth spoke with both Miss Selwood and the claimant in similar terms about the failure to distribute the correct cause for concern forms and for leaving documents on the claimant's desk.

76. We find that the failure to distribute the correct cause for concern form was due to a breakdown in communications, after the updated form was circulated shortly before the Summer holidays. We concluded that Mrs Wadsworth did not criticise the claimant for this failure, rather she told Miss Selwood and the claimant that the right form needed to be distributed.

77. On 9 September 2019, the claimant asked Mrs Wadsworth for a meeting. The claimant said that the other administrative team members had emailed her, accusing her of leaving confidential documents on her desk. The claimant said that Miss Selwood had left those documents when Miss Selwood had borrowed her desk. Mrs Wadsworth asked Ms Scargill to attend the meeting with the claimant. The claimant explained during their meeting that it was Miss Selwood who left the documents, not the claimant. Mrs Wadsworth said that Ms Scargill would work with the claimant and Miss Selwood to ensure that there was a clear division of duties on Tuesdays

between the two of them. Mrs Wadsworth later spoken with Miss Selwood, who admitted that she had left the documents on the claimant's desk by mistake.

TM's role and claimant's request for job share (September 2019)

78. TM, a Grade 4 Programme Administrator, went on maternity leave in or around October 2019. LL successfully applied to cover her maternity leave from 1 November 2019. LL then left Greenacre. The claimant understood that TM intended to return to work three days per week, rather than her previous full time hours. The claimant asked Mrs Wadsworth if she could be considered for a job share with TM, carrying out the remaining two days' work that TM would no longer perform on her return to work.

79. However, the respondent took the decision to restructure TM's role such that TM would continue to carry out the more 'senior' parts of her role on the days that TM was working. Mrs Wadsworth said that the remaining more 'junior' tasks were undertaken by Miss Selwood (such as filing and photocopying) and by the rest of the office staff.

80. Mrs Wadsworth informed the claimant that there was a possibility that another Programme Administrator may be advertised in the near future and that the claimant may be able to apply for that role on a job share basis. Mrs Wadsworth noted that the role would require typing skills because part of the duties would involve minuting meetings and annual reviews. We find that Mrs Wadsworth did not tell the claimant that she was 'not a competent typist'. Rather, Mrs Wadsworth informed the claimant that the role required a 'competent typist' to complete the tasks required by of a Programme Administrator.

Events on 23 September 2019 Claimant's meeting with Mrs Wadsworth on 24 September 2019

81. The claimant confirmed during the hearing that Allegations 9 and 10 of the List of Issues both related to a meeting with Mrs Wadsworth that took place on 24 September 2019. The parties agreed that there was no separate meeting on 23 September 2019.

82. On Monday 23 September 2019, the claimant came into work and was due to work on reception as normal. DL called in to say she would not be at work but would be on sick leave that day. Mrs Wadsworth covered reception until the claimant arrived. The claimant had previously always worked on reception alongside DL or another member of staff. The claimant arrived and said that she was anxious about working on reception on her own because she was not trained and she didn't know what she was doing. Mrs Wadsworth therefore arranged for other members of the administrative team to work alongside the claimant.

83. Mrs Wadsworth was concerned that the claimant had raised her lack of training on reception, given the positive feedback that she had received regarding the claimant's progress from DL. The claimant disagreed with Mrs Wadsworth's evidence regarding her performance on 23 September 2019 and stated that Mrs Wadsworth had praised her on that day for doing a 'good job'.

84. TB later recorded her version of the events on 23 September 2019 in an email prepared in relation to the claimant's grievance:

"*[X] had been working on Reception for months every Monday and other days for cover observing Debbie on the process. Myself and [X] were asked to cover the afternoon bus run, Sue asked that [X] please do the PA system and radio as she had been on reception far more than me, I was to do the door and observing. I advised [X] of this request and she said "I am not doing it, I've not been trained", I said out of the two of us she'd had more chance to observe and learn the PA system than I had so hence why Sue had asked her to cover it. [X] got increasingly angry/upset, she shouted "I am not doing it", threw the radio towards me which landed on the reception desk and walked away."*

85. We have no reason to doubt TB's version of events that day. We note that the claimant had asked TB to attend as a witness on her behalf at the grievance hearing and to support her during the grievance.

86. Mrs Wadsworth asked the claimant to meet with her at around 8.30am on Tuesday 24 September 2019. Mrs Wadsworth was not aware of TB's allegation that the claimant threw the radio towards TB on 23 September 2019 at that time.

87. We made the following findings in relation to the meeting between the claimant, Mrs Wadsworth and Ms Scargill on 24 September 2019. We have considered the witness evidence provided by each of these individuals (although we placed less weight on Ms Scargill's evidence because she did not attend the Tribunal hearing). We have also considered the claimant's email of complaint dated 25 September 2019 and Ms Scargill's account of the meeting which she emailed to DT on 26 September 2020:

87.1 the meeting took place shortly after the claimant arrived at work that morning;

87.2 they discussed the claimant's work on reception on 23 September 2019. Mrs Wadsworth said that the claimant was unable to conduct some of the reception duties, including operating the tannoy and radio tasks. The claimant said that she was not confident in her ability to manage reception duties alone because she had always worked on reception alongside another member of staff and she had not been fully trained on reception tasks such as the use of the tannoy and radio;

87.3 they also discussed an issue regarding 'hidden filing'. Ms Scargill was in the filing room with Miss Selwood when a box of old paperwork was discovered that had not been filed. They raised this with Mrs Wadsworth, who then raised it with the claimant during the meeting. The claimant said that she had not hidden the paperwork;

87.4 Mrs Wadsworth stated that if the claimant's performance did not improve, there was a chance that she may be placed on a performance improvement plan ("PIP"). She did not state that the claimant was going to be placed on a PIP that day, contrary to the claimant's recollection;

87.5 the claimant became upset and left the meeting; and

87.6 Ms Scargill had a conversation later that day with the claimant, during which Ms Scargill said to the claimant that Mrs Wadsworth had to address issues with her because she was her manager. She also said to the claimant that Mrs Wadsworth had offered her support and she should take it. The claimant said that many of the problems raised were not her fault and that Mrs Wadsworth never raised similar issues with Miss Selwood. Ms Scargill explained to the claimant that she would not be placed on a PIP if her performance improved.

Claimant's sickness absence – 25 September 2019 onwards

88. The claimant finished working her normal hours on 24 September 2019 and did not return to work at Greenacre after that day. She was absent on sick leave from her next working day on Monday 30 September 2019. The claimant was dismissed with payment in lieu of notice with from 23 July 2020.

89. The respondent's sickness absence policy contained a section headed 'Managing Long-Term Sickness Absence'. This stated:

"10.1. Long-term sickness absence is defined as absence of 4 or more consecutive weeks and will result in progression to a formal Sickness Absence Meeting.

10.2. Line Managers must maintain regular contact with employees whilst they are off sick to demonstrate concern for their welfare, promote inclusion, offer reasonable support and seek to discuss alternative options which may facilitate an earlier return to work."

90. The policy did not provide any details as to the nature of the 'progression to a formal Sickness Absence Meeting'. The policy also stated:

"11.4 Where there is ongoing medical intervention taking place, Line Managers should convene regular review meetings to monitor progress with a view to supporting their return to work.

The Line Manager will also refer the employee to Occupational Health. The Line Manager will provide the employee with a written outcome of the meeting…

11.5. The medical certificate or/and the Occupational Health report may recommend reasonable adjustments…

11.6. Where Occupational Health identify that an employee is unfit to work for the foreseeable future (approximately 3 months or more) a formal Sickness Absence Hearing will be convened which may result in dismissal.

11.7. In all cases where the employee is permanently unable to return to their substantive role due to medical reasons the option of ill health retirement should be considered."

Claimant's grievance – informal process

91. The claimant submitted an email of complaint to the respondent on 25 September 2019. She stated in her complaint:

"As of the 25 September 2019, I would like to admit a formal complaint regarding the unfair treatment / harassment I've received, and continue to receive, from my office manager, Sue Wadsworth.

…

Yesterday, 24/09/2019, I was called into a meeting… I was accused of being incapable of conducting some of the duties required of me on Reception the previous day; specifically those regarding the morning run which includes 'bing bong' and certain radio tasks always done by Debbie Lunn herself…

…I would rather appreciate regular, clear instructions on the daily tasks to be performed, as opposed to unfair and unjustified reprimands afterwards.

Sue's next item on the agenda to be brought up at the same meeting, was an accusation that I had left an old filing box abandoned in the filing room, and this full of recent documents…On the grounds of these unjust accusations, I was told that I would be put on the Performance Management Plan and monitored very closely from now on. I got so upset at this point, simply because I had not done anything wrong and felt I was being treated unfairly, if not victimised.

I am deeply hurt with my manager's unreasonable reprimands, which have continued since the start of this academic year. Every week I have either gone home upset or cried at work, constantly feeling anxious, dreading the day ahead, and all the while wondering what lay in store for me the next working day. Her decision to put me on the Performance Management Plan is the last straw and as far as I am willing to go.

…the unjustified accusations have left me feeling extremely stressed and downhearted, to the extent where I have now had to seek medical attention."

92. DG tried to contact the claimant to discuss her complaint email, but was unable to reach her. Arrangements were made for a meeting between the claimant and DT on 4 October 2019, but the invitation letter arrived too late for the claimant to attend. An offsite meeting was arranged for 16 October 2019 instead. The claimant attended this meeting with DT and Mrs Wilcock.

93. DT wrote to the claimant on 21 October 2019, setting out a number of options for the claimant to consider including:

"• A supported restorative meeting with your line manager

• Working 2 days per week on Reception under the direction of the senior receptionist, reporting to Rachel Scargill/senior leadership team.

• Redeployment to work as Teaching Assistant in class, subject to clearance from occupational health around the suitability of the post in relation to your health.

• Relocation to a suitable alternative role within one of the local academies, subject to availability."

94. The claimant and Mrs Wilcock discussed these options by email. The claimant stated that she was only willing to consider relocation to a role within another academy. Mrs Wilcock emailed the claimant on 7 November 2019 stating:

" I am sorry to hear that you feel unable to move forward with the options that we discussed and you feel that the only possible outcome is to consider a relocation, subject to a suitable role being available. As discussed in the meeting, mediation/restorative approaches are fully supported by a member of SLT and encouraged as a way to address your concerns and seek a resolution into this matter. It would be advisable to consider this as a way forward, however in the mean time I will explore whether there are any suitable alternative posts available within the trust. Should this not be the case and you feel unable to attempt to resolve the matter via one of the other options, we will conclude the internal grievance and progress to manage your sickness absence in line with policy. You would then have the right to submit a formal grievance should you wish, details of which can be found under sections 4 and 5 of the grievance resolution policy."

95. DT later confirmed that there were no suitable vacancies elsewhere within the respondent's local academies in the response to the claimant's complaint dated 26 November 2019. The claimant remained absent on sick leave in the meantime. Her fit notes from this period stated that her absence was due to 'work-related stress'.

96. Mrs Wilcock also noted in an email of 28 November 2019 that the claimant should raise any formal grievance within 10 working days. She also attached a wellbeing leaflet for the claimant, noting that the claimant had stated that she was experiencing high levels of anxiety and stress.

First Occupational Health referral

97. Mrs Wilcock obtained the claimant's consent to refer her to occupational health. She sent a referral form to occupational health on 28 November 2019 which stated:

"We wish to clarify if and when [X] will be fit for work and whether she is fit to take part in any formal meetings in relation to the sickness and/or grievance procedures"

98. The claimant queried the purpose of the occupational health referral and asked if she could meet with her GP instead. Her appointment with occupational health was re-arranged a few times. In the meantime, the condition referred to in her sick notes changed in January 2020 to refer to 'stress and anxiety'.

99. The claimant met with the respondent's provider on 6 February 2020. The occupational health report stated:

"Miss [X] has been absent from work since 30/09/19, with anxiety and stress.

…

Miss [X] attended her GP and was prescribed antidepressants, which she has taken for around 6 weeks now. She is not sure if these have been beneficial. The GP also suggesting counselling. However, she is not sure she wishes to receive this and has cancelled several appointments. She will talk to her GP and friends.

…

Conclusions and recommendations

In answer to your specific questions:

In my opinion, it will be difficult to achieve a return to work in this case. Although Miss [X] was generally a good historian, I was unable to ascertain to what degree her problems at work were technical and how much were interpersonal. In the case of interpersonal relationship issues, especially with immediate managers, it is near impossible to achieve a return to the previous environment. It is also difficult to achieve a return to work when the employee has developed a fear of the work environment (our meeting was conducted away from the school).

In my opinion, Miss [X] has primarily experienced a period of sustained stress. It appears that this has ultimately led to symptoms of mild depression which are now being treated. Without a resolution to her work situation, whether this involves return to work or not, I feel it is unlikely that she will make a recovery in the foreseeable future.

I have serious doubts that Miss [X] will ever make a return to her current work environment.

I understand that, following a management meeting, Miss [X] was offered a restorative meeting with her line manager and redeployment to a different role/area. I believe that these measures offer the most realistic chance of rehabilitation in this case. However, she felt unable to engage with or consider these.

In my opinion, Miss [X] is fit to attend any formal management meetings."

Claimant's grievance – formal process

100. The claimant submitted a formal grievance form (attaching her original complaint) to the respondent on 4 December 2019. She stated:

"I would like an investigation to take place on the points I have raised. I would also like to determine the actual reason/reasons of the unfair treatment directed towards me. In other words, why am I being harassed/victimised in this way? For instance, could the reason be relating to my Easter European origins, or perhaps that I was redeployed to the office due to my medical impairment…"

101. DT acknowledged receipt of the claimant's grievance by letter dated 10 November 2019 and stated that SP (Interim Head of School) would investigate her concerns.

Respondent's investigation into the claimant's grievance

102. Mrs Wilcock stated that SP first looked into the claimant's personnel file, which took her until mid-January. She noted that there were two weeks' Christmas holidays in the interim. Mrs Wilcock said that SP then interviewed witnesses for the claimant's grievance on 23 and 24 January 2020.

103. Mrs Wilcock and SP exchanged emails on 24 January 2020, in which SP said:

"I've finished speaking to everyone now, have you got any time next week to talk through our next steps?"

104. It then took over a month for Mrs Wilcock and SP to meet, for SP to prepare a short management report (consisting of around one and a half typed pages) and for the arrangements for the grievance hearing to be made. We note that one of those weeks was the February half term holiday.

105. Mrs Wilcock also stated in evidence that she could not arrange the claimant's grievance hearing until occupational health had advised that the claimant was fit to attend a meeting. However, Mrs Wilcock did not tell the claimant that the pending occupational health report was the reason for delaying the grievance hearing. We also note that there was a delay of over a month between the claimant's meeting with occupational health on 6 February 2020 and the grievance hearing on 13 March 2020.

106. We note that the respondent's grievance policy states that a grievance hearing will be "held as soon as is reasonably practicable". We find that the delay in investigating the claimant's the grievance hearing was excessive. We appreciate that SP had other duties at Greenacre, but her investigation did not involve large amounts of documentation. In addition, SP's notes of her interviews with six witnesses consisted of between two and four questions per witness, suggesting that the interviews were very brief. SP stated that her investigation was complete by 24 January 2020. Mrs Wilcock's explanation of the further delay in holding the grievance meeting on 13 March 2020 was not credible.

107. We find that as a matter of good practice the claimant's grievance should have been dealt with in a much shorter time period, particularly given that the claimant was absent on long term sick leave at the time and suffering from anxiety and stress related to work.

108. However, we have concluded that the reason for the delay was not part of an attempt to 'cover up' any wrongdoing by Mrs Wadsworth, as alleged by the claimant. We concluded that the delay was due to the respondent's focus being on other matters during that time, including the redundancy consultation regarding the redundancy proposals which were announced to staff by letter on 24 February 2020.

Witnesses/support for claimant during grievance hearing

109. The claimant was informed of the right to be accompanied to the grievance hearing. She emailed four colleagues whom she hoped would attend either as witnesses for her grievance hearing or to support her during the hearing. Of those four witnesses, LJ was the only individual who was willing to attend the hearing as a witness for the claimant. We saw emails in the hearing file detailing the reasons given by the other three colleagues for not attending, including stress relating to the work restructure, their personal health and their domestic difficulties. We also accept Mrs Wilcock's evidence (which was supported by the contemporaneous emails) that she offered to discuss matters with some of the colleagues to deal with their concerns.

110. Mrs Wilcock offered that the claimant could provide her with a list of questions to ask the remaining colleagues on the claimant's behalf. However, the claimant did not provide Mrs Wilcock with any questions.

111. Mrs Wilcock also suggested that the claimant could seek alternative support from another member of the senior leadership team. The claimant did not take up this offer.

Grievance hearing on 13 March 2020

112. The grievance hearing on 13 March 2020 lasted around two hours. The grievance panel was chaired by Ms Wilson (who was the Executive Principal Designate for Joseph Norton, a separate academy managed by the respondent, at that time). The other grievance panel members included ST (from the respondent's Springwell academy) and DG (Headteacher of Greenacre). We were provided with a copy of the minutes from the grievance hearing. The claimant did not provide any specific evidence to dispute the accuracy of the minutes.

113. We concluded that:

113.1 the claimant was given a full opportunity to explain the events that had led to her grievance;

113.2 the grievance panel asked the claimant several questions regarding the issues that she raised; and

113.3 witnesses were called and questioned, including LJ, AP and Ms Scargill. Everyone present at the hearing also had the opportunity to read the statements taken from witnesses who were interviewed by SP but did not attend the hearing.

114. The claimant's grievance was rejected and the outcome letter was sent to the claimant on 16 March 2020. Ms Wilson stated in the letter that claimant's grievance was rejected: *"…as the panel have not seen any evidence to support your claim of less favourable treatment. Witnesses attended the hearing called by you and management, but their statements did not support your claim."*

115. The claimant initially stated that she intended to appeal against the outcome of the grievance. The timescales for her appeal were extended twice, but the claimant did not provide her grounds of appeal to the respondent.

116. In the meantime, the claimant's sick notes referred to the condition causing her absence as 'anxiety and depression'.

Payroll emails

117. In the meantime, the respondent made some mistakes in the calculation of the claimant's sick pay. She exchanged emails with the respondent's payroll team in around April and May 2020 (who dealt with payroll for all of the respondent's academies). The respondent concluded that the claimant's sick pay had been calculated incorrectly and made arrangements to correct shortfall. The respondent's payroll manager stated that the claimant should have been on full pay until April 2020, then she would be on half pay until September 2020 during any sickness absence.

Claimant's first Employment Tribunal claim

118. The claimant submitted her first Employment Tribunal claim to the Tribunal on 12 May 2020. The claim was served on the respondent who responded on 16 June 2020. The claim included complaints of race and disability discrimination, along with complaints of pregnancy/maternity discrimination (which were later dismissed at the second preliminary hearing on 22 January 2021 by Employment Judge Little).

Second Occupational Health review

119. Mrs Wilcock contacted the claimant to arrange a second occupational health review. Mrs Wilcock prepared a referral to occupational health dated 9 June 2020, in which she stated:

"[X] has agreed to a referral for further assessment of her health and wellbeing due to the time lapse of the last report so that we can proceed with managing her sickness absence with the most up to date information and advice.

[X] has mentioned numerous times that she does not wish to return to work nor can she face entering the building itself. We wish to clarify if and when [X] will be fit for work."

120. The appointment took place by way of a fifteen minute telephone conversation on 11 June 2020. The report from occupational health stated:

*"**Conclusions and recommendations***

Ms [X] appears not to have progressed towards making a return to work. She remains fixated on past events of school and her belief that the school has mistreated her despite her grievance not having been upheld. She is unable to express clearly what she expects from her employer or how return to work could be achieved, although she is categorical that she will be unable to return to her previous working environment.

I am not concerned that Ms [X] has any significant degree of anxiety, depression or other mental health issue, in my opinion, she has experienced stress. However, she is likely to be experiencing despondency after such prolonged absence from work and it is not conducive to good mental health to remain fixated on a particular issue or situation long after it has passed.

Ms [X] used the phrase "flashbacks" during our discussion. Flashbacks are associated with post-traumatic stress disorder (PTSD). This is relevant in an occupational setting because PTSD is commonly claimed amongst employees, and others, seeking financial compensation. In this case, these appear to be a replaying of various events in her mind, rather than true flashbacks, which occur when the individual has witnessed, or experienced, severe acute trauma.

In answer to the questions asked on the referral form:

In my opinion, whilst I am unable to ascertain any health reason why Ms [X] is unfit to return to work, I believe that a return to work is unlikely to be achieved in this case.

As stated, I do not believe that Ms [X] is suffering with any specific condition.

At any time a return to work becomes feasible, I advise that a 2 to 4-week period of reduced hours and/or duties are allowed.

In my opinion, it is highly unlikely that Ms [X] will provide her employer with a reliable and efficient service in the long-term.

In my opinion, the only adjustment that is likely to aid a return to work is relocation to a different work environment."

Sickness absence review meeting

121. Mrs Wilcock emailed the claimant on 17 June, to arrange meeting on 26 June 2020. The purpose of the meeting was to discuss the occupational health report and review her sickness absence. The claimant responded twice on the morning of 18 June 2020:

121.1 in her first response at 8.20am, the claimant stated that she had another appointment on that date; and

121.2 in her second response at 8.51am, the claimant stated:

"Please go ahead with the sickness meeting without me as the outcome will have been decided already. If you require a true medical report then please get it from my doctor. The report you have forwarded me is not accurate, just an opinion from 15 mins conversation.

There is no mention of me taking 2 different anti depressants and now starting a therapy with NHS mental health nurse. No mention of feeling suicidal when I was made to attend the hearing with you in March in my own. The flashbacks I told him about are real I have them every day. To suggest the reason I mentioned having flash backs is for financial compensation is unprofessional as this is a medical report and I only spoke of my medical symptoms."

122. Mrs Wilcock responded later that day and stated:

"I would like to reassure you that no decision has been made in relation to your employment and how to proceed. The purpose of the meeting is to enable us to discuss the content of the report, to obtain more information from you about how you are feeling, whether you believe that you can return to work in the near future and if so, how the Trust can support and assist with this. The meeting will also provide an opportunity for you to explain any concerns that you have about the report that has been received and if you believe that other reports are needed we can discuss this further.

In the circumstances then and in light of your unavailability on Friday 26th June, I am happy to reschedule the meeting to Tuesday 30th June at 1pm.

…

Please confirm that you shall attend on this date and time. In the event that you fail to do so, without good reason, the meeting may go ahead in your absence. It is in your best interests to attend and engage in this meeting to enable us to make

any decisions and arrange any support needed with the benefit of all available information and your views to hand.

123. The claimant did not attend the meeting and it took place on 30 June 2020 in her absence. Mrs Wilcock also carried out a search for alternative vacancies at the respondent's local academies on their websites. She also contacted the academies to check if they had any forthcoming vacancies that had not yet been advertised. No vacancies were available.

124. The respondent wrote to the claimant by letter of 1/7/20. The letter stated:

"The purpose of the meeting was to discuss the content of the occupational health report following your recent assessment and to obtain more information from you about how you are feeling, whether you believe that you can return to work in the near future and if so, how the Trust could support and assist with this. The meeting would also provide an opportunity for you to explain any concerns that you have about the report that has been received and if you believe that other reports are needed to enable us to discuss this further. It is unfortunate that you have been unable to engage with this meeting, take part in further discussions or provide additional information. Without your input we could only consider the information we had to hand.

The occupational health report cites that you 'appear not to have progressed towards making a return to work' and 'I believe a return to work is unlikely to be achieved'. The health practitioner is unable to identify any health reasons why you are unfit for work and 'does not believe that you are suffering with any specific condition'. The report suggests that the only adjustment that is likely to aid a return to work is relocation to a different work environment. Prior to the meeting, we explored whether there were any alternative roles within the Trust but unfortunately no current vacancies exist.

In view of the content of the latest occupational health report and your email as set out above, there are concerns about whether you will be able to return to work at the Trust at all in the foreseeable future. In these circumstances and in accordance with our sickness absence / capability procedure, the next step would be to progress to a final meeting in order that we would consider whether a return to work in the foreseeable future is likely and if so, what steps can be taken to assist with this. A potential consequence of such a meeting is the termination of your employment.

…

\Ne note your suggestion that we should obtain a report from your treating doctor to obtain a clear picture of your current health. It is assumed from the content of your email that you believe that a report from your doctor will demonstrate that you have an underlying medical condition and that a return to work for the Trust is unlikely for foreseeable future. However if this is incorrect and you believe that the report from your doctor would in fact alert us to the fact that you are able to return and/or that there are additional steps that can be taken to assist you with a return to work then please do confirm this, as well as your treating doctors contact details. If appropriate and with your cooperation, we will then take the necessary steps to obtain this report.

Otherwise, we wish to invite you to attend a final sickness absence review / capability meeting on Friday 17th July 2020 … We would be grateful if you would confirm your attendance at this meeting by no later than 4pm on Friday 10th July 2020. Please note, in the event that you are unable to attend this meeting we may be left with no choice but to rely on the information we have and a potential outcome of the meeting is the termination of your employment.

…

…If you fail to attend the meeting, it may go ahead and a decision made about your ongoing employment in your absence."

125. Mrs Wilcock sent the letter of 1 July 2020 to the claimant under cover of an email of 3 July 2020. She stated in that email: *"A potential outcome of this hearing could be termination of your employment…You must make yourself available for this sickness absence hearing. If you fail to attend without reasonable cause, then the hearing may go ahead in your absence."*

126. Mrs Wilcock also emailed the claimant on 4 July 2020 stating: *"Please note that if you fail to attend, without good reason, the hearing will go ahead in your absence and a decision made about your ongoing employment in your absence"*

Dismissal hearing arrangements

127. The claimant did not respond to Mrs Wilcock by 10 July 2020. Mrs Wilcock emailed the claimant again on 14 July 2020, reminding the claimant of the meeting on 17 July 2020. Mrs Wilcock stated:

"Please note that if you fail to attend, without good reason, the hearing will go ahead in your absence and a decision made about your ongoing employment in your absence. It is in your best interest to engage with this process to enable your views to be taken into account.

If you are experiencing any difficulties please let me know as soon as possible."

128. The claimant responded by email on the afternoon of 16 July 2020 stating: *"Sorry I am not well enough to attend the meeting tomorrow"*.

129. Mrs Wilcock responded on the same date stating:

"I'm sorry to hear that you are not feeling well enough to attend the hearing tomorrow. As previously mentioned, there are a number of options available to you. Firstly, your representative can attend the meeting on your behalf or secondly, you can submit a written statement ahead of the hearing. This will ensure that your views are available for the panel to consider."

130. Mrs Wilcock did not offer to postpone the meeting on 17 July 2020. In addition, Mrs Wilcock did not enquire into the nature of the claimant's illness. Instead, she emailed occupational health to ask: *"Based on your assessment of [X] [X] on 11th June, could you kindly confirm whether you consider her to be fit to take part in a formal hearing?"* Occupational health responded that evening and stated: *"Yes, I see no reason why not"*.

Claimant's dismissal

131. The claimant's dismissal meeting was chaired by Ms Wilson (who had been appointed as Executive Principal for both the Joseph Norton and the Greenacre Academies by that time). The remainder of the panel consisted of LF (Head of School, Joseph Norton Academy) and DR (Executive Vice Principal, Springwell Academy). They considered documents at the hearing including the two occupational health reports, correspondence regarding sickness absence meetings and the outcomes to the claimant's formal and informal grievance. DT presented a management report at the meeting.

132. The claimant did not attend the meeting on 17 July 2020. During the meeting, the respondent's managers discussed the claimant's current sickness absence and the likelihood of her returning to work. During the meeting:

132.1 DT stated that the claimant's absence was related to work, rather than mental health issues. She stated that the claimant was 'experiencing stress in relation to work';

132.2 Mrs Wilcock commented: *"I would like to mention that stress is not an illness but a reaction to a situation, and to clarify that there is no underlying medical condition that we are aware of affecting her ability to return to work"*;

132.3 neither DT nor Mrs Wilcock mentioned that the claimant had been diagnosed with anxiety, that she had been taking anti-depressants nor that she had been offered counselling;

132.4 they noted that the 'frequent reason' that the claimant gave for not attending meetings was that *"she is not well to attend and may feel anxious to attend. She has never offered alternative dates or asked for the meetings to be rescheduled. It became increasingly difficult to engage with [X] over time"*;

132.5 in response to a question whether the meetings were arranged during working hours, DT confirmed yes. However, we note that some of the meetings were arranged on the claimant's non-working days;

132.6 the alternative roles considered for the claimant were 'admin roles' and 'not classroom based;

132.7 the claimant's absence had a 'significant impact' on Greenacre. DT stated: *"We have had reduction in the number of staff and her role has had to be picked by others in the office. Sue, Tracy, Rachel and Molly are fulfilling her role. Molly is limited to what she can do as she is an apprentice."* ;

132.8 whether the claimant had suggested any alternatives to resolve the situation. DT stated that she had apologised on behalf of the school 'about the way she felt she was treated'. DT also referred to the informal grievance outcome and stated that the claimant was only willing to consider relocation.

133. The panel members then adjourned and no notes were taken of their deliberations. In the meantime, Mrs Wilcock carried out a further search of the respondent's academies' websites for alternative roles for the claimant. She noted that there were no vacancies advertised at any of the academies at that time.

134. Ms Wilson summarised the panel's decision at the end of the hearing as follows:

"After taking into consideration the length of the absence and the occupational health reports which state there are no signs or underlying medical conditions that would suggest [X] cannot return to work, it has been decided to terminate [X]'s employment given, [X] has advised that she will only return to a role off site and such a role is not available, there is also the ongoing significant impact that her absence has had on the office and the admin staff."

135. The respondent emailed an outcome letter to the claimant on 23 July 2020, stating that they had decided to dismiss the claimant. The letter stated:

"I can confirm that the decision was made to terminate your employment on the grounds of capability and in light of your inability/unwillingness to return to work…

…

As was explained to you in advance of the hearing and more specifically, within a letter to you dated 01 July 2020, the purpose of the hearing was to consider ongoing concerns relating to your ongoing period of sickness absence and to consider whether a return to work in the foreseeable future was likely. You were informed prior to the hearing that a potential consequence of the hearing was the termination of your employment.

Despite being urged to attend the meeting in order that any representations you had could be considered, you did not attend the hearing.

...

The panel also noted that Mrs Wilcock - Human Resources Business Partner contacted you on 16 July 2020 via email as she had not received confirmation of your attendance to which you responded stating that you were not well enough to attend the hearing. No further explanation regarding the reason for your inability to attend was provided. Mrs Wilcock reminded you of the information contained in the email dated 03 July 2020 and as set out above but you did not respond. As you had not responded, Ms Wilcock contacted Mr Watkinson the Occupational Health Practitioner who has assessed you in February and June 2020 to ask if his assessment of you at your last appointment was that you were fit to attend meetings. He responded stating that further to his assessment of you on 11 June 2020, he could see no reason why you would be unable to attend. The panel were therefore of the opinion that you had not provided a reasonable explanation for your non-attendance and as advised in previous correspondence the hearing went ahead in your absence as whilst you advised you were unwell there was no reason as to why you could not attend the hearing.

…

You commenced a period of sickness absence on 30 September 2020 and you currently remain absent from work. The panel noted that you had submitted sick notes to cover your period of absence from work which read as follows:

25.09.2019 - 12.01.2019 - Work related stress

13.01.2020 - 09.02.2020 - Stress and anxiety

10.02.2020 - 09.03.2020 - Depressed Mood

09.03.2020 - 22.03.2020 - Anxiety and stress

15.03.2020 - 18.04.2020 - Anxiety and stress

19.04.2020 - 18.05.2020 - Anxiety and depression

19.05.2020 - 25.06.2020 - Anxiety

25.06.2020 - 22.07.2020 – Anxiety

…

In response to your email, you were offered the option of obtaining a report regarding your health to be obtained from your GP. However, at no point have you responded to this or have you provided the details for your GP to enable this report to be obtained. Additionally, you have not submitted any evidence or provided any further explanation for your assertion that the occupational health report was inaccurate or regarding your medical condition(s) that you wanted the panel to consider regarding your fitness for work. However, the panel was of the opinion that your response regarding the occupational health report suggested that you felt that your symptoms were in actual fact worse than the report indicated and the panel were concerned to read that you had previously felt suicidal.

…

As a result of the occupational health reports, your ongoing absence and your comments about your ongoing health and the severity of this, as well as your unwillingness to speak to the Trust about your employment, the Panel were of the opinion that a return to your current role in the foreseeable future, or at all, was unlikely. It did then go on to consider whether there were any alternatives to dismissal at this stage including looking at whether any suitable alternative positions available for you within another School within the Trust. Unfortunately the Panel found that there were none and it was not likely that there would be any in the near future. You have also not indicated that you would like to be considered for any other position within the Trust.

In light of the above, the Panel decided a return to work in the foreseeable future was unlikely and the impact your ongoing absence would have on the Trust was not something that could be sustained any longer, and so the decision should be made to terminate your employment."

136. The Tribunal panel asked Ms Wilson why she and her colleagues did not enquire further as to what the claimant meant when she stated she was 'unwell' in her email of 16 July 2020. She responded:

"Because we had a pattern – there was no indication that it was a cough or a cold. We had a text message from Mrs Wilcock and there was no response. We got advice that we could go ahead…we did not feel that delaying would have encouraged her to attend."

137. The Tribunal panel asked Ms Wilson why the meeting on 17 July 2020 was not postponed. Ms Wilson stated:

"*At this stage there had been a complete breakdown in communication, it had been very difficult for Mrs Wilcock to maintain appropriate contact. Also we had contact from occupational health to say there wasn't a reason – she was given option to submit something in written format. She said a return to school was not an option."*

"At that point we would have been looking at September for the next time could convene a panel. Given the lack of communication and the difficulty in communicating – Miss [X] made it clear at that point that redeployment was the only option – we felt it was better to go ahead."

138. Ms Wilson stated in response to the Tribunal's questions that the reason for the claimant's dismissal was due to a combination of factors: *"it was unlikely that she would be able to return to work, the impact on the school and the claimant's suggestion that redeployment was the only option"*.

139. Ms Wilson also stated that she was aware that the claimant had submitted her first Tribunal claim before the meeting on 17 July 2020. However, she did not know what the claim was about and had not seen a copy of the claim form. In addition, Ms Wilson stated that the other two panel members were not aware of the claimant's first Tribunal claim.

140. The Tribunal panel asked Ms Wilson whether the panel considered any alternatives to dismissal, such as ill health early retirement (as referred to in the respondent's sickness absence policy). Ms Wilson confirmed that they did not consider this as an option.

141. The claimant was dismissed by the respondent with payment in lieu of notice with effect from 23 July 2020. She did not appeal against her dismissal and submitted a second Employment Tribunal claim.

142. The respondent did not recruit a replacement for the claimant. Ms Wilson stated that the claimant's tasks were shared between the other members of the team during her absence. Ms Wilson stated that they were unable to recruit after the claimant's dismissal because there was a recruitment freeze in place due to the respondent's pending restructure (which had been placed on hold due to the initial Covid-19 lockdown in March 2020). Ms Wilson said the new staffing structure at Greenacre was implemented in January 2021. The claimant's former post was not included in that new structure – both the Grade 2 and Grade 3 administrative roles were removed. We also accept Mrs Wadsworth's evidence that since that time, Greenacre's reception desk was only staffed by one member of staff at a time.

143. We have concluded in relation to the claimant's dismissal:

143.1 the respondent should have postponed the meeting on 17 July 2020 to provide the claimant with an opportunity to attend the meeting. The respondent stated the meeting would go ahead in the claimant's absence if she failed to attend 'without good reason'. The claimant stated that she was 'unwell'. On the face of it, that was a good reason to postpone the meeting. However, the respondent made no attempt to ascertain the nature of the illness that was preventing the claimant from attending the meeting. Mrs Wilcock checked with occupational health whether the claimant was fit to attend the meeting, based on the report of 11 June 2020 and occupational health confirmed that she was fit to attend. Occupational health were not in contact with the claimant on 16 July 2020. We concluded that whether or not an individual was in general fit to attend a meeting (based on previous medical history) did not mean that they were well enough to attend a meeting on a specific date;

143.2 the key reasons why the respondent was unwilling to postpone the meeting included:

143.2.1 the respondent pointed to a 'pattern' of the claimant not attending meetings and the difficulties in communicating with the claimant. However, the only meeting that the claimant had failed to attend was a sickness absence review meeting on 30 June 2020 which she stated should proceed in her absence. However, we note that the meeting on 17 July 2020 could result in the claimant's dismissal and was a very important meeting. The claimant did not state that this meeting should proceed in her absence - she emailed Mrs Wilcock on 16 July 2020 stating that she was 'unwell';

143.2.2 the earliest that a further meeting could have been arranged would have been September 2020, due to the school Summer holidays;

143.2.3 the respondent was concerned about the impact of the claimant's ongoing absence on its staff. However, we note that the claimant worked term time only and her absence would not have contributed to any additional workload during the Summer holidays;

143.2.4 the respondent stated that it was also unable to obtain supply staff to cover roles during staff sickness absence. This is an internal decision taken by the respondent – we note that there is no legal reason to prevent such cover being obtained. We also note that the claimant would have exhausted the additional sick pay due under the respondent's policies by September 2020;

143.2.5 we note that the respondent did not recruit to fill the claimant's role after her dismissal and that her role was removed from the new structure from January 2021. As a result, her duties remained shared between the other administrative staff, even after she was dismissed;

143.2.6 the respondent thought that the claimant would have been unable to provide any information that would have changed the outcome of the meeting. Ms Wilson noted that the claimant had suggested that redeployment was the only option. However, the discussions at that point in time related to the claimant's grievance, rather than her dismissal.

143.3 the respondent should have sought clarification of the second occupational health report. The claimant had initially taken anti-depressants in December 2019 and was awaiting therapy. In addition, her GP sick notes (as set out in the dismissal letter) state that she had been recently suffering from 'anxiety' and 'depression'. It is not clear whether the occupational health nurse were aware of that information when they concluded: *"I am not concerned that Ms [X] has any significant degree of anxiety, depression or other mental health issue"*.

Claimant's evidence re time limit issues

144. The Tribunal panel asked the claimant why she did not submit first Tribunal claim at an earlier stage, having noted that any events that took place before June 2019 were potentially out of time in light of Employment Judge Little's judgment. The claimant stated that the comment made by Mrs Wadsworth in 2015 was 'just one of the things that happened at the time'. She said that she was 'always hopeful that things could improve and change – with the arrival of AP they did start to improve'. The claimant said that she was not aware of the respondent's grievance procedure until she raised a complaint in September 2019. She stated that she was not aware of the possibility of submitting a Tribunal claim at the time and only became aware of that possibility in around April 2020, after speaking with ACAS and the Citizen's Advice Bureau.

RELEVANT LAW

145. **The summary of the relevant law is set out at Annex 2 to this Judgment**. A draft copy of this summary was provided to both parties on the fourth day of this hearing and we provided them with the opportunity to comment on the summary as part of their submissions.

146. We have also considered the legal principles set out in the parties' helpful submissions (including the respondent's written submissions), although their submissions have not been summarised in this Judgment.

APPLICATION OF THE LAW TO THE FACTS

147. We will now apply the law to our findings of fact. We will deal with each factual allegation set out in Table A in the Agreed List of Issues (see Annex 1) of direct discrimination and harassment first relating to matters that took place prior to the

claimant's dismissal. We will then consider the claimant's complaints of unfair dismissal and victimisation relating to her dismissal.

Direct discrimination complaints - comparators

148. We note that the Tribunal must compare the claimant's treatment with that of her named comparators for the purposes of determining whether her treatment amounted to less favourable treatment. Those comparators must be in the same material circumstances as the claimant, save for her race. We note that the claimant has stated that her comparators were Miss Selwood, TM and LL (in addition to a hypothetical comparator). We concluded that these individuals' circumstances were not materially the same as those of the claimant in relation to their grade, pay and duties. In particular, we noted that:

148.1.1 TM was employed as a Grade 4 Programme Administrator;

148.1.2 Miss Selwood joined the respondent in January 2019 as an apprentice, paid at the apprentice rate; and

148.1.3 LL was initially employed at the same role and grade as the claimant when she covered the claimant's maternity leave and for a two month period afterwards, but she then applied successfully to become a Grade 4 Programme Administrator from November 2019.

Allegation 1 – 'alphabet' comment (2015)

149. We found that Mrs Wadsworth did state: *"Can't you even do the alphabet right, I thought you had a degree"*, after the claimant mistakenly put files in the wrong order when she was moving files between cabinets. The context of this comment is set out in detail in our findings of fact.

150. The claimant has complained that Mrs Wadsworth's comment amounted to harassment. We found that her comment was unwanted conduct (for the purposes of the claimant's harassment complaint) and could potentially have amounted to less favourable treatment (for the purposes of the claimant's direct discrimination complaint). We note that Mrs Wadsworth herself stated that it was an 'ill-advised joke'.

151. However, we concluded that the comment was not related to the claimant's race for the following key reasons:

151.1 Mrs Wadsworth made that comment by reference to the fact that the claimant was educated to degree level, rather than by reference to the claimant's race;

151.2 Mrs Wadsworth was not aware that the claimant's first alphabet was not the Roman (i.e. English) alphabet;

151.3 the context of the comment was that the claimant had mistakenly moved files between cabinets and had not placed them back in the correct

alphabetical order. As a result, one pupil's file was missing and all of the office staff had to search for it because the senior leadership team required the file urgently.

Allegation 2 – claimant's letter to governors (January 2017)

152. We concluded that Mrs Wadsworth did not prevent the claimant from applying to the governors for her role to be re-graded from Grade 2 to Grade 3. We found that Mrs Wadsworth did not see the claimant's letter to the governors and that the claimant only discussed the letter with AP as set out in our findings of fact. We also note that the claimant did not chase up a response to her letter.

Allegation 3 – filing work (June 2018 onwards)

153. The claimant alleged that Mrs Wadsworth required her to undertake the bulk of the filing work and refused her the opportunity to carry out more skilled or interesting work. We have set out in detail our findings regarding the claimant's duties from June 2018 in this Judgment. We found that:

153.1 the amount of daily filing undertaken by either the claimant or her general administrative colleagues was around 30 minutes per day;

153.2 the amount of filing that the claimant personally undertook depended on the staffing levels at the respondent from time to time. However, we found that when Miss Selwood joined the respondent in January 2019, she undertook the bulk of the filing because she worked full time and the claimant worked two days per week. In addition, the claimant's filing duties decreased again in April 2019 when she started working one day per week on reception;

153.3 the claimant herself acknowledged that her duties had become more varied in her reviews with Mrs Wadsworth in September 2018 and February 2019.

154. We have concluded that the claimant was not required to undertake the bulk of the filing work and she was not refused the opportunity to carry out more skilled or interesting work. However, even if our conclusion is incorrect, then we find that the reason for the claimant's duties was due to the workload and staffing within the administrative team at that time. It was not due to the claimant's race.

Allegation 4 – stock check (19 July 2018)

155. The claimant alleged that Mrs Wadsworth stopped her from carry out a check of the stationery check and re-directed her towards the filing work. The claimant and Mrs Wadsworth agreed that this occurred and the circumstances of this event are set out in detail in our findings of fact.

156. We accepted Mrs Wadsworth's evidence that the reason why she re-directed the claimant to filing was because another member of staff had already undertaken the stock check. We conclude that this was not less favourable treatment for the purposes of direct discrimination because Mrs Wadsworth (as the claimant's

manager) was entitled to exercise her discretion as to which tasks should take priority. In addition, we concluded that even if this were less favourable treatment, this was not due to the claimant's race.

Allegation 5 – reception work and pay (April 2019 onwards)

157. The claimant alleged that she was not paid at a Grade 3 rate for the reception work that she undertook on Mondays from April 2019. We found that the claimant was never promised that she would be paid at a Grade 3 rate when she agreed to undertake reception duties in April 2019 and that she remained on her Grade 2 rate, as recorded in her February 2019 variation to contract letter. We note that Greenacre's staff who undertook the majority of the reception work were employed at Grade 3, but undertook additional duties including invoicing, milk returns, liaising with external lettings and dealing with the out of hours calendar. The claimant did not undertake these duties.

158. However, if our conclusions are incorrect, we have also considered whether this was due to the claimant's race. We have concluded that it was not due to the claimant's race; rather the claimant was paid at the Grade 2 rate because this was her Grade as stated in her employment contract.

Time limits (Allegations 1 to 5)

159. Even if we are incorrect in our conclusions, we concluded that the claimant's complaint was outside the time limits and it was not just and equitable to extend the time limits beyond the extension granted by Employment Judge Little at the Preliminary Hearing of these claims.

160. Allegations 1 to 5 range from 2015 to April 2019 and there are significant gaps in time between each allegation. The claimant did not raise any complaints about Mrs Wadsworth's behaviour until 25 September 2019. The claimant stated that she was not aware of the possibility of raising a Tribunal claim until April 2020. However, we note that the claimant is an educated individual who had previously worked in a solicitor's office. The claimant could have taken steps at an earlier stage to make herself aware of the possibility of raising a complaint and/or a Tribunal claim. It would not be just and equitable to extend the time limits by a further period of time permit the claimant to bring this complaint.

Allegation 6 – cause for concern form (3 September 2019)

161. The claimant alleged that Mrs Wadsworth criticised her for not distributing the updated version of the 'cause for concern' form. We found that the failure to distribute the correct cause for concern form was due to a breakdown in communications, after the updated form was circulated shortly before the Summer holidays. We found that Mrs Wadsworth did not criticise the claimant for this failure, rather she told Miss Selwood and the claimant that the right form needed to be distributed.

Allegation 7 – TM job share (9 September 2019)

162. The claimant alleged that Mrs Wadsworth refused her request to be considered for a job share with TM and remarked that the claimant was 'not a competent typist'. We concluded that this was not correct, for the following reasons. We found that the claimant understood that TM intended to return to work after maternity leave and work three days per week, rather than her previous full time hours. The claimant asked Mrs Wadsworth if she could be considered for a job share with TM, carrying out the remaining two days' work that TM would no longer perform on her return to work.

163. However, the respondent took the decision to restructure TM's role such that TM would continue to carry out the more 'senior' parts of her role on the days that TM was working. Mrs Wadsworth said that the remaining more 'junior' tasks were undertaken by Miss Selwood (such as filing and photocopying) and by the rest of the office staff.

164. Mrs Wadsworth informed the claimant that there was a possibility that another Programme Administrator may be advertised in the near future and that the claimant may be able to apply for that role on a job share basis. Mrs Wadsworth noted that the role would require typing skills because part of the duties would involve minuting meetings and annual reviews. We find that Mrs Wadsworth did not tell the claimant that she was not a 'competent typist'. Rather, Mrs Wadsworth informed the claimant that the role required a 'competent typist' to complete the tasks required by of a Programme Administrator.

Allegation 8 – documents left on desk (9 September 2019)

165. The claimant alleged that Mrs Wadsworth blamed her for leaving documents on her desk, when this had actually been done by Miss Selwood. We found that the claimant complained to Mrs Wadsworth in a meeting on 9 September 2019 that other members of staff had emailed her, accusing her of leaving confidential documents on her desk. Mrs Wadsworth said that Ms Scargill would work with the claimant and Miss Selwood to ensure that there was a clear division of duties on Tuesdays between the two of them. Mrs Wadsworth later spoken with Miss Selwood, who admitted that she had left the documents on the claimant's desk by mistake.

166. We concluded that Mrs Wadsworth did not 'blame' the claimant for leaving documents on her desk. Other members of staff had emailed the claimant regarding the confidential documents that they had found on the claimant's desk in her absence. It was the claimant, rather than by Mrs Wadsworth, who raised the issue at the meeting on 9 September 2019. Mrs Wadsworth then dealt with this issue by speaking to Miss Selwood and asking Ms Scargill to ensure that there was a division of duties between the two of them.

Allegations 9 and 10 – 24 September 2019 meeting

167. The claimant complained that at the meeting on 24 September 2019 (mistakenly referred to as 23 September 2019 in allegation 9) Mrs Wadsworth:

167.1 accused the claimant of refusing to undertake a task (which the claimant clarified related to the reception tannoy and radio on 23 September 2019);

167.2 pointed out the claimant's failings and mistakes (which were actually mistakes made by Miss Selwood); and

167.3 informed the claimant that she would be put on a Performance Improvement Plan ("**PIP**").

168. We found that at that meeting:

168.1 Mrs Wadsworth and the claimant discussed her work on reception on 23 September 2019. Mrs Wadsworth said that the claimant was unable to conduct some of the reception duties, including operating the tannoy and radio tasks. The claimant said that she was not confident in her ability to manage reception duties alone because she had always worked on reception alongside another member of staff and she had not been fully trained on reception tasks such as the use of the tannoy and radio;

168.2 they also discussed an issue regarding 'hidden filing'. Ms Scargill was in the filing room with Miss Selwood when a box of old paperwork was discovered that had not been filed. They raised this with Mrs Wadsworth, who then raised it with the claimant during the meeting. The claimant said that she had not hidden the paperwork;

168.3 Mrs Wadsworth stated that if the claimant's performance did not improve, there was a chance that she may be placed on a PIP. She did not state that the claimant was going to be placed on a PIP that day, contrary to the claimant's recollection;

168.4 the claimant became upset and left the meeting; and

168.5 Ms Scargill had a conversation later that day with the claimant, during which Ms Scargill said to the claimant that Mrs Wadsworth had to address issues with her because she was her manager. She also said to the claimant that Mrs Wadsworth had offered her support and she should take it. The claimant said that many of the problems raised were not her fault and that Mrs Wadsworth never raised similar issues with Miss Selwood. Ms Scargill explained to the claimant that she would not be placed on a PIP if her performance improved.

169. We concluded that Mrs Wadsworth did not inform the claimant that she would be placed on a PIP. Instead, Mrs Wadsworth stated that if the claimant's performance did not improve, there was a chance that she may be placed on a PIP.

170. We also concluded that the other matters discussed at the meeting on 24 September 2019 related to the claimant's performance of her duties and did not relate to her race. The claimant herself stated that she had not been trained on all reception tasks and could not operate the tannoy or the radio. The matter of the 'hidden filing' had already been discussed with Miss Selwood, because she was in the filing room with Ms Scargill when the unfiled paperwork was found.

Allegation 11 – delay in grievance process (4 December 2019 to March 2020)

171. The claimant alleged that the respondent (and in particular Mrs Wilcock) delayed in dealing with her formal grievance (submitted on 4 December 2019), because the respondent intended to cover up Mrs Wadsworth's discriminatory actions.

172. We found that the respondent took too long to investigate the claimant's grievance and arrange a grievance meeting, as detailed in our findings of fact. We found that as a matter of good practice, the claimant's grievance should have been dealt with in a much shorter time period, particularly given that the claimant was absent on long term sick leave at the time and was suffering from anxiety and stress related to work. However, we concluded that the respondent did not intend to cover up any actions by Mrs Wadsworth. We concluded that the delay was due to the respondent's focus being on other matters during that time, including the redundancy consultation regarding the redundancy proposals which were announced to staff by letter on 24 February 2020. This was not a matter related to the claimant's race.

Allegation 12 – grievance witnesses (December 2019 to March 2020)

173. The claimant alleged that Mrs Wilcock and the senior leadership team at the respondent instructed employees who would have been potential witnesses for the claimant at her grievance hearing not to get involved with the grievance. We found that no one at the respondent instructed employees not to get involved with the claimant's grievance. We saw emails in the hearing file detailing the reasons given by some colleagues for not attending, including stress relating to the work restructure, their personal health and their domestic difficulties. We also accepted Mrs Wilcock's evidence (which was supported by the contemporaneous emails) that she offered to discuss matters with some of the colleagues to deal with their concerns.

174. Mrs Wilcock offered that the claimant could provide her with a list of questions to ask the remaining colleagues on the claimant's behalf. However, the claimant did not provide Mrs Wilcock with any questions.

Conclusions on direct race discrimination and harassment complaints

175. We have concluded that the claimant was not subject to direct race discrimination and that she was not subject to harassment related to her race.

Failure to make reasonable adjustments

Respondent's knowledge of disability

176. The respondent accepted that the claimant's condition of chronic back pain amounted to a disability, but denied knowledge. The respondent's representative stated at paragraphs 52 and 54 of her submissions that the respondent: "*accepts that it was aware she experienced back pain and discomfort, but it denies that it was aware, or ought to have been aware that this amounted to a disability at all material times… The evidence is clear that the Claimant never revealed to the Respondent all of the symptoms she has since included in her impact statement to the*

Respondent. These are also not referred to in any medical evidence presented to the Employment Tribunal or the Respondent."

177. However, we concluded that the respondent knew or could reasonably have been expected to know that the claimant's chronic back pain amounted to a disability by March 2015 at the latest (i.e. one year after her initial sickness absence due to back pain and sciatica). By this point in time, the respondent had knowledge of the following issues:

177.1 the claimant's back pain was long term (i.e. it had lasted 12 months or more or it was likely to recur);

177.2 the condition had a 'substantial' (defined under the Equality Act as more than 'minor or trivial') impact on her ability to carry out normal day to day activities. For example:

177.2.1 it rendered her unable to attend work on several occasions due to the level of pain. Her symptoms also included numbness in her left leg and toes and limping which affected her ability to walk on occasions;

177.2.2 the respondent had agreed to redeploy her on medical grounds from early 2014 into an administrative role, but her back pain continued;

177.3 the claimant was taking measures to manage her back pain, without which it was likely to have an even greater impact on her ability to carry out normal day to day activities. For example, she was taking strong painkillers and had some sessions of physiotherapy. In addition, the respondent obtained a new chair and a ladder with a handrail to enable the claimant to continue to perform her duties, as a result of the DSE assessment in December 2016 that Mrs Wadsworth arranged.

*Provision, criterion or practice ("**PCP**")*

178. However, we concluded that the respondent did not have a PCP of requiring its administrators to carry out repetitive tasks, including filing. The key reasons for our conclusions are our findings that:

178.1 the claimant carried out a variety of administrative tasks, of which filing took around 30 minutes per day;

178.2 the claimant was able to take breaks from tasks to avoid repetition for prolonged periods of time;

178.3 the claimant noted in her review forms in 2018 and 2019 that she had been provided with a greater variety of tasks during that period. She also noted that Miss Selwood carried out filing after she joined in January 2019;

178.4 the claimant did not have any absences due to back pain after 23 July 2018; and

178.5 from April 2019, the claimant worked on reception for one out of her two working days which she stated she enjoyed.

Time limits

179. Even if we are incorrect in our conclusions, we concluded that the claimant's complaint was outside the time limits and it was not just and equitable to extend the time limits beyond the extension granted by Employment Judge Little at the Preliminary Hearing of these claims.

180. The claimant did not specify a period of time in relation to her allegation of failure to make reasonable adjustments. However, the claimant stated during her 2019 review form (which she signed in April 2019) that: *"I had no big issues since arranging an agreement with my manager where I could stop for breaks from filing when needed. This was a big help in terms of managing my back problems."* After this time, the claimant worked on reception one day per week, which meant she only carried out general administrative tasks on one day per week. In addition, the claimant did not raise any concerns regarding back pain during the period from April to September 2019.

181. The claimant did not raise any complaints about Mrs Wadsworth's behaviour until 25 September 2019. The claimant stated that she was not aware of the possibility of raising a Tribunal claim until April 2020. However, we note that the claimant is an educated individual who had previously worked in a solicitor's office. The claimant could have taken steps at an earlier stage to make herself aware of the possibility of raising a complaint and/or a Tribunal claim. It would not be just and equitable to extend the time limits by a further period of time permit the claimant to bring this complaint.

182. The claimant's complaint of failure to make reasonable adjustments therefore fails.

Unfair dismissal and victimisation complaints

Reason for dismissal

183. We have considered the reason for the claimant's dismissal. The claimant submitted that she was dismissed because she brought her first Employment Tribunal claim on 12 May 2020. The respondent submitted that the reason for dismissal was either capability (i.e. ill health) or some other substantial reason (i.e. that the claimant's continued employment was untenable because of the breakdown in the working relationship).

184. We concluded that the claimant was not dismissed because she brought her first Employment Tribunal claim. Ms Wilson was the only member of the panel that decided to dismiss the claimant who was aware of the claimant's Tribunal claim. The other two panel members were not aware of the claimant's Tribunal claim. The claimant's complaint of victimisation therefore fails.

185. We were satisfied that the reason for the claimant's dismissal was her sickness absence, taking the following key points into consideration:

185.1 the claimant was absent on sick leave from late September 2019 and did not return to work;

185.2 the respondent started the process of managing the claimant's sickness absence for several months before her dismissal. The respondent sought the claimant's consent for a referral to occupational health in late November 2019 and obtained a report in February 2020;

185.3 the respondent obtained a second occupational health report in June 2020 and arranged a sickness absence review meeting (which the claimant did not attend) to discuss the report. The report suggested that the claimant was unlikely to return to work, unless she could be relocated to another academy.

186. We concluded that it was the claimant's sickness absence that led to her dismissal, rather than any breakdown in the employment relationship. The procedure followed by the respondent focused on the claimant's sickness absence and the impact of her absence on her colleagues, rather than on the relationship between the claimant and the respondent. In addition, if the respondent had believed that the claimant's relationship with the respondent itself (i.e. the education trust, as opposed to Greenacre) had broken down, then it would not have sought alternative vacancies for the claimant at other academies that were managed by the respondent.

Dismissal procedure

187. However, we have concluded that the procedure that the respondent undertook when dismissing the claimant was unfair. In reaching this conclusion we have taken into account the caselaw regarding the range of reasonable responses test (which we have explained in more detail at Annex 2).

188. We note that the ACAS Code of Practice on Disciplinary Procedures does not apply to this case because the reason for dismissal was neither misconduct nor performance.

189. We note that during the claimant's absence from 30 September 2019 until the final meeting on 17 July 2020, the following key events took place:

189.1 Mrs Wilcock corresponded with the claimant, albeit that much of the correspondence related to the claimant's complaint letter and grievance;

189.2 the claimant stated as part of her informal grievance outcome in November 2019 that she would be willing to consider redeployment to another of the

respondent's academies, but there were no vacancies available at that time;

189.3 the respondent obtained two occupational health reports regarding the claimant's fitness to work in February and June 2020. Both reports stated that the claimant the claimant was unlikely to return to work at Greenacre;

189.4 the respondent arranged a sickness absence review meeting on 30 June 2020 to discuss the claimant's absence and the second occupational health report, which the claimant did not attend;

189.5 the respondent invited the claimant to a meeting on 17 July 2020 by email on 3 July 2020, warned her that one outcome of the meeting may be her dismissal and stated that the meeting may proceed in her absence if she failed to attend 'without good reason'.

190. The respondent's representative sought to rely on a document that the claimant submitted as part of her second Tribunal claim on 2 October 2020 in which the claimant stated that as at June and July 2020, her "mental health was at breaking point" and she stated "I could not deal with emails and I certainly could not attend any more meetings". However, we note that this specific information was not within the respondent's knowledge at the time of the claimant's dismissal.

191. The key reasons why we have concluded that the respondent's procedure when dismissing the claimant was flawed relate to the arrangements for and the conduct of the final meeting on 17 July 2020. We found in relation to that meeting that:

191.1 the respondent should have postponed the meeting on 17 July 2020 to provide the claimant with an opportunity to attend the meeting. The respondent stated the meeting would go ahead in the claimant's absence if she failed to attend 'without good reason'. The claimant stated that she was 'unwell'. On the face of it, that was a good reason to postpone the meeting. However, the respondent made no attempt to ascertain the nature of the illness that was preventing the claimant from attending the meeting. Instead the respondent stated that the claimant had two options available to her – either that a representative could attend on her behalf or she could submit a written statement before the hearing;

191.2 Mrs Wilcock checked with occupational health whether the claimant was fit to attend the meeting, based on the report of 11 June 2020 and occupational health confirmed that she was fit to attend on this basis. Occupational health did not contact the claimant to ascertain whether there was any other reason that she could not attend on 17 July 2020;

191.3 the key reasons why the respondent was unwilling to postpone the meeting included:

191.3.1 the respondent pointed to a 'pattern' of the claimant not attending meetings and the difficulties in communicating with the claimant. The respondent believed that if the meeting was postponed, the claimant would not attend any re-arranged meeting. However, the

only meeting that the claimant had failed to attend was a sickness absence review meeting on 30 June 2020 which she stated should proceed in her absence. We note that the meeting on 17 July 2020 could result in the claimant's dismissal and was a very important meeting. The claimant did not state that this meeting should proceed in her absence - she emailed Mrs Wilcock on 16 July 2020 stating that she was 'unwell';

191.3.2 the earliest that a further meeting could have been arranged would have been September 2020, due to the school Summer holidays. The respondent was concerned about the impact of the claimant's ongoing absence on its staff. However, we note that the claimant worked term time only and her absence would not have contributed to any additional workload during the Summer holidays;

191.3.3 the respondent stated that it was also unable to obtain supply staff to cover roles during staff sickness absence. This is an internal decision taken by the respondent – we note that there is no legal reason to prevent such cover being obtained. We also note that the claimant would have exhausted any additional contractual sick pay by September 2020. We note that an employer is not obliged to wait until an employee has exhausted their sick pay entitlement. However, the fact that the claimant would have exhausted her sick pay by September 2020 meant that the financial costs of potentially continuing to employ the claimant after that time would have been significantly lower;

191.3.4 we note that the respondent did not recruit to fill the claimant's role after her dismissal and that her role was removed from the new structure from January 2021. As a result, her duties remained shared between the other administrative staff, even after she was dismissed; and

191.3.5 the respondent thought that the claimant would have been unable to provide any information that would have changed the outcome of the meeting. Ms Wilson noted that the claimant had suggested that redeployment was the only option. However, the discussions at that point in time took place in the context of the claimant's grievance and occupational health reviews, rather than a meeting that could potentially lead to her dismissal.

191.4 the respondent should have sought clarification of the second occupational health report. The claimant raised questions regarding the accuracy of the occupational health report in her email of 18 June 2020. The claimant had initially taken anti-depressants in December 2019 and was awaiting therapy. In addition, her GP sick notes (as set out in the dismissal letter) state that she had been recently suffering from 'anxiety' and 'depression'.

It is not clear whether the occupational health nurse were aware of that information when they concluded: *"I am not concerned that Ms [X] has any significant degree of anxiety, depression or other mental health issue"*. We note that the claimant did not provide her GP's details as requested by the respondent in its letter of 1 July 2020, but the respondent could have raised these matters with occupational health directly.

192. The claimant also complained as part of the Agreed List of Issues that she did not receive adequate notice of the meeting on 17 July 2020 and that the respondent failed to obtain a medical report from the claimant's GP. We do not accept these complaints for the following reasons:

192.1 the claimant was provided notice of the meeting on 3 July 2020 (attached to which was a copy of a letter dated 1 July 2020 arranging the meeting). We concluded that 14 days' notice of the meeting was sufficient notice; and

192.2 the claimant did not provide the respondent with her GP's details in order for them to obtain a medical report.

CONCLUSIONS

193. We have concluded that the claimant's complaints of direct race discrimination, harassment related to race, failure to make reasonable adjustments and victimisation fail and are dismissed.

194. We have concluded that the claimant's complaint of unfair dismissal succeeds and is upheld.

195. For the avoidance of doubt, we have not reached any conclusions on issues relating to remedy in this Judgment (including contributory fault and/or *Polkey* reductions). These matters will be dealt with at the remedies hearing.

NOTES

196. The date for a potential remedies hearing was agreed with the parties at the end of the liability hearing. The remedies hearing will take place on Thursday 28 April 2022 and separate case management orders setting out the preparation required for that hearing will be sent to the parties.

Employment Judge Deeley

17 December 2021

RESERVED JUDGMENT

Public access to Employment Tribunal judgments
Judgments and written reasons for judgments, where they are provided, are published in full online at shortly after a copy has been sent to the parties in the case.

ANNEX 1 – AGREED LIST OF ISSUES

Table A - direct race discrimination and harassment related to race (factual complaints)			
Date	**People involved**	**Complaint**	**Legal claim**
1. 2015	SW	SW made a sarcastic comment to NS: "Can't you even do the alphabet right, I thought you had a degree", after NS had mistakenly put files in the wrong alphabetical order	Harassment
2. January 2017	SW	SW prevented NS's application to the governors for her role to be re-graded from Grade 2 to Grade 3	Direct discrimination
3. June 2018 onwards	SW	SW required NS to undertake the bulk of the filing work and refused her the opportunity to carry out more skilled or interesting work such as ordering stock	Direct discrimination
4. 19 July 2018	SW	SW stopped NS from carrying out a check of the stationery stock and re-directing her towards the filing work	Direct discrimination
5. April 2019 onwards	SW	NS was not paid at a Grade 3 rate for the one day per week that she undertook the role of receptionist	Direct discrimination
6. 3 September 2019	SW	SW criticised NS for not distributing a "cause for concern" form when that failure had again allegedly been Ms Selwood's	Direct discrimination
7. 9 September 2019	SW	SW refused NS' request to be considered for a job share with Tayler Mace and remarking that the claimant was not a competent typist	Direct discrimination
8. 9 September 2019	SW	SW blamed NS for leaving documents on her desk when that had actually been done by Ms Selwood.	Direct discrimination
9. 24 September 2019	SW	SW informed NS that she was to be put on a Performance Improvement Plan because she had been making mistakes (the claimant alleges that the mistakes were in fact those of others, in particular an apprentice called Ms Selwood)	Direct discrimination

Table A - direct race discrimination and harassment related to race (factual complaints)			
Date	**People involved**	**Complaint**	**Legal claim**
10. 24 September 2019	SW	SW again accusing NS during the course of an impromptu meeting that she had refused to undertake a task, pointing out other alleged failings and indicating that the claimant would be put on a Performance Improvement Plan	Harassment and Direct discrimination
11. 4 December 2019 to March 2020	AW (on behalf of HR)	Delay in dealing with NS' formal grievance submitted on 4 December 2019 which NS states was intended to cover up SW's discriminatory actions	Direct discrimination
12. December 2019 to March 2020	AW (on behalf of HR) and senior leadership team	Instructing employees who would have been potential witnesses for NS at her grievance hearing not to get involved with the grievance	Direct discrimination

Table B – claimant's complaints regarding her dismissal
1. the respondent unreasonably accepted the explanation and denial of poor treatment put forward by the claimant's line manager Ms Wadsworth and rejected the claimant's grievance; 2. the respondent had relied upon an occupational health report which the claimant believed to be inaccurate and which omitted important points regarding the claimant's mental health' 3. the respondent failed to obtain a medical report from the claimant's own GP; 4. the respondent did not give the claimant enough notice of the hearing to be held on 17 July 2020; 5. the respondent proceeded with the hearing on 17 July 2020 in the claimant's absence and deciding at that hearing to dismiss her; and 6. the claimant was dismissed because she brought her first Employment Tribunal claim.

Direct race discrimination

1. The claimant describes herself as being of Eastern European origin.

2. Did the respondent do the things set out at Table A (all allegations except allegation 1)?
3. Was that less favourable treatment?

   The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

   The claimant relies upon Ms Selwood as a comparator in relation to the matters where she is referenced above. With regard to the allegation that the claimant was not permitted to undertake the more interesting work of ordering stationery and other stock, the claimant relies upon the comparators Lesley Logan and Tayler Mace.

4. If the claimant establishes that all or any of this less favourable treatment occurred, was it done because of the claimant's race?

Harassment related to race

5. Did the respondent do the things set out at Table A (allegations 1 and 10 only)?
6. If so, was that unwanted conduct?
7. Did it relate to the claimant's race?
8. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
9. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Disability discrimination – reasonable adjustments

10. The respondent accepts that the claimant's chronic back pain (which the claimant states results from mild scoliosis, minor spina bifida occulta and sciatica) amounts to a disability for the purpose of s6 of the Equality Act 2010.
11. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? If so, from what date?
12. A "PCP" is a provision, criterion or practice. Did the respondent have a PCP of requiring its administrators to carry out repetitive tasks and in particular filing?
13. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that it would aggravate the claimant's back pain and leave her in continuous pain?

14. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
15. What steps could have been taken to avoid the disadvantage? The claimant suggests:
    15.1. the respondent should have permitted the claimant to take more breaks; and
    15.2. the respondent should have provided the claimant with a variety of tasks.
16. Was it reasonable for the respondent to have to take those steps?
17. Did the respondent fail to take those steps?

Time issues in relation to the race discrimination and disability discrimination complaints

18. The Tribunal has already granted an extension of the time limit to 12 May 2020 (on just and equitable grounds) such that the time limit began to run from 25 September 2019 (paragraph 4 of Employment Judge Little's Judgment dated 2 February 2021 at pages 94 and 95 re race discrimination and harassment related to race complaints). However, any complaint about something that happened before 25 September 2019 may not have been brought in time.
19. Were the discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
    19.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
    19.2. If not, was there conduct extending over a period?
    19.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
    19.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
        a) Why were the complaints not made to the Tribunal in time?
        b) In any event, is it just and equitable in all the circumstances to extend time?

Victimisation

20. Did the respondent dismiss the claimant because she brought her first Employment Tribunal claim (case number 1802652/20)?

Unfair dismissal

21. What was the reason or principal reason for the claimant's dismissal?

The respondent seeks to show the potentially fair reasons of capability or some other substantial reason (i.e. that the claimant's continued employment was untenable because of the breakdown in the working relationship).

22. If the reason was capability (related to the claimant's sickness absence), did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide whether the respondent adequately warned the claimant and gave the claimant a chance to improve her attendance;

23. If the reason was some other substantial reason (i.e. the breakdown in the working relationship), was it capable of justifying dismissal?

24. In any case, did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant (i.e. was the dismissal within the range of reasonable responses open to the respondent)? The Tribunal will also have regard to the claimant's allegations at Table B.

ANNEX 2 – SUMMARY OF RELEVANT LAW

DISCRIMINATION CLAIMS

*All claims for discrimination are brought under the Equality Act 2010 (the "**EQA**").*

Direct sex discrimination (s13 EQA)

6. Section 13 of the Equality Act 2010 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."

7. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur in the employment context, which includes the employer dismissing the employee or subjecting the employee to any other detriment.

8. There are two key questions that the Tribunal must consider when dealing with claims of direct discrimination:

   8.1 was the treatment alleged 'less favourable treatment', i.e. did the respondent treat the claimant less favourably than it treated or would have treated others in not materially different circumstances;

   8.2 if so, was such less favourable treatment because of the claimant's protected characteristic?

9. However, the Tribunal can, in appropriate cases, consider postponing the question of less favourable treatment until after they have decided the 'reason why' the claimant was treated in a particular way (*Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337 HL).

10. In relation to less favourable treatment, the Tribunal notes that:

    10.1 the test for direct discrimination requires an individual to show more than simply different treatment (*Chief Constable of West Yorkshire Policy v Khan* 2001 ECR 1065 HL);

    10.2 an employee does not have to experience actual disadvantage for the treatment to be less favourable. It is sufficient that an employee can reasonably say that they would have preferred not to be treated differently from the way an employer treated or would have treated another person (cf paragraph 3.5 of the EHRC Employment Code); and

    10.3 the motive and/or beliefs of the parties are relevant to the following extent:

        10.3.1 the fact that a claimant believes that he has been treated less favourably does not of itself establish that there has been less favourable treatment (see, for example, *Shamoon*);

        10.3.2 in cases where the conduct is not inherently discriminatory, the conscious or unconscious 'mental process' of the alleged

discriminator is relevant (see, for example, *Amnesty International v Ahmed* 2009 ICR 1450 EAT); and

10.3.3 for direct discrimination to be established, the claimant's protected characteristic must have had a 'significant influence' on the conduct of which he complains (*Nagarajan v London Regional Transport* 1999 ICR 877 HL).

11. The Tribunal also notes that if an employer treats all employees equally unreasonably, it is not appropriate to infer discrimination (see, for example, *Laing v Manchester City Council & another* 2006 ICR 1519 EAT and *Madarassy v Nomura International plc* 2007 ICR 867 CA).

Comparators

12. To be treated less favourably implies some element of comparison. The claimant must have been treated differently to a comparator or comparators, be they actual or hypothetical, who do not share the relevant protected characteristic. The cases of the complainant and comparator must be such that there must be no material difference between the circumstances relating to each case (section 23 Equality Act 2010 and see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285).

13. It is for the claimant to show that any real or hypothetical comparator would have been treated more favourably. In so doing the claimant may invite the tribunal to draw inferences from all relevant circumstances and primary facts. However, it is still a matter for the claimant to ensure that the tribunal is given the primary evidence from which the necessary inferences may be drawn. The Tribunal must, however, recognise that it is very unusual to find direct evidence of discrimination. Normally, a case will depend on what inferences it is proper to draw from all the surrounding circumstances.

14. When considering the primary facts from which inferences may be drawn, the Tribunal must consider the totality of the facts and not adopt a fragmented approach which has the effect of 'diminishing any eloquence the cumulative effects of the primary facts' might have on the issue of the prohibited ground (*Anya v University of Oxford* [2001] IRLR 377).

Harassment

15. The provisions relating to harassment are set out at s26 of the EQA:

26 Harassment

(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 subsection (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.

(5) The relevant protected characteristics are – …race;
…

16. There are three elements to the definition of harassment:

    16.1 unwanted conduct;

    16.2 the specified purpose or effect (as set out in s26 EQA); and

    16.3 that the conduct is related to a relevant protected characteristic: see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, as updated by reference to the EQA provisions in *Reverend Canon Pemberton v Right Reverend Inwood* [2018] EWCA Civ 564.

17. A single act can constitute harassment, if it is sufficiently 'serious' (cf paragraph 7.8 of the EHRC Code).

18. The burden of proof provisions apply (see below). When a tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of a protected characteristic (such as race), it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of that characteristic. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of that characteristic. The tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed: see *Nazir v Asim & Nottinghamshire Black Partnership* [2010] IRLR 336 EAT.

19. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. The Tribunal must consider whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant.

20. In *Dhaliwal*, the EAT considered the question of whether unwanted conduct violated a claimant's dignity and held that:

    "while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct…it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question."

21. The EAT in *Dhaliwal* also stated that:

"Not every…adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended".

22. The EAT in *Weeks v Newham College of Further Education* (UKEAT/0630/11) considered the question of whether unwanted conduct created an intimidating, hostile, degrading, humiliating or offensive environment. The EAT held that:

"…although we would entirely accept that a single act or single passage of actions may be so significant that its effect was to create a proscribed working environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.…An 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace."

Failure to make reasonable adjustments (s20 and 21 EQA)

23. The legislation relating to a claim for failure to make reasonable adjustments is set out at sections 20 and 21 of the EQA:

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

…

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

…

24. We also note that 'substantial' in the context of 'substantial disadvantage' is defined at s212(1) of the EQA as: *"more than minor or trivial"*.

25. The Tribunal must assess whether the respondent applied a provision, criterion or practice (a "**PCP**") which placed the claimant at a substantial disadvantage in

comparison to those employees not sharing his disability. If so, the duty to make reasonable adjustments is engaged.

26. The Tribunal must then consider whether a reasonable adjustment might have eliminated or reduced that disadvantage.

27. We note that an employer will not be liable for a failure to make adjustments if it: "*does not know, and could not reasonably be expected to know'* that a PCP would be likely to place the employee at a substantial disadvantage" (paragraph 20(1)(b), Schedule 8 EQA). The employer's state of knowledge is assessed at the time of the alleged discrimination (*Tesco Stores Ltd v Tennant* UKEAT/0167/19/00).

28. The burden of proof is on the claimant to establish the existence of the provision, criterion or practice and to show that it placed the claimant at a substantial disadvantage (*Project Management Institute v Latif* [2007] IRLR 579). The claimant must also identify the potential reasonable adjustments sufficiently to enable them to be considered as part of the evidence during the hearing. These are not limited to any adjustments that the claimant brought to the respondent's attention at the relevant time. The respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved. It is not necessary, at the time, for the claimant to have brought the proposed adjustment to the respondent's attention.

29. The reasonableness of the steps to be taken to avoid the disadvantage is to be determined on an objective basis (*Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160). In order for an adjustment to be "reasonable", it does not have to be shown that the success of the proposed step was guaranteed or certain. It is sufficient that there was a chance that it would be effective. Guidance as to the considerations that are relevant in assessing reasonableness is provided in paragraph 6.28 of the Employment Statutory Code of Practice.

30. In *Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10, the EAT held that if there is a real prospect of an adjustment removing a disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one.

31. In addition, the Tribunal needs to consider the implications of any proposed adjustments on a respondent's wider operation (*Lincolnshire Police v Weaver* [2008] AER 291, decided under the former Disability Discrimination Act 1995).

Victimisation (s27 EQA)

32. The legislation relating to a claim for victimisation is set out at s27 of the EQA:

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because -
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –
...

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

33. The respondent in this case accepts that the claimant's protected act was the submission of her first Employment Tribunal claim. The claimant alleges that she was dismissed because she submitted that claim.

34. The respondent's state of mind is relevant to establishing whether there is a necessary link in the mind of the alleged discriminator between the doing of the protected act and the less favourable treatment (see *Nagarajan v London Regional Transport* [1999] IRLR 572 and *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830). However:

34.1 there is no requirement for the claimant to show that the alleged discriminator was wholly motivated to act by the claimant's protected act (*Nagarajan*). Where there is more than one motive in play, all that is needed is that the discriminatory reason should be of 'sufficient weight' (*O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615, CA); and

34.2 the respondent will not be able to escape liability by showing an absence of intention to discriminate if the necessary link between the doing of the acts and less favourable treatment exists.

Burden of proof

35. The burden of proof is set out at s136 EQA for all provisions of the EQA, as follows:

136 Burden of proof

…

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

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

…

(6) A reference to the court includes a reference to -

(a) an employment tribunal;

…

36. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 approved guidance given by the Court of Appeal in *Igen Limited v Wong* [2005] ICR 931, as refined in *Madarassy v Nomura International plc* [2007] ICR 867. In order for the burden of proof to shift in a case of direct discrimination it is not enough for a claimant to show that there is a difference in status and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation.

37. Mummery LJ stated in *Madarassy*: *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the*

balance of probabilities, the respondent had committed an unlawful act of discrimination"

38. In addition, unreasonable or unfair behaviour or treatment would not, by itself, be enough to shift the burden of proof (see *Bahl v The Law Society* [2004] IRLR 799). The House of Lords held in *Zafar v Glasgow City Council* [1998] IRLR 36) that mere unreasonable treatment by the employer "casts no light whatsoever" to the question of whether he has treated the employee "unfavourably".

39. The guidance from caselaw authorities is that the Tribunal should take a two stage approach to any issues relating to the burden of proof. The two stages are:

    39.1 the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that he has been treated less favourably than those identified or than he hypothetically could have been (but for his disability); there must be "something more".

    39.2 if the claimant satisfies the first stage, out a prima facie case, the burden of proof then shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

40. However, we note that the Supreme Court in also stated that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

UNFAIR DISMISSAL

41. The Employment Rights Act 1996 ("**ERA**") sets out the right to claim unfair dismissal as follows:

98 General

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

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

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

(2) A reason falls within this subsection if it -

…

(a) relates to the capability… of the employee for performing work of the kind which he was employed by the employer to do,

…

(3)

(a) "capability", in relation to an employee, means his capability assessed by reference to…health…

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

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

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

…

42. The Tribunal has to consider the reasonableness of the employer's conduct but must not substitute its decision for that of the employer. The function of the Tribunal is to determine whether in the particular circumstances of the case and whether the decision to dismiss fell within a band of reasonable responses, which a reasonable employer might have adopted. *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439.

43. The range of reasonable responses test applies to all aspects of the decision to dismiss including the procedure followed: see *Foley v Post Office*; *HSBC v Madden* [2000] ICR 1293 and *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23. However, the ACAS Code of Practice on Disciplinary Procedures does not apply in this case because the reason for dismissal was not misconduct or performance.

Capability (ill health)

44. Where dismissal is due to ill health, the Court of Session stated in *BS v Dundee City Council* [2014] IRLR 131:

    44.1 in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer and also to consider alternative employment;

    44.2 there is a need to consult the employee and take his views into account. We note that this is a factor that can operate both for and against dismissal. If the employee states that she is anxious to return to work as soon as he can and hopes that she will be able to do so in the near future, that operates in her favour; if, on the other hand she states that she is no better

and does not know when she can return to work, that is a significant factor operating against her;

44.3 there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.

45. In addition, if the employer is in one sense or another responsible for an employee's incapacity then this is relevant to whether, and if so when, it is reasonable to dismiss them for that incapacity (see, for example, *McAdie v RBS* [2007] IRLR 895). This is the case, not only where the employer caused the employee's incapacity, but also where the employer exacerbated it. This may mean that the employer should take greater steps to avoid dismissal than would otherwise be the case, eg by finding alternative employment for the employee, or putting up with a longer period of sickness absence than would otherwise be reasonable.

Some other substantial reason (breakdown in employment relationship)

46. The respondent has submitted that an alternative reason for the claimant's dismissal was due to a breakdown in the working relationship. If the Tribunal finds that this was the reason for dismissal, the Tribunal will need to determine whether dismissal was a reasonable response to any such breakdown in the working relationship and whether the respondent followed a fair procedure, taking into account the guidance set out in caselaw such as *Ezsias v North Glamorgan NHS Trust* [2011] IRLR 550 and *Perkin v St George's Healthcare NHS Trust* [2006] ICR 617.