



## EMPLOYMENT TRIBUNALS

**Claimant:** Mrs E C Beasley  
**Respondent:** **The Rainbow Trust**  
**Heard at:** via CVP at Newcastle Employment Tribunal  
**On:** 31 August 2021, 1, 2, 3, 6, 7 and 8 September 2021;  
10 September 2021 – deliberations  
**Before:** Employment Judge Jeram sitting with Mr Dobson and Ms  
Johnson  
**Representatives:**  
**Claimant** in person  
**Respondent** Mr D Howells of Counsel

## RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The claimant's claims of:
  - a. Direct age discrimination;
  - b. Direct disability discrimination;
  - c. Harassment related to disability;
  - d. Failure to comply with duty to make reasonable adjustments;
  - e. Discrimination arising in consequence of disability;
  - f. Victimisation;
  - g. Detriment on the ground of making a protected disclosure;
  - h. Detriment on the ground of making a health and safety disclosure;

- i. Unfair dismissal;
- j. Automatic unfair dismissal contrary to s.100 ERA 1996;
- k. Automatic unfair dismissal contrary to s.101 ERA 1996;
- l. Automatic unfair dismissal contrary to s.103A ERA 1996

are not well founded and are dismissed.

## REASONS

1. By claims presented on 30 August 2019 and 24 July 2020, the claimant complains of age discrimination, disability discrimination, victimisation, protected disclosure detriment, health and safety detriment, unfair dismissal, automatic unfair dismissal for having made a protected disclosure/may the health and safety disclosure, automatic unfair dismissal for assertion of a statutory right.
2. We discussed with the claimant, at some length, the numerous issues arising in the claimant's claims, at the outset of the case. They are summarised as Annex A. The relevant law is summarised at Annex B.

### Evidence

3. We had regard to a file of documents comprising of 2117 pages.
4. We read statements of, and heard from, the following witnesses:
  - a. The claimant submitted two witness statements, one comprising of 696 paragraphs and the other, which she elected to rely upon and therefore which we took into account when we heard from her, comprising of 783 paragraphs.
  - b. For the respondent: Zillah Bingley (Chief Executive), Fiona Walker (Family Support Manager and the claimant's line manager), Gemma Melhuish (Director of Human Resources), Bob Coyne (Director of Finance and

Administration) and Oonah Goodman (Director of Fundraising and Engagement).

### **The Claimant**

5. We consider it necessary to make some observations about the claimant and her credibility generally. We found the claimant to be intelligent, articulate and quick witted. She was able to engage with the Tribunal with reasonable familiarity of not only the facts but also the legal issues arising in her numerous claims. To the extent that we detected equivocation and hesitancy, and on occasions silence, it tended to coincide with the Tribunal's queries about the less obvious aspects of her case or when the response was likely to be adverse to her interests. Although we do not seek to minimise the challenge involved in presenting a case as lengthy and detailed as hers, she demonstrated an impressive ability to advance her cross examination of the respondent's witnesses in detail and with reasonable structure. She was robust in her challenges and able to cross refer witnesses to inconsistencies in the bundle, or their earlier inconsistent oral statements, often without hesitation. She made reasonably ordered oral submissions. We did not detect any significant limitation on the claimant's ability to explain or advance her case.
  
6. We did observe several consistent features of the claimant's case. We noted a marked tendency on her part to misquote or selectively quote from written materials including on occasion inviting the Tribunal to construe her own correspondence in a manner that an objective construction could not bear. She was unable to explain her own actions in circumstances where her behaviour was being challenged in cross examination and, where she did advance explanations, they were as inconsistent as they were numerous. We conclude that the claimant is an unreliable witness of fact. Where there was a conflict as to fact, we preferred the evidence of the respondent's witnesses, who were more credible, reliable and persuasive. Where contemporaneous documentary evidence was available, they again supported the respondent's case.

7. In addition to a lengthy mid-morning and mid-afternoon break, the claimant was offered the ability to take breaks whenever she sought them and on at least one occasion declined to do so. In addition, and without resistance from Mr Howells, the Tribunal offered her the opportunity to recall respondent witnesses in the event that she remembered questions she had forgotten to put to them.

### **Findings of Fact**

8. The Claimant was employed as family support worker for the respondent's North East team from 12 September 2011 until her dismissal, on 12 March 2020.
9. The respondent is a charitable trust whose object is to provide emotional and practical support to families across England who have a child with a life-threatening or terminal illness.
10. The respondent has a head office in Leatherhead, Surrey, at which 28 employees are based. A further 45 employees are arranged into eight regional care teams.
11. The trust is run by a Board of Trustees, of which there are currently eight volunteer members, and which delegates the day-to-day responsibility for the operation of the trust to the Senior Leadership Team ('SLT'). The SLT comprises of five members, together with an Executive Assistant. The five current members are Zillah Bingley (Chief Executive) Anne Harris (Director of Care), Bob Coyne (Director of Finance & Operations), Oonagh Goodman (Director of Fundraising & Engagement) and Gemma Melhuish (Director of Human Resources). Of the SLT, GM and ZB were recent newcomers, having commenced in post in August 2016 and January 2017 respectively. We heard nothing to suggest that the claimant had a difficult relationship with any members of the SLT, prior to the events complained of in this claim.

12. The respondent is funded exclusively by public donations, whether by donations from individuals, trusts or corporations, and from fund raising events; it receives no central government funding nor does it enjoy any other regular source of funding and as a result, its budget requires resetting each year.
13. On 9 January 2017 Zillah Bingley ('ZB') commenced as Chief Executive of the respondent. ZB is a qualified solicitor of the Supreme Court of England and Wales, having been admitted to the roll in September 1995. She ceased practice in 2007. Prior to her commencement as Chief Executive, on 4 November 2016, Mark Cunningham, the chair of the Board of Trustees, had circulated an internal announcement to all employees of the respondent introducing ZB; it was sent out ahead of the external announcement of the same news. In it, he introduced ZB as "*an experienced senior executive and qualified solicitor [with] a wealth of experience in both the commercial and charity sector . . .*" ZB has never held herself out to be a barrister, purported to be a barrister, or made any such suggestion.
14. On appointment, ZB sought to create a step change to grow the organisation, by delivering more frontline care services and to provide increased support to more families in more locations. Furthermore, conscious of the fact that the SLT were based in Surrey, one of the practical steps ZB took was to increase visibility and accessibility of the SLT to its support workers across the country by introduced and implemented nationwide SLT roadshows.

### **Family Support Workers and the North East Family Support Team**

15. Family support workers are arranged into eight regional teams, each structured to operate with one Family Support Manager and at least six family support workers. The family support workers work with families to provide practical support such as ensuring children maintain school attendance, providing respite, attending hospital appointments, looking after siblings, providing support for end-of-life care and following the death of a child, providing bereavement support the entire family.

16. Family Support Workers are expected to work with an average case load of 17 families at any one time - although the specific number is informed by the complexity and the level of support required by each family. There is an expectation that each working week should consist of approximately 25 hours of contact work with families.
17. The North East family support team consisted at the material time of 6 family support workers and is based in Durham; it supports families across a region encompassing Northumberland to Redcar and Cleveland in the south and across to the Cumbrian Border to the west.
18. In June 2014 Fiona Walker ('FW') was employed as the Family Support Manager for the North East team and therefore line managed the claimant; FW reported to one of two National Managers, initially Karen Proudlock and latterly Hannah Petheram ('HP'). HP was based in the North East and worked from home and the Sunderland office; she was a member of the respondent's health and safety committee.
19. A support worker is provided with support via weekly team meetings and a monthly supervision meeting of around 1- 2 hours in length with the Support Manager; in the claimant's case, with FW. 'Wellbeing' was a standard item to be discussed and recorded in supervision.
20. Furthermore, and in recognition of the emotional demands that the role makes on its workers, the respondent also provides front-line staff with access to an external qualified counsellor to support their own health and wellbeing, described as 'non-managerial supervision'. We return to this below.
21. Finally, there is in place a personal development review process, with a mid-year review of progress on objectives identified. The end of year review, which takes place between the manager and the employee, generally takes place between May and July each year. A score is not provided at the meeting itself, but sent to a committee for calibration. In 2016, the claimant scored a 'low 2'.

She appealed. Gemma Melhuish ('GM') was advising the panel; the claimant's appeal was unsuccessful.

### **The claimant's relationship with her colleagues**

22. The claimant's relationship with her colleagues was poor. There was a general view held of the claimant that she did not 'pull her weight' and that she was not a team player. For example, she did not keep her diary updated, thereby withholding from her colleagues information about her whereabouts and activities. The feeling was mutual; having heard the claimant's response to her colleagues' efforts to celebrate her birthday and post a photograph on social media, it is evident that she regarded her colleagues with deep mistrust.

23. The claimant's relationship with her manager, FW, however, was reasonably good. The claimant described herself in evidence, and we note, she described herself during employment as a '*private person*'. On the evidence before us, she was an intensely private person; she did not divulge personal information lightly. Of FW, the claimant told the Tribunal that "*on an individual level I found her supportive*". Taking into account the facts and our impression of the dynamics of both women, we consider that comment to be a recognition on the part of the claimant that FW generally managed her in a way that the claimant considered to be acceptable to her and that she knew was favourable to her. For example, the claimant, of her own volition, refused to support families in the Hartlepool region, and this was accepted by FW, despite her peers voicing to FW their concerns about her 'cherry picking' and about her general work ethic. The claimant's view of FW remained positive throughout her employment.

### **Company Car**

24. The claimant was given the use of a company car to enable her to travel to visit families. The respondent has a Private Fuel Use Policy and a Vehicle Policy.

25. Pursuant to the Private Fuel Use Policy, the respondent provides fuel cards '*for employees who have a company vehicle and are required, as part of their role,*

*to undertake significant business mileage. The cost of all fuel should be charged onto the fuel card'. The policy states that 'as reasonable private (i.e. non-business related) use of the vehicle is also permitted, the private use cost element of the fuel is refundable to Rainbow Trust and will be repaid as a monthly payroll deduction. The employee is responsible for calculating the private use element and submitting a monthly 'negative' expense claim for this amount. Full details are in the Vehicle Policy.'*

(emphasis applied)

26. In respect of the provision of a vehicle, the Vehicle Policy provides that eligibility for a vehicle will *'depend upon need and position . . . where the employee has use of a vehicle there may be occasions when they will be asked to loan their vehicle to another member of staff.'* and *'A review procedure will apply . . . when a new position is created.'*

27. The policy provides for 'Caveats' which include *'Rainbow Trust reserves the right to recover a vehicle from an employee through misuse or long-term absence e.g. after contractual sick pay expires.'*

28. In respect of fuel use and mileage, the Vehicle Policy provides:

*'Employees will reimburse Rainbow Trust for the cost of private mileage on a monthly basis and this will be deducted via an expense claim' and 'On the monthly expense sheet, the following should be shown; business mileage for the month, Total mileage on the clock, Details of all business trips.'*

### **Employee Starter Information and Health Declaration**

29. The claimant completed a form when she commenced employment in which she set out her personal details, including bank and national insurance details. In it, and as against the question 'known medical conditions / allergies: pernicious anaemia'.



30. The claimant completed a Health Declaration on 25 May 2011. In response the question “*do you have a health problem or disability relevant to your application?*”, The claimant answered “No”.
31. In response the question ‘*Have you ever suffered from any of the following: . . . psychiatric illness/anxiety/depression*’, the claimant ticked the box for “Yes”, and in the space beneath she gave the following details “*Childhood asthma. Suffered from antenatal depression - 1995*”.
32. To the question “*are you receiving medicines, pills or tablets from a doctor on prescription*” the claimant answered “*yes. Vitamin B12 injection every three months*”.

### **Non-Management Supervision Meetings**

33. The respondent’s policy, which is non-contractual and was last updated in March 2018, provides that the ‘non-managerial support’ is mandatory, albeit that it is the responsibility of the individual worker to organise their non-managerial supervision sessions, to engage fully with it, and to inform their line manager of dates for the sessions. It is generally expected that such sessions should take place every 4-6 weeks. The contents of the discussions are confidential unless, and we consider exceptionally, the counsellor considers that there is a serious concern for the welfare of an individual. The policy continues:

*‘No more than two members of any one team should be supported by the same non-managerial supervisor unless this means a staff member would need to change NMS’.* (emphasis applied)

34. The policy states, and the parties agree, that the requirement to use, ordinarily, separate non-managerial supervisors for more than 2 members of the same team, is to ‘*maintain balance and confidentiality*’. Sharon Dodds (‘SD’) was the non-managerial supervisor to the claimant and two other support workers in the same team, ever since the claimant started in employment.

35. The claimant was designated a non-managerial supervisor, SD, when she commenced employment with the respondent in 2011. On **20 December 2016**, during a monthly supervision session, the claimant first raised with FW her desire for a change. The claimant told FW that she had been seeing SD for a number of years and wanted a change. There was nothing in the exchange to suggest that the request was an urgent one; we disagree with the claimant that the fact that she sought a change, in and of itself, meant that FW was required to act on it urgently.
36. The matter was kept under infrequent review and five months later, at a supervision meeting on **16 May 2017**, the claimant said she would '*stay with Sharon for now*'.
37. Further discussions were had at the monthly supervision meetings about practical and cost implications of changing the non-managerial supervisor to someone of the claimant's choosing in April and May 2018.
38. On **4 July 2018**, FW said she would look into changing to another non-managerial supervisor. The claimant told FW that she was having difficulty arranging an appointment with SD; she did not at any stage tell FW that the last time she had attended a non-managerial supervision session was in November 2017.
39. We reject the claimant's contention that her own failure to attend her non-managerial supervision sessions, as well as her failure to notify her manager of the same, is something that the SLT should have become aware of via other means, e.g. the lack of invoicing by SD, which in any event depends on the frequency with which invoices are received.
40. The end of 2018 was a busy time for the North East team generally.

**First Period of Sick Leave - 10 January 2018 to 2 April 2018**

41. The claimant was absent on sick leave on **10 January 2018**; she told FW that she was feeling 'nauseous' and that she did not know what had brought it on. On **12 January 2018**, she submitted a fit note for two weeks citing 'anxiety' as the reason for her absence. This was the first fit note the respondent received from the claimant during her employment that cited a mental health reason. The fit note was subsequently extended on three further occasions until her return to work on 3 April 2018; the subsequent reasons were 'stress/low mood' and 'low mood'. During her absence, FW remained in contact with the claimant via the claimant's chosen method of text and phone calls, and the claimant did not accept an offer to meet.
42. On **12 February 2018**, FW conducted a wellbeing call with the claimant. The claimant described herself as having "good days and bad days" and that the claimant *'is feeling forgetful at times-muggy head. Aware in retaining information is difficult at current time'* [sic]. FW is of a similar age to the claimant and recognised the symptoms as being not dissimilar to her own menopausal symptoms.
43. It was in that context that FW queried with the claimant, whether her symptoms *"could be down to the menopause"*. She asked the question in an effort to empathise with her, as well as to offer her managerial support. The enquiry was not misguided; the claimant had been noted as post-menopausal by her consultant in a letter to her GP on 19 April 2016. We have no reason to doubt the accuracy of the letter, despite the claimant's bare protest. The claimant denied to FW that she was menopausal. FW noted: *"Not menopausal"*.
44. We are satisfied that this was the singular occasion when the claimant was asked about her symptoms in connection with menopause; we reject the claimant's contention that FW essentially repeated the same query at a return to work meeting on 3 April 2018. Our reasons for so finding are: we have no reason to doubt the accuracy of FW's evidence; the claimant does not seek to undermine FW's good faith or credibility generally; there appears to be no logical reason for FW to repeat the query 6 weeks later, on 3 April, when she has already sought, and obtained and noted an answer in the negative in

February. Furthermore, it played no part of the claimant's pleaded case that her claim of discrimination rested upon a repetition of the query, despite taking various opportunities to refine her case. We reject her explanation that she regarded a reference to the repetitive query as 'unnecessary information' to include in her pleaded claim; it is the basis of her claim. It was only after disclosure of FW's notes when the claimant suggested for the first time in her witness statement, that her allegation of discrimination rested upon a repetition of the same query. On the claimant's own oral evidence, she does not seek to criticise FW asking her on one occasion (*'to be asked once is fine'*).

45. On **19 March 2018**, the claimant informed FW that she was feeling better and was to discuss a phased return to work with her GP; FW was unsure whether an Occupational Health was still required in those circumstances. She said she would check; she did check, with GM, and called the claimant to inform her that if her GP was recommending a return to work, an Occupational Health report would not be required. The claimant informed FW that she was 'feeling overwhelmed with everything work being included as it is part of her life'. She told FW that she 'was unsure what the actual triggers of this anxiety had been'. The claimant in fact submitted one further fit note before returning to work on a phased return. It was in those circumstances that the claimant returned to work without the respondent understanding the cause of her absence.

46. For the avoidance of doubt, we find, consistent with that above, that FW discussed with the claimant the possibility of a referral to Occupational Health, but no steps were taken for the reasons discussed with the claimant at the time i.e. no referral was considered necessary once the claimant confirmed to FW that she was fit to return to work with her GP's approval. For the avoidance of doubt, we reject the claimant's evidence that she was at this stage given a consent form in order for the respondent to obtain GP or Occupational Health advice; or that she signed it, or that she offered a signed copy to the respondent, or that the respondent declined to take the signed consent form, not least because the claimant could not explain why, if this were true, she simply didn't give her consent on the subsequent six occasions that the respondent sought it.

### **Phased Return to Work – April 2018**

47. FW suggested phasing the return and the claimant's GP, together with the input of a counsellor that the claimant had been referred to, provided the proposed structure. The claimant returned to work on **3 April 2018**. The phased return was achieved over an agreed period of 8 weeks; on the ninth week, being the week commencing 1 June 2018, the claimant returned to full time hours.

48. In the early stages of the claimant's phased return, her brother was admitted to hospital and diagnosed with a serious illness.

### **360-Degree Feedback Introduced**

49. In or around April 2018, the respondent introduced the staff to the new system of 360-degree feedback as part of the personal development programme for all staff, including the SLT. ZB in particular was familiar with the use of 360-degree feedback in her earlier experience with charities. The plan to implement the feedback was introduced to staff during the SLT roadshows. On 23 April 2018, GM followed up with a 'Q&A' document sent to all staff to provide more detailed information about how the scheme would work. In summary, staff were told that feedback would be sought about them from around 3-4 colleagues, and that the form of the feedback would be restricted by certain parameters ('*I would like Colleague X to stop/start/continue. . .*') and that it was to be collated and summarised before being shared in discussion. In essence, employees were told that the information received in the feedback would be anonymised and the raw material would not be shared:

*Q6. How should the feedback be presented back to me by my manager? The feedback will be collated and anonymised. During the end of year review this will be discussed with you so that you have the opportunity to ask any questions.*

*Q7. Should I expect an anonymized copy of the feedback? No, some managers will be collating the feedback from a number of their direct reports ... This will be combined and summarised verbally for each individual in the end of year review. Further discussion with your manager can be held regarding your feedback if clarification is required.*

50. The formal introduction of the 360-degree feedback was an extension of an already existing policy of the respondent, being the priority the respondent affords to ensuring that managers and employees are able to provide and receive effective feedback to colleagues and managers to help them develop both personally and professionally. The policy includes a recommended method for the effective giving of feedback in a constructive manner.

### **Family Contact Hours**

51. Around halfway through the phased return, i.e. towards the end of April 2018, the number of families the claimant supported was about to reduce to 6 when others in her team were reaching capacity. New families were therefore to be directed towards the claimant. There were many new referrals i.e. families who had been assessed and accepted by the respondent, over this period and therefore there was no shortage of families to support. FW asked the claimant to take on more families; she refused, saying she was too busy without providing an explanation of why.

52. Furthermore, almost every week, the claimant's contact hours were significantly short of the 25 hours per week of contact work expected of her, adjusted to reflect the claimant's reduced hours.

53. There appeared to be a lack of consensus before us as to what activities constituted family hours, but we agree with Mr Howells that the difference is academic; even on the claimant's case, her hours were significantly below that

which was expected of her. In the month of May, the claimant was achieving between 1/3 and 2/3 of the pro rata contact hours expected of her.

### **Supervision Meeting - 9 May 2018**

54. On **9 May 2018**, FW met with the claimant at a one to one meeting. FW was aware that there were pressures within the team generally, but the claimant allayed any concerns about her own stress by telling FW that she believed that the phased return was working well albeit that she had 'some personal issues'.

### **Supervision Meeting- 29 May 2018**

55. The claimant met with FW for a monthly supervision meeting on **29 May 2018**.

56. During the meeting, the claimant described how she felt particularly stressed due to two specific matters: first that she was moving to a new house, and second that her brother had recently been diagnosed with an advanced stage of illness. The claimant expressed an interest in temporarily reducing hours which she said would enable her to better support her brother.

57. The claimant and FW explored how best the claimant's wishes might be met. The discussion and the possible re-arrangement of her working pattern, in whatever form it might take, was expressly intended to accommodate the caring needs of the claimant's brother, and the claimant's own wishes about moving home; no part of that discussion was to accommodate the claimant's health needs (disability related or otherwise). FW's evidence to this effect, is supported by her own supervision notes.

58. As to what form that adjusted role might take, the claimant and FW did discuss the possibility of part time working. But the claimant told FW that what she wanted was a temporary reduction in hours, not a permanent one, as supported by the supervision notes for that meeting consistent with her evidence to the Tribunal. The claimant at the time verbally advanced to FW a reason for this;

a permanent reduction in hours would not assist the claimant's application for a mortgage.

59. FW and the claimant discussed the possibility of a flexible working request: FW thought this would be a better plan for the claimant and the claimant acquiesced to this suggestion; a temporary arrangement, which would be reviewed, suited her brother's needs as well as her own need to not permanently reduce her hours and therefore her income.

60. It follows that we reject the claimant's contention that she made an application to work part time, or as the claimant described in her witness statement '*a verbal application to reduce my hours [which was] urgent [and] deserving of serious and immediate consideration*' to FW. She did not, as she contended, verbally provide FW with 'far more information' than that required in the flexible working request form; she accepted in cross examination that she herself did not know what pattern of part time work she sought, a question which appears on the form. Furthermore, there are obvious inconsistencies between her witness statement and her own lengthy and detailed grievance and grievance appeal letters, the latter two of which described her concern for having been denied the "*opportunity to explore*" part time working; we reject the claimant's explanation that this was her own use of 'office speak', alternatively that she was not in a fit state to check the incorrect wording used by the anonymous author of her letters; it was an attempt to divest herself of responsibility for agreeing to FW's suggestion.

61. It also follows that we consider the claimant's reliance on an extract of the respondent's policy, which suggests that part time working is not available to support workers, as an opportunistic, but nevertheless irrelevant, attempt to bolster her case. For the avoidance of doubt, we have no hesitation in accepting the evidence of Anne Harris ('AH'), Director of Care, that that extract is a vestige of an old policy and that it did not then prevent support workers applying for part time roles, and does not now reflect current practices; we accept that AH does consider all applications she receives for part time working on its merits.



62. We are not satisfied that FW interrupted the supervision meeting to leave the room and telephone GM in order to take advice, as the claimant contends. We acknowledge that there is a possibility that that happened; as FW herself recognises, it would not be unusual for FW to seek guidance from GM. Neither FW nor GM are able to recall the call being made or being taken; neither FW nor GM can recall a comment being made by GM, asking FW *'isn't [the claimant] coping well?'*, although as GM fairly concedes, she may well have said words to similar effect (albeit without the suggested negative connotation). FW denies returning to the claimant, repeating GM's alleged comment, whilst mimicking a sarcastic or unsympathetic tone of voice. The supervision notes do not suggest that guidance was taken during the meeting, or in response to discussions had in the meeting.

63. Indeed, the only positive evidence before us that the call took place at all is from the claimant. We do not consider the claimant to be a reliable historian and therefore, in the absence of any corroborating evidence, we reject the claimant's factual contention that during the supervision meeting on 29 May 2018, FW left to make a telephone call to GM or, for the avoidance of doubt, that GM made a comment about whether the claimant was coping in a sarcastic or otherwise unsympathetic manner and that upon her return, FW faithfully reproduced that comment to the claimant.

64. That said, we do not doubt that at that supervision meeting in May 2018, the claimant believed that the FW would effect a change to the claimant's working pattern, whether after discussion with GM or otherwise, that would accommodate her wishes.

65. On **1 June 2018**, the claimant returned to working full time hours.

66. Later in June, FW sought a flexible working request form from GM. A copy was sent by GM to FW on 25 June 2018, together with an email stating that the claimant would be informed of the outcome of the request, *'including any review periods'*.

67. Around the same time, FW became increasingly conscious about the relatively amount of contact time the claimant appeared to be having with the comparatively few families she supported. The claimant's phased return to work had ended on 1 June 2018 and FW asked the claimant to take on more families since the current level was relatively low, at ten. The claimant maintained that she was too busy to take on and support more families but was unable to explain why or where her time was being spent. Her calendar suggested that a significant part of her day was being taken up with travelling and administrative tasks, rather than face to face contact time with the families.

#### **Supervision Meeting - 4 July 2018**

68. The claimant was given a flexible working request form and it was discussed at the next supervision meeting with FW on **4 July 2018**; the claimant was told to complete it without delay for consideration by HR and AH as to whether to grant the application.

69. The claimant in fact never returned a completed document; we are not satisfied with any of the explanations she sought to give for her failure. We reject the claimant's explanation that the reason she failed to submit a completed form was because FW told her that any change would be limited to a maximum period of 3 months, not least because she confirmed in her oral evidence that she only sought an adjustment for a temporary period. We also reject a further explanation, being that it would take 'too long' i.e. 3 months for the application to be determined. We consider it far more likely that the claimant has misconstrued, accidentally or otherwise, a reference to the respondent's policy to grant flexible working request subject to a review in 3-6 months, as alluded to in GM's email to FW, as being a limit / processing time rather than a review point. As to a third explanation for her own failure to submit an application being her belief that the respondent 'never' granted requests for flexible working; we have no reason to disbelieve GM's evidence that in her direct experience, she could recall 9 requests being granted in the time she had been with the respondent. Finally, as to the claimant's contention that she did not see the

need to complete the form, since she had verbally imparted to FW significantly more information than the form required, thereby obviating any need on her part to personally complete the form: her evidence was self-evidently incorrect – as noted above, the claimant later accepted that she did not know what working pattern she in fact sought.

70. In summary, the claimant did not at any stage make a request for part time working, much less did she tell FW that it was required to accommodate her own health. The height of her complaint – contained in her subsequent grievance to ZB - was that she had been denied the '*opportunity to explore*' the possibility of part time working. Finally, we add that had she submitted a request for flexible working, we have no reason to doubt the evidence of GM and AH that the likelihood is that the claimant's application would have been granted, albeit kept under review as per the respondent's policy.

71. We do not doubt that the claimant's impression at this meeting was that FW either was to, or ought to, ensure arrangements were made that suited the claimant; her evidence about this meeting supports the Tribunal's general impression that the claimant believed FW to be at her behest.

72. Also, at this meeting, the claimant told FW that she was having difficulty in booking in a meeting with her non-managerial supervisor, SD. She did not tell FW that she had not been attending her non-managerial supervisions since November 2017.

73. At this meeting, the claimant was tearful but confirmed she was fit for work and that it was not work that was causing her stress but her personal circumstances; her brother's health and the fact that the sale of her house had fallen through were discussed. As a result, FW decided not to raise with the claimant the fact that her contact hours with families appeared to be low.

74. Instead, on **24 July 2018**, FW received from the National Care Manager a breakdown of the family support hours her team had provided to families in the period 1 – 23 July, from the ECCO database. This was the only potential source

of information available to FW, as broad in nature as it was; the database could not provide FW with information as to how the claimant was spending non-contact time. As against an expectation of an average of 25 hours of contact per week the claimant had provided a total of 28 hours contact time over a three-week period during which she had worked the equivalent of two full time weeks.

75. The following day, FW directed the claimant to provide her with her weekly timesheets, noting that the last one submitted was 25 June 2018. The claimant did not ever comply with FW's management instruction, although she did disclose them for the purposes of this litigation.

76. At the same time, FW sought guidance from GM about the claimant's lack of family contact time and her refusal to take on more families. Despite the claimant's denial, we accept FW's evidence that her refusal to accept more families put a strain on the rest of team and impacted on their ability to provide the support to families who required it. GM suggested a time and motion study; it had been used by Karen Proudlock, the previous National Manager responsible for the North East team, in an instance that GM had supported before. The template was a rudimentary one requiring a brief description of activities undertaken in time slots of 30 minutes. Nevertheless, the document could provide both the claimant and FW with more information than was being captured on the ECCO data base or would be captured had the claimant completed and returned her time sheets.

### **End of Year Review – 26 July 2018**

77. On Thursday **26 July 2018**, FW conducted the end of year review with the claimant. The document itself consists of 12 pages requiring significant amounts of information to be completed by both the member of staff and the manager. The claimant's PDR was discussed at the meeting. Although no score was provided to the claimant at this meeting, the calibration committee subsequently scored her one grade higher than she had achieved in the last 3 years.

78. At the meeting, two specific matters relevant to these findings were raised with the claimant. First, FW raised with the claimant a request to complete a time and motion study. Second, the claimant was provided with a verbal summary of her own 360-degree feedback from colleagues.
79. Of the time and motion study, FW explained to the claimant was told by FW that the template would assist to get a better understanding why and where she was spending her time, and what support she might need in order to work more efficiently. The claimant accepted in evidence that her employer was entitled to know how she spent her time. On the claimant's own account, however, her response to FW was *'you must be joking, when am I supposed to do that, I can't do that for a week'*. FW asked the claimant to complete the template over the following 4 weeks. Our impression of the claimant's evidence was that the simple fact that the study would cause her additional work was a valid basis to refuse the request. The claimant asked or asserted that the request amounted to a disciplinary measure and that she refused to do it. FW told the claimant it was not a disciplinary measure.
80. Of the peer feedback obtained for the claimant, the raw comments were, as might be expected, positive and neutral as well as negative. The concerns were not new. Both FW as well as the claimant herself recognised in her PDR for that year that she needed to improve her management of her diary. The suggestion that the claimant was not a 'team player' was something that the team had raised with FW as early as December 2016.
81. FW sought and had obtained guidance from GM on the best way to structure feedback; this was the first time she had had to give feedback in this way and she was concerned to get it right. FW followed the advice and created a summary to provide to the claimant with at the meeting; she re-phrased comments about not being a team player as an emphasis on the need for 'building relationships'.
82. The summary was as follows:

*"It is great that you have wanted to be involved in the ECCO team and Sean has been in touch, to take that forward. Also being involved in the Ward 3 meetings are becoming invaluable and the importance of having a RT worker present is continuing to raise the awareness of the RT within the hospital. Being an active member of the North East team is vital to the role of a FSW, building relationships and being communicative with the team, in team meetings and following the psych social meetings will strengthen relationships. It is recognised that you are a very private person however it has been suggested to share some personal issues at times, this will enable the team to support you more effectively. Being more vocal with a reason will enable the team to be more understanding rather than a 'no'. You present as organised individual, however at times there are gaps in your calendar and sometimes they are completed after the event. Please ensure your calendar is completed fully each day, with no gaps. Everyone has a busy workload: when you ask the team to cover pickups/groups/lifts etc this has added a stress to your colleagues, they do not feel they can talk to you about how your comments make them feel. It has been suggested you become more involved with the organised activities arranged with the families rather than asking other members to see to the families on your caseload. Continue with the tribute days they are recognised as something you are passionate about, because of them being such a valued cherished time with the families. Continue to work well with your families on your caseload, when you do talk about them you ensure their needs are met."*

83. The summary was very significantly shorter than the volume of information covered by the PDR. It is not contended that the feedback was not genuine, or that the summary is not a fair reflection of the 'raw' feedback that was disclosed to the claimant in these proceedings. The claimant responded to FW by saying she felt victimised. She complained that she did not get tagged into posts on social media. She said she had a lot to cope with this particular year, including her own anxiety and her brother's health.

84. We accept FW's evidence that the discussion about the time and motion study was wholly unconnected to the 360-degree feedback, not least because she had intended to, but made a conscious decision not to, raise the issue with the claimant at the previous supervision meeting.

### **27 July 2018 – Second period of Sick Leave**

85. Early the following day, being Friday 27 July 2018, the claimant emailed FW stating that she would like to read her '360 review in full' and asked FW to email it to her. FW refused, saying it was a summary but that she would go through

it again with her on the Monday. In evidence the claimant contended that the comments were *'about [her]'* and that *'if I ask for it, FW should provide it'*.

86. The same day, the claimant submitted a fit note for 4 weeks, citing *'stress and low mood'*. She did not return to work that day, or at any stage thereafter until her dismissal some 20 months later.

87. FW kept in touch with the claimant regularly during her absence, principally via text message exchange until January 2019 when FW was absent on extended leave. Thereafter, FW's manager, Hannah Petheram ('HP'), National Manager, took over as the principal point of contact for the claimant, a change that the claimant agreed to.

#### **7 August 2018 - Anne Harris email**

88. On **7 August 2018**, Anne Harris ('AH'), Director of Care Services, emailed the North East team in the following terms:

*Oh my goodness! 17 referrals in July and no waiting list – you are an amazing team!*

*I just wanted to thank you all for all of your hard work – I really appreciate it especially as you are a member of staff short while Claire is ill – I am sure that you are all juggling all the time and I wanted you to know that it doesn't go unnoticed!*

*I also understand that there is a limit to what anyone can do, so please just do what you can manage – it is greatly appreciated."*

89. The email was sent by AH after the monthly statistics were received at the beginning of August showing the status of referrals received, cases closed etc. It was in the same vein as other emails that she regularly sends acknowledging the achievements of individuals and teams.

90. The receipt of 17 referrals i.e. assessing and accepting a case, in one month is a high number; the email recognised the achievements of the team as a whole for securing that number and this, AH had assumed, included the claimant, who was at work in the month of July. The team were already aware of the

claimant's absence and AH sought to acknowledge that the remainder of the team would be required, as is standard practice, to take on families in her case load so as to ensure that families did not miss out on services. We reject the claimant's contention that the email was unnecessary because families could be left without an alternative carer for an indefinite period of time during her absence as unattractive; in any event, on her own account, the claimant covered her colleagues' absences by taking responsibility for their families. Finally, we accept that AH's comment that the team manage only as much as they could was made to simply recognise that the team would be working under some additional pressure and that their efforts were valued; it was made entirely independently of discussions between the claimant and FW regarding the time and motion study, something that AH had no involvement in whatsoever.

### **5 September 2018 – First Grievance**

91. On **5 September 2018**, the claimant submitted a 6-page written grievance to ZB. In it, the claimant made a number of factual complaints which form the subject matter of her allegations in her claim. She complained about the 'imposition' of a time and motion study, an alleged failure to allow her to explore the possibility of working part time, and the alleged comment that GM said to FW 'isn't she coping well'. She did not complain about the FW enquiry about whether her absence was due to the menopause, or about FW's refusal to provide a written copy of her colleague's feedback, or the email from AH.

92. The claimant stated that she was suffering from a mental health illness and that the respondent was guilty of causing a 'fundamental loss of trust', and 'having now found myself as carer for my brother, I am aware that I am protected under legislation for discrimination on grounds of disability by association'. She cited her research of Sheffield University HR Department and in various ways alleged that the claimed that the respondent was guilty of acting with gross misconduct by 'imposing' a time and motion study on her, and that the respondent had breached her right to confidentiality, and that it had failed in its duty of care towards her.



93. In this latter respect, the claimant stated that she had not been to see her non-managerial supervisor since November 2017 and claimed that this must have been apparent to senior management, not because she had told FW as much, but because, she contended, the lack of invoicing on the part of SD should have been queried and addressed by them.

94. The following extract of the letter is relied upon by the claimant to protected disclosure and / or a health and safety disclosure:

*“Rainbow Trust supervision policy 2017 states: ‘should the supervision provided prove to be unsatisfactory in anywhere, it is the responsibility of individual worker to inform their line manager further these issues may be resolved’ I initially told my manager of my dissatisfaction with the standard of my supervision in October 2016. Nothing has been done to resolve this some 22 months later. I believe that this has not been taken seriously and Rainbow Trust management have disregarded my concerns. In my opinion the poor standard of non-managerial supervision I have encountered have contributed to the mental health difficulties I have encountered while working for Rainbow Trust. Rainbow Trust Supervision Policy August 2017 states: ‘No supervisor will work with more than two members of one team in order to maintain balance and confidentiality’. I began working for Rainbow Trust in 2011. I was referred to Sharon. for non-managerial supervision. At that time, Sharon was already supervising both [SL] and [LC], both Family Support Workers and the NE team. I then became the third employee to be supervised by Sharon. [SD] subsequently joined the North East team and is also currently being supervised by [SD]. I feel that Rainbow Trust Senior Management have failed in their ‘commitment to protect the health and welfare of its employees’, in disregarding and failing to implement their own policies. I hope that you will fully investigate these matters and I look forward to hearing from you in due course”.*

95. The claimant cited that part of the non-managerial supervision policy that stipulates that a supervisor ought to work with no more than 2 members of the same team but omitted to replicate the qualification *‘unless this means a staff member would need to change NMS’*. The claimant made no reference to anyone else being affected by this rule.

96. On the claimant’s own account, she could have ‘easily emailed’ HP as a member of the health and safety committee if she was contending that sharing a non-managerial supervisor with two other team members amounted to a breach of duty of care, or a health and safety concern.

97. On **10 September 2018**, Gina Hudson ('GH') HR Manager wrote to the claimant noting that she had been absent from work due to stress and low mood. She sought consent to obtain a report from her GP or Occupational Health.

98. On **11 September 2018**, the claimant met with HP, at a coffee shop in Hartlepool for an absence review meeting. The claimant confirmed she was angry and upset about being asked to undertake a time and motion study and believed that 'HR' were using it in a punitive way. She said she had not considered that the study might serve a constructive purpose. She confirmed FW had been '*really supportive*' on her return to work in April and furthermore that she '*didn't want things to reflect on Fiona*' and that '*it was only the meeting when the time and motion study was mentioned that she felt let down*'. The claimant was resistant to talk to HP about her mental health, despite HP offering up her own experience and having a lengthy and personal discussion generally. She spoke of the pressure on her of her brother's illness and that he was her only sibling, and how much he had changed; she said that she had so much going on, and the meeting with FW was the final straw. The claimant said she definitely wanted to return to work, although not yet, since her brother had only just started chemotherapy. She was offered counselling sessions. She took away with her another medical consent form, and she told HP that she would '*go away and think about*' and that she would post it back to HP. HP confirmed, at the claimant's request, that she could grant permission without it being necessary to disclose her GP records. The claimant was told that her PDR rating was a '3' and that this would lead to a pay increase. The claimant said to HP that she was '*interested in returning to work part time and a flexible working request was something [she] had planned to discuss with Fiona in more depth*'. HP encouraged the claimant to submit the flexible working request form that the claimant confirmed she had in her possession and offered to meet with her to assist her to complete it. HP offered to meet the claimant in person again, or via telephone but the claimant said that she would prefer communication to be via text only.

99. In fact, the claimant's written evidence to the Tribunal was that efforts on the part of the respondent to obtain consent to access GP or Occupational Health

advice was disingenuous and had come 'long after the horse had bolted'. In her oral evidence, she confirmed that as of September 2018, she was on that basis refusing to engage with the respondent and its attempts to meet with her, or obtain medical advice from her GP or Occupational Health.

100. At the end of the meeting, HP wrote a summary of the meeting, in which she reflected that the claimant 'warmed up' towards the end of the meeting. HP sent a summary of the meeting to C as well as copying it to HR; the claimant subsequently complained about HP for an alleged failure to keep her information confidential in breach of an apparent agreement between the two of them that no notes were to be kept; that part of the claimant's grievance was dealt with by Bob Coyne.

101. On **18 October 2018**, the claimant and her trade union representative met with Bob Coyne ('BC') who was tasked with Investigating and determining the claimant's grievance. BC approached the exercise with considerable care and in significant detail. He identified 15 allegations made by the claimant. BC interviewed FW, GM and AH. The claimant, despite being written to, failed to respond to BC's enquiry as to what her desired outcome of the process was. BC partially upheld two allegations, finding that FW could have responded differently; he dismissed the other allegations, and he made a total of 4 recommendations as to better future practice, which recommendations were subsequently implemented.

102. BC found that the request to complete a time and motion study amounted to a reasonable management request to establish what was preventing the claimant from providing more family support hours. He also found that FW had suggested to the claimant that a flexible working request might be better suited to her needs and that the claimant appeared to be '*fine*' about it and never submitted a request for either part time working or flexible working. Of the allegation about HP, he found that there were conflicting version of what had been agreed, but recommended that employees were made clear as to whether notes were going to be kept.

103. BC informed the claimant that she had a right to appeal, and that the policy provided 5 days as the time frame within which to appeal; he stated that in order to avoid stress or anxiety, he was prepared to extend the time limit to 10 days.
104. On **13 November 2018**, GH, wrote to the claimant asking whether she had had time to think about providing the respondent with the medical consent that she had discussed with HP on 11 September 2018. She informed the claimant that it was her right to refuse the respondent permission to obtain a medical report from her GP or Occupational Health, but that without medical advice, *'it makes it very difficult for us to review what, if any, adjustments we might reasonably be able to make to facilitate and support your return to full time work. This would not be a particularly satisfactory situation and is not in the interest of either yourself for the Rainbow Trust'*. GH enclosed a further consent form and asked the claimant to reply within 7 days.

### **Grievance Appeal Correspondence**

105. The claimant wrote to ZB with a letter headed *'Intention to Appeal the Grievance'* on **Friday 23 November 2018**. It consisted of 9 pages and 30 paragraphs, set out in the style of a skeleton argument. It cited the EHRC Code of Practice, as well as innumerable case law and lengthy extracts of dicta. In summary, it contended that the claimant was a disabled person falling within the definition of s.6 EqA 2010, the respondent had knowledge of that, and two things followed. First, she contended that BC was guilty of four separate contraventions of the Equality Act by extending the time frame to appeal to (only) 10 days instead of the usual 5 days. Second, she contended that this failure was the *'last act of on-going acts and omissions to act to accommodate my needs as an employee with a disability'*.
106. In the letter, for the first time, the claimant argued that she herself was a disabled person, in that she had an 'anxiety related disorder' and anaemia that, she said, had a 'substantial effect that was more than minor or trivial'. She said that the cumulative effects of the mental and physical impairment were such to

*'cause my cognitive function to become impaired, especially when under feeling stressed [sic], under duress, anxious or distressed. My diminished cognitive abilities also impedes my memory function and thought processes, too'. She alleged that the respondent was 'aware of the fact that I had been taking anti-depressant medication since the beginning of this year' as well as taking injections every three months for iron deficiency. The letter continued, that the claimant had 'a disability which has a substantial adverse long-term effect on [her] day to day activities'.*

107. She informed ZB that she intended to furnish her with her appeal on or before 31 December 2018.

108. On **Tuesday 28 November 2018**, the claimant wrote to ZB alleging that her failure to respond was causing the claimant 'needless distress and anxiety'. ZB had already emailed her to confirm the extension of required by the claimant and subsequently wrote to extended the date further to 7 January 2019.

109. The claimant's entitlement to contractual sick pay (3 months at full rate of pay, followed by 3 months at half rate) reduced to nil on **27 November 2018**; the claimant was formally notified of this by letter dated **3 December 2018**. ZB explored whether the claimant was entitled to any expenses which might be paid over to the claimant and, at her instigation, GM wrote to the claimant to offer to pay her her accrued but untaken annual leave.

## **Second Grievance and Appeal against outcome of First Grievance**

110. The claimant accepted the respondent's offer to be paid in respect of her untaken leave in a letter written on **6 December 2018**, which advanced a second grievance. Again, set out as a legal argument, it comprised of 24 paragraphs which contend that the reduction in sick pay to half and then nil pay amounted to several species of disability discrimination and which amounted to a barrier to return to work; again, the Code of Practice, various statutory provisions and numerous extracts of case law were set out to support these

propositions. ZB agreed to consider these contentions once the appeal against the outcome of her grievance was received.

111. On **4 January 2019**, ZB received the claimant's appeal against the grievance outcome. It comprised of 670 paragraphs set out over 94 pages. It made reference to innumerable legal sources, including the Equality Act 2010, various health and safety legislation, the Code Statutory Code of Practice and tens of citations of case law, including extracts of dicta.
112. The length and format of the letter concerned ZB. We have sympathy for ZB's description of the document as 'unmanageable'; it was plainly intended to be. It not only made for relentless reading, it was a wholly unnecessary approach to an internal grievance procedure, and the claimant knew that; she confirmed in her evidence that she knew the purpose of the grievance process was simply to air and have investigated issues of concern arising at work - and furthermore, that it was not a technical, much less a legal process. She was unable to explain why she sent a document to ZB in the form that it was, other than to suggest that she was an innocent passenger to the decision of the anonymous author of the letter.
113. Furthermore, the claimant was aware that in the penultimate paragraph, where she contended that the respondent had fundamentally breached the implied term of trust and confidence, she was implying that she may resign and claim unfair constructive dismissal, but again she was unable to explain why, particularly given the events that followed, she did not.
114. We reject her evidence that her various assertions in the body of the letter to the effect that she would bring matters to the attention of the Employment Tribunal were intended to convey nothing more than a possibility that she might bring a claim. They were threats to commence litigation; the final paragraph, 670, twice states that the respondent has 7 days within which *to 'enter into meaningful discussions to obviate the need to pursue the litigative route'* and *'failing which'* she intended to *'assert my statutory rights under s.7*

*ERRA 2013 with a view to bringing multiple claims. . . against multiple respondents’.*

115. The letter included further demands. The claimant sought *‘the meta data for all the evidence which supports the position that my employer has complied with its contractual duties to facilitate non-managerial supervision’*. She also stated *‘to this end I am making a SAR in accordance with Article 15 of The GDPR 2018 for all the documents which support the position of the Trust i.e. that the Trust has complied with its contractual duties to provide non-managerial supervision’*.

116. ZB replied on **9 January 2019**, stating that *‘in view of the length and substantial detail’* of the appeal letter, she would respond on or before 15 February 2019 - thereby allowing herself fewer days than she had given the claimant to submit her appeal. She stated that whilst engaged in the appeal procedure, it would be *‘entirely premature to commence litigation or the precursor thereto under s.18A of the Employment Tribunals Act 1996’*. We consider it to be illustrative of the claimant’s attitude generally that she sought in cross-examination to criticise ZB’s singular reference to a statutory provision despite herself having sent to ZB in excess of 100 pages of legal argument and authorities – and referring on several occasions to the ACAS early conciliation process either in plain English or by reference to statutory provisions.

117. The claimant’s response to ZB’s letter was no less combative than her appeal letter; she accused ZB of seeking to exhaust the statutory time limits and threatened to instigate ACAS Early Conciliation if she did not receive the outcome of her appeal within one calendar month of the submission of her letter of her appeal. She did not respond to ZB’s enquiry as to whether the claimant sought an appeal hearing.

### **Use of Company Fuel Card**

118. ZB responded on **14 January 2019** to reassure the claimant that the timescales indicated were appropriate and necessary given the length and

nature of her appeal. ZB noted that the claimant was using the company fuel card to incur fuel charges for personal mileage during her sick leave, which she sought reimbursement for. She asked the claimant to submit an expense claim so that arrangements could be made for reimbursement of the personal mileage. The claimant, during her employment, had regularly submitted monthly expenses which included an account of that part of her fuel use that related to personal mileage.

119. The claimant responded on **15 January 2018** in a short, 15 paragraph, letter stating that she was unaware of the need to submit expense claims whilst on sick leave, that she required further information of why ZB was contending that the claimant had ever been under a duty to do so, she required evidence to support ZB's contention and sought further information about other employees in similar situations in the last three year period. She asked why she had not been informed that she ought not use the company fuel car for her own personal mileage whilst on sick leave. She stated that she did not want to submit an expense form to date for fear of being disciplined.

120. On **18 January 2019**, ZB responded to the claimant's most recent letter pointing out that the period over which the fuel card – from October 2018 up to and including 4 January 2019 - had been used was exclusively during her sick leave, thereby leading the respondent to conclude that the company fuel card was being used for personal mileage. The claimant was told that the fuel card was being temporarily suspended, ready to be reinstated on her return to work. ZB informed the claimant that it would not be appropriate to disclose personal data sought of other employees' use of the fuel card. In the meantime, the respondent sought reimbursement in the sum of £392.78 and offered to arrange a repayment plan.

121. The claimant wrote the same day making no mention of repayment of the sums she plainly owed the respondent but instead demanding a number of further particulars of ZB in order *'to determine whether or not [by making this demand] you have subjected me to unlawful victimisation for having done protected acts'*, reminding ZB that it was open to an Employment Tribunal to



draw inferences from her evasive or equivocal answers. She said that in the absence of compliance, she would have *'no choice'* but to initiate early conciliation via ACAS.

122. ZB notified the claimant in a letter dated **24 January 2019**, that she would investigate the points the claimant made, including why she had not been asked to cease using her fuel card during her period of sick leave in early 2018, and address them as part of her appeal against the grievance outcome. It was in those circumstances that ZB asked members of her SLT to carry out a yet further investigation into what practice is adopted in similar circumstances. The outcome of that investigation was that of those staff who had used their fuel cards during sickness absences, they all submitted monthly expenses claims to reimburse the respondent.

### **Request for Return of Company Car**

123. The demands on the North East team had become so high between August and December 2018, that in addition to supporting families that had been supported by the claimant, the team were having to run a waiting list for families requesting support. On **25 January 2019** the respondent placed an advertisement for a temporary support worker. The successful candidate was identified on 5 February 2019. There were no spare cars in the respondent's fleet that could be used, or re-allocated to the new support worker, meaning that the claimant's vehicle would have to be recovered. The cost of a short-term hire is more expensive than the regular 4-year lease that the respondent enters into.

124. ZB wrote to the claimant on **3 February 2019**, stating that whilst her request, contained in the claimant's letter of appeal dated 4 January, for the 'meta data' to substantiate that the respondent had complied with its duties pursuant to the non-managerial supervision policy did not amount to a Subject Access Request, the respondent would provide her with personal data relating to that matter in due course, explaining that the absence of FW, for a period

longer than anticipated, was likely to delay matters. There followed protracted and needless correspondence between the parties about the claimant's address, with the claimant refusing to provide the respondent with a definitive address for her; no one had suggested to the claimant that they would attend her home without her consent.

### **Grievance appeals outcome – 15 February 2019**

125. ZB reviewed the grievance, its investigation and the outcome. She sought legal advice on the extensive legal content contained in the appeal letter. She sent a letter dated **15 February 2019** in which she dismissed the appeal.

126. In respect of a number of grounds advanced by the claimant about the alleged shortcomings in the grievance procedure, such as alleged failings on the part of BC for asking insufficient questions to establish the discrimination, or allegedly failing to identify the appropriate comparator, or allegedly failing to inform the claimant that she had made a protected disclosure, ZB concluded that the investigation was of a reasonable standard.

127. ZB sought to address other areas, which whilst not identified specifically as a separate ground of appeal, did relate to allegations of behaviour that led to the grievance; they too were dismissed.

128. Of the contention that the claimant had made a protected disclosure in her grievance of 5 September 2018, ZB being unclear what the precise nature of the disclosure was, and noting that the claimant had not identified her concerns as being such, agreed to undertake an investigation into the alleged disclosures on her return to work *'so as to avoid causing any undue stress during your sickness absence'*.

129. Of the claimant's complaint that she had been asked to reimburse her personal fuel usage, ZB confirmed that it was an oversight to have not requested the claimant to reimburse personal fuel expenditure during her earlier

period of sick leave. ZB requested the claimant pay the personal fuel expenditure by 22 February and reiterated that it was open to the claimant to propose a repayment structure if that was more feasible.

130. Explicitly recognising that the claimant might be disappointed with the outcome ZB sought to reassure her that she, ZB, was dedicated to assisting her return to work and seeking to resolve outstanding matters without recourse to litigation. The claimant was informed ZB wished to meet with her in due course to discuss a managed return to work, for example via a phased return to work, with flexible working hours or other reasonable adjustments. She added a personal request of claimant, for consent to refer her to Occupational Health.

131. On **22 February 2019**, the claimant sent to ZB an 8-page response, explicitly recognising she had no further right to appeal.

132. Nevertheless, she continued, and in the letter, twice the claimant referred to ZB's professional status:

- a. In one instance, she stated "*in light of my ignorance of the law and for the sake of clarity however, I do acknowledge that you are well versed in the law given your background as a barrister*";
- b. Later, she wrote: "*it is my belief that you are using your professional background as a barrister and knowledge of the law to be deliberately evasive about the matter of my non-managerial supervision*".

133. The claimant confirmed in her oral evidence her belief that she would expect solicitors and barristers to '*behave the same way*'.

134. We accept ZB's evidence that she did not consider it necessary to correct either comment referring to her '*as a barrister*', because, for the same reason expressed by the claimant; the sentiment appeared to apply irrespective of the type of qualification she held and because it was not proportionate to

address each and every contention the claimant raised in her correspondence. Indeed, the claimant herself contended that the legal qualification was relevant simply to the extent to which she expected to ZB to behave *'fairly and equitably'*.

135. We reject the claimant's written evidence that she understood ZB to be providing her with legal advice and furthermore that she relied upon it in preference to the assistance provided to her by her union representative, as disingenuous, not least because the claimant told us she was obtaining her own legal advice at the time.

136. In the same letter, the claimant asked for an expenses form to enable her to submit her expenses for July 2018, which was done and ZB, understanding that the claimant would in the same document be declaring her personal fuel expenditure, sought payment by the extended date of 8 March 2019.

### **Third and Fourth Grievances – Requests to Reimburse Fuel / Recover Company Car**

137. On **1 March 2019**, the claimant submitted a further grievance claiming that the request for reimbursement by 8 March was a deliberate act, knowing of the claimant's straitened financial circumstances, and done with the malicious intention of victimising the claimant for having done protected acts. ZB knew nothing of the claimant's personal financial situation other than what she was receiving from the respondent in terms of sick pay.

138. On **5 March 2019**, GH wrote to the claimant to notify her of the recruitment of a temporary staff member, who was due to commence on 11 March 2019. The claimant was reminded that vehicles may be recovered under the Vehicle Policy in cases of long-term absences such as sick leave and suggestions were made as to how and when arrangements could be made for recovery of the vehicle.

139. On **6 March 2019**, the claimant replied to GH alleging that the request to return her vehicle amounted to discrimination arising in consequence of disability, victimisation and whistleblowing detriment.
140. On **7 March 2019**, the claimant wrote a 3-page letter comprising of 20 paragraphs explaining why she was submitting a grievance about being asked to reimburse the respondent for her personal fuel expenditure; in summary, she contended she could not afford it, that ZB knew she could not afford it and that therefore her demand was malicious.
141. On **8 March 2019**, ZB wrote to the claimant notifying her that her two grievances, i.e. the request to reimburse the personal fuel expenditure and the request to return her company car, were to be investigated by Oonagh Goodman ('OG'), Director of Fundraising and Engagement, as an independent member of the SLT.
142. The claimant told the Tribunal that the recovery of the vehicle meant that she was unable to transport her brother to his medical appointment. ZB subsequently agreed to delay the return of the vehicle to enable the claimant to transport her brother to hospital, and it was ultimately returned to HP on **18 March 2019** at a location of the claimant's choosing.
143. On **10 April 2019**, OG met with the claimant and the same trade union representative who accompanied her to the grievance meeting with BC. The claimant contended that she continued to charge personal fuel to the company fuel card whilst on sick leave as, she said, was required of her by that part of the fuel policy which required employees to ensure that *'all fuel should be charged to the fuel card'*. She omitted that part of the Policy that places responsibility upon employees to account for personal fuel use every month.
144. The claimant accepted in the meeting, as she did before us, that she knew she owed the money to the respondent. She added, by way of explanation to us, that the dispute was simply over the *'use of the fuel card'* and that in behaving as she did, she was seeking to *'hold a mirror up to the SLT'*.

145. In relation to the car, the claimant contended that car was provided for both personal as well as company use and that therefore its removal was an act of discrimination, victimisation, and detriment for having '*blown the whistle*', the protected act having been the submission of her original grievance. OG asked the claimant to explain what she meant, as she was not a lawyer; the claimant said she was not a lawyer, either. The claimant said the car should be returned to her.

146. On **16 May 2019**, OG wrote to the claimant with the outcome of the grievance investigation. In relation to the grievance about the return of the company car, OG reminded the claimant that the respondent was a charity with limited resources to provide extra cars. She concluded that the requirement to provide a company vehicle to the new employee was the sole reason for seeking recovery of the company vehicle from the claimant and not because the claimant had submitted a grievance or '*blown the whistle*'.

147. In relation to the request to reimburse the respondent for personal fuel expenditure, OG noted that on the claimant's own account, she incurred sums on the fuel card knowing that she could not repay the money to the respondent, on 12 separate occasions. OG concluded that the claimant's explanation that she could not submit monthly expenses as this required the use of form and access to the IT system was unsustainable in light of the fact that she was in regular contact with FW and subsequently HP during her sick leave. OG's investigations of what happened when colleagues were on sick leave revealed similar facts to those identified by ZB. She concluded that the respondent's sole intention is seeking reimbursement of the fuel expenses was just that; to be reimbursed for monies legitimately due to it, in circumstances where resources are tight.

148. Both grievances were dismissed and again the timescale within which the claimant was permitted to appeal was doubled from 5 days to 10 days.

149. On **23 May 2019**, the contents of the claimant's fit note changed from citing the reason for her absence as being no longer '*anxiety*' or '*low mood*' or '*stress and low mood*' to, for the first time, '*depression*'.

150. On **30 May 2019** and as before, the claimant wrote to ZB, in the style of a skeleton argument. The letter consisted of 8 pages, in which over 29 numbered paragraphs, she cited statutory provisions, the EHRC Code of Practice, many employment cases, including extracts of their dicta to argue that she was a disabled person by reason of '*an anxiety-related disorder*', the respondent had constructive knowledge of that fact, and the timescale of 10 days to appeal provided for by OG was a contravention of the Equality Act 2010. She informed ZB that she '*will furnish [her] appeal on or before 16.6.19*'.

### **Appeals against Third and Fourth Grievances**

151. ZB agreed the further extension of time and the claimant submitted her grievance appeal on **14 June 2019**. Over 75 paragraphs she argued, in essence, that it would have been '*reasonable*' to allow her to keep her vehicle, the respondent was fully aware of her need to use the vehicle to transport her brother to and from hospital for treatment, and that it was especially callous to remove the vehicle '*in the knowledge of her current mental ill health*' and that to do so did not assist with her recovery.

152. Of the decision to reject her grievance that she had been required to reimburse the respondent for her personal fuel consumption, she criticised OG's ability to carry out her role, her tone and the implications of her findings. She argued that she was bound by the respondent's policy to charge all fuel to her fuel card and resented OG's observation that she continued to do so at a time when she was aware that she would no longer receive contractual sick pay. She stated that her budget was tighter than the respondent's. She concluded by alleging that OG's conclusions were '*seriously flawed*' and that the SLT had '*invented*' a rule out of malice and that this constituted harassment pursuant to s.26 Equality Act 2010.

153. After further correspondence between the claimant and ZB, the grievance appeal was determined on paper and the outcome sent to the claimant on **23 July 2019**. The appeal was rejected, ZB having found that the removal of the car was done for a legitimate business reason in that a temporary employee that had been recruited to cover the claimant's role required the vehicle and that the removal was in accordance with the Vehicle Policy and that the request had only been made when it was determined that no other vehicle was available. She observed that the claimant and her brother's needs had been accommodated in that she had been permitted to retain the vehicle for a further period to transport her brother to hospital. The respondent was unaware of similar instances where there was a need to cover a role with an interim employee and there were no records of a comparative situation arising. She concluded that the respondent does not provide cars for solely private use, but rather to enable staff to undertake their duties. The respondent did not have a spare vehicle available for use in its fleet, she said, did not have the funds available to hire an extra car to enable one to be used for private purposes, and that the respondent had just completed its 2018/19 year end on 30 June in deficit. ZB offered to keep the situation under review so that should an existing car become available, she would consider then whether to make it available to the claimant for a period.

154. Of the appeal that OG should not have dismissed the claimant's grievance against being asked to reimburse the respondent for her personal fuel consumption, ZB noted that the claimant had omitted reference to that part of the policy that states that *'the employee is responsible for calculating the private use element [of fuel consumption] and submitting a monthly 'negative' expense claim for this amount'*. She added that the respondent expects employees to use their common sense with regard to whether to use their fuel card for pure personal expenditure, for example, when they are on holiday, or on long term sick leave, particularly when they feel unable to submit an expense claim. ZB noted that the claimant agreed to accept her accrued holiday as pay, £1,421.39 in her December wages, and that after that she was asked to reimburse the respondent for fuel expenses that she continued to incur until 4 January 2019 and at a time when she was aware that she would not return to



work before at least 28 February 2019. ZB repeated that the respondent's oversight in failing to seek reimbursement during her initial period of sick leave (10 January to 2 April 2018) was an inadvertent error. ZB rejected the criticism of OG, who she said was stating, not misstating, the facts as she found them to be.

155. ZB concluded by noting that the claimant's fit note stated, for the first time, that her absence was by reason of depression. She commented that notwithstanding the claimant's decision to commence the ACAS early conciliation process, she remained committed to engaging with the claimant to identify what could be done to assist her return to work.

156. On **25 July 2019**, GH wrote to the claimant for the third time. She noted that the reason cited on her GP's fit notes for her absence had changed to '*depression*'. She told the claimant that a report on her current state of health would assist the respondent to fairly address her absence and help her. She continued that the respondent may have to make decisions in the absence of medical advice if it were unable to obtain a report. She repeated the contents of her earlier letters of 10 September and 11 November 2018, to the effect that it was a matter for the claimant if she wishes to refuse permission, but that it was not in either party's interests to do so. She enclosed another consent form and asked the claimant to respond as soon as practically possible. GH on **20 August 2019** emailed the claimant about her asking her how she would like to proceed.

157. On **16 September 2019**, GH wrote to the claimant inviting her to a sickness review meeting which was to take place on 3 October 2019. The claimant was told that the purpose of the meeting was to review the medical evidence available and determine the next steps. The claimant was told that if it was determined that the claimant could not return to work in any capacity, one possible outcome was to progress to Stage 3 of the absence procedure at which a disciplinary hearing would be convened which could lead to termination of employment on the grounds of incapacity. GH offered for the meeting to take

place in person at the claimant's home or a location of her choosing, or via telephone as a default arrangement if she did not receive a response. The claimant was told she could be accompanied by a work college or trade union representative and arrangements could be made to accommodate their availability. The meeting could proceed in the claimant's absence, she was informed.

158. On **25 September 2019**, the claimant wrote to GH to allege that she had been invited to a sickness review meeting as a response to being served with her claim form. In fact, the respondent received the ET1 on 18 September 2019, it having been presented on 30 August. She said the respondent had medical evidence in the form of her fit notes. She considered it far too late in the day to suggest a sickness review meeting, now that the respondent had been served with a claim form. She said that GH and HP were *'insufficiently qualified'* to make a determination about her capacity to work. She invited settlement discussions *"in relation to the grievances claim that I have now brought against you. In the absence of agreeing some form of settlement, then you should be in no doubt, that I am fully prepared to take this all the way, to allow the Employment Tribunal to examine the full facts themselves and determine the best remedy"*. We agree with the respondent's submission that the claimant was seeking to frustrate the sickness review process.

159. On **30 September 2019**, GH rejected, with reasons, the claimant's contention that the sickness absence could not proceed in the absence of medical evidence; she once again asked the claimant to provide consent for a medical report to be obtained from either her GP or Occupational Health with a view to understanding the current position and the respondent's ability to support her return to work.

160. On the morning of **3 October 2019**, the claimant wrote to GH, stating that the requirement for her to attend a meeting was unlawful and that it disregarded her disability.

161. A second meeting was due to take place on 14 November 2019, which was postponed by the respondent, in anticipation of receiving disclosure of the claimant's medical records, pursuant to an order of the Tribunal. On further reflection, the respondent concluded that disclosure of the purposes of litigation did not amount to express consent to use her medical records for the purposes of the capability process. The claimant's criticism of the respondent, contained in her witness statement, for failing to utilise her medical records is not one, we note, that she ever expressed to the respondent at the time or even to the Tribunal on presentation of her claim of unlawful dismissal; rather, it appears to have been advanced after disclosure of the documents including an internal file note about this point. Furthermore, we note that the claimant, in a document submitted to the Tribunal and dated 4 May 2020 sought to criticise the respondent's use of the records for any collateral purpose.

#### **SAR / NMS disclosure – October and December 2019**

162. On **18 October 2019** ZB wrote to the claimant at two separate addresses the respondent had for the claimant, confirming that FW having returned to work, the respondent had been able to finalise collation of those documents that amounted to personal data for the purposes of the request she made in her appeal against the outcome of her grievance; ZB did not accept, however, that the request formally amounted to a SAR. She again sought a definitive address for the claimant. Documents were sent to the claimant under cover of a letter dated **3 December 2019** at an address that the respondent informed the claimant it would use in the absence of her confirming one way or the other.

#### **Sickness Absence Review Meeting**

163. The third scheduled sickness review meeting took place on **6 January 2020**. The claimant did not answer the call made by HP and GH to her mobile telephone, nor did she respond to the voicemail left for her. The hearing proceeded in the claimant's absence, the claimant having now been warned on at least three occasions of the possibility of this (16 September 2019, 30 September 2019 and 10 December 2019). The decision was to proceed to

Stage 3 of the sickness absence policy and invite the claimant to a disciplinary hearing at which the respondent would consider the likelihood and circumstances in which the claimant might return to her work, or suitable alternative work.

164. On **14 January 2020**, GH sent to the claimant notification of the outcome of the sickness review meeting. She confirmed that a stage 3 hearing would be convened at which termination of her employment on grounds of capability was a possibility; she sent to the claimant all relevant materials. The claimant was informed of her right to be accompanied and that an alternative date could be accommodated if it was not convenient for her colleague or union representative. She was told she could submit a written statement for consideration. She was reminded of the respondent's Employee Assistance Programme, a free and confidential support line. The claimant was told that hearing would proceed on 10 February 2020, thereby giving the claimant significantly in excess of the three days' notice that the sickness absence policy allows, and asked the claimant to confirm her attendance by 20 January.

165. On **24 January 2020**, GH wrote to the claimant to inform her that BC was appointed as chair of the Stage 3 hearing, and that it would now take place on 11 February 2020 at a venue in Hartlepool. The letter was in much the same terms as before. The claimant was asked to confirm her attendance. She did not reply and the claimant was again written to on **5 February 2020**, when she was reminded of her ability to provide a written submission. BC and GH travelled from head office to Hartlepool to conduct the hearing. The claimant did not attend the hearing on **11 February 2020**. She did not respond to a text message sent by BC. One hour after the planned start time for the hearing, the claimant emailed GH stating that she had had difficulties with her union, and that she did not have time to review the materials that had been '*dropped on*' her 14 January 2020 and that she required a further month to review the documents and take legal advice. The meeting was postponed.

166. On **12 February 2020**, BC emailed the claimant with a selection of three alternative dates later in February, observing that she had already had a month

to prepare and a further two weeks was acceptable. The claimant did not respond to BC by 17 February but responded to a second email. On **18 February 2020**, the claimant informed BC that she had made her position '*clear enough*' and that it '*remained unchanged*'; she would not be attending until she had an appropriate representative. She accused the respondent of playing the 'charity card' during a recent case management hearing in her Tribunal proceedings. She concluded by saying that she would be taking the further four weeks she had demanded.

167. That same afternoon, BC wrote to the claimant, apologising for the distress that the process was causing her. He said he had given considerable thought to whether it was appropriate to grant yet further time to prepare and had concluded that he was prepared to make '*one further exceptional adjustment*' and reschedule the hearing so that it was now to take place on **12 March 2020** again at a venue in Hartlepool. No further postponements would be made, he added. He told the claimant she could submit written representations, if she wished, and asked the claimant to inform him of her intentions by 2 March 2020 so that travel and accommodation arrangements could be planned.

168. On **2 March 2020** BC again emailed the claimant to ask her to confirm whether she would be attending the hearing, failing which he would assume she did not intend to do so and in which case he would transfer the location of the hearing to head office in Surrey.

169. On **3 March 2020**, the claimant wrote to BC to inform him that she had an urgent appointment with her doctor, that she had taken advice from either a trade union representative or a lawyer, as a result of which she asked why one of the documents provided to her was so heavily redacted. She continued '*Notwithstanding the above, as a result of injuries I have sustained in the workplace, the Employment Tribunal, I am unable to engage in any form of disciplinary process right now with you because I simply just don't have the capacity to do so.*'

170. BC replied on the same day, providing an explanation for the claimant's query. He said he was sorry the claimant was unable to attend the hearing but reminded her that she could submit a written statement for consideration, or alternatively for her to send a trade union representative in her place. Given her personal absence, BC confirmed the meeting would now be held at the respondent's head office in Leatherhead. The claimant was reminded that termination of her employment was a possible outcome and again reminded of the availability of the respondent's Employee Assistance Programme.

### **Stage 3 Sickness Absence Hearing**

171. On **12 March 2020**, the hearing proceeded in the absence of either the claimant or her trade union representative; no written submissions had been received from the claimant, either. He took into account the fact that the claimant had been absent on sick leave for over 19 months, during which the claimant had been provided with such support as she sought, being via text message principally, having declined offers to meet. He considered the change in the reason for the claimant's absence being initially anxiety, stress and low mood and latterly depression. He took into account the numerous attempts to seek consent to obtain further medical advice from either the claimant's GP or occupational health. Furthermore, she had failed to attend to sickness absence review meetings on 3 October 2019 and 6 January 2020. He concluded that there was no prospect of the claimant engaging in the sickness absence process in the foreseeable future, whether personally or by her trade union. He noted that the current fit note did not expire until 22 April 2020, a further six weeks away and that he had no information before him as to prognosis. He took into account '*mitigating factors*' which included the fact that the claimant had been employed since September 2011 and that in an email to GH on 11 February 2020 the claimant had indicated that the most appropriate solution would be for a phased return, doing a job that she enjoyed.

### **Dismissal**

172. On **18 March 2020**, BC wrote to the claimant confirming his decision. He noted that, having reviewed all the information available there was no indication of a return to work in the foreseeable future, either in her current role or a suitable alternative role. He noted that the claimant had continued to express that there had been no improvements in her condition and that her current fit note was not due to expire for until 22 April 2020. He that his decision, with regret, was to terminate her contract of employment by reason of *'incapacity'*.

173. The claimant, once again, was given an extended timescale within which to appeal, of 10 days. The claimant was informed that her appeal was to be directed to BC and copied to HR.

174. In evidence the claimant confirmed that she could not have returned to work at the date of dismissal, as she was unfit to do, even on a part time basis and that furthermore, as at the date of the hearing, she remained unfit to return to work.

175. On **22 May 2020**, the claimant wrote to Mark Cunningham ('MC'), Chair of the respondent's board of trustees. The claimant said she had taken advice from ACAS and was directing her *'grievance'* to him as ZB's *'senior, since she is the member of staff named in the grievance'*. In ten numbered paragraphs, she contended that the respondent had contravened, in various ways, and in respect of her dismissal, contravened 9 specific provisions of the Equality Act. She concluded by stating she awaited his proposals *'to provide adequate and suitable remedy to resolve this situation without having to further pursue matters noting the grievances I have raised above and that the fact that my absence from work was a disability related sickness absence. You have seven days in which to respond.'*

176. In these proceedings, the claimant contends that her letter of 22 May 2020 was a letter of appeal against the decision to dismiss her.

177. On any objective view, it was not a letter appealing against the decision to dismiss her, and nor could it reasonably be construed as such. The claimant was more than capable of describing the document as an appeal, or writing a 'notice of appeal' or seeking more time to appeal, as we note, she had done only the month before. It was not addressed to BC; she had hitherto had no contact at all with MC. Having taken advice from ACAS, she described it as a grievance, she identified ZB as the subject matter of the grievance, despite BC being the decision maker. She was not seeking reinstatement; if she wanted her job back, she could have said that much more easily than citing various alleged contraventions of the Equality Act. We have no difficulty rejecting her suggestion that she submitted a letter that she erroneously described as a grievance, because she is *'not a lawyer and have never been through a grievance or disciplinary procedure before'*. On the claimant's own case, she was not fit to return to work at this point in time, or at any stage in the future. We agree with the respondent's submission that this letter is seeking a financial settlement – its final paragraph is essentially a repetition of her letter of 22 September 2019 or indeed subsequent correspondence where the claimant repeated demands for a financial settlement to avoid continued litigation.

178. MC responded to the claimant on 10 June 2020 addressing each of her points.

179. On 24 July 2020, the claimant presented a second claim to the Tribunal, complaining about her dismissal.

### **Discussion and Conclusions on Disability**

180. The material time with which we are concerned is from 3 April 2018 to 12 March 2020. The claimant contends that she was at all material times a disabled person by reason of depression and pernicious anaemia. She invites the tribunal to find that a symptom of her pernicious anaemia is not only fatigue but also depression. The respondent puts her to proof.



181. We have had regard to the parties' evidence and the claimant's medical records; the latter appear to relate to only to her more recent medical history, and furthermore those computerised records that are provided appear at times to be incomplete. In her closing submissions the claimant drew our attention to a letter from Dr Shah, consultant psychiatrist, dated 13 August 2020.

### Depression

182. The claimant has a lengthy history of what are described in her medical notes as depressive '*episodes*'. Her records indicate episodes on: 17 May 1990, 13 July 1995, 20 July 2004, 11 January 2007. The medical records do not provide any other detail about those episodes, for example, the triggers for them or their length.

183. The claimant's medical records show that in December 2013 the claimant attended her GP and complained about being bullied by her colleagues, but that she did not want to consider fit note; the GP noted "*low mood*" and a patient questionnaire identified generalised anxiety disorder.

184. On 6 January 2014, the claimant attended her GP complaining of feeling drained and difficulties going to sleep and then waking up again. The claimant reported having had her vitamin B12 injection that day and stating that she "*usually feels like this when due*". Her GP noted that problem was '*stress at work*'.

185. In February 2014, the GP made a note of '*worsening depression*'; the claimant had suffered a significant bereavement, she also told her GP that it was '*stressful at work – being bullied – looking for other jobs*'. Also, in 2014, the claimant had counselling or talking therapy for approximately six months before being discharged back to her GP; the trigger was noted to be "*bereavement and stress*".

186. In 2016 again, the claimant completed further sessions of counselling, again via her GP it is likely an again for approximately six months, the trigger being noted as *“anxiety and interpersonal issues”*.
187. In February 2017, the claimant’s GP noted that the claimant had spoken to *‘her boss about her throwaway comment and feels better’*, although her appointment with her counsellor did not go well and that she wanted a change. The counselling continued for several months before the claimant was discharged, when the main presenting issues were identified as *“low mood, stress and anxiety”*.
188. In January 2018, the claimant’s GP discussed re-issuing the claimant with fluoxetine (she had taken anti-depressants in the past). The GP noted *‘Anxious as work in stressful. Works as a social carer with terminal ill, covers north east with lots of travel, single mom lives with 3 children, financial difficulty; wants to sell house before August’*. The GP noted she had a past history of depression, linking it to the bereavement episode of 2014. A fit note was issued citing *“anxiety”*.
189. The claimant commenced fluoxetine in mid-February 2018. On 1 March 2018, the claimant’s GP, on renewing the claimant’s fit note noted the diagnosis as stress/low mood. The note read *‘req sick note. Been off work with stress and low mood since Jan 18 does not feel ready to go back to work yet. Due to see counsellor soon. Feel no benefit [of fluoxetine] yet stress at home – needs to sell house’*. The GP notes are confusing and despite the fact that the claimant was submitting fit notes throughout the period, the next GP entry in the records is in respect of 28 February 2019, when no medication is prescribed but a fit note is given citing *“stress and low mood”*.
190. On 13 March 2019, the GP notes that an increase in the prescription of fluoxetine is required *“as anxiety increasing”*. The next entry relates to 23 May 2019. At that appointment, the GP has noted as follows: *‘Pt states work have told her “you are not depressed”’*. For the avoidance of doubt, the Tribunal heard no evidence about this suggested event. The fit note provided on this

occasion cites the reason as being depression. In November 2019 it appears the claimant agreed to increase the level of fluoxetine.

191. Summarising here, for convenience, the contents of her fit notes from end July 2018 were 4 weekly in length, citing '*stress and low mood*' as the reason for absence until November 2018 when they were extended to cover a 6 week period and then a subsequent 8 week period. She received a fit note for the same reason covering a period of 3 months from 28 February 2019 to 23 May 2019. On 23 May 2019, her fit note was for a period of 3 months again to expire on 15 August 2019, but for the first time it cited '*depression*' as the reason for her absence. Thereafter the fit notes continued to cite depression as the reason for absence and were 8 weeks in length.

192. On 13 August 2020 Dr Shah, consultant psychiatrist wrote to the claimant's GP. Dr Shah diagnosed recurrent depression. In that letter, Dr Shah states as follows:

*"Claire describes struggling with mental health problems for many years. However, her current episode started in 2018 when she was working for a charity (Rainbow Trust) when she says she had a 'breakdown'. She went off sick and returned to work in April 2018 and after some time went off sick again. According to Claire, during the time she was working with the trust she encountered bullying and undermining. She said she had an end of year review, which involved a 360° feedback; she said she could not take in any information during the meeting. She felt something had happened in her brain in the meeting and she could not process any of the information that was being said to her.*

*She mentioned that this memory, over the past year has become a big problem for her. She said a short-term memory is very poor to forget things easily and can only do one task at a time. She described thinking that she needed to go to the toilet, would then go upstairs but instead of going to the toilet would go to a son's bedroom. She gave a further example of where she was making tea and poured cold water into the cups with the teabags.*

*I explained to Claire that, in my opinion she does not suffer from any significant memory problems, i.e. a dementia-type illness. The explanation of why her short-term memory is poor and that is probably because she has low mood and anxiety, which can affect concentration levels, which in turn can come across as a symptom of poor short-term memory and she then struggles to register and take in information".*

### Pernicious Anaemia

193. The claimant was diagnosed with pernicious anaemia in or around 2004. The claimant has produced an information leaflet from the Pernicious Anaemia

Society. It describes the condition as lifelong, and one that is caused when a person is unable to absorb vitamin B12 from food. There is no cure, it states, but patients can be kept alive by providing them with an alternative source of vitamin B12, usually by injections. The leaflet explains that vitamin B12 injections can treat the anaemia, but that *'a great many patients will still experience the symptoms... after replacement therapy injections started. Some patients will experience one or two of the symptoms and only to a small degree whilst others will find no relief from what can be debilitating manifestations of Pernicious Anaemia.'*

194. The leaflet identifies nine physical symptoms and nine mental symptoms. It reminds the reader that *'individual patients will experience some or all of the following to different degrees of severity-patients are individuals and will therefore experience different symptoms to differing degrees'*. Of the 18 possible physical and mental symptoms, depression is one. The claimant invites the Tribunal to find that her depression is a symptom of her physical impairment, although she was unable to identify any evidential basis for attributing any mental symptoms to her physical impairment.

195. Turning to her medical history, it appears that in December 2003, the claimant was referred to Dr Dear, consultant physician and gastroenterologist. The reasons for the referral not apparent from the medical records before us. In his or her letter to the claimants then GP, Dr Dear described a series of gastrointestinal symptoms, before positing the possibility the claimant has a B12 deficiency. In June 2004 Dr Dear wrote to the claimant's then GP identifying that they *"strongly suspect the diagnosis here is pernicious anaemia"*.

196. On 6 January 2014, the claimant visited her GP. The entry record notes *"still drained, difficulties going to sleep, then waking up again. Had B12 inj today, usually feels like this when due."*

197. In **August 2017**, at the claimant's supervision meeting, as against the theme 'Wellbeing', FW noted *'feeling okay, although then stated felt stressed*

*trying to fit families in, + health*'. As against the 'Action' column, FW wrote 'B12 due beg Sept'. At the following months' supervision, as against 'wellbeing' FW wrote 'feeling well self had B12 last week'; no 'Action' requirement was noted. The respondent did not challenge the claimant's contention that FW's mother 'has the same treatment'.

### Impact Statement

198. The claimant has provided us with an impact statement in which she contends a wide variety of adverse effects on her day to day activities. Many of those matters that she describes are not unusual in the context of the claimant's conditions, although, some appear to be extremely severe, for example the contention that she can only stay awake for two hours before needing to sleep again, which the claimant qualified by saying that that occurred only when she "has relapses".
199. Pernicious anaemia is plainly a long-term physical impairment; it is lifelong. Deducing the effects of that impairment without regard to the vitamin B12 injections, we find the claimant is likely to suffer tiredness and fatigue, as well as gastrointestinal problems. The leaflet from the Pernicious Anaemia Society suggests the *possibility* of depressive symptoms, but no more than that. We are not satisfied on the balance of probability that an adverse effect of the anaemia is depression.
200. We find that without the partial relief the claimant says she had from fluoxetine, the claimant has episodes when to varying degrees she has difficulty relaxing, difficulty sleeping and difficulty waking up, or staying awake, she has short term memory problems manifesting itself as forgetfulness and tiredness. They were substantial adverse effects ('SAE') in that they were more than minor or trivial.
201. As to the question of whether the SAE were likely to last 12 months or more from the date of the first alleged contravention (3 April 2018), we find that they were. We accept that there was a long term underlying condition of recurrent depression, during which time, although the claimant did not always

suffer SAE, or even SAE that had or were likely to last 12 months or more, but during which time they were 'likely to recur': **J v DLA Piper** and **SCA Packaging v Boyle**. The claimant's medical records indicate that she has suffered depressive episodes (as distinct from a formal diagnosis of depression) for a significant part of her life that has required her to have access to medical and counselling support. We infer from that, that the likelihood is that there were SAE, of the type described above, albeit to varying degrees, on each occasion. The episodes, and therefore the SAE, were not infrequent, the triggers include not just specific matters such as bereavement, but also more routine instances, such as problematic relationships with her colleagues and other 'interpersonal' issues; that strongly suggests that further episodes were likely.

202. We draw assistance from the letter of Dr Shah in arriving at this finding. Albeit written after the material time, in August 2020, we are satisfied that it is highly likely that the claimant was suffering from (recurrent) depression not only for a significant period and throughout the material time i.e. 3 April 2018 until dismissal in March 2020 but also that during the material time, the SAE were also likely to recur; Schedule 1 para 2(2) and **Boyle**.

203. We therefore find that at all material times, the claimant was a disabled person within the meaning of s.6 EqA by virtue of pernicious anaemia and recurrent depression.

### **Discussion and Conclusions on Knowledge of Disability**

204. The respondent had actual knowledge of the claimant's pernicious anaemia at all material times; the information was provided by the claimant in her starter form.

205. We turn to the question of knowledge of the depression. The burden rests upon the respondent to prove that it would be unreasonable to be fixed with knowledge (actual or 'constructive').

206. We reject the claimant's contention that she declared that disability in her health declaration and that therefore the respondent had actual knowledge of her mental impairment at all times. The claimant had informed the respondent that she had historically suffered from post-natal depression; the question was phrased in the past tense, she answered using the past tense and she indicated that the event took place 6 years previously. That answer was itself misleading, because the claimant had suffered at least two depressive episodes since 1995, according to her GP records.
207. We do, however, accept that the respondent acquired actual knowledge of the claimant's disability on or around 23 November 2018 when she submitted her letter headed '*Intention to Appeal Grievance*'. Albeit framed as little more than bare assertions designed to meet the statutory definition, the letter contains sufficient information to tell the respondent that the claimant suffered from a mental impairment that caused substantial adverse effects on her day to activities of cognitive function and memory. The SAE were by that stage, long term (in the sense as we have found them to be i.e. likely to recur), although the claimant's assertion that the respondent knew she was taking anti-depressants '*since the beginning of this year*' was untrue.
208. We have considered whether, the respondent acquired constructive knowledge of the depression before that date, and we have concluded it had not. In summary, this is because almost all the steps that the respondent actually took served only to compound the claimant's refusal to engage; any further steps, even if they could be said to be reasonable for the respondent to have to take, would do nothing to reveal any more information than the claimant had given it.
209. The claimant was an intensely private person. She did not have friends at work; her relationship with FW was amiable but at arm's length. Just as she made a conscious decision to disclose the physical impairment of anaemia, we find she made a conscious decision to mislead the respondent about the true extent of her mental health impairment. Having regard to the GP records, the

claimant was accessing medical and counselling support for almost 5 years at work during which time the claimant was alleging that she was the victim of bullying at work; she did not disclose any of that to her employer. This same was true of the claimant's absence in the first quarter of 2018, when the claimant told FW that despite seeing her GP, and a counsellor, she said to FW, she remained unsure what the actual triggers of her anxiety were. Without understanding that the claimant had or appeared to have an entrenched problem with her employment, or a long standing history of depressive episodes, the respondent cannot reasonably be expected to have known that any stress, low mood or anxiety – of which it was aware of for the first time in January 2018 - was likely to be long term.

210. For the avoidance of doubt, we have considered whether the respondent ought to have made a referral to Occupational Health at this stage in any event. We do not think that that was a failure; there is no reasonable basis to believe that, if having seen a GP and a counsellor, the claimant was unsure what the triggers were, it would be any better informed, even had the respondent managed to persuade the claimant to attend an Occupational Health appointment.
211. On her return to work, the claimant routinely identified her domestic circumstances as being the source of stress (e.g. 9 and 29 May 2018, 4 July 2018, 26 July 2018) as well as explicitly denying that work was a cause of her stress (e.g. 4 July 2018). The domestic circumstances she mentioned were the claimant's brother's ill-health, as well as her proposed house move. Both were, potentially at least, adverse life events that would not necessarily lead to long-term SAE.
212. Certainly, by 5 September 2018, it was clear from the claimant's grievance that despite having done a significant amount of legal research, even at that stage, the claimant did not identify herself as a disabled person but instead chose to allege discrimination by association with her brother.
213. A sickness review meeting took place soon thereafter, on 11 September 2018. The respondent took all reasonable steps to inform itself of the medical



position at that stage by not only meeting with her, but it is clear from the notes of the meeting that HP went to significant lengths to try to engage the claimant about her health. Again, she did not mention that her anger towards her employer was an entrenched one which had subsisted for many years; instead she told HP that she was content with her manager and that the demand of 'HR' to impose a time and motion study was the trigger. It cannot be reasonably said that the respondent, at this stage ought to have known that the claimant was suffering either an impairment much less one whose SAE were likely to be long-term. HP encouraged the claimant to consider giving the respondent permission to obtain GP or Occupational Health advice; it already provided her with a consent form. HP at the claimant's request reassured her that she could withhold access to her GP records if she was to be seen by Occupational Health; HP offered to speak with or meet with the claimant to assist her with completing the form. That the claimant submitted a complaint about HP for preparing a note of the meeting and sending a copy 'to HR' – and subsequently refusing to even provide the respondent with her address - underscores our finding that the claimant is an intensely private individual who did not share personal information unless in her own interests. The claimant ignored GH's follow up letter asking her if she had any thoughts about providing the respondent with medical consent to obtain further information about her health.

214. We have considered whether the respondent could reasonably have been expected to do more e.g. to seek to meet with her more often. We have found, in all the circumstances, it was not reasonable to expect the respondent to take further steps. The claimant had indicated to both FW and later HP that she preferred to be contacted by text and her subsequent conduct is consistent with that preferred method of communication; steps were taken in August and September 2018 to seek further information from the claimant, but the claimant is entitled to have her privacy respected – to have done more, we find, would not be reasonable in the circumstances.

215. By September 2018, the claimant, on her own account had ceased engaging with the respondent. The claimant shared information about her disability status only after she had made an allegation of discrimination, and to

support that and various other allegations that she was a victim of discrimination; on balance we find that she would only have provided information about her medical status if it suited her interests to do so. Thus, had we had found that the respondent could reasonably be expected to have taken further steps to inform itself, we would have had no hesitation in also finding that those steps would have been futile and adding nothing to the state if the respondent's knowledge.

## **DISCUSSION AND CONCLUSIONS ON THE SUBSTANTIVE ISSUES**

### **Allegation 1 – FW comment at return to work interview on 3 April 2018**

216. The claimant's case rested upon the contention that, having made one enquiry of the claimant, FW repeated that enquiry on 3 April 2018; she makes no complaint at a singular query ('once is fine'). We note that it played no part of the claimant's pleaded case that her claim of discrimination rested upon a repetition of the query, despite taking various opportunities to refine her case. It was only after disclosure of FW's notes when the claimant suggested for the first time in her witness statement, that her allegation of discrimination rested upon a repetition of the same query.

217. FW did not make ask the claimant whether her absence was due to the menopause on 3 April 2018, as alleged. She asked the claimant once, during a wellbeing call in February, whether she thought that the symptoms she was describing were due to the menopause. On the claimant's own evidence, to be asked once is 'fine'. The allegation are not well founded.

### **Allegation 2 – GM comment during supervision meeting on 29 May 2018**

218. We are not satisfied that the comment was made by GM or for that matter recounted to the claimant by FW; the allegations pursued are not well founded.

### **Allegation 3 – Adjusted Working Hours – 29 May 2018 to 26 July 2018**

Failure to make Reasonable Adjustments

219. The respondent did operate a PCP that required employees to work their contracted hours.
220. We are not satisfied that the PCP put the claimant to a substantial disadvantage of *'being physically unable to cope with a heavy demanding caseload'*, compared to those who are not disabled; the claimant had been medically cleared to work full time following an 8-week phased return to work.
221. The respondent did know and could not reasonably be expected to know that the PCP would put the claimant at the substantial disadvantage claimed. The claimant had completed a phased return to work, she told FW that it had worked well, and that work was not the source of her concern. She told the respondent that she was seeking adjusted hours was to accommodate her caring duties for her brother, and to assist with a house move. The claimant's health was discussed at monthly supervision meetings, and at no stage did the claimant say, or for that matter even indicate, that the interest in adjusting her hours was in order to accommodate her own health concerns.
222. Further, and in any event, the claimant acquiesced in FW's suggestion that a flexible working pattern would be most suitable for her, and it invited her to submit her application, but she chose not to; that offer to make an application for adjusted hours was a reasonable adjustment that would have had the effect of avoiding the claimed substantial disadvantage.

**Allegations 4 and 7 – 360-Degree Feedback – 26 and 27 July 2018**

223. This claim had originally been advanced as a claim that the colleagues' comments were discriminatory and was subsequently amended to FW making *'condemning and judgment statements'*. Following a case management hearing, EJ Sweeney identified that as well as advancing a harassment claim she also advanced a reasonable adjustment claim; in respect of the latter, he identified the PCP as providing verbal feedback and the comparative

substantial disadvantage as '*not being able to take it in*' and that therefore the adjustment was to put the feedback in writing. In fact, having explored with the point with the claimant in her evidence, she contended that the respondent should not have given her the feedback at all. We deal with matters on both bases.

### Harassment

224. The provision of feedback was not unwanted; it did not amount to FW making '*condemning and judgmental statements*'. It was not related to the claimant's disability; it was wholly related to the decision of the respondent to implement a system of 360° feedback as a personal development tool for all employees.

225. The purpose of the feedback was not to create the prohibited environment; it was to assist employees including the claimant in their personal and professional development. Neither was the effect of the feedback to create the prohibited environment; in all the circumstances, taking into account the claimant's perception and whether it was reasonable for the feedback to have that effect. The summary was sensitively worded and constructive and insofar as it contained areas for improvement, such as references to keep her calendar updated and effective communication with her colleagues, they were not new to the claimant, having been raised with her in December 2016. Furthermore, it would cheapen the words of the statute to find otherwise: **Land Registry v Grant**.

### Failure to make Reasonable Adjustments

226. The respondent had a PCP of providing verbal feedback in summary form to its employees.

227. The respondent knew that the claimant was a disabled person by reason of anaemia, but it did not know and it could not reasonably be expected to know, that the PCP put the claimant at the substantial disadvantage of '*having*

*difficulty absorbing the information*', in comparison with those who are not disabled. The claimant was fit to work; there was no evidence before us that the claimant had difficulty engaging with the rest of the personal development review. The verbal feedback was significantly shorter than the rest of the review.

228. Further, and in any event, and in particular having regard to the fact that the purpose of the exercise was to assist with personal development, the respondent did make reasonable adjustments to avoid the substantial disadvantage when FW volunteered, in line with the information provided in the Q&A document, to revisit the feedback with the claimant on her return to work the following Monday and provide clarification (and when, had the claimant wished, no doubt she could have made her own notes). What the claimant sought, at the time, was the 360 review *'in full'*; it was not a reasonable adjustment to PCP to provide different information i.e. the 'raw data' from which the verbal summary had been created. Nor was it a reasonable adjustment to simply withhold the feedback; it was an important part of the respondent's process of encouraging personal development and to withhold feedback would defeat the purpose of the exercise.

## **Allegations 5 and 6 – time and motion study**

### Harassment

229. The request to complete a time and motion study was not related to the claimant's disability; the request was made because the claimant's contact time with families was unaccountably low.
230. The purpose of the request was not to create the prohibited environment; it was to understand how the claimant was spending her time so as to identify what support could be offered to create greater efficiencies in her working and to do so in circumstances where the claimant's contact hours were low and she told FW that she was too busy to take on more families. As a claimant herself

acknowledges, the respondent was entitled to know how the claimant was spending her time. Neither was the effect of the request to create the prohibited environment, in all the circumstances and having regard to perception of the claimant and whether it was reasonable to have an effect; contact time with families is a core part of the role of a family support worker, the claimant had failed to submit weekly timesheets, and failed to comply with FW's management request to provide her with the weekly timesheets, the ECCO database provided FW with only the most basic information (how many hours of contact time), the claimant provided FW with no further explanation than the claimant she was too busy and, as the claimant accepted in evidence, the respondent had a right to know how she was spending her time. Further, it would cheapen the words of the statute to suggest that asking an employee to account for their time by completing a rudimentary form would amount harassment: **Land Registry v Grant**.

#### Direct Discrimination

231. There is no evidence before us to suggest that the claimant was asked to carry out a time and motion study because she was a disabled person; on the contrary we are amply satisfied that she was asked to carry out a time and motion study because her family contact hours were unaccountably low.

#### Discrimination Because of Something Arising in Consequence of Disability

232. The respondent knew at the material time that the claimant was disabled person by reason of anaemia.

233. We are not satisfied that the time and motion study amounted to unfavourable treatment; whereas it certainly added, albeit to a limited extent, to the claimant's workload, as the claimant herself accepted, it had the potential to be an illuminating and useful work tool.

234. Having heard from FW we are satisfied that the request was made because the claimant's family contact hours were unaccountably low. We

reject, for the avoidance of doubt, that they were not low because, as the claimant contends, because she only had a few families to support on her return to full-time work after a phased return from a disability-related absence; there were not only more families waiting to be supported, but FW was asking her to support more families. The claimant does not establish a prima facie case.

#### Failure to Make Reasonable Adjustments

235. The respondent did have a PCP of requiring those employees who it required to participate in a time and motion study to do so by recording in writing how they spent their working time in 15- or 30-minute intervals.

236. We are not satisfied that the PCP put the claimant to a substantial disadvantage, where what is 'substantial' is that which goes beyond the normal differences in ability which might exist among people. We recognise that the additional demand was irksome, but that falls significantly short of the claimant's contention that that the PCP put the claimant at a substantial disadvantage when compared to those who are not disabled by '*creating an unbearable workload*'. Nor could it be said that the respondent knew, or could reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage claimed; the claimant was fit to work and, other than telling FW that she '*must be joking*', she did not indicate to FW that there was any particular problem with her ability to carry out the study.

237. The respondent did have a PCP of expecting a full-time equivalent worker to demonstrate 25 hours of contact hours with families.

238. We have already found that the claimant did not have fewer or insufficient families to whom she could dedicate 25 hours per week of contact time, because of her disability related absence; the fact that she had fewer or insufficient families, is because she refused FW's requests to take on more families. She was not put to a comparative disadvantage.

### Victimisation

239. We have already found that the claimant did not do a protected act in that she did not make a request for part-time or adjusted hours. Other than the claimant's expressed belief, there was no evidence to suggest that there was any link at all between the discussion about adjusting the claimant's hours, and the request to undertake a time and motion study; we accept that the two were wholly unconnected and that the time and motion study was not required of the claimant because she had done, or the respondent believed she had done, or may do, a protected act.

### **Allegation 8 – Anne Harris email of congratulations - 7 August 2018**

#### Direct Discrimination

240. AH did not send the email to the North East care team because of the claimant's disability. It was sent because in her role as Director of Care she was carrying out an important aspect of her role by acknowledging and communicating her appreciation for the hard work of the team.

#### Harassment

241. We find that the email was not unwanted conduct relating to the claimant's disability; the email was addressed to the whole of the team, its contents related to the efforts of the whole of the team. Furthermore, there was no evidence before us that AH knew, believed, or even suspected, that the claimant had a disability when she sent the email.

242. We reject the claimant's contention that the purpose of the email was to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment; as above, after receiving monthly statistics, she sent the email as part of her managerial duties to recognise the achievements of the team, as she had done regularly with others; this particular email was triggered by her receipt of month end statistics. Nor do we accept that the email could reasonably be considered as having that effect, when



taking into account the circumstances, the perception of the claimant and whether it was reasonable to have that effect. AH had assumed, correctly, that the claimant had had an input in processing the large number of referrals in July. The email was sent to the whole of the team and recognised the efforts of the team (*'you are an amazing team'*). The claimant was a member of that team, even if she did not feel that she was. That the claimant was absent on sick leave was a fact known to the North East team and the email recognised that as an additional factor adding to the workload of an already busy team; when individual members of the team or absent, others assist with the families-the claimant had herself taken on other team members' families in similar circumstances. Finally, we consider that any allegation, made out, would be insufficiently serious to amount to a contravention: **Land Registry v Grant**.

#### Duty to Make Reasonable Adjustments

243. The respondent, via AH, does have a PCP of sending emails of congratulations to staff.

244. The email did not place the claimant at a substantial disadvantage when compared with those who are not disabled by disregarding (or appearing to disregard) the claimant's involvement when compared to those who were not disabled; anyone else who was ill in the same period but who was not disabled, insofar as they may be that way inclined, would be similarly marginalised.

245. Nor could the respondent know or reasonably have been expected to know that the claimant was likely to be placed at the disadvantage claimed, since the claimant was at work in July and was a contributor of the high volume of referrals.

#### **Allegation 9 - response to the claimant's grievance**

##### Did the Claimant make a Protected Disclosure?

246. We remind ourselves that there is no bright line between that which amounts to information and that which is a pure allegation, but we accept the respondent's submission that there is insufficient information in the claimant's grievance, or the surrounding information (in this case, the supervision meetings) about her non-managerial supervisor and the respondent's response to her request to change supervisor to amount to information which tends to show a breach of the duty of care, or that the health and safety of an individual was endangered. Insofar as the disclosure contained facts at all, the contention that the standard of supervision was '*poor*' and which had the effect of compounding her mental health problems is too vague and lacking specificity so as to amount to a disclosure of information which tends to show either a breach of the legal duty of care, or a health and safety breach. Neither does the contention that the respondent is acting in breach of its own internal rules amount to sufficient information which tends to show a relevant failing.

247. The claimant did not genuinely believe that any such information tended to show a relevant failing; she selectively misquoted the respondent's policy to exclude that part which permitted more than two team members to attend the same non-managerial supervisor.

248. Neither did the claimant reasonably believe that any such information tended to show a relevant failing; she knew that the policy, as it plainly states, is not about a legal duty (whether health and safety or otherwise); it was about '*balance and confidentiality*'.

249. The claimant did not genuinely believe that any disclosure of information was in the public interest and nor did she have reasonable grounds for believing so: the service is confidential and there is no evidence that the claimant was even aware of what her colleagues thought - she had no basis upon which to believe her colleagues were affected by an alleged poor standard of service, and nor did she suggest to her employer then, or before us at the hearing, that she believed they might be affected. The complaint was solely about her own interests.

250. The disclosure was not a protected disclosure within the meaning of s.43B ERA 1996.

Did the Claimant make a Health and Safety Disclosure?

251. There was a health and safety committee and HP was one of the respondent's representatives. She was not only based in the North East, she met with the claimant only 6 days after the claimant sent in the grievance she relies upon as amounting to a health and safety disclosure. The claimant accepted that she could have easily emailed HP who was not only a member of the respondent's health and safety committee, based in the North East, but also the very person she met with only 6 days after submitting her grievance. It was reasonably practicable to raise any health and safety matters with HP directly.

252. The claimant did not have a genuine belief, reasonably held, that there were circumstances connected with her work that were harmful or potentially harmful to health or safety, for the same reasons given above in respect of our relevant findings in relation to protected disclosure.

Detriment

253. It follows from what we have found above that those the claims reliant on either disclosure having been made must fail; nevertheless, we have made findings in the alternative on the issue of detriment below.

254. We accept that the reason for the delay between the general request for data made in January 2019, and its provision in October and December 2019, was, we find, for precisely the reason that ZB warned the claimant about in her initial response to the request i.e. the unexpected and lengthy absence of FW. The request was not a compliant SAR, and the respondent

was under no pressure of time to comply it had communicated that to the claimant immediately upon receipt. It may be that more could have been done – although we bear in mind the significant demands that the claimant was making on the respondent's resources for much of 2019 – but we accept the answer the respondent gives as a complete one; the delay in providing data was not done because of any disclosure made by the claimant.

### **Allegation 10 - Request to Reimburse Private Fuel Use - 18 January 2019**

255. The respondent first identified the fact that the claimant had incurred expenses for personal fuel consumption on the company fuel card soon after ZB had asked for enquiries to be made as to whether the respondent owed the claimant any monies at a time when the claimant's contractual sick pay was about to come to an end. The claimant had charged fuel to the company fuel card during her sick leave and therefore the charges could not be work-related expenses. The claimant charged to the respondent on 12 occasions, during the period of sick leave between October 2018 and January 2019. The claimant was required, in accordance with the Vehicle Fuel Use Policy to account for the personal element of any fuel charges to the company fuel card on a monthly basis. She did not. It was a significant amount of money. The respondent is a charity, with no regular source of funding; its existence is 'hand to mouth'. Its budget was in deficit by its year end in June 2019. The claimant accepts that she owed the respondent the expenses she charged to the company fuel card instead of paying for them herself, none of which she had accounted for to the respondent. We are satisfied that the respondent would have asked any employee, whether disabled or not, or on disability-related leave or not, to reimburse it, in those circumstances. We note that on two occasions, the claimant was offered a repayment plan; both offers were ignored by the claimant. We are satisfied, having heard from ZB, that the request made by her was wholly unconnected with any disclosure, or attempted disclosure made by the claimant, or the content of her grievances. The request was motivated by the fact that the claimant was continuing to use the company fuel card for purely personal use and without any attempt to reimburse the respondent.

### Harassment

256. The request to reimburse the respondent for monies did not amount to unwanted conduct relating to the claimant's disability; it related to the fact that the claimant was charging her personal fuel expenditure to the respondent without reimbursing it. It was neither the purpose, nor objectively, the effect of the request to create the prohibited environment. Further, it would cheapen the words of the statute to suggest that asking an employee to repay monies owed in such circumstances would amount harassment: **Land Registry v Grant**.

### Whistleblowing Detriment / Health and Safety Detriment

257. The claimant did not make a health and safety disclosure or a protected disclosure for the reasons set out above.

258. We are satisfied that the reason for the request was solely to seek reimbursement of a significant amount of money that the claimant had been incurring over several months without making any attempt to repay it.

### Victimisation

259. The claimant contended that she had done a protected act when submitting her grievance on 5 September 2018, or as she added at the outset of the hearing, 6 December 2018, in the alternative.

260. Irrespective of whether the contents of any of her lengthy correspondence amount to a protected act, her claim fails. Even assuming the claimant had done a protected act, or the respondent believed the claimant had done, or may do, a protected act, we are satisfied that the reason for the request was because the claimant was incurring, without accounting for, significant amounts of personal fuel expenditure on the company fuel card. Nor do not

accept that it is a detriment to be asked to repay monies that the claimant legitimately owed the respondent.

**Allegation 11 and 12 - requesting the return of the claimant's company car -  
11 March 2019**

261. The respondent was entitled to consider whether the claimant continued to have a need for the vehicle, it was entitled to review the provision of the vehicle on the creation of a new position, and/or ask the claimant to loan her car to the temporary support worker on their appointment; see the respondent's Vehicle Policy. Furthermore, the policy specifically envisaged the possibility of recovery of the vehicle in circumstances where an employee is on '*long-term absence e.g. after contractual sick pay expires.*'

262. The car was provided to the claimant for the primary purpose of carrying out her role and she had been unable to use it for that purpose since late July 2018. The claimant's contractual sick pay expired on 27 November 2018; no steps were taken to recover the vehicle then. In fact, the respondent waited until 5 March 2019, once the temporary support worker had not only been identified but was about to commence employment on 11 March 2019; by then the claimant had been off work for over 7 months, with no indication, much less evidence, that the claimant would be returning to work in the foreseeable future. The support worker was on a temporary contract. The respondent had no spare fleet cars to provide to the worker and a short-term hire car would not only amount to an additional cost to the respondent, but an additional cost at a higher rate than the claimant's lease car. The respondent is a charity, with no regular source of funding; its existence is '*hand to mouth*'. Its budget was in deficit at its year end in June 2019. The request was made on 5 March 2019; the parties agreed that the claimant could retain the vehicle until 18 March 2019 to enable her to transport her brother to hospital. The evidence before us was that in the event that a vehicle became free even whilst the claimant remained off work, the respondent would consider providing her with a company vehicle again.

### Detriment claims

263. The request was to enable a fleet car to be used by a new member of staff in circumstances where no other vehicle was available for use. We are satisfied that the request was not made:

- a. Because the claimant had done a protected act, or the respondent believed her to have done so, or would do so, in respect of any of her grievances;
- b. On the ground that the claimant had made a protected disclosure of any kind, on any date, contained in any of her grievances;
- c. On the ground that the claimant had made a health and safety disclosure.

### Victimisation

264. We are satisfied that the only reason the respondent sought the return of the company car was to enable the temporary worker to use it for work purposes and not because the claimant had done a protected act.

### Reasonable Adjustments

265. The claimant contends that there was a PCP of removing company cars from those employees whose contractual sick pay expired. The Vehicle policy plainly envisages the possibility of retrieving a company vehicle in those circumstances; it *'reserves the right to recover a vehicle from an employee through misuse or long-term absence e.g. after contractual sick pay expires.'*

266. Thus, notwithstanding the fact that there had historically been no similar instances, we are satisfied that there was a PCP that was capable of being applied to others in similar circumstances: **Ishola**.

267. However, we disagree that there was a disadvantage personal to the claimant; her evidence was that the vehicle was required to transport her brother to medical appointments. We are not satisfied that there exists a comparative disadvantage i.e. that those employees who are not disabled

would not have suffered the alleged disadvantage once their entitlement to contractual sick pay is exhausted.

268. Nor did the respondent know and nor could it reasonably be expected to know of any such comparative disadvantage; adjustments were made that were reasonable by allowing the claimant to retain the vehicle for almost two weeks to allow her to transport her brother to his medical appointment. We disagree that to allow her to retain the vehicle without limit was reasonable; the primary purpose of the vehicle was to enable its user to perform their role.

#### Discrimination Arising in Consequence

269. The request was made because of the claimant's absence from work, which was arising in consequence of the claimant's disability.

270. The burden rests upon the respondent to objectively justify the treatment. The aim of ensuring that the respondent has sufficient cars available to its workforce is plainly a legitimate aim. The request to return the car to make it available for a colleague was capable of achieving that aim. The request was reasonably necessary to achieve the aim. The primary reason a support worker is provided with a company car is to enable them to carry out their role by travelling to see families that they support. There were no spare vehicles in the respondent's fleet to provide to the new colleague. The colleague was a temporary employee, not a permanent one; it was inappropriate and unnecessary to enter into a new 4-year lease for them and a short term hire of a vehicle would amount to not only an additional expenditure for the respondent, but expenditure at a higher cost than the vehicle that the claimant had in her possession. The claimant had been off sick for a significant period during which time she had been unable to use the vehicle for work and there was no indication that the claimant would be returning to work in the near future, so as to resume use the vehicle for its primary purpose. Even assuming that the claimant had a contractual right to the vehicle, it is a balance between the needs of the respondent to serve the legitimate aim and the discriminatory



effect on the claimant, and we find that the treatment of requesting the return of the vehicle is justified since no less discriminatory means could have achieved the objective of ensuring that the respondent had sufficient vehicles available for its workforce.

### Indirect Discrimination

271. For the reasons given above, we accept that there was a PCP capable of applying to disabled as well as non-disabled persons i.e. requesting the return of a company vehicle from those whose entitlement to contractual sick pay had expired.

272. We agree that the respondent would apply that PCP to those who are not disabled.

273. Although the Tribunal attempted to explore with the claimant the particular disadvantage that she relied upon, she only re-stated her pleaded case, which does not state the disadvantage. Ordinarily, that might be the end of her claim. However, we inferred, as the respondent invited us to, that the disadvantage was the same or similar to the substantial disadvantage relied upon in the reasonable adjustments claim i.e. when employees' contractual sick pay expired, they too would be asked to return their vehicle and be without a company vehicle to use as transport to medical appointments. The claimant has adduced no evidence of comparative disadvantage. We are not satisfied that the PCP put or would put disabled persons at a particular disadvantage when compared to those persons who are not disabled.

274. Further and in any event, we agree with the respondent that the PCP was a proportionate means of achieving a legitimate aim for much the reasons given above. The company car is provided to enable support workers to undertake their work. In circumstances where a support worker for an absence that is of such length as to exhaust their entitlement to contractual sick pay, the PCP is an appropriate and reasonably necessary way to achieve the aim of

ensuring that there are sufficient vehicles available to the respondent's work force. The vehicle is provided primarily for work use and in circumstances where an employee is on a long term absence and therefore unable to carry out their work, we find that nothing less discriminatory could be done instead. Balancing the needs of an employee who is not capable of attending work and therefore cannot use the vehicle for its primary purpose, against the needs of the respondent who provides vehicles, and who continues to incur the associated cost of providing a vehicle, to its employees for that purpose, we are satisfied that the PCP is a proportionate means of achieving the legitimate aim.

**Allegation 13 – failure to correct the claimant's impression that ZB was a barrister – 22 February 2019 onwards**

275. The claimant contends that the respondent victimised the claimant by subjecting her to the detriment of allowing her to believe that ZB, as a barrister, would deal with the claimant's grievances reasonably, fairly and equitably.

276. Setting aside, for a moment, that on the claimant's own written evidence, she knew that ZB was a qualified solicitor, and corrected a colleague's misunderstanding to other effect, we address how the claimant wishes to advance her claim.

277. The claimant's evidence to support her allegation is two fold; first, in her statement, the claimant contended that ZB had informed others that she was, or had qualified as, a barrister and second, in her pleaded claim, she contended that ZB had victimised her by failing to correct her impression that ZB was a barrister – and as communicated in ZB in a letter dated 22 February 2019.

278. As to the first point, the claimant refrained from challenging the truth of ZB's assertion that she had never held herself out as a barrister, despite being reminded by the Tribunal to challenge ZB's evidence to that effect. We have no doubt at all that ZB has never asserted, or indicated, at any time, that she was a barrister.

279. As to the alleged detriment, the claimant was unable to explain to the Tribunal how her misunderstanding, even where uncorrected, could amount to a detriment.

280. We find that there was no such misunderstanding in any event; on the claimant's own evidence, she corrected a colleague's misunderstanding about ZB's qualification, asserting herself that she knew that ZB was a solicitor. That she may have forgotten the truth of the matter is not the same as saying she had entirely misunderstood the position in the first place.

281. As to the alleged failure to correct the claimant's asserted understanding, we note that the correspondence that ZB did send to the claimant, was timely, thorough and detailed. We have sympathy for ZB's evidence that it was unnecessary to address each and every assertion made by the claimant; by February 2019, the claimant had sent to ZB voluminous correspondence, which was often framed in imperious and combative terms and we accept that it was not proportionate to respond to each and every contention contained in her correspondence. We also agree entirely that it was in particular unnecessary to do so when the sentiment expressed – that ZB as a lawyer was '*well versed*' in the law – was equally applicable to either limb of the profession. Finally we note that the claimant conceded in her own evidence, as well as restating in her cross-examination of ZB, that whilst she was aware of the distinction, and that she did '*not think it was of import*' because she '*would expect someone to behave the same whether they were a solicitor or a barrister*'.

282. We are satisfied that the failure to correct the claimant's assertion that ZB was a barrister in her letter of 22 February 2019 was not because the claimant had done a protected any protected act, or because the respondent believed she had, or that she may do so. Nor, for the avoidance of doubt, did the respondent in any way fail to do what is alleged because the claimant had made any protected disclosure or made a protected or health and safety disclosure.

283. We find that the claimant suffered no detriment by any alleged failure.

284. Given the claimant's wholesale inability to explain how she advances her claim in any credible way, we conclude that this allegation was formulated and advanced by the claimant in an attempt to impugn ZB's integrity and to cause her personal and professional embarrassment in a public forum.

### **Dismissal**

285. By the time the claimant was dismissed on 12 March 2020, she had been absent on sick leave for almost 20 months. During that time, the claimant had been asked on at least six occasions for consent to refer her to Occupational Health. On several of those occasions, the claimant was informed of the purpose of obtaining medical advice, as well as the consequences of failing to do so. The claimant attended only one absence review meeting in September 2018, after which she sought to disengage with the respondent about her employment and sought instead to advance her grievances. By her response on 25 September 2018, the claimant was, consistent with her oral evidence, not only continuing to refuse to engage with the respondent in any meaningful way about her employment, but she subsequently sought to frustrate the process whilst inviting the respondent to discuss a financial settlement in order to avoid litigation. By its letter dated 16 September 2019, when inviting the claimant to a sickness absence review meeting, the respondent had put the claimant on notice that it was considering how long it was reasonable to wait for the claimant to be well enough to return to work. The absence review meeting in October 2019 was postponed at the claimant's request, but she did not attend the postponed meeting, which was held in her absence on 6 January 2020, the respondent having warned her on three occasions of that possibility. BC proceeded with genuine patience and sensitivity; he was scrupulous in his efforts to facilitate the claimant's engagement in the process. As the claimant accepted in cross-examination, the respondent had acceded to every request she made for more

time. Ultimately, the claimant did not attend the stage 3 hearing, nor did she accept the offer to send a trade union representative in her stead, or for that matter make any written submissions, which on the evidence before us she was perfectly capable of making. In advance of the stage 3 hearing, the claimant was given appropriate notice of the hearing, provided with all relevant materials, informed of her right to be accompanied by a colleague or trade union representative and warned of the possibility of dismissal; she was offered the option of identifying a more convenient date. On 11 February 2019, and in circumstances where the respondent might well have been justified to proceed in the claimant's absence, the claimant notified BC after the commencement of the hearing that she intended to take a further four weeks to prepare for the hearing. That request was not only acceded to, the claimant was offered a choice of three alternative dates. The hearing proceeded on 12 March 2020, in the claimant's absence, the claimant having informed BC that she would not be attending. BC took into account all relevant evidence; he did not take into account anything inappropriate or irrelevant. There was no medical evidence, or representation even, from the claimant herself, to suggest that she would be fit to return to work, in any capacity, in the foreseeable future; BC's belief in the claimant's inability to resume her role, in any capacity the foreseeable future was genuine. Nor, by the time the decision to dismiss was made, was there any realistic hope that, the claimant might suddenly change her behaviour and begin to re-engage with the respondent. It was in those circumstances that he decided to dismiss the claimant. The claimant was reminded of her right to appeal her dismissal; she did not appeal.

286. Furthermore, the continued absence of the claimant was causing sufficient difficulties within the team that the respondent was required to recruit a temporary support worker in order to carry out the work that the claimant would otherwise have done. Plainly replacing a permanent employee with a temporary agency worker is not sustainable in the long term.

287. On any objective view, the claimant did not submit an appeal against her dismissal, for the reasons we have already stated above. Further, in any event,

on her own evidence the claimant was unfit to return to work as at the date of dismissal, even on part-time hours, and nor was she even the date of the hearing.

### 'Ordinary' Unfair Dismissal

288. The facts known, or beliefs held, by BC causing him to dismiss the claimant were that the claimant had been unfit to attend work for almost 20 months and, furthermore, there was no indication, whether from the claimant herself or in the form of medical evidence, that she was likely to return to work in the foreseeable future. We accept that the respondent dismissed the claimant for a potentially fair reason, being capability.

289. The respondent did all that could be reasonably expected to encourage the claimant to personally engage with it during her sickness absence despite the fact that at a relatively early stage, it was apparent that she would not cooperate. It did all it could reasonably be expected to do to inform itself of the medical position throughout her absence, but the claimant did not allow it. The claimant's relationship with HP, GH and BC was unremarkable. In cross examination, the claimant denied that the respondent had carried out a sufficient investigation and a fair process, but when asked by the Tribunal what more it could have done, she was unable to say. We conclude, having regard to the reason for dismissal, the dismissal was fair in all the circumstances. BC had due regard to the length of service and the fact that the claimant had expressed that she enjoyed her job. Dismissal was not only a decision that was in the range of reasonable responses open to a reasonable employer, it was, in all the circumstances, fair.

### Discrimination Arising In Consequence

290. The dismissal amounted to unfavourable treatment because of the claimant's disability related absence. The respondent's legitimate aim is to ensure the respondent has an effective workforce by making long term plans

for its workforce, hiring permanent staff so as to ensure the supported families receive effective support. That is a legitimate aim.

291. We are satisfied that dismissing the claimant was not only an appropriate means of achieving long term workforce planning, but a reasonably necessary means of doing so; for as long as the claimant remained an employee, with no signs of returning, the respondent was unable to embark on any workforce planning or otherwise create stability in a small team working under significant pressure so as to effectively serve the families the charity seeks to support.

292. We consider the needs of the employer. That plainly included continuing to meet the objective of the charity, i.e. to serve the needs of families who required support. However, it also included, on appointment of ZB, the need to grow the charity by delivering more frontline care services and to provide increased support to more families in more locations. In August 2018, the North East team had processed a high number of referrals; it was struggling to meet demands by end 2019. It is a small team, consisting of six support workers; the impact of the claimant's absence on its ability to meet its demands was therefore significant. For as long as the claimant remained off work, the respondent was left in suspended paralysis, unable to fill the role with a permanent employee. Temporary employees require a disproportionate amount of investment in recruitment as well as training; they are time limited and inexperienced. There are consequences for the North East team generally in terms of bonding, identity and mutual support. The continuing sense of impermanence impacts not only the employee, the team and the respondent generally, but critically, it impacts on the need for continuity of care and support for families who find themselves in a highly vulnerable state. We find that the impact of the claimant's absence on the respondent was severe; it has a need for a full and effective workforce in order to serve its objectives. After almost 2 years of the claimant's absence, and with no sign of improvement in the claimant's health or her willingness to engage, it was also entitled to finality. That was particularly so when the claimant was depriving the respondent over a prolonged period of time, of any ability to inform itself of the claimant's health,

by herself refusing to provide it with information about the medical position, and by refusing to provide it with medical consent. All the information that the respondent was left with was fit notes, and no information at all to suggest that the claimant was likely to be able to return to work, in any capacity, in the foreseeable future.

293. The discriminatory impact of the fact of dismissal on the claimant is not ignored. However, the claimant was deprived of her employment, in circumstances where she was in exclusive possession of all factual and medical information, save for her fit notes, about her health and its prognosis, and yet she steadfastly refused to engage with the respondent, for a prolonged period, in full knowledge of the potential consequences of doing so, at every stage.

294. A consideration of justification requires a balancing exercise between the discriminatory effect of the treatment and the reasonable needs of the employer.

295. The dismissal was proportionate; it was reasonably necessary to enable the respondent to make effective plans for its workforce by hiring permanent staff so as to deliver effective support to families, since no less discriminatory means could have achieved that aim. Balancing the discriminatory effect of the dismissal and the reasonable needs of the employer, the respondent has satisfied us that the dismissal was a proportionate means of achieving a legitimate aim.

#### Failure to Make Reasonable Adjustments

296. The respondent did have a PCP of requiring employees to submit appeals against dismissal within five days.

297. We are not satisfied five-day window did in fact claimant a substantial disadvantage of making it harder for her to comply with the deadline, for the following reasons; the claimant's actions generally demonstrate that she was



capable of writing lengthy and detailed letters in speedy reply to correspondence from the respondent; the claimant did not even indicate that she intended to wish to appeal (c.f. Letter of 23 November 2018) and we note that only the previous month (February 2020) the claimant twice asserted her intention to take 4 weeks to review documents and seek legal advice in relation to the Stage 3 hearing; she was capable of formulating and presenting a claim, attending a case management hearing, and complying with tribunal orders at around the same time as she claims to have had difficulty submitting a letter of appeal.

298. Even if the PCP did put the claimant to a comparative substantial disadvantage, the respondent had already made such adjustment as was reasonable to avoid the disadvantage, namely to double the time limit to 10 days. We reject the claimant's contention that a reasonable adjustment would be for the respondent to consider her letter of 22 June 2020 as her appeal against dismissal. The letter was a grievance inviting the Chair of the Board to enter into settlement discussions so as to avoid continued litigation; it was not an appeal in which she sought, genuinely or otherwise, to be reinstated.

Direct Discrimination / Victimisation / Protected Disclosure Detriment / Health and Safety Detriment / Assertion of a Statutory Right

299. There is no evidence before us that the claimant was dismissed because she is a disabled person.

300. We accept that the respondent did not dismiss because she did a protected act (or that the respondent believed she had, or may do), or on the ground that she made a protected disclosure, or made a health and safety disclosure.

301. The claimant contends that the principal reason for her dismissal was that she brought proceedings in the employment tribunal 'for issues under the EqA 2010'. That is not a 'relevant statutory right' as defined at s.104(4) ERA

1994. In any event, we have, for the reasons given above, found that the reason for the dismissal was capability, not for the assertion of any statutory right.

302. All the claims are not well founded and are dismissed.

Employment Judge Jeram

Date: 20 December 2021

## ANNEX A

### ISSUES ARISING IN THE CLAIMS

The reference to allegation numbers are references to allegations set out in claimant's document headed 'ET1 (Revised and Simplified)' at page 109-113 of the bundle, and as combined, for ease of navigation, by Mr Howells.

#### Disability

1. Was the claimant a disabled person within the definition of section 6 EqA 2010 by reason of pernicious anaemia or depression?
2. Did the respondent know, or could it reasonably have been expected to know, of the claimant's disability?

#### **Allegation 1 - alleged comment made by FW out return to work interview on 3 April 2018**

3. Did FW ask the claimant whether she thought her absence "*could be down to the menopause?*"

#### Direct Discrimination

4. If so, did the enquiry amount to less favourable treatment because of the claimant's disability?

#### Harassment

5. If so, was it unwanted conduct relating to her disability? If so did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

#### **Allegation 2 - alleged comment made by GM at supervision meeting on 29 May 2018**

6. Did GM ask FW, about the claimant, "*isn't she coping very well?*"?

#### Direct Discrimination

7. If so, did the enquiry amount to less favourable treatment because of the claimant's disability?

#### Harassment

8. If so, was it unwanted conduct relating to her disability? If so did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

### **Allegation 3 – Adjusted Working Hours – 29 May to 26 July 2018**

#### Reasonable Adjustments

9. Did the respondent have a PCP of requiring employees to work their contractual hours?
10. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant was physically unable to cope with a heavy demanding caseload?
11. Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
12. What steps could have been taken to avoid the disadvantage? The claimant suggests: part time (or fewer) hours and a lighter case load.
13. Was it reasonable for the respondent to have to take those steps?
14. Did the respondent fail to take those steps?

### **Allegation 4 and 7 - 360° feedback from colleagues – 26 and 27 July 2018**

#### Harassment

15. Did FW make a series of condemning and judgemental statements?
16. If so, did those comments made by FW amount to unwanted conduct relating to her disability? If so did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

#### Failure to Make Reasonable Adjustments

17. Did the respondent have a PCP of providing verbal communication of 360° feedback? If so did this PCP place the claimant at a substantial disadvantage compared to non-disabled employees in that because of her mental health she was not able to take it in?

18. What steps were reasonable for the respondent to take, that would avoid the disadvantage? The claimant contends that the respondent should have provided the claimant with the feedback in writing?

**Allegations 5 and 6 - requesting the claimant to undertake a time and motion study – 26 July 2018**

Direct Discrimination

19. Did the request made by FW to undertake a time and motion study amount to less favourable treatment because of the claimant's disability? The claimant compares herself to those without her disabilities.

Disability Harassment

20. Did the request by FW amount to unwanted conduct relating to her disability? If so did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

Discrimination Arising in Consequence

21. Was the request made because of something arising in consequence of the claimant's disability? The claimant contends that she has requested to participate in the time and motion study because her 'family contact hours' were low, and that therefore the 'something' is that her contact hours were low because the claimant had been on sick leave, which arose in consequence of her disability. If so, with request a proportionate means of achieving a legitimate aim; the respondent relies on the aim of managing its employees working arrangements.

Duty to Make Reasonable Adjustments

22. Did the respondent have a PCP of requiring those employees who it required to participate in a time and motion study to do so by recording in writing how they spent their working time in 15 or 30 minute intervals?

23. Did the PCP put the claimant at a substantial disadvantage when compared to those who are not disabled by 'creating an unbearable workload'.

24. Alternatively, does the respondent have a PCP of expecting a full-time equivalent worker to demonstrate 25 hours of contact hours with families? Did the PCP put her at a substantial disadvantage when compared to those who are not disabled because she had an insufficient number of families to whom she could dedicate 25 hours per week of contact time, because of her disability related absence.

25. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantages above?
26. What steps could have been taken to avoid the disadvantages? The claimant contends that a reasonable adjustment would be to forego the time and motion study, and examine the claimant's timesheets instead.
27. Were those steps reasonable?

#### Protected Act

28. Did the claimant do a protected act? The claimant contends that the protected act was making a request for part-time hours, and in doing so, she was asking the respondent to comply with its duty to make reasonable adjustments and this constituted a protected act within the meaning of s.27(2) EqA 2010.
29. The respondent requested the claimant undertake a time and motion study; in doing so did it subject claimant to a detriment? If so, was it because the claimant did a protected act?

#### **Allegation 8 – Anne Harris email of congratulations - 7 August 2018**

30. The claimant contends that the email implies that the results have been achieved by the rest of the team, and fails to recognise her contribution.

#### Direct Discrimination

31. Did the email sent by AH to the North East care team amount to less favourable treatment because of the claimant's disability? Despite attempts to clarify her case, it was not altogether clear to the Tribunal who the claimant compares herself to; we understand the claimant to say that AH in sending the email to the team, afforded them the recognition that *'there is a limit to what anyone can do, so do what you can manage'* which was accommodation that was not afforded to the claimant, who was disabled and subject to a time and motion study.

#### Harassment

32. Did the email sent by AH amount to unwanted conduct relating to the claimant's disability? If so did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

#### Duty to Make Reasonable Adjustments

33. Does AH have a PCP of sending emails of congratulations?

34. Although the claim is not altogether clear, the Tribunal identifies the claimant's claim as follows:
35. If so, does it place the claimant at a substantial disadvantage when compared with those who are not disabled? The claimant says it disregards (or appears to disregard) the claimant's contribution?
36. Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage above?
37. What steps could have been taken to avoid the disadvantage and was it reasonable for the respondent to take those steps?

### **Allegation 9 - response to the claimant's grievance**

#### Protected Disclosure

38. Did the claimant, in her grievance of 5 September 2018, disclose information?
39. Did she reasonably believe the disclosure was made in the public interest?
40. Did she reasonably believe it tended to show that a person was likely to fail to comply with any legal obligation - the claimant contends the respondent failed to comply with this duty of care towards care staff. Alternatively, did she reasonably believe it tended to show that the health and safety of any individual had been, was being or is likely to be endangered?

#### Health and Safety Disclosure

41. Was the claimant employed at a place where there was no representative or safety committee, alternatively there was a representative or safety committee, but it was not reasonably practicable for the employee to raise the matters by those means?
42. If so did the claimant bring to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believes were harmful or potentially harmful to health or safety?

#### Detriment

43. Did the respondent do the following thing: failed to supply the claimant with her personal data to which she was entitled to in response to a subject access request, submitted to the respondent on 4 January 2019?
44. If so, the respondent subject the claimant to a detriment?
45. If so, was it on the ground that she made a protected disclosure or made a health and safety disclosure?

## **Allegation 10 - request to reimburse private fuel use - 18 January 2019**

### Harassment

46. Did the request to reimburse the respondent for the expenses incurred on the respondent's fuel card during the claimant's sick leave amount to unwanted conduct relating to the claimant's disability? If so did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

### Whistleblowing / Health and Safety Detriment

47. Did the request to reimburse the respondent for the expenses incurred on the respondent's fuel card during the claimant's sick leave amount to a detriment?

48. If so, was it on the ground that she made a protected disclosure or made a health and safety disclosure in either the grievance of 5 September 2018, or the further grievance of 6 December 2018?

### Victimisation

49. The respondent accept that the claimant is a protected act, when she submitted a grievance on 5 September 2018 and 6 December 2018.

50. The respondent requested the claimant reimburse the claimant for fuel expenses incurred for private mileage; in doing so did it subject claimant to a detriment? If so, was it because the claimant did a protected act?

## **Allegation 11 and 12 - requesting the return of the claimant's company car - 18 March 2019**

### Detriment claims

51. Did the claimant's grievance of 1 March 2019 contain a protected act?

52. Did the request to return the claimant company car amount to a detriment done on the ground that the claimant did a protected act on 5 September 2018 or 1 March 2019?

53. Did the request amount to a detriment done on the ground that the claimant had made a health and safety disclosure on 5 September 2018?

### Victimisation

54. Did the claimant do a protected act, when she submitted a grievance on 5 September 2018 or 1 March 2019?

55. When the respondent sought the return of the company car, did it subject claimant to a detriment? If so, was it because the claimant did a protected act?



### Reasonable Adjustments

56. Did the respondent have a PCP of removing company cars from employees after their sick pay had expired?
57. Did that PCP put the claimant at a substantial disadvantage when compared to those who are not disabled, in that it affected her ability to access treatment?
58. If so, what steps was reasonable for the respondent to take to avoid that disadvantage; the claimant contends that the company car should have been returned to her.

### Discrimination Arising in Consequence

59. Was the request made because of something arising in consequence of the claimant's disability? The claimant contends that the request was made because she was off sick, which arose in consequence of her disability. If so, with request a proportionate means of achieving a legitimate aim; the respondent relies on the aim of ensuring sufficient cars were available to the workforce.

### Indirect Discrimination

60. Did the respondent have a PCP of removing company cars from employees after their sick pay had expired?
61. Did the respondent apply the PCP to persons who are not disabled? If so, did it put disabled persons at a particular disadvantage when compared to those who are not disabled? The claimant was unable to state in terms the particular disadvantage relied upon. Did the PCP in fact put the claimant at that disadvantage?
62. If so, was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were: of ensuring sufficient cars were available to the workforce.

### **ALLEGATION 13 – Failure to correct C's mistaken belief that ZB is a barrister**

63. Was the claimant under the mistaken impression that ZB was a qualified barrister?
64. Did ZB's failure to correct that mistaken belief amount to a detriment?
65. If so, did the respondent, in failing to mistake the claimant subject to claimant to a detriment?
66. If so, was it done on the ground that the claimant had made any protected disclosure or health and safety disclosure?

### **DISMISSAL**

Ordinary Unfair Dismissal

67. Was the reason or principal reason for dismissal capability (long term absence)?
68. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

Discrimination Arising in Consequence – s.15 EqA 2010

69. Did dismissal amount to unfavourable treatment, if so, did it arise because of the claimant's absence and if so, did that absence arise in consequence of the claimant's disability? Can the respondent objectively justify the treatment?

Reasonable Adjustments

70. The respondent has a PCP of allowing 5 days to appeal against a decision to dismiss.
71. Did that PCP put the claimant to a disadvantage of making it more difficult to submit an appeal when compared to those without a disability? If so, did the respondent know or ought it reasonably to have known of the substantial disadvantage?
72. What adjustments were reasonable to have avoided the disadvantage? The claimant contends that the respondent should have accepted her letter of 22 May 2020 as an appeal.

Automatic Unfair Dismissal – ss. 101 and 103A ERA 1996

1. Was the reason or principal reason for the dismissal that the claimant had made a:
  - a. health and safety disclosure?; And/or
  - b. Protected disclosure?

Direct Disability Discrimination

2. Did the respondent dismiss because the claimant is a disabled person?

Victimisation

3. Did the respondent dismiss the claimant because she did a protected act?

Assertion of a statutory right – s.104 ERA 1996

4. Was the reason, or the principal reason, the dismissal the claimant had brought proceedings against the respondent to enforce a relevant statutory right?

## ANNEX B

### THE LAW

#### Disability

1. Section 6 of the Equality Act 2010 provides;

*(1) A person (P) has a disability if-*

- a. P has a physical or mental impairment, and*
- b. the impairment has substantial long-term adverse effect on P's ability to carry out normal day-to-day activities.*

2. Section 212(2) provides that a defect substantial it is more than minor or trivial.

3. Paragraph 2 of Schedule one of the Act sets out the definition of "long-term" in this context. It provides;

*(1) the effects of an impairment is long-term if-*

- (a) it has lasted for at least 12 months*
- (b) it is likely to last for at least 12 months,*
- (c) it is likely to last for the rest of the life of the person affected*

*(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur...*

4. "Likely" in this context means something that "*could well happen*", rather than being probable: **SCA Packaging Ltd v Boyle** [2009] ICR 1056.

5. An impairment is to be treated as having a substantial adverse effect on the ability of a person to carry out normal day-to-day activities if measures are taken to treat or corrected and, but for such measures, it would be likely to have the prescribed effect: para 5 of Schedule 1 to the EqA.

6. The likelihood of recurrence within the meaning of paragraph 2(2) of Schedule 1 of the EqA is to be assessed at the time of the alleged contravention: **McDougall v Richmond Adult Community College** [2008] ICR 431.
7. Schedule 1 para 5(1) of the Act requires an impairment to be treated as having a substantial adverse effect on the ability of a person to carry out normal day to day activities if measures as being taken to treat or correct it and but for that, it would be likely to have that effect.
8. In certain circumstances, and with medical evidence, it may be appropriate to infer that there is a continuing disability where there are recurrent symptomatic episodes **J v DLA Piper UK LLP** [2010] ICR 1052 at 45 and **Sullivan v Bury Street Capital Ltd** [2021] EWCA Civ 1694 at 91-2.

### **Knowledge Of Disability**

9. The legal principles were recently summarised by HHJ Eady QC in **A Ltd v Z** [2020] ICR 1999. What is required is knowledge (actual or constructive) of the facts constituting the disability; knowledge of the diagnosis is not necessary. As to what the respondent could reasonably have been expected and now, the test is one of reasonableness. What is reasonable will depend on all the circumstances of the case. Knowledge of the cause of the absence, or symptoms, can be of importance, because they may related to a reaction to adverse events, and further, it becomes much more difficult to know whether the SAE may last for more than 12 months, if it has not already done so. Where the Tribunal finds that the respondent could reasonably have been expected to take further steps to find out if the claimant had a disability, it must then consider whether as a result, it could then have reasonable have been expected to know of the disability.

10. The Tribunal is required to take into account the **EHRC Code of Practice** on Employment where it appears relevant. Paragraphs 5.14 and 5.15 provide that an employer must show that they could not reasonably have been expected to know about disability and that they must do all they can reasonably be expected to do to find out if an employee of the disability; what is reasonable in the circumstances.

### **Direct Discrimination**

11. Section 13 of the Equality Act 2010 ('EqA') provides that: '*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*'. Section 23 of the Equality Act 2010 states that '*there must be no material difference between the circumstances relating to each case*'.

### **Discrimination Arising in Consequence of Disability**

12. Section 15(1) of the Equality Act concerns discrimination arising out of disability and provides:

*A person (A) discriminates against a disabled person (B) if—*

- a. A treats B unfavourably because of something arising in consequence of B's disability, and*
- b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

13. A respondent may objectively justify unfavourable treatment if it can establish that the treatment was a proportionate means of achieving a legitimate aim. To be proportionate, the treatment must be an appropriate means of achieving a legitimate aim and also reasonably necessary in order to do so: Homer v Chief Constable of West Yorkshire [2012] UKSC 15 at [20-25].

14. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. It is for the Tribunal to conduct that balancing exercise and make its own assessment of whether the latter outweighs the former; there is no

range of reasonable responses test. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys and Hansons plc v Lax [2005] EWCA Civ 846 Pill LJ at [19-34].

## Harassment

15. Section 26(1) Equality Act 2010 provides that: *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.*

...

16. Section 26(4) provides that: “. . . when 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.*

17. We had regard to the guidance given by the EAT in Richmond Pharmacology v Dhaliwal [2009] IRLR 336 as reviewed by the CA in Pemberton v Inwood [2018 EWCA Civ 564 per Underhill LJ at [85-88].

18. When considering whether the conduct created an intimidating, hostile, degrading, humiliating or offensive environment Elias LJ reminded Tribunals that they must not cheapen the significance of these words; they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment: **Grant v HM Land Registry and anor** [2011] EWCA Civ 769.

## Indirect Discrimination

19. Section 19 provides as follows

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

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

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

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

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

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

### **The Duty To Make Reasonable Adjustments**

20. We have had regard to the provisions of s.20 and 21 of the Equality Act 2010 as well as the correct approach to their interpretation as set out in Environment Agency v Rowan [2008] IRLR 20 EAT.

21. The term 'PCP' connotes 'some form of continuum in the sense that it is the way in which things generally are or will be done'; it must be therefore something capable of being applied to others: **Ishola v Transport for London** [2020] EWCA Civ 112.

### **Victimisation**

22. Section 27(1) EqA 2010 provides: '*A person (A) victimises another person (B) if A subjects B to a detriment because – (a) B does a protected act, or A believes that B has done, or may do, a protected act.*' Subsection (2) defines what a protected act is.

### **Burden Of Proof – Equality Act**

23. Section 136(2) EqA provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

However, section 136(3) provides that subsection (2) does not apply if A shows that A did not contravene the provision.

## Health And Safety Disclosure and Detriment

24. Section 44 ERA 1996 provides as follows:

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

*(a) . . .*

*(b) . . .*

*[(ba) . . .*

*(c) being an employee at a place where—*

*(i) there was no such representative or safety committee, or*

*(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,*

*(d) . . .*

*(e) . . . .*

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

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

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

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

*(3) . . .*

*(4) . . . this section does not apply where the [worker is an employee and the] detriment in question amounts to dismissal (within the meaning of [Part X]).”*



## Protected Disclosure

25. A worker has the right not to be subject to any detriment, done by his employer on the ground that he or she has made a protected disclosure: s.47B ERA 1996.

26. A disclosure to an employer is a qualifying disclosure where it is, in accordance with s.44B ERA 1996 a:

*“disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—*

(a) . .

(b) *that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*

(c) . .

(d) *that the health or safety of any individual has been, is being or is likely to be endangered,*

(e) . .

(f) . . “

27. There is no bright line between ‘information’ on the one hand and ‘allegation’ on the other. Whether what is communicated amounts to a protected disclosure depends on whether it contains sufficient information when construed within the overall phraseology which continues ‘which tends to show. . .’: **Simpson v Cantor Fitzgerald Europe** [2020] EWCA Civ 1601.

28. What amounts to ‘public interest’ was considered in **Chesterton Global Ltd v Nuromohamed** [2017] EWCA Civ 979.

## Unfair Dismissal

29. Section 98(1) ERA 1996 provides that it is for the employee to show the reason, or if more than one, the principal reason, the dismissal. ‘Capability’ includes an employee capability assessed by health or any other physical or mental quality: s.98(2). Whether a dismissal is fair or unfair, having regard to the

reason shown by the employer, depends on whether in the circumstances, including the size and administrative resources the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with the equity and substantial merits of the case: s.98(4).

### **Automatic Unfair Dismissal - Protected Disclosure**

30. An employee who is dismissed shall be regarded as automatically unfairly dismissed if the principal reason for the dismissal is that the employee made a protected disclosure: s.103A ERA 1996.

### **Automatic Unfair Dismissal - Health and Safety Disclosure**

31. An employee who is dismissed shall be regarded automatically as having been unfairly dismissed in accordance with s.101 ERA 1996:

*if the reason (or, if more than one, the principal reason) for the dismissal is that—*

(a) ...

(b) ...

[(ba) ...

(c) *being an employee at a place where—*

(i) *there was no such representative or safety committee, or*

(ii) *there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,*

(d) ...

(e) ...

### **Asserting a statutory right – s104**

32. Section 104 ERA 1996 provides that it is automatically unfair to dismiss an employee, where the reason for the principal reason is that they asserted a

relevant statutory right, or alleged that the employer had infringed right of his which is a relevant statutory right. The phrase 'relevant statutory rights' is defined at s.104(4) and includes '*any right conferred by this Act*' as well as other legislation, not including the Equality Act 2010.