EMPLOYMENT TRIBUNALS

Claimant: **Dr. S Shaikh**

Respondent: **DB Engineering & Consulting GmbH**

Heard at: **Nottingham**

On: **15th, 16th, 17th & 18th November 2021**
3rd December 2021 (In Chambers)

Before: **Employment Judge Heap**

Members: **Mrs. F French**
Mr. A Wood

Representation
Claimant: **Mr. P Jelley – Lay Representative (15th November 2021 only)**
Claimant in person – 16th, 17th & 18th November 2021
Respondent: **Mr. M Greaves - Counsel**

JUDGMENT

1. The complaints of discrimination arising from disability fail and are dismissed.

2. The complaints of a failure to make reasonable adjustments fail and are dismissed.

3. The complaints of harassment relating to the protected characteristic of disability fail and are dismissed.

REASONS

BACKGROUND & THE ISSUES

1. This claim is brought by Dr. Samia Shaikh (hereinafter referred to as "The Claimant") against her former employer, DB Engineering & Consulting GmbH (hereinafter referred to as "The Respondent").

2. The Claimant presented her claim to the Employment Tribunal by way of an ET1 Claim Form received on 10th July 2020. The complaints pursued by the Claimant at the stage of presentation of that Claim Form were as follows:

    a. Discrimination relying on the protected characteristic of race;
    b. Discrimination relying on the protected characteristic of sex;
    c. Discrimination relying on the protected characteristic of disability;
    d. Victimisation; and
    e. A complaint about unpaid holiday pay.

3. The matter came before Employment Judge Camp at a Preliminary hearing which took place on 8th October 2020. As the claim was unclear he made Orders for the Claimant's then legal adviser to set out in Further and Better Particulars what complaints were advanced and the factual and legal basis for them. He also directed that a further Preliminary hearing for case management should take place and recommended that thought be given to whether it was in the Claimant's best interests to concentrate on stronger parts of the claim and abandon the weaker points.

4. Further and Better Particulars were duly served by the Claimant's legal adviser and the matter came before Employment Judge Ayre for the further Preliminary hearing on 5th February 2021. At that hearing the Claimant's then legal representative withdrew the complaints of race and sex discrimination; the complaints of victimisation and of direct and indirect disability discrimination. Those complaints were dismissed on withdrawal under a Judgment sent to the parties on 9th February 2021. After that Preliminary hearing the Claimant's then representative also withdrew the complaint about unpaid holiday pay.

5. That representative notified the Tribunal on 3rd June 2021 that she was no longer instructed by the Claimant and since that time the Claimant has represented herself as a litigant in person. That is with the exception of the first day of hearing time before us when she was represented by her husband, Mr. Jelley. The Claimant decided between the first and second days of hearing time that she would thereafter represent herself because she was more familiar with the hearing bundle than Mr. Jelley.

6. By the time that the hearing before us came around the only complaints that therefore remained were of discrimination arising from disability; a failure to make reasonable adjustments and harassment relying on the protected characteristic of disability.

7. The Claimant's claims were resisted in their entirety by the Respondent by way of an ET3 Response submitted and received by the Employment Tribunal on 13th August 2020.

8. At the point of presentation of the ET3 Response, the Respondent disputed that the Claimant was a disabled person within the meaning of Section 6 Equality Act 2010. In this regard the Claimant relied upon anxiety and depression as being a disability for the purposes of all of the disability discrimination complaints.

9. However, the issue of disability was later conceded by the Respondent at the Preliminary Hearing before Employment Judge Ayre.

10. Whilst the question of disability was, therefore, no longer a live issue by the time that the claim came before this Employment Tribunal, it was and continued to be, the Respondent's case that the Claimant was not discriminated against in respect of any of the types of discrimination relied upon and, moreover, it was said that the Respondent did not know and could not reasonably be expected to know that the Claimant had a disability at the time that the acts of which she complained occurred and that accordingly the duty to make reasonable adjustments was not triggered and she could not have been discriminated against for something arising from that disability.

11. The issues that the Tribunal had to determine were set out by Employment Judge Ayre in her case management Orders following the Preliminary hearing on 5th February 2021 and feature at pages 128 to 130 of the hearing bundle with some minor amendments. In that regard, it was agreed between the parties that the provision, criteria or practice ("PCP") in respect of the complaints of a failure to make reasonable adjustments needed to be wider as they had been phrased only to apply to the Claimant. It was also clear that some words were missing from the Orders and those were accordingly corrected by agreement with the parties. Finally, by the time that final submissions came around Mr. Greaves withdrew any reliance on any justification defence insofar as the claim under Section 15 Equality Act was concerned.

12. By agreement, the issues that we as a Tribunal had to determine were therefore as follows:

<u>Discrimination arising from disability</u>

Did the following things arise in consequence of the Claimant's disability:

(a) The Claimant's sick leave; and/or
(b) Her inability to cope with her workload and the working environment?

Did the Respondent treat the Claimant unfavourably as follows:

(a) By dismissing her;
(b) By requiring her to attend a disciplinary hearing on 21st January 2020 without proper notice and/or the right to representation; and/or
(c) Behaving in a confrontational manner towards her during that same meeting.

If so, did the Respondent treat the Claimant in those ways because of her sick leave, her inability to cope with her workload and/or inability to cope with the working environment.

Did the Respondent not know and could not be reasonably expected to know that the Claimant had the disability relied upon (namely anxiety and depression).

<u>Failure to make reasonable adjustments</u>

Did the Respondent not know and could not be reasonably expected to know that the Claimant was a disabled person.

Did the Respondent apply the following PCP's:

(a) The requirement that employees spend extended periods of time working away from home;
(b) The failure to take medical advice upon disclosure of health conditions; and/or
(c) The requirement to work without proper management support.

Did any such PCP put the Claimant at a substantial disadvantage in relation to any relevant matter in comparison with persons who are not disabled at any relevant time, in that it put the Claimant under considerable stress and caused a deterioration in her health.

If so did the Respondent know or could it have been reasonably expected to know that the Claimant was likely to be placed at any such disadvantage.

If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage and, particularly, whether it should have:

(a) Made a referral to occupational health for a medical assessment;
(b) Not required the Claimant to spend substantial periods of time working away from home;
(c) Seconding or recruiting another employee or other employees to work in Dublin without delay; and/or
(d) Reducing the number of days that the Claimant was required to work away from home.

If so, would it have been reasonable for the Respondent to have taken those steps at any relevant time.

Harassment

Did the Respondent engage in the following conduct:

(a) Asking the Claimant on 21st January 2020 to attend a disciplinary meeting with Mr. Hunefeld on that day, without giving the Claimant notice of what was to be discussed or the opportunity to arrange to be accompanied; and/or
(b) Mr. Hunefeld sending an email on 28th February 2020 to other employees telling them that the Claimant had been dismissed with immediate effect.

If so, was that conduct unwanted.

If so, did it relate to the protected characteristic of disability.

Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

THE HEARING

13. The claim was allocated four days of hearing time. Unfortunately, as a result of a number of issues it could not be concluded within that time with a Judgment being given as we had originally intended. Some of those issues were outside the control of the parties and this Tribunal. We had intended to hear submissions on the afternoon of the final day. Mr. Greaves had prepared detailed written submissions which were provided to the Claimant and to us before an elongated lunch break.

14. When we returned the Claimant made an application to adjourn the hearing because she was having difficulty finalising her oral submissions and she sought time to make written representations instead. Mr. Greaves and the Respondent helpfully did not object to that course and so Orders were made for the Claimant to have the time that she wanted to set out her written submissions and for the Respondent, if so advised, to have a right of reply before the Tribunal were able to reconvene in chambers for our deliberations. As it was we received brief further submissions on behalf of the Respondent and a further reply from the Claimant, all of which we considered as part of our deliberations before reaching our decision. We have not repeated each and every argument advanced by the parties within this decision but they can be assured that we have considered all of the evidence and everything that they have told us in full and in detail.

15. We attempted to assist the Claimant insofar as it was permissible for us to do so during the course of the hearing. That included reminding the Claimant of the case that she was advancing when that had not been put in cross examination. We took that course to ensure that the Claimant was put on as equal a footing as possible given that the Respondent was represented by Counsel.

16. During the course of the hearing, we heard evidence from the Claimant. She also produced a witness statement from her husband, Philip Jelley. Mr. Jelley did not give live evidence because there were no cross examination questions that Mr. Greaves had for him and we as a Tribunal had no questions for him either. The Claimant also produced a witness statement from a Stephen Hughes who was a former employee of the Respondent. He did not attend the hearing and we were told that that was for family reasons. The Respondent did not agree to his witness statement being taken as read and we explained that position to the Claimant and Mr. Jelley (as he was at that time representing her) and that it would be a matter for them if he was to be called but otherwise we may not be able to attach weight, or only minimal weight, to that statement. Ultimately it has not been necessary for us to attach any weight to that statement because ultimately it speaks only to the content of WhatsApp messages within the bundle which are already before us and upon which the Claimant gave evidence.

17. On behalf of the Respondent we heard from the following individuals:

    a. Mr. Christian Hunefeld - the Respondent's Director of UK and Ireland, the Claimant's former line manager and the person who decided to dismiss her;
    b. Ms. Joanne Attridge – the Respondent's Director of Business Development who also acts as Mr. Hunefeld's deputy; and

c. Ulrike Hennings – the Respondent's Head of Human Resources Business International Market and International Security who dealt with a grievance that the Claimant submitted after the termination of her employment.

18. We deal with the credibility of the witnesses from whom we heard below.

19. In addition to the witness evidence that we have heard, we have also paid reference to the documentation to which we have been taken during the course of the proceedings and also to the aforementioned submissions made by both the Claimant on her own behalf and Mr. Greaves on behalf of the Respondent.

20. During the course of the hearing there was additional disclosure of documentation on both sides. No objections were made to the provision of such documentation by either party. As a result of documents produced on the final hearing day Mr. Hunefeld was recalled in order to give further evidence.

21. Ms. Hennings gave her evidence via Cloud Video Platform and so the hearing had proceeded as a hybrid hearing with everyone other than Ms. Hennings and the Respondent's solicitor in physical attendance. The use of a hybrid hearing caused no difficulties other than delays due to technological problems but we are satisfied that that did not affect the fairness of the hearing, the quality of the evidence that we received or the ability of Ms. Hennings to participate remotely.

CREDIBILITY

22. Our findings of fact have invariably been informed by our assessment of the credibility of the witnesses from whom we have heard. We begin that assessment with the Claimant. Ultimately, we found her evidence to be entirely unsatisfactory and lacking in credibility. She was argumentative during cross examination on even the most straightforward of matters and frequently failed to answer questions without significant off topic expansion.

23. There were a number of elements of her evidence which were particularly troubling and led us to conclude that the account that she gave us was not credible. The following are not exhaustive but are particular examples of note:

a. The Claimant's evidence that she had not lied to the Respondent in respect of her whereabouts when asked where she was working from on one occasion was, at best and on a generous interpretation, disingenuous. When replying to an email from Ms. Attridge asking if she was working in Dublin the Claimant replied to say that she was not and that she was in Derby. It was entirely obvious that the Claimant's intention within that email was to mislead Ms. Attridge that she was in the Derby office when in fact she was working from home without permission. Only when Ms. Attridge said that she was in the Derby office and the Claimant was not there did she admit that she was working from home. The Claimant's evidence and insistence that she was telling the truth because she lived in Derby and therefore if she was working from

home she would be entitled to say that she was in Derby was, again, at best disingenuous. It was abundantly clear that the Claimant had intended to mislead Ms. Attridge as to her whereabouts and did not admit that she was working from home until she was unexpectedly caught out by Ms. Attridge not being in Birmingham as the Claimant had been anticipating;

b. The Claimant's account at various stages has not been consistent. As we come to further below, her accounts of what she told Ms. Hennings about the Respondent knowing about her disability differed considerably to her evidence before us and she has not given any satisfactory account of the reasons for that;

c. The Claimant had also included within the bundle as if accurate notes of a grievance meeting that she had made (see pages 272 to 275 of the hearing bundle). In fact those notes were not accurate and included commentary that she had added which were on her own admission not said during the meeting. One key issue was the inclusion of words which made it plain that she had had conversations with Ms. Attridge and Mr. Hunefeld on "multiple occasions" about her disability. It is plain that the Claimant had included that to try and bolster her claim that she had told Ms. Attridge and Mr. Hunefeld that she suffered from depression. By the point that those notes were provided the Claimant knew full well that knowledge of her disability was an issue and we received no reasonable explanation why she had included such references. The Claimant had titled those notes as "minutes" suggesting that they provided an accurate account of the meeting and it was plain that the additions of this nature were not just after the event notes as the Claimant contended given references to "SJS stated". Her explanations about that in cross examination were entirely lacking in credibility. She initially contended that it may be an issue as to her husband's handwriting and then that the Respondent's notes – which she had previously expressly agreed were entirely accurate – had been in some way corrupted. The presentation of those notes as "minutes" was clearly an indication that she was contending that those statements were what she had actually said in the meeting. It was actually a far cry from what the Claimant had really said as she told Ms. Hennings that she could not remember the content of any discussions about disability and that "it was a long time ago during chit chat" and that upon speaking about mental health in general she knew that she "must have told them". At best those notes were misleading and the Claimant's various explanations about that matter lacked credibility;

d. We have not had any reasonable explanation as to how the Claimant could now recall at the hearing before us over 18 months later specific conversations that she contends that she had with Ms. Attridge and Mr. Hunefeld which she could not recall anything other than general chit chat when she was asked about that by Ms. Hennings;

e. The Claimant was prone to make unsupported suggestions which had no foundation and were made simply to try and portray the

Respondent in a negative light. That included a suggestion that a meeting held with Ms. Hennings to discuss her post termination grievance had been covertly recorded when there was no evidence of that at all and also that notes of the grievance meeting could have been doctored or the file corrupted – despite having previously agreed their accuracy – when taken to the inclusions of a different account in her own notes as we have already referred to above;

f. The Claimant maintained on occasion that she had not known that she was required to work in Dublin for four days a week and that Mr. Hunefeld had not told her about that. That evidence flew in the face of her contention that she had asked Michael Cunnington, the Project Manager in Dublin, if she could only work three days a week. There was no reasonable explanation as to why she would have asked to work three days a week in Dublin if it had not been explained to her that the requirement was for a four day week in Dublin;

g. The Claimant's evidence was also disingenuous at best as to the arrangements that she claimed that she had made with Mr. Cunnington. Both her account to Ms. Hennings during a grievance meeting and her witness statement maintained that Mr. Cunnington had agreed with her that she could work three days a week. Her witness statement at paragraph 128 said that Mr. Cunnington was "happy" for her to do that and she told Ms. Hennings that Michael Cunnington *"said it was no problem that I worked 3 days in Dublin"*. Moreover, in a set of notes that the Claimant contended were accurate in respect of a meeting on 21st January 2020 with Mr. Hunefeld her account was that Mr. Cunnington had "assured her that it was ok" to work 3 days per week in Dublin. In fact, through the Claimant's own oral evidence it was plain that he said and done no such thing. Her evidence was that she had raised a query with him and he had never got back to her. That is a very different position to the accounts that she had previously given which were both inaccurate and misleading; and

h. The Claimant maintained both in cross examination and in her own questioning of the Respondent's witnesses that she had been given a verbal warning. She in fact knew full well that she had not been given a verbal warning as her own notes of the meeting specifically set out. As we shall come to below, however, we do not accept that those minutes were accurate and they sought to place the Claimant's own spin on what had happened.

24. We considered the witnesses called by the Respondent on the other hand to be credible. Their evidence was measured, logical and largely consistent with the documentation before us. That was despite lengthy and often hostile cross examination from the Claimant in respect of which the Tribunal had to intervene more than once.

25. Whilst the Claimant is critical of the evidence of Mr. Hunefeld on the basis that a date that he says that he telephoned her contradicted what had been set out in the ET3 Response, we do not find that nor the fact that he could

not recall certain details to be damaging to his credibility given that he was being asked about events in some cases which occurred over two years ago and which would not have been at the time of particular significance. That is, in our collective experience, not an unusual position and as to the key matters Mr. Hunefeld's evidence was certain and consistent.

26. We also gained the impression that some of the difficulties with questions that Mr. Hunefeld had came as a result of the fact that he did not always appear clear on what he was being asked. We bear in mind that English is not Mr. Hunefeld's first language and often we had to ask the Claimant to shorten her questions or break them down.

27. Whilst the Claimant is critical of Mr. Hunefeld for raising incidents where the Claimant had not been in Dublin when she should have been which had not been in his witness statement, as was made plain in his evidence Mr. Hunefeld had gone back over his emails between the second and third day of the hearing in view of one of the questions that he had been asked in his evidence the previous day and had uncovered those matters. He provided documentation to evidence that position. Whilst that documentation should have been disclosed earlier we accept that this was an oversight and it provided no smoking gun for the Claimant.

28. The Claimant's points in her written submissions about Mr. Hunefeld not making records and not verifying information through investigation do not for us hold weight in respect of his credibility. They go to the processes that he adopted rather than the credibility of his evidence before us and we remind ourselves that this is not an unfair dismissal claim where such procedures are of significant importance.

29. We would also observe that the cross examination of both Mr. Hunefeld and Ms. Attridge – but the former particularly – was not an easy experience. Mr. Hunefeld particularly was asked the same question on a number of occasions and more than once we had to request that the Claimant take a different style to her cross examination given that it had become inappropriately aggressive.

30. We also considered the evidence of Joanne Attridge to be credible. The Claimant contends that her evidence ought not to be accepted because she had referred to the Claimant's former husband in an account that she gave of a conversation that they had had and the Claimant had never been married. The Claimant accepted that that conversation had taken place (although there is a divergence as to whether her disability was mentioned) but that the reference had been to her former partner and not former husband. That is in our experience an error that anyone could have made in a conversation that occurred many months previously and we do not consider that that made Ms. Attridge's recollection of the remainder of the meeting and what she was told – or rather not told – about the Claimant's disability to be unreliable.

31. We also do not accept the Claimant's account that Ms. Attridge showed contempt for her during her cross examination. She was robust in some responses and it is clear from their interactions that there is no love lost between Ms. Attridge and the Claimant but there was no contempt as alleged.

32. The Claimant took a very different approach in cross examination of Ms. Hennings with a much calmer and respectful style. We considered Ms. Hennings to be a measured witness who was prepared to carefully consider the points being put to her. We considered her to be a credible and reliable witness and we had no concerns about the evidence that she gave to us.

33. Therefore, unless we have expressly said otherwise we preferred the evidence of the Respondent's witnesses to that of the Claimant for the reasons that we have already given.

THE LAW

34. It is necessary before turning to our findings of fact, as set out below, to say a little about the law to be applied to claims of this nature.

35. The discrimination complaints brought by the Claimant are of discrimination arising from disability, a failure to make reasonable adjustments and harassment and the relevant statutory provisions dealing with those complaints are contained within Sections 15, 20, 21, 26 and 39 Equality Act 2010 (EqA 2010).

36. Section 39 EqA 2010 provides for protection from discrimination in the work arena and provides as follows:

(1) An employer (A) must not discriminate against a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(2)An employer (A) must not discriminate against an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(3)An employer (A) must not victimise a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(4)An employer (A) must not victimise an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(5)A duty to make reasonable adjustments applies to an employer.

(6)Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—

(a)unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or

(b)if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.

(7)In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a)by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b)by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8)Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.

Discrimination arising from Disability

37. Section 15 deals with the question of discrimination arising from disability and provides as follows:-

"(1) 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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

38. There is no requirement in a Section 15 complaint for there to be identification of a comparator. All that is required is that the Claimant is able to show unfavourable treatment, in that regard some detriment, and further that there are facts from which it can again be established that that unfavourable treatment was in consequence of something arising from disability. The EHRC Code assists in the interpretation of the term "unfavourable" treatment and provides that it requires the employee to have been "put at a disadvantage" (paragraph 5.7 of The Code).

39. It is not sufficient, however, to simply show that a person is disabled and receives unfavourable treatment, that unfavourable treatment must be in consequence of something arising from the disability.

40. Equally, the unfavourable treatment in question is not the disability itself but must arise in consequence of the employee's disability – such as disability

related sickness absence. This means that there must be a connection between whatever led to the unfavourable treatment and the disability (paragraph 5.8 of The Code) and which can be referred to as the "causation" question.

41. The Employment Appeal Tribunal provided a useful analysis with regard to the causation question in the context of a Section 15 EqA 2010 claim in **Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305**. **Weerasinghe** sets out a two-stage approach and that, firstly, there must be something arising in consequence of the disability and secondly, the unfavourable treatment must be "because of" that "something".

Failure to make reasonable adjustments

42. Section 20 EqA 2010 provides that:

> *"Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2)The duty comprises the following three requirements.*
>
> *(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(4)The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*
>
> *(6)Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.*
>
> *(7)A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.*

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9)In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a)removing the physical feature in question,

(b)altering it, or

(c)providing a reasonable means of avoiding it.

(10)A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a)a feature arising from the design or construction of a building,

(b)a feature of an approach to, exit from or access to a building,

(c)a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d)any other physical element or quality.

(11)A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12)A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13)The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

43. Section 21 provides that:

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

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

(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

44. It will therefore amount to discrimination for an employer to fail to comply with a duty to make reasonable adjustments imposed upon them in relation to that disabled person (paragraph 6.4 of The Code).

45. However, the duty to make reasonable adjustments will only arise where a disabled person is placed at a substantial disadvantage by:

- An employer's provision, criterion or practice ("PCP").
- A physical feature of the employer's premises.
- An employer's failure to provide an auxiliary aid.

46. Where the claim relates to a PCP, this "should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions" imposed by the employer (paragraph 6.10 of The Code).

47. Matters resulting from ineptitude or oversight on the part of the employer will not, however, amount to a PCP (see ***Newcastle Upon Tyne Hospitals NHS Foundation Trust v Bagley UK EAT 0417/11***).

48. The duty to make reasonable adjustments only arises insofar as an employer is required to take such steps *as it is reasonable to take* (our emphasis) in order to avoid the substantial disadvantage to the disabled person. A Tribunal is required to take into account matters such as whether the adjustment would have ameliorated the disabled person's disadvantage, the cost of the adjustment in the light of the employer's financial resources, and the disruption that the adjustment would have had on the employer's activities.

Harassment

49. Harassment is dealt with by way of the provisions of Section 26 EqA 2010, which provide as follows:

(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2)A also harasses B if—

(a)A engages in unwanted conduct of a sexual nature, and

(b)the conduct has the purpose or effect referred to in subsection (1)(b).

(3)A also harasses B if—

(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b)the conduct has the purpose or effect referred to in subsection (1)(b), and

(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

50. The conduct complained of, in order to constitute harassment under Section 26, must relate to the protected characteristic relied upon by the complainant. However, in respect of a complaint of harassment, the word "relate" has a broad meaning (see for example paragraph 7.10 of the EHRC Code).

51. As restated by the Employment Appeal Tribunal in **Nazir & Anor v Aslam [2010] UK EAT/0332/09** the questions for a Tribunal dealing with a claim of this nature are therefore the following:

a) What was the conduct in question?

b) Was it unwanted?

c) Did it have the purpose of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant?

d) Did it have the effect of doing so having regard to an objective, reasonable standard and the perception of the complainant?

e) Was the conduct related to the protected characteristic relied upon?

EHCR Code

52. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code or the ECHR Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

FINDINGS OF FACT

53. We ask the parties to note that we have only made findings of fact where that is relevant to the issues to be determined in the claim. We have not therefore made findings on all areas where the parties are in dispute with each other where that is not necessary for the proper determination of the claim before us. For example, we heard much from the Claimant as to breaches of GPDR and alleged breaches of her contract regarding being asked to work in Dublin but those are not complaints before us nor are they relevant to the issues and so we have not made findings on those matters because it is unnecessary to do so.

The Claimant's background and employment with the Respondent

54. The Claimant is a Chartered Engineer with a doctorate in engineering. She has past experience before joining the Respondent within the rail, naval and aerospace industries and in research and development. Her main field is working as a Safety Engineer. She is highly qualified and she is rightly proud of the achievements that she has made in what might be seen as something of a male dominated industry. Her qualifications, experience and the quality of her work are not in question. That includes during her time with the Respondent. Indeed, after her employment terminated in circumstances to which we shall come below Mr. Hunefeld gave the Claimant a very favourable reference (see page 288 of the hearing bundle).

55. The Respondent is a large organisation employing around 5,000 employees in a variety of places around the globe. In 2018 the Respondent opened an office in the United Kingdom. Initially, they had a rental agreement for office space in Derby from one of the subsidiaries of the Respondent but the intention was always to open a permanent office in Birmingham. The Director for the United Kingdom and Ireland operations is Christian Hunefeld.

56. Mr. Hunefeld is predominantly based in Germany and in his absence he deputises aspects of his role to Joanne Attridge, the Respondent's Director of Business Development. Ms. Attridge is based in the United Kingdom and predominantly works out of the Respondent's offices in Birmingham.

57. The Claimant interviewed for the position of RAMS (Reliability, Availability, Maintainability and Safety) Support with the Respondent. She attended two interviews with Mr. Hunefeld. He was impressed with the Claimant and offered her the position. We do not accept the Claimant's account that at her interview she was informed by Mr. Hunefeld that she could work from home whenever she wanted to do so but that it would be "nice to see her in the Birmingham office sometimes" or words to that effect. We prefer the evidence of Mr. Hunefeld that that was not said at the interview and the expectation was that the Claimant would work from the Respondent's offices.

58. We also accepted the account of Ms. Attridge and Mr. Hunefeld that the Respondent's policy has always been that some degree of flexibility can be provided around homeworking but that no-one has a contract which allows them to solely or predominantly work from home. It is the case that permission from a line manager is required on each occasion where an employee wants to work from home. We are satisfied that that has been the position at all times and there was no change to the position during the

course of her employment as the Claimant contends. We deal further with the issue of homeworking below.

59. The Claimant was sent an offer letter following her interviews with Mr. Hunefeld. The offer was for a position as a RAMS Expert. She was offered a salary of £63,600.00 per annum along with various other fringe benefits. The Claimant's salary was subsequently increased to £65,000.00 per annum.

60. The role was a full time position working 40 hours per week. We did not accept the Claimant's position that as long as she worked those 40 hours she could work them at any time that she wanted and could have done so over two days per week if she wished. Indeed, her contract of employment set out the requirement to work those 40 hours per week over Monday to Friday (see page 146 of the hearing bundle).

61. The offer letter sent to the Claimant also included mention that domestic and international travel might be required (see page 143 of the hearing bundle). The Claimant did travel internationally during the course of her employment including to Israel and, as we shall come to further below, Dublin.

62. The Claimant commenced employment on 22nd October 2018. The Claimant disputes that date saying that she commenced employment earlier but her start date is clear from her contract of employment and in all events nothing really turns on that point. She remained in employment until 3rd March 2020 when her employment was terminated by Mr. Hunefeld. We deal with the reasons for that termination below.

63. Prior to the commencement of the Claimant's employment she completed a personal data sheet (see pages 155 to 158 of the hearing bundle). That form had provision for the Claimant to set out whether she was a "severely disabled person or person with a similar impairment". The Claimant crossed that section of the form out. Whilst the Claimant tells us that she did not consider herself to be "severely disabled" or fall into that category, the fact that the Claimant did not put anything at all within that section of the form leads us to conclude that she was not as open about discussing her disability as she maintained in her evidence.

64. Moreover, her evidence was that she had attempted to have a conversation with Ms. Attridge in the early days of her employment about her medication because she felt that that was important if she collapsed and had to be attended to by paramedics so that they could be told what she had been prescribed. We do not accept that that conversation made any reference to medication for depression but if the Claimant had been concerned about a possible collapse we cannot understand why she would not have made reference to her condition on the personal data sheet.

Working relationship with Mr. Hunefeld

65. Mr. Hunefeld was the Claimant's line manager and they had a reasonably good working relationship at the outset. That included the Claimant having bought Mr. Hunefeld a "Best Boss" mug and them having attended spa days together. However, we accept the evidence of Mr. Hunefeld that he did not know the Claimant well because he would not see her regularly because he was based in Germany and although he would generally speak to her once a

week or so, on a face to face basis that would be more like once per month and some months not at all. Their main source of communication was via email and WhatsApp messages.

66. However, that cordial relationship somewhat soured after Mr. Hunefeld took the Claimant to task for working at home without permission, her attitude towards others and not undertaking the correct number of days that she should have been working on a project in Dublin.

67. After that discussion took place and the way in which the Claimant dealt with it, Mr. Hunefeld lost trust in her and she was in turn irritated that she had been found out and taken to task. Relations thereafter soured. We come to those matters further below.

Knowledge of disability

68. The Claimant suffers from depression and anxiety and has done so since 2009. That is not in dispute nor is it disputed that as a result she is a disabled person within the meaning of Section 6 EqA. The Claimant contends that she informed Ms. Attridge in the first week of her employment that she suffered from anxiety and depression and told her about the medication that she takes for that condition. We do not accept that evidence. We prefer the account of Ms. Attridge that the Claimant told her about medication that she takes for a thyroid condition but that nothing at all was mentioned about depression or any medication for such a condition. In all events the Claimant's position as to informing Ms. Attridge at the outset of employment was inconsistent with the position as set out in the Further & Better Particulars of her claim that she informed Ms. Attridge that she suffered from depression and anxiety in July 2019.

69. In this regard in or around July 2019 the Claimant contacted Ms. Attridge to report that another member of staff had told her that he had been raped. The Claimant later came to believe that what that member of staff had told her was untrue and she also told Ms. Attridge about that. We accept the evidence of Ms. Attridge that the Claimant was angry about the fact that she believed that the member of staff in question was lying and that she told her that she no longer wanted to be friends with the person concerned. We do not accept the Claimant's evidence that she told Ms. Attridge that the incident had triggered her or that she made reference to suffering from depression. Whilst there is a reference within messages between the Claimant and Ms. Attridge to the latter saying that she did not want the matter to affect the Claimant more than it already had, we do not find that that supports the Claimant's account that she had discussed her mental health with Ms. Attridge. Ms. Attridge was simply aware that the Claimant was angry about what had happened.

70. We also prefer the evidence of Mr. Hunefeld that the Claimant never informed him that she suffered from depression when she also discussed the incident with him. Whilst the Claimant contends that it is contradictory that Mr. Hunefeld did not recall the specifics of the conversation but was certain that the Claimant's disability was not discussed, we do not agree. Mr. Hunefeld was being asked about the details of a conversation that occurred over two years before but his position at all stages – including before the commencement of these proceedings – has always been that the first time

that he was made aware of her disability was on receipt of a later grievance letter.

71. It is perhaps notable that the Claimant spent very little time in cross examination dealing with the occasions when she contended that she had told either Mr. Hunefeld or Ms. Attridge that she suffered with depression and we had to remind her to put those points to the witnesses.

72. However, for the reasons that we have given we accept the evidence of both Mr. Hunefeld and Ms. Attridge that the first time that they were made aware that the Claimant suffers from depression was when she submitted a grievance after her dismissal.

Working from home

73. The Claimant's contract of employment provided that her place of work would be Derby and Birmingham. We do not accept that that reflected any arrangement to regularly work from home as the Claimant suggests but that it had been agreed that she could work in the Derby office which the Respondent was operating out of temporarily and go to the main UK office in Birmingham when it was required. However, as we have touched upon above the Respondent was renting the space in the Derby office and that arrangement came to an end around July 2019. Thereafter, it was expected that the Claimant would be working out of the Birmingham office. The Claimant did not want to do that because it was more convenient for her to work from home.

74. The Respondent permitted the Claimant considerable flexibility in terms of her working from home. As we have already referred to above the reason that the Claimant wanted to work from home was because it was more convenient for her to do so and the Respondent permitted her to work from home for personal reasons such as taking in deliveries for her wedding, being tired after her wedding ceremony, collecting prescriptions, having a sofa delivered and having tradespeople do work at her home (see for example pages 210, 212, 213, 214 and 311 of the hearing bundle). The Claimant wanted to work autonomously and appeared almost affronted during cross examination by Mr. Greaves that the Respondent would be entitled to ask her where she was or require her to be in a particular location.

75. However, we are satisfied that at all times the Claimant was aware that she required permission to work from home. As we have already set out above we do not accept that she was told at interview that she could work from home whenever she wished or that there was any change in approach later notified to her as she contends. The Claimant therefore knew at all times that she needed permission if she wanted to work from home.

76. In the first instance that permission should have come from Mr. Hunefeld or, in his absence, Ms. Attridge. At the times that the Claimant did request permission to work from home she would do that in the main via WhatsApp messages to Mr. Hunefeld. On some occasions that would be presented more of a fait accompli – for example on 2nd August 2019 when the Claimant messaged Mr. Hunefeld at 9.16 to ask if she could work from home because she had slept through her alarm and just woken up. Whilst she points to the fact that Mr. Hunefeld could have said no and required her to come into the

office, obviously that would have significantly delayed her arrival and practically speaking there was little choice for him.

77. However, it came to the attention of Mr. Hunefeld that the Claimant was also working from home without permission. That knowledge came from Ms. Attridge who had discovered that on occasion the Claimant had been working from home without seeking permission and she had also been told by Suzanne Bassett, the Office Manager at Derby, that the Claimant was hardly ever there.

78. One such occasion was on 15th October 2019 when Ms. Attridge attended the Derby office and found that the Claimant was not there. She emailed the Claimant indicating that position, said that she was not aware that the Claimant was working from home and asking her if everything was alright. The Claimant replied to say that everything was fine, that she could focus at home and that she had various wedding related deliveries arriving that day. She also apologised for not informing Ms. Attridge.

79. Ms. Attridge replied to explain that in the future the Claimant needed to ask first before working from home because the Respondent needed to know where she was at all times. The Claimant replied to apologise again and indicated that she was "under a lot of pressure and quite stressed out". The Claimant contends that that should have placed Ms. Attridge on notice that her mental health was suffering and/or triggered further investigation into that matter. We do not agree. We accept Ms. Attridge's evidence that this did not bring to mind any issue that the Claimant was suffering mental health issues. All that the Claimant appeared to be saying was that she was under pressure at work which is not unusual in industries such as the one in which the Respondent operates. It was also seen as an excuse for not having obtained the permission that the Claimant knew was required to work from home.

80. Mr. Hunefeld and Ms. Attridge both also formed the view that the Claimant was not always being truthful with the Respondent about her whereabouts. This arose from an email exchange between the Claimant and Ms. Attridge on 25th November 2019 where Ms. Attridge had gained the impression that the Claimant was working in Dublin. The Claimant replied saying "So, no I am in Derby today".

81. Unfortunately for the Claimant Ms. Attridge was in the Derby office that day and replied to say that she was there but the Claimant was not. The Claimant at this point replied that she was at home. She had not obtained permission to work from home that day and Ms. Attridge replied to remind her that she needed permission.

82. Her evidence before us was that she had said that she was working in Derby because she lives in Derby. We did not accept that evidence at all and considered that account to be disingenuous. We are satisfied that the initial response from the Claimant was to mislead Ms. Attridge about her whereabouts because she had not got permission to work from home that day. She had not expected Ms. Attridge to be in the Derby office because she ordinarily worked out of Birmingham and was forced to admit that she was working from home when Ms. Attridge said that she was present there

and the Claimant was not. Both Ms. Attridge and Mr. Hunefeld formed the view, not unreasonably, that the Claimant had not been truthful in that email.

83. The Claimant had sent a further email to Ms. Attridge after she remined her that she needed permission to work from home saying, amongst other things, that she was "pretty mentally exhausted" from travelling and that she was forgetting things. The Claimant again contends that that was sufficient to put the Respondent on notice that she was suffering with her mental health and/or that further enquiries should have been made. We do not accept that. The Claimant had clearly linked being mentally exhausted to the requirement to travel and there was nothing to suggest that she was suffering from any mental health condition or that should have triggered further enquiry about that to be made.

84. Ms. Attridge had replied to say that she understood and that the Claimant should let her know if she needed anything. The Claimant did not reply to suggest that there was anything that she needed. That would of course have been the perfect time to put the Respondent on notice of the difficulties that she says that she was experiencing with her mental health whilst being required to work in Dublin and we note that this was a peak time in the Dublin project.

The Dublin project

85. One of the major projects that was secured by the UK arm of the Respondent's operations was with Irish Rail. This was referred to as the TPS project. We accept the evidence of Mr. Hunefeld that this was the biggest client that had been secured by the UK branch of the Respondent and it was a key project. We also accept that the Respondent encountered difficulties with the delivery of the project in terms of the person engaged as Safety Assurance Manager ("SAMS"). The original incumbent of the post as set out in the tender documentation that the Respondent had submitted to Irish Rail decided not to undertake the role for health reasons and his replacement decided after a reasonably short period of time to retire. That left the Respondent in difficulties because the SAMS role was critical.

86. Mr. Hunefeld asked the Claimant to undertake the SAMS role in an interim capacity until a permanent replacement was found by the Respondent. We accept that the Respondent was taking steps to actively recruit for the role and the intention was that the Claimant would only be in that interim post for a relatively short period of time. The Claimant was aware of that position and she agreed to undertake the interim SAMS post.

87. The Respondent does require employees to travel for work and that can manifest itself in a variety of ways. The evidence of Mr. Hunefeld was that that can be a business trip not exceeding a certain duration (Mr. Hunefeld thought that this would be around 90 or 100 days) and after that period Human Resources have to become involved and employees placed on a "Commuter Contract". Mr. Hunefeld himself is engaged on a Commuter Contract because of the requirement for him to travel from Germany relatively regularly. If employees are required to work abroad seconded to another organisation they are placed on an "Ex pat" contract if the period exceeds 180 days or they are given the option to "freeze" their existing contract of employment and take up the option of a local contract relevant to

the country that they are working out of. In short, the Respondent does have a requirement for, often lengthy, periods of travel working abroad or away from a main base.

88. Although there may have been other people who could potentially undertake the SAMS role, we accept that Mr. Hunefeld asked the Claimant to undertake it because she was in his team and she had the expertise to carry it out. Given that Mr. Hunefeld was responsible for delivery of the project it was his team that was responsible for providing an incumbent for the SAMS role. Mr. Hunefeld believed that with her experience in delivering safety critical projects the Claimant would be best placed to deal with the interim role. The successful delivery of the project was important to the Respondent as this was a key client. Mr. Hunefeld spoke to the Claimant about the position and she agreed to undertake it.

89. Ms. Attridge emailed the Claimant on 16th October 2019 indicating that the then incumbent of the role was leaving on 31st October 2019 and that the Claimant would be required to cover in the interim (see page 295 of the hearing bundle). The Claimant replied saying:

"That is fine, however, just to confirm I do not want to be working in Dublin full time."

90. Both the Respondent and we as a Tribunal took that to mean that she did not want the position on a permanent basis.

91. Although the contractual terms between the Respondent and Irish Rail may not have been explained to the Claimant in detail we are satisfied that she was at all times fully aware that she was required to be in Dublin to undertake the SAMS role for four days per week. Indeed, that was confirmed by the Project Manager, Michael Cunnington, during an investigation into grievances that the Claimant later raised (see page 348 of the hearing bundle). We are also satisfied that the project did obligate the Respondent to have the person undertaking the SAMS role on site for four days per week and that the Respondent could not ask an important client to reduce that critical requirement.

92. The Claimant spent considerable time in cross examination dealing with whether her contract of employment permitted the Respondent to deploy her to Dublin. However, that is not to the point because firstly there is no breach of contract claim and secondly the Claimant expressly agreed with Mr. Hunefeld when he asked her to go that she would do so.

93. The Claimant contended at times before us that she had agreed with Mr. Cunnington that she would only work in Dublin for three days per week. However, that was misleading as she later accepted that she had asked Mr. Cunnington the question but that he had never replied. If that conversation did in fact happen then it did not give the Claimant implied authority to only work in Dublin for three days per week when she had expressly been told that she had to work there for four days per week. Mr. Cunnington made it plain during the grievance investigation that there had been one occasion in December 2019 when the Claimant had asked if she could work for three days per week because she had personal matters to attend to and that was agreed as a one off (see again page 348 of the hearing bundle). That is not

suggestive of a wider discussion about working only three days per week or any implicit agreement that she was entitled to do so.

94. We accept the evidence of Mr. Hunefeld that Mr. Cunnington made complaints to him that the Claimant was only working for three days per week in Dublin. Indeed, it is clear from what Mr. Cunnington said during the course of the grievance investigation that he had complained to Mr. Hunefeld about the Claimant not being in Dublin for the time that had been agreed (see page 348 of the hearing bundle).

95. When he became aware that the Claimant was not working for four days per week in Dublin Mr. Hunefeld raised that with her during a telephone conversation and reinforced that she must spend four days per week in Dublin. Whilst Mr. Hunefeld was aware that the Claimant did not want to work in Dublin, we are satisfied that she never told him or Ms. Attridge that she was experiencing any difficulties - with her mental health or otherwise - in travelling to and from Dublin or working on the project there. Instead, the Claimant agreed that she would spend four days per week in Dublin after the conversation, although Mr. Hunefeld came to believe thereafter that she was in fact still only working for three days per week in that location on occasion.

96. Whilst much was made by the Claimant in cross examination about the possibility of Mr. Hunefeld being wrong about some of the occasions that he believed that she was not in Dublin – for example 12th December 2019 – this is not of course an unfair dismissal claim and we accept that Mr. Hunefeld's belief based on communications from Mr. Cunnington at the time was that the Claimant was not doing as instructed and that that caused him dissatisfaction and fed into his later decision to terminate her employment.

97. We are also not satisfied that the Claimant did experience the difficulties with working in Dublin that she described in her evidence. Whilst she did not want to work in Dublin permanently or full time, there is no contemporaneous evidence of any difficulties. Particularly, whilst the Claimant saw her General Practitioner during the course of her employment with the Respondent that was to discuss problems arising from personal issues and she did not seek any further assistance until two weeks after her time in Dublin had come to an end (see page 107 of the hearing bundle).

98. Similarly, the Claimant did not reply to Ms Attridge's email of 25th November 2019 to say that she needed any assistance nor did she explain in a later meeting of 21st January 2020 with Mr. Hunefeld (which we shall come to below) that she was having difficulties with her work because of her disability.

<u>21st January 2020 meeting</u>

99. On 21st January 2020 Mr. Hunefeld sent the Claimant an invitation to a meeting entitled "Various things to talk about". That email was sent around noon that day as the Claimant messaged a colleague, Stephen Hughes, at 12.09 that day expressing that she thought that Mr. Hunefeld was going to "let her go" but for the fact that he had just replaced her work mobile telephone (see page 220 of the hearing bundle). The meeting was scheduled for 4.30 p.m. to 5.00 p.m. that day and the Claimant expressed her view to Mr. Hughes that it had been timed to keep her in the office late which she described to him as being "a bit cheeky".

100. The reason for the meeting was that Mr. Hunefeld had become dissatisfied with some aspects of the Claimant's behaviour. There were three major concerns in this regard. The first of those was the failure of the Claimant to seek permission to work from home which we have already touched upon above. The second was the Claimant's behaviour towards Mr. Hunefeld's Personal Assistant, Michaela Skinner. In that respect, Mr. Hunefeld was aware that the Claimant had sent emails to Ms. Skinner when she was trying to assist her with something that were inappropriate in tone.

101. That issue had arisen when the Claimant had asked Ms. Skinner to book her flights to Dublin in late December 2019. Ms. Skinner had a difficulty in locating the details within the system and had to email the Claimant a number of times as a result. The Claimant's replies became more terse as the exchange went on culminating with a final email that she sent to Ms. Skinner which we accept was unacceptable in tone. That email said this:

"Michaela, I am very busy preparing things for my trip to Dublin and working on deliverables. I have provided you with all the information that you need to enable you to book my flights.

I don't have time to be continually playing email ping pong with you.

If you can't get access to the workflow, I suggest that rather than emailing me, you contact the helpdesk/people that actually can help you as I can provide you with no more new information."

102. The final issue was the Claimant failing to undertake four days work per week in Dublin. We accept that those were all significant issues as far as Mr. Hunefeld was concerned.

103. At the outset of the meeting Mr. Hunefeld said words to the effect that he intended to give the Claimant a verbal warning. However, we accept that it was not his intention for that meeting to be a disciplinary hearing and what he meant by a verbal warning was a "ticking off". We are satisfied from Mr. Hunefeld's evidence that a verbal warning in Germany is very different from the formal sanction of such a warning in the UK. In Germany such a warning is just an informal telling off and that was what he intended to do during the meeting with the Claimant.

104. The Claimant would of course have seen that differently and believed that she was being given a formal warning but Mr. Hunefeld was not aware of that at the time. However, upon Mr. Hunefeld indicating that he was going to give the Claimant a verbal warning she said that he could not do so and also raised the fact that she was entitled to be accompanied at the meeting. After seeking Human Resources advice Mr. Hunefeld said that he would just have a discussion with the Claimant. We are satisfied that that is what happened.

105. We do not accept the Claimant's evidence that Mr. Hunefeld was aggressive, confrontational towards her or acted inappropriately at the meeting. She was not able to give specifics of that other than the fact that he had initially said that she would be given a verbal warning and that that was hostile and it had been hostile to have to have a meeting alone with a man. We do not accept that position. Mr. Hunefeld was the Claimant's line manager and he was

entitled to meet with her face to face. Nothing that he had done had given any indication that meeting him alone would result in hostility.

106. In fact, we prefer the evidence of Mr. Hunefeld that the meeting was difficult because problems are hard to raise and to hear but that any hostility was coming from the Claimant. Having seen the way that the Claimant cross examined Mr. Hunefeld we prefer his account that it was the Claimant who was being combatative and that he did not act inappropriately in the meeting.

107. After the meeting the Claimant produced a document which she referred to as being minutes of the discussions held on 21st January 2020. We did not accept that those "minutes" were at all an accurate description of what had taken place and we prefer the evidence of Mr. Hunefeld on this. Whilst the Claimant points to the fact that Mr. Hunefeld did not reply to correct the minutes, we are satisfied that he did not see a need to do so because he had already decided that the Claimant's employment should be terminated.

108. The Claimant sent the minutes to Mr. Hunefeld on 23rd January 2020 (see page 226 of the hearing bundle). She attached them to an email, some of the content of which we find quite extraordinary. In this regard, the Claimant referred to future meetings needing an agenda and then said this:

"It is widely recognised that meetings held without an agenda are largely ineffective and a waste of peoples time. I don't know about you, but I am very busy contributing toward the success of our business and could easily do without wasting my time on such banal matters.

Next time you have a problem with me, please just pick up the phone, call me, and speak to me like a human being. It's not really much to ask."

109. That was contemptuous and a highly inappropriate thing to say to one's line manager. It was demonstrative of the Claimant's confrontational nature and we are entirely unsurprised that Mr. Hunefeld was unhappy to receive it.

110. We accept that the tone of that email and the content of the minutes was the last straw for Mr. Hunefeld and he determined upon receipt that he wanted to dismiss the Claimant. Mr. Hunefeld was particularly annoyed by the Claimant's reference to the three major areas of his concern as having been agreed as being "not an issue". The reason that that was of concern to Mr. Hunefeld was because they were certainly not in his mind non-issues and had not been described in that way during the meeting. We accept his evidence that by this point and in view of the email and minutes that Mr. Hunefeld had lost trust in the Claimant and viewed this as further examples of her dishonesty. That evidence was consistent with what Mr. Hunefeld told Ms. Hennings at a meeting that he had with her to discuss a post termination grievance raised by the Claimant (see page 325 of the hearing bundle). We come to that grievance below.

111. We also accept his evidence that he would have dismissed her there and then had it not been for intervention from Human Resources. In this regard Mr. El-Nacoury from Human Resources asked Mr. Hunefeld to delay dismissing the Claimant until the Respondent had obtained legal advice. There was a delay between the email and the termination of the Claimant's employment a few weeks later so as to obtain that advice and for a draft

dismissal letter to be circulated. However, from receipt of the email and minutes we accept that Mr. Hunefeld had determined that the Claimant was to be dismissed.

112. We should say that whilst Mr. Hunefeld's evidence was that he felt that he was seeing another side to the Claimant, we do not accept that the content of her email, her conduct at the meeting or behaviour that had led to the meeting was such to put the Respondent on notice that she may be suffering with her mental health or cause further enquiries about that to be made. It was simply a matter of the Claimant having been caught out.

113. It is notable with regard to the "minutes" produced by the Claimant after the 21st January meeting that she made no reference to her disability. If, as she contends, she was experiencing difficulties at work because she was suffering from depression and that had impacted her and caused her to exhibit the behaviour which Mr. Hunefeld was complaining of and that she needed reasonable adjustments to be made, this was clearly the time and place to make that plain. However, even on her own account she did not do so either at the meeting or in the minutes.

Sickness absence

114. The Claimant did not return to work after the meeting with Mr. Hunefeld. On 23rd January 2020 she submitted a Statement of Fitness for Work ("Fit Note") citing work related stress. The Claimant submitted a further Fit Note to the Respondent citing stress at work and certifying her as being unfit for work between 12th February and 27th February 2020. The Claimant submitted a third Fit Note also citing stress at work certifying her as being unfit for work between 27th February and 12th March 2020.

115. We do not accept the Claimant's position that the Fit Notes caused or should have caused the Respondent to form the view that she was suffering from depression or make further enquiry about her mental health. We accept the evidence of the Respondent's witnesses, and Ms. Hennings particularly, that it is normal for most people to suffer from some degree of stress at work and that could not be equated to people by implication suffering from a mental health condition such as depression. We accept that many people suffer with work related stress at times and are absent because of it but that does not necessarily equate to them having an underlying mental health condition. The Claimant's sickness absence had of course commenced immediately after a difficult meeting with Mr. Hunefeld and could be seen as a reaction to that.

116. The Claimant notified Mr. Hunefeld that she had received the third Fit Note on 28th February 2020 by WhatsApp (see page 238 of the hearing bundle). He read that message at 15.31. Later that day he sent the Claimant a letter dismissing her and notified the rest of the team of the termination of her employment. We deal with that further below.

117. It is common ground that during the course of the Claimant's sickness absence she was not contacted by Mr. Hunefeld. We accept his evidence that that was on the basis that he believed that he was not entitled to contact the Claimant to discuss the reasons for her absence because that was the position in Germany and that he also did not see the point in doing so

because he had already decided that he was going to terminate her employment.

The Claimant's dismissal

118. By letter dated 28th February 2020 Mr. Hunefeld wrote to the Tribunal terminating her employment. Mr. Hunefeld believed that the Claimant would receive the letter the same day as he wrote it because it was sent to her by email to both her work and personal accounts. However, the Claimant did in fact not receive it until a few days later by post because Mr. Hunefeld erroneously got one digit of her personal email address wrong and the Claimant was not accessing her work account whilst she was off sick. Whilst the Claimant has maintained before us that there was disclosure of her personal data to a random email address, she is in fact perfectly well aware that the email later "bounced back" and it was not delivered to someone else.

119. Unfortunately, the Claimant discovered that her employment had been terminated from a colleague prior to receipt of the letter because Mr. Hunefield notified his team of her dismissal on the evening of 28th February. Mr. Hunefeld sensibly accepted in his evidence that in hindsight it would have been better to have waited before emailing the team to advise them of the Claimant's dismissal but we accept that he believed at the time that it was necessary to inform them promptly so that they would be aware that the Claimant was not returning to work.

120. The letter from Mr. Hunefeld set out the reasons for the Claimant's dismissal and we accept that those were genuinely the reasons for his decision to terminate her employment. The relevant part of the dismissal letter said this:

"The main reason for termination is the loss of trust and confidence, due to your:

- *working from home without prior consent by your direct supervisor on several occasions;*
- *breach of agreements regarding your on-site presence in connection with the performance for the "TPS" project in Ireland;*
- *general attitude and behaviour towards your managers and colleagues."*

121. The Claimant's employment ended with immediate effect but she was paid in lieu of the three months notice to which she was contractually entitled. She was told that because she had less than two years service she was not entitled to appeal against the decision to terminate her employment.

122. As we have already observed, the Claimant submitted her third Fit Note shortly prior to Mr. Hunefeld sending her the letter terminating his employment. However, we are entirely satisfied from the evidence of Mr. Hunefeld that the submission of the fit note had nothing at all to do with the reason for dismissal. We accept that Mr. Hunefeld had made up his mind that he had lost trust in the Claimant and determined that he was going to terminate her employment upon receipt of the notes and email on 23rd January 2020. We accept that the only thing that prevented him from doing so was input from Human Resources who indicated that they should obtain some legal advice. The delay in Mr. Hunefeld taking his decision to dismiss

and that decision being communicated to the Claimant was as a result of him taking legal advice and then submitting the dismissal letter as a draft to Human Resources and solicitors.

123. As we have already touched upon above, we accept the evidence of Mr. Hunefeld that receipt of the Claimant's email and her note of their meeting on 21st January 2020 was the last straw. He saw the labelling of all of his concerns about the Claimant's conduct as "non issues" as further dishonesty on her part because we accept that that was not at all what had been discussed. We also accept that he viewed the tone of her email as rude and aggressive and again we have little hesitation in agreeing with that assessment.

124. The fact that Mr. Hunefeld had decided to terminate the Claimant's employment at that point but was prevented from doing so by Human Resources pending legal advice is also supported by what Mr. El-Nacoury told Ms. Hennings during the course of an interview to deal with a grievance which the Claimant raised and which we come to further below (see page 329 of the hearing bundle). That is supportive of the position that the reason for termination was as set out in the letter and not the receipt of the third Fit Note and the Claimant was not able to give any reason in her evidence why receipt of that Fit Note would weigh on the mind of Mr. Hunefeld as a reason to dismiss her.

The Claimant's grievance

125. Following her dismissal the Claimant wrote two letters to the Respondent. The first of those was a complaint that there had been a breach of the Data Protection Act in respect of the email that Mr. Hunefeld sent to his team notifying them of the her dismissal. The Claimant said that she had consulted the Information Commissioners Office ("ICO") and asked the Respondent for an explanation. The Respondent replied on 7th April 2020 to say that there had been no breach of the Data Protection Act in their view (see page 256 of the hearing bundle) although a complaint that the Claimant made to the ICO was upheld and a finding made that there had been such a breach (see page 281 of the hearing bundle).

126. The second letter the Claimant sent was a grievance in which she complained about having been discriminated against at work (see page 249 to 254 of the hearing bundle). It is a lengthy letter and so we do not rehearse it all here. However, the Claimant set out that she felt that the reasons given for the termination of her employment were "false and libellous" and that she believed that her dismissed was because of a deterioration in her mental health. She referred to having told Mr. Hunefeld and Ms Attridge verbally that she suffered from stress, depression and anxiety and reiterated her vie that she had been discriminated against because of her mental health.

127. The Claimant set out a number of reasons why she considered that she had been discriminated against. Most of those centred around working on the TPS project in Dublin. The Claimant's grievance also referred to "systematic bullying" from Mr. Hunefeld and Ms Attridge, that they had not attempted to contact her whilst she was off sick or make any reasonable adjustments for her. The Claimant also set out that she had been made aware of her dismissal by a colleague and said that the real reason for the termination of

her employment was because of her gender, ethnicity, disability or a combination of all three factors.

128. The Claimant made it plain that she would not be able to return to work at the Respondent and set out that she wanted the following to resolve her grievance:

    a. A positive reference;
    b. A public apology for what she described as libellous statements made to staff;
    c. Public recognition of bullying and discrimination from Mr. Hunefeld and Ms. Attridge and a personal commitment from them to educate themselves in respect of discrimination and its impact;
    d. A commitment from senior management to eradicate discrimination and bullying from the company; and
    e. Compensation for the discrimination suffered and potential loss of earnings.

129. The Claimant indicated that if she did not receive a response by 20th March 2020 then she would initiate Tribunal proceedings.

130. The Claimant's grievance was passed to Ulrike Hennings, the Respondent's Head of HR, Business Partner International Market, International Security who is responsible for leading the Respondent's international Human Resources division. She had not had any previous involvement in the matter and was suitably independent to deal with the grievance.

131. Ms. Hennings wrote to the Claimant inviting her to an appeal hearing (see page 260 of the hearing bundle). Mr. Hunefeld in the dismissal letter had of course told the Claimant that she did not have a right of appeal but the Respondent had since sought advice from ACAS and invited the Claimant to participate in an appeal process. Ms. Hennings referred in her invitation letter to a grievance not being conducted because the Claimant was no longer employed. That was of course not entirely accurate as many employees raise grievances post termination but nothing turns on it as the issues raised by the Claimant were formally addressed.

132. The Claimant replied to say that she would not attend an appeal hearing but would attend a meeting to discuss her grievances. She set out the notice that she would require to attend a meeting and reiterated that she was not seeking reinstatement. As we shall come to in our conclusions below the Claimant now seeks to contend that this was an appeal against her dismissal but that is not consistent with what she was saying at the time nor her position that she was not seeking reinstatement and could not return to employment with the Respondent.

133. The Claimant attended a meeting with Ms. Hennings on 20th April 2020 to discuss her grievance. The Claimant produced a set of "minutes" of that meeting which appears in the bundle at pages 272 to 275. As we have already set out above, we are satisfied that those notes were not accurate and included commentary that even on her own account the Claimant had added which were not said during the meeting. That included the claim that she had had conversations with Ms. Attridge and Mr. Hunefeld on "multiple occasions" about her disability. That was not said at the meeting and what

the Claimant had really told Ms. Hennings was that she could not remember the content of any discussions about disability and that "it was a long time ago during chit chat" and that upon speaking about mental health in general she knew that she "must have told them" (see page 338 of the hearing bundle). The lack of clarity of that statement compared to the detailed account that the Claimant now gives over 18 months later again leads us to prefer the evidence of Ms. Attridge and Mr. Hunefeld that the Claimant never told them that she suffered from depression and anxiety and that the first that they knew of it was when they saw the Claimant's grievance letter.

134. As part of her investigation into the Claimant's grievances Ms. Hennings also interviewed Mr. Hunefeld, Ms. Attridge, Ms Skinner, Mr. El-Nacoury and Mr. Carrington. She also met again with the Claimant on 27th April 2020 (see page 340 to 342 of the hearing bundle).

135. Both Ms. Attridge and Mr. Hunefeld made it clear that the first time that they had been aware of the Claimant suffering from anxiety and depression was when they saw her grievance. That is consistent with the account that they gave to us. They also set out their observations and concerns about the Claimant's conduct.

136. Ms. Hennings finalised her grievance report and sent a copy to the Claimant by email on 6th May 2020 (see page 261 of the hearing bundle). We do not need to set out the content of that report here but Ms. Hennings concluded that there was no evidence to substantiate the Claimant's grievances and she did not uphold them. She rejected the suggestion that the Respondent should pay the Claimant compensation for injury to feelings.

137. The Claimant subsequently presented the claim which is now before us for determination.

CONCLUSIONS

138. Insofar as we have not already done so we deal here with our conclusions on the complaints advanced by the Claimant.

139. We begin with the question of whether the Respondent had actual knowledge of the Claimant's disability because in respect of the complaints that she advances, if the Respondent did not know and could not reasonably be expected to know that the Claimant suffered from depression they fail.

140. We did not accept the Claimant's account that she had told either Mr. Hunefeld or Ms. Attridge that she suffered from stress, anxiety and depression for the reasons that we have already given in our findings of fact above. The first time that they or the Respondent generally came to have knowledge of the Claimant's disability was upon receipt of her post termination grievances.

141. We turn then to the question of whether the Respondent had constructive knowledge of the Claimant's condition. We remind ourselves that The Code sets out that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (see paragraph 5.15). An example is given at paragraph 5.14 of an employee who been at a particular workplace for two years. He has a good attendance and performance record

but in recent weeks had become emotional and upset at work for no apparent reason. He had also been repeatedly late for work and has made some mistakes in his work. The Code sets out that the sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that these were connected to a disability.

142. The Claimant relies upon the following in contending that the Respondent in this case could reasonably have been expected to know that she was suffering from depression:

    a. The change in her behaviour in respect of the matters identified by Mr. Hunefeld as causing her dismissal;
    b. Her emails to Ms. Attridge referring to forgetting to obtain permission to work from home; being "under a lot of pressure and quite stressed out" and pretty mentally exhausted; and
    c. The Fit Notes citing work related stress or stress at work.

143. We are satisfied that neither singularly or cumulatively did those issues fix the Respondent with constructive knowledge of the Claimant's disability or put them on notice that further enquiry was required. We have accepted the account of Mr. Hunefeld that the change that he saw in the Claimant's attitude and behaviour was simply a side to her that she had not previously seen and we do not accept the Claimant's position that what she had put in emails to Ms. Attridge were obvious pointers to the fact that she was suffering from depression. Some degree of stress in the high pressured environment that the Respondent operates would not be seen as unusual and we do not accept that the emails or Fit Notes hinted at anything other than the Claimant reacting to work situations. Particularly, there was no impact on the Claimant's performance and she continued to deliver at a high level. She had also been told by Ms. Attridge to revert to her if she needed any assistance but she never did so. She had made no reference to the matters that were discussed in the 21st January meeting being because of pressures or for health reasons and had simply dismissed them as "non-issues".

144. We do not therefore accept that the Respondent had either actual or constructive knowledge of the Claimant's disability nor was there anything that put them on notice that further enquiry and a referral to occupational health or elsewhere was required. The complaints that the Claimant advances require the Respondent to have known or being reasonably expected to know of the Claimant's disability. As we have found that not to be the case the claim fails on that basis.

145. However, we should observe that it is not in dispute that at the time that the Claimant raised her grievance the Respondent had knowledge of her disability. The grievance letter itself spelt that out.

146. In her closing submissions the Claimant seeks to argue that the hearing before Ms. Hennings formed an "integral part of the decision to dismiss" (see paragraph 106). She relies on the decision in **Baldeh v Churches Housing Association of Dudley and District Ltd EAT 0290/18** in respect of that argument and invites us to take into account the decision making of Ms. Hennings as being part and parcel of the decision to terminate her

employment. This is not an issue that had previously been raised in the Claim Form, either of the two Preliminary hearings, in the Claimant's Further & Better Particulars of the claim, within the list of issues or at the time of discussing the list of issues at the outset of the hearing.

147. Whilst the Claimant is a litigant in person she is both intelligent and articulate and has previously had the benefit of legal advice. Moreover, she has been aware of what the issues to be determined in the claim are for some time since the Preliminary hearing before Employment Judge Ayre. No reference at all was made to an appeal process before now. It appears to us that the Claimant has only raised the issue of the appeal at this late stage because she was aware that she faced difficulties with regard to the issue of knowledge of her disability prior to the receipt of her grievance.

148. In all events, we accept the submissions of the Respondent that **Baldeh** did not establish any legal principle to the effect that the same approach invariably applies in a discrimination claim (see **Stott v Ralli Ltd EAT 0223/20)**. Allegations of discrimination relating to a decision to dismiss and a decision on appeal are distinct claims that must be raised and considered separately (see **Reynolds v CLFIS (UK) Ltd 2015 ICR 1010, CA**).

149. Whilst Ms. Hennings termed her dealings with the matter as an appeal, it was plain that the Claimant viewed matters as a grievance – indeed she said that she would not attend an appeal meeting - and that she had no intention of returning to work for the Respondent. The Claimant had what was in effect a list of demands as to what she wanted as an outcome from her grievance. Not one of those things related to her reinstatement. The whole point of an appeal process is to revisit the earlier decision to dismiss and to determine if that should be overturned to reinstate the employee. Ms. Hennings was not doing that because the Claimant was very clear that that was not what she wanted. Whatever Ms. Hennings termed the meeting the way in which she approached the matter was to determine grievances that the Claimant had raised.

150. As we have already observed and despite a number of opportunities to do so the Claimant made no mention of the decision made by Ms. Hennings at any stage before now. There is also no unfair dismissal claim advanced in these proceedings which would require us as part of that process to examine the fairness or otherwise of any appeal that might have been made.

151. On any fair reading of the claim advanced by the Claimant this does not relate to the decision of Ms. Hennings to reject her grievance and in our view this is a case which is aligned with the decision in **Stott** rather than **Baldeh**.

152. However, had we found that the Respondent did have actual or constructive knowledge of disability we have gone on to consider the remainder of the issues in the claim. The first of those complaints is of discrimination arising from disability. There are three acts of unfavourable treatment which the Claimant relies upon. The first of those is her dismissal. It is accepted by the Respondent that the Claimant's dismissal amounted to unfavourable treatment.

153. The Respondent also accepts that the Claimant's sickness absence was something arising from her disability and that her inability to cope with the

working environment between 23rd January to 28th February 2020 (i.e. the period of her sickness absence) was also something arising from her disability. There is no admission that there was any inability to cope with workload or the working environment at any other time and, particularly, not whilst the Claimant was working in Dublin.

154. We do not accept that the Claimant was unable to cope with her workload or the working environment at any other time other than whilst she was absent on sick leave. The Claimant was able to continue to perform to a high standard at all times; did not revert to Ms. Attridge when invited to do so or report any difficulties to Mr. Hunefeld. She also managed juggling both her personal and professional life including preparations for her wedding. The real difficulty for the Claimant was that she had been caught out by Mr. Hunefeld and was taken to task for that. That was the trigger for her commencing sick leave.

155. We understand the Claimant to argue that the conduct and behaviour for which she was dismissed resulted from the fact that she was suffering from depression. We do not accept that and there is no evidence to support that position except the Claimant's contention to that effect. We are satisfied that the tone of the Claimant's email, her failure to ask for permission to work from home and her failure to work in Dublin for four days a week were deliberate actions on her part and not influenced by her disability. If they had been things that were caused by the Claimant's disability then the obvious time to raise that was at the meeting with Mr. Hunefeld on 21st January or in the subsequent "minutes" that she produced.

156. Instead, the Claimant maintained that they were non-issues and also throughout these proceedings has similarly largely taken the stance that she had done nothing wrong. We do not find that any of the Claimant's actions which resulted in her dismissal arose from her disability but instead from her position that she should be entitled to work autonomously and as she pleased and her resentment that the Respondent might require her to do otherwise.

157. We turn then to the question of whether the Claimant was dismissed on account of either her sickness absence or her inability to cope with the workload or working environment. We are entirely satisfied that she was not. The only factor pointing towards the Claimant having been dismissed because of her sickness absence was the timing of the dismissal coming shortly after submission of her final Fit Note.

158. However, for the reasons that we have already given we accept that Mr. Hunefeld had already determined some time previously that he was going to terminate the Claimant's employment and the only delay was to allow for legal advice to be obtained. The reasons why Mr. Hunefeld decided to terminate the Claimant's employment were as set out in the dismissal letter which was on account of her conduct and behaviour. We are satisfied that her sickness absence played no part in that decision. The Claimant's dismissal was therefore not an act of discrimination arising from disability. This part of the claim therefore fails and is dismissed. Had we needed to have considered the position of the appeal outcome on that point we would have reached the same conclusion.

159. We turn then to the question of whether the Claimant's dismissal resulted from her inability to cope with the working environment. Again, we are satisfied that it did not. The Claimant's actions, for the reasons that we have already given above, did not arise from her disability. She was dismissed for her conscious misconduct. This part of the claim therefore also fails and is dismissed. Again, had we needed to have considered the position of the appeal outcome on that point we would have reached the same conclusion.

160. We turn then to the next complaint as to whether the Claimant was treated unfavourably for something arising from her disability by Mr. Hunefeld requiring her to attend a disciplinary hearing on 21st January 2020 without proper notice and/or the right to representation. This part of the claim fails on its facts. Mr. Hunefeld had no intention that the meeting on 21st January 2020 was a disciplinary hearing. Whilst he made a clumsy reference to giving the Claimant a verbal warning that was never done because of the protestations that she made and all that was ever intended by Mr. Hunefeld was an informal ticking off and that was in fact all that happened. The Claimant had adequate notice of the meeting and was not entitled to representation because it was not and was never intended to be a disciplinary hearing. Section 10 Employment Relations Act 1999 did not therefore engage and nor was there any breach of the ACAS Code of Practice on Grievance and Disciplinary procedures. There was therefore no unfavourable treatment.

161. However, had we concluded that this was an act of unfavourable treatment then we would nevertheless have dismissed the complaint because it did not because of something arising from disability. It could not have been because of the Claimant's sick leave because that had not commenced at that point nor was it anticipated.

162. It was also not a meeting held because of the Claimant's inability to cope with the workload or working environment. The meeting was to deal with the behaviour and conduct that the Claimant was exhibiting and as we have already set out above that was not something arising from her disability. The arrangements that Mr. Hunefeld made for the meeting were that he intended it to be an informal ticking off and as such believed that no formalities of the sort suggested by the Claimant were required. That had nothing to do with anything at all arising from the Claimant's disability.

163. The final complaint of discrimination arising from disability is the allegation that Mr. Hunefeld behaved in a confrontational manner towards the Claimant at the meeting of 21st January 2020. We can deal with that in short order because again it is a complaint that fails on its facts. It was not Mr. Hunefeld who was confrontational towards the Claimant but the other way around. In all events, for the same reasons that we have already given above the meeting or the way in which it was conducted was not done because of the Claimant's sick leave (which had not commenced at that time) or because of her alleged inability to cope with the workload or working environment. We have already set out our conclusions in that regard above and do not need to repeat them here again.

164. We turn then to the complaints of a failure to make reasonable adjustments. Again, all complaints of a failure to make reasonable adjustments fail

primarily because the Respondent did not know and could not be reasonably expected to know that the Claimant was a disabled person.

165. However, again we have gone on to consider what the position would have been had we found to the contrary.

166. The first question for us is whether the Respondent applied a PCP of a requirement that employees spend extended periods of time working away from home. Whilst Mr. Greaves submits that no such PCP was applied because it was only the case that some foreign and domestic travel was required; the Claimant's predominant base was Birmingham and she was only asked to cover in Dublin for an interim period we do accept that there was a PCP of the sort relied on by the Claimant. We have in mind the evidence of Mr. Hunefeld that there were a variety of different contracts that governed the arrangements for employees who were deployed away from their country of residence. Indeed, Mr. Hunefeld himself is governed by one of those arrangements. We accept that when it was necessary, spending extended periods of time working in a different location away from home was required. Although the Claimant was only undertaking the position on an interim basis, that was pending recruitment of a suitable replacement and had no certain fixed end date. We therefore accept that a PCP to spend extended periods of time working away from home was applied to employees of the Respondent.

167. It is not disputed by the Respondent that if that PCP was applied then it placed people suffering from the same disability as the Claimant at a substantial disadvantage (see paragraph 67 of the Respondent's written submissions).

168. However, it is plain that the Respondent could not have known or be expected to have known that the Claimant would be placed at that disadvantage. Although somewhat a circular position, firstly the Respondent did not know at that time that the Claimant was a disabled person. Although the Claimant made it clear that she did not want to work in Dublin full time and the Respondent was aware that she did not particularly enjoy working there, that is very different to an awareness that the Claimant would suffer the effects on her mental health that she described to us. We did not accept that she told Mr. Hunefeld about that but only asked if he had found a replacement and she did not revert to Ms. Attridge to describe any difficulties when she had invited her to contact her if she had any problems. Indeed, the Claimant accepted at paragraph 127 of her written submissions that the Respondent could not have known or been reasonably expected to know that she would be placed at a substantial disadvantage by being sent to Dublin on an interim basis. The duty to make reasonable adjustments was not therefore engaged.

169. Had we concluded to the contrary, however, and found that the duty was triggered then we are satisfied that the adjustments suggested by the Claimant were not reasonable ones. There was no other employee who could have been seconded to that role for the four days per week that were required; the Claimant was in Mr. Hunefeld's team whereas other people that she has identified were not and he trusted her as the best person to undertake the interim role because of her skills and experience; the Claimant had raised no concerns about working in Dublin; she was allowed to work for

three days per week on the occasion that she actually asked for permission to do so; the Respondent was actively seeking an replacement as the Claimant was aware; the Irish Rail contract was a key one for the Respondent and there had already been upheaval with previous incumbents of the SAMS post and that same role was key to the delivery of the contract with Irish Rail who would not have accepted a lesser period of time being spent in its delivery. It was also not reasonable as the Claimant suggested to have another employee from Germany or even Ms. Attridge or Mr. Hunefeld to travel to Dublin to provide cover or a presence in lieu of her own for one day per week. Continuity was required and we remind ourselves that this was a key and safety critical role.

170. That complaint of a failure to make reasonable adjustments therefore fails and is dismissed.

171. The next complaint of a failure to make reasonable adjustments relies on a PCP of the failure to take medical advice upon disclosure of health conditions. There is no evidence that the Respondent operates any such practice. The Claimant's complaint in this regard appears limited to the fact that they did not take medical advice in her case. However, had we found that there was such a PCP applied we would not have concluded that it placed the Claimant at a substantial disadvantage. The purpose of obtaining medical advice would have been to identify any reasonable adjustments that could be made (rather than being a reasonable adjustment in itself) to enable the Claimant to return to work with the Respondent. Mr. Hunefeld had already determined that he was going to dismiss the Claimant and so no consideration of adjustments to return to work was needed. Similarly, the Claimant had already made it plain in her communications to Ms. Hennings that she was not seeking reinstatement and so that rendered any referral for medical advice redundant. This complaint of a failure to make reasonable adjustments also therefore fails and it is dismissed.

172. The final complaint of a failure to make reasonable adjustments relies on a PCP of a requirement to work without proper management support. It has been somewhat difficult to see what this was said to relate to as the Claimant's witness statement was silent on the issue and her evidence and cross examination on the point was similarly unclear.

173. However, the Claimant's written submissions make it plain that this is said to be the failure by Mr. Hunefeld to contact her during her sickness absence. We accept that this is the practice operated by Mr. Hunefeld on the basis that in Germany it is not permitted for line managers to make enquiries about the reasons for sickness absence. However, we do not accept that that placed people with the Claimant's disability at a substantial disadvantage. We accept the submissions of Mr. Greaves that many people absent with mental health conditions find contact unwelcome – and even in some cases view it as harassment – and so we do not accept that there is any substantial disadvantage in those circumstances.

174. Moreover, if there had been such contact the Claimant contends that this would have allowed Mr. Hunefeld to enquire into her health issues and her dismissal would not have taken place. We presume that to mean that he would have discovered that the reasons that he had decided to dismiss her were occasioned by her mental health. However, it is notable that the

Claimant did not tell Mr. Hunefeld on 21st January 2020 at the meeting that her conduct was because of her mental health; she did not mention it in the "minutes" that she prepared thereafter and she did not even mention it at the point that she submitted her grievance where she referred to the reasons for dismissal as being "false and libellous". There is no reason to suppose that the Claimant would have been any more forthcoming in telling Mr. Hunefeld that her disability was the alleged reason for her actions and particularly it seems to us that the Claimant herself does not strongly assert that given the focus of her cross examination that Mr. Hunefeld was wrong about his assertions about her conduct.

175. The Claimant has also sought to develop within her written submissions a suggestion that that contact would have led to the timely obtaining of medical advice to identify reasonable adjustments to facilitate a return to work. Again, leaving aside that that is not a reasonable adjustment in itself but only one where adjustments might be identified, it was not put to Mr. Hunefeld in cross examination (or suggested at any time previously) that there was a "credible possibility" that she would be returning to work until the endorsement to dismiss was given. In all events, it is difficult to see what adjustments could have been made given that the Dublin secondment had ended and again there was nothing to suggest that the Claimant's conduct was anything to do with a medical condition but rather her desire to work as she pleased. It follows that this complaint of a failure to make reasonable adjustments also fails and is dismissed.

176. We turn finally to the complaints of harassment contrary to Section 26 EqA 2010. There are two acts of harassment complained of by the Claimant. The first of those is asking the Claimant on 21st January 2020 to attend a disciplinary meeting with Mr. Hunefeld on that day, without giving the Claimant notice of what was to be discussed or the opportunity to arrange to be accompanied and the second is Mr. Hunefeld sending the email on 28th February 2020 to other employees telling them that the Claimant had been dismissed with immediate effect.

177. The Claimant's written submissions also made reference to two other acts of alleged harassment namely telephone calls to her on her wedding day and on her honeymoon but those are not complaints that have previously been identified as being advanced in these proceedings; no application to amend the claim to advance them has been made and we are only entitled to determine complaints that form a part of the pleaded case (see **Chapman v Simon [1994] IRLR 124)**. We have therefore limited our determination to the complaints that are actually before us.

178. It is accepted by the Respondent that both the complaints that the Claimant does advance in these proceedings both occurred and did amount to unwanted conduct. The next question for us is therefore whether those acts had the purpose of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

179. In respect of the first complaint about the meeting being called without notice or the right to representation we are satisfied that the reason for calling the meeting in this way was not for the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The purpose of the meeting was to raise with the

Claimant Mr. Hunefeld's concerns about her behaviour. He called the meeting in that way because he intended it only to be an informal meeting where he could raise those matters and essentially give the Claimant a ticking off. He did not at any point intend the meeting to be a formal disciplinary hearing and we accept the submissions of Mr. Greaves that as the Claimant's line manager he was entitled to raise with her issues of concern.

180. However, we must then consider whether it had the effect of doing so having regard to an objective, reasonable standard and the perception of the Claimant. We are not satisfied that it did. The Claimant did not suggest in the WhatsApp messages to Mr. Hughes any affront at being asked to attend without what she terms as proper notice or without representation. Her concern was centred on whether she might be dismissed. She stridently raised the issue of representation and that Mr. Hunefeld could not give her a verbal warning and he took advice, retracted that suggestion and matters proceeded entirely informally as had been Mr. Hunefeld's intention at the outset. There was no violation of the Claimant's dignity or creation of an intimidating, hostile, degrading, humiliating or offensive environment by the way in which the Claimant was invited to the meeting nor could her perception reasonably be that it had that effect. She was well aware within the first few minutes that it was an informal meeting and she was not being given a verbal warning despite her reluctance to admit to that during her evidence. Mr. Hunefeld was perfectly entitled to raise issues of concern with the Claimant's conduct and behaviour as her line manager and to call an informal meeting with her to do so.

181. The final question is whether the conduct was related to the Claimant's protected characteristic. We are satisfied that it was not. Leaving aside that Mr. Hunefeld was not aware of the Claimant's mental health, there is nothing at all to suggest that the way in which the meeting was called and the arrangements for it had anything to do with disability.

182. The Claimant's written submissions rely on her (now) assertion that the issues to be discussed at the meeting were caused by her disability. Leaving aside the fact that the complaint is actually about the arrangements for the meeting as opposed to what it was called to discuss, for the reasons that we have already found we do not accept that the Claimant's behaviour and her conduct with which Mr. Hunefeld took issue were in any way related to her disability. Indeed, it is again noteworthy that the Claimant did not suggest that to Mr. Hunefeld at any stage nor in her later grievance following her dismissal.

183. That complaint of harassment relating to the arrangements for the meeting of 21st January 2020 therefore fails and is dismissed.

184. The final complaint of harassment is in respect of the email that Mr. Hunefeld sent advising other members of staff of the Claimant's dismissal. It has already been accepted by the Respondent that that was unwanted conduct.

185. We therefore need to consider if the purpose of the sending of that email by Mr. Hunefeld was to violate the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We do not accept that it did. It was clumsy and Mr. Hunefeld sensibly accepted in cross

examination that it would have been better to have waited. However, the purpose of sending the email was his genuine belief that the team needed to know that the Claimant would not be returning to work and he wrongly believed that she would have been aware that her employment had been terminated.

186. However, we then turn to the question of whether it had the effect of doing so having regard to an objective, reasonable standard and the perception of the Claimant. We are satisfied that it did. The Claimant could not have known at the time that the Respondent had sent her a letter terminating her employment because she had not received it. She was left to find out second hand that she had been dismissed from one of her colleagues. We accept that the Claimant found that humiliating and it is little surprise that she did. Her evidence that her concern was not about others being told but the fact that no efforts were made to contact her first was not inconsistent with that. She had a reasonable expectation that she would not be the last to find out that her employment had been terminated and that she should have to find out about it from someone else.

187. However, that conduct must of course relate to the protected characteristic of disability. We have nothing at all to suggest that sending the email to other members of the team when it was sent had anything whatsoever to do with the Claimant's disability. It is even unclear from the Claimant's written submissions how that is said to be the case. This final part of the claim also fails and is accordingly dismissed.

188. It follows that for all of the reasons given above the claim fails in its entirety and is dismissed. However, what we would say is that it is plain that there are a number of key differences between the way in which employment relations and disciplinary matters are dealt with in Germany to the way in which things are done in the United Kingdom. Where overseas line managers are in place it may well stand both them and the Respondent in good stead to put in place some Human Resources and employment law training.

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Employment Judge Heap

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Date: 31st January 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Note:

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