EMPLOYMENT TRIBUNALS

Claimant: **Miss K Malik**

Respondent: **Home Office**

Heard by **On:** **8, 12, 17 and 19 November 2021**
14, 15 and 18 February 2022
28 February 2022 (in chambers)

Before: **Employment Judge Brain**
Members: **Ms R Hodgkinson**
Mr M Taj

Representation

Claimant: **In person in November 2021**
Mr A Tinnion in February 2022
Respondent: **Mr P Smith, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is:

1. Upon the claimant's complaint of unfair dismissal pursuant to the Employment Rights Act 1996:
   1.1. The complaint of unfair dismissal succeeds.
   1.2. There shall be no reduction made to any compensatory award for the chance that the claimant would have been fairly dismissed for incapacity had a fair procedure had been followed or for the chance that she would have been fairly dismissed for some other reason.
2. Upon the claimant's complaint of direct disability discrimination brought pursuant to sections 13 and 39 of the Equality Act 2010:
   2.1. The complaint in paragraph 4.1.1 of the list of issues (set out in paragraph 170 below) fails and stands dismissed.
   2.2. The complaint in paragraph 4.1.2 is dismissed upon withdrawal.
3. Upon the complaint of discrimination for something arising in consequence of disability brought pursuant to section 15 and section 39 of the 2010 Act:
   3.1. The complaint in paragraph 5.1.1 succeeds.

3.2. The complaint in paragraph 5.1.2 fails and stands dismissed.

3.3. The complaint in paragraph 5.1.3 succeeds.

4. Upon the claimant's complaint that the respondent was in breach of the duty to make reasonable adjustments pursuant to sections 20 and 21 and 39(5) of the 2010 Act:

4.1. The complaints in paragraph 6.2.3 and 6.2.9 of the list of issues stand dismissed upon withdrawal.

4.2. The remaining complaints in paragraph 6.2 fail and stand dismissed.

5. Upon the claimant's complaint of harassment related to disability brought pursuant to section 26 and 40 of the 2010 Act:

5.1. The complaints identified in paragraph 7.1.1 succeed in part. The Tribunal finds that the conduct in question had the effect of violating the claimant's dignity. The complaint that the conduct has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her and that that the conduct both had that purpose and the purpose of violating the claimant's dignity fails and stands dismissed.

5.2. The complaints in paragraph 7.1.2 of the list of issues fail and stands dismissed.

6. The complaints in paragraphs 4.1.1, 4.1.2, 5.1.1, 5.1.2, 7.1.1 and 7.1.2 were brought outside of the limitation period in section 123 of the 2010 Act. It is just and equitable to extend time to vest the Tribunal with jurisdiction to hear them.

7. BY CONSENT, The claimant was at all material times a disabled person for the purposes of section 6 of the 2010 Act.

REASONS

1. After hearing evidence in the case and then after having heard the parties' helpful submissions, the Tribunal reserved judgment. We now set out reasons for the Judgment that we have reached.

Introduction and preliminaries

2. The claimant, Miss Malik, was employed by the respondent as an administration officer. Her employment commenced on 1 January 2015. She was dismissed summarily but with a payment in lieu of notice on 20 August 2020. Prior to illness commencing in February 2019 (with which the Tribunal is concerned) she worked a 30 hours' week between Monday and Thursday.

3. The claimant claims that her dismissal was unfair for the purposes of the Employment Rights Act 1996. She also complains that by dismissing her the respondent breached the Equality Act 2010 by treating her unfavourably for something arising in consequence of disability.

4. In addition, the claimant complains (pursuant to the 2010 Act) of being subjected to discrimination and harassment related to disability during her employment. She also says that the respondent failed to comply with the

duty to make reasonable adjustments. We set out all the issues which arise in the case in paragraph 170.

5. The respondent concedes that the claimant was a disabled person at all material times by reason of the physical impairment of functional neurological disorder. We shall now refer to this condition as *'FND.'* The respondent also accepts that for the purposes of the 2010 Act complaints, (except the reasonable adjustments complaint) they had knowledge of the FND from 30 May 2019. This is the date of the first occupational health services report commissioned by the respondent.

6. The respondent contests the substantive claims. They say that the dismissal of the claimant was fair for the purposes of the 1996 Act. They say that the claimant was not subjected to disability-related discrimination or harassment under the 2010 Act and that there was no failure to make reasonable adjustments.

7. The Tribunal was presented with a bundle of documents paginated 1 to 638. The Tribunal heard evidence from the claimant. She put in evidence a brief written witness statement from Dr Lucy Cormack, clinical director of Primary Care Sheffield. She also put in evidence a written witness statement from Adel Taylor, occupational health advisor with the Sheffield Occupational Health Advisory Service (SOHAS) dated 3 March 2021. The Tribunal did not hear evidence from either Dr Cormack or Adel Taylor.

8. Upon behalf of the respondent, the Tribunal received evidence from the following witnesses:

   8.1. Aneka Ijaz. She is employed by the respondent as executive officer. She attended ready to give evidence in November 2021. Unfortunately, for personal reasons she was unbale to attend to give evidence in February 2022.

   8.2. Vicky Broadhurst. She is employed by the respondent as higher executive officer. She attended to give evidence.

   8.3. Nick Moulson. At the material time with which we are concerned, he was employed by the respondent as an operations manager at UK Visa and Immigration. He attended to give evidence.

9. Several preliminary matters arose during the course of the hearing. At a case management preliminary hearing which came before the Employment Judge on 26 July 2021, the case was listed for 8, 12, 15, 16, 17 and 19 November 2021. 8 November 2021 was set aside to be used by the Tribunal as a reading day.

10. Due to the unexpected unavailability of the Employment Judge upon 15 and 16 November 2021, an amended notice of hearing was sent to the parties on 24 November 201. The hearing scheduled for 15 and 16 November was re-listed for 10 and 11 November 2021. The claimant attended upon the morning of 10 November 2021. Unfortunately, the respondent was not in attendance. A hybrid hearing was quickly arranged attended by a solicitor from the Government Legal Department. It was explained by her that the amended notice of hearing had not been received by the respondent. Accordingly, the matter was adjourned until 12 November 2021. This unfortunate turn of events resulted in the loss of two

days of hearing time in November 2021. Hence, the matter was adjourned part heard after concluding the claimant's case on 19 November 2021.

11. Between the second day of the hearing on 12 November 2021 and the third day of the hearing upon 17 November 2021 the respondent applied (late in the afternoon of 16 November 2021) for permission to adduce a supplemental witness statement from Mr Moulson. It was regrettable that such a well-resourced respondent should seek to adduce evidence at such a late stage of the proceedings. The timing was unfortunate as the claimant was at the time part way through giving her evidence. The Employment Judge directed that the usual restriction upon a part-heard witness from discussing her case with others while her evidence was being heard be relaxed in order that she may discuss the matter with her father. In the event, she raised no objection to the respondent's application and an Order was made on 19 November 2021 that the supplemental witness statement may be admitted into evidence.

12. The respondent also sought to introduce into the bundle the occupational health referral and associated documents which led to the final report obtained from occupational health services. The claimant was equivocal as to whether she had any objection to the admission of these documents and effectively she left the matter to the Tribunal. The Tribunal directed that although this material ought to have been disclosed much earlier, it formed an important part of the record of events and ought to be admitted. The general principle is that the Tribunal will not speculate about matters where it is able to know them.

13. The claimant acted in person in November 2021. She then instructed Mr Tinnion of counsel who represented her when the matter resumed in February 2022. At the outset, when the hearing resumed in February 2022, he withdrew the allegation set out in the list of issues (in paragraph 170 below) at paragraphs 4.1.2. He withdrew the part of allegation 7.1.2 brought upon the basis of purposely violating the claimant's dignity and creating a hostile, degrading, humiliating or offensive environment of the claimant. He also withdrew the reasonable adjustments complaint at paragraph 6.2.3. The reasonable adjustments complaint in paragraph 6.2.9 was withdrawn later during the course of the February 2022 hearing.

14. During the course of the hearing in 2022, the respondent applied for permission to introduce more late produced documents. There was no objection form Mr Tinnion. The late produced documents were the respondent's special leave policy and procedure (November 2019); and the respondent's '*HR policy and guidance- workplace (reasonable) adjustments'* dated May 2016. The latter was paginated pages 461 to 485. (This was confusing as it repeated the pagination in the bundle. We shall refer to the internal pagination when referring to the reasonable adjustments policy).

15. FND is a term used to describe illness where functional symptoms affecting the nervous system manifest themselves. The claimant experienced functional symptoms of the nervous system including difficulty with walking, limb weakness, seizures and speech problems. The claimant did not seek any adjustments during the conduct of the hearing other than the provision of regular breaks upon request.

Findings of fact

16. The Tribunal shall now set out the relevant facts. Where we have had to resolve any conflict of evidence, we indicate how we have done so at the material point. There are some significant disputes of fact between the parties (particularly about the matters which form the basis of the claimant's complaints of direct disability discrimination, harassment related to disability and two of the three limbs of her complaint of unfavourable treatment for something arising in consequence of disability). That said, this is one of those cases where much of the factual background is not in dispute and the issues that arise turn upon whether the respondent's approach to the matter was compliant with the relevant law.

17. The respondent did not put in issue that the claimant was anything other than a well-regarded and competent employee. She worked from the respondent's premises at Vulcan House in Sheffield.

18. The matters which give rise to the claim start in February 2019. At that time, the claimant's immediate line manager was Katherine Wright. Aneka Ijaz joined the department in May 2019 and became the claimant's executive officer ('EO') and immediate line manager.

19. Vicky Broadhurst was Katherine Wright's and then Aneka Ijaz's higher executive officer from April 2019. She (Vicky Broadhurst) took over this role when Elaine Reardon retired. Miss Ijaz and Mrs Broadhurst were therefore in post at the time that the occupational health service's first report upon the claimant was prepared on 30 May 2019.

20. The onset of the FND occurred in February 2019. In her witness statement, the claimant gave an account of losing the ability to walk on Friday 8 February 2019. Mrs Broadhurst said in evidence that she was aware of the incident (but not that it affected the claimant's mobility). The claimant managed to return to work on Monday 11 February 2019 but then unfortunately she lost all sensation in her legs. We can see from the medical record at page 605 of the bundle that she was admitted to hospital that day. She was discharged on 14 February 2019 with a diagnosis of functional lower limb weakness.

21. Within the bundle is a document commencing at page 206 entitled *"Timeline of contact with [the claimant]."* Mrs Broadhurst introduces this document in paragraph 2 of her witness statement. She says, *"The timeline at [206 to 225] would have been put together by Katherine [Wright] from February 2019 and then added to by Aneka [Ijaz] from June 2019 (when she took over line management of [the claimant] from Katherine) with notes being made of the various events that took place from the time of [the claimant's] first absence. I've looked through the timeline and to the best of my recollection it accurately sets out events."* The entry at page 208 records a call taken by Elaine Reardon from the claimant's partner, and which describes a diagnosis of FND and symptoms. Mrs Broadhurst said that this information was not imparted to her at the time.

22. The claimant was certified as unfit for work by her general practitioner for the period between 12 February 2019 and 11 April 2019. The relevant fit note is at page 96 of the bundle. The claimant's GP assessed her case on 11 March 2019. The presenting condition was of *"functional lower leg*

weakness (medically unexplained symptoms)." The GP observed that the claimant was awaiting treatment.

23. A further fit note was signed by her general practitioner on 15 April 2019 (page 97). This was for the period from 11 April 2019 to 8 May 2019. Again, the claimant was certified as unfit for work with a presenting condition of "*tiredness/weakness – undergoing psychotherapy".*

24. On 17 April 2019 Katherine Wright held a telephone meeting with the claimant. Vicky Broadhurst attended as a minute taker. The minutes are at page 98. A record was also made in the timeline documents at pages 211 and 212. The claimant told Katherine Wright and Vicky Broadhurst that her condition was as yet undiagnosed and that her symptoms presented as *"uncontrollable jerks/ticks which can come on at any time".* She was attending psychotherapy sessions. She reported experiencing feelings of anxiety and a reluctance to go out of the house *"as she was embarrassed by the jerking".* The claimant gave verbal consent for a referral to the respondent's occupational health services. Mrs Broadhurst's evidence was that the discussion on 17 April 2019 was the first occasion upon which she became aware that the claimant's mobility and ability to walk was impacted by the claimant's FND. She said that she had gained an understanding of FND in discussion with Katherine Wright and Miss Ijaz, that it entailed spasms and jerking and that such was suggestive of a serious and unpleasant condition.

25. The claimant saw Dr Olufunto Phillips, consultant occupational physician, on 23 May 2019. This was commissioned by the respondent, who use an external organisation for whom Dr Phillips works. Mr Moulson said that it was open to the respondent to revert to the occupational health provider if dissatisfied with any aspect of their service. He had done so on one occasion prior to his involvement in the claimant's case.

26. Dr Phillips' report dated 30 May 2019 is at pages 100-102. Mrs Broadhurst said that Katherine Wright (to whom the report was addressed) shared it with her. She says she saw it no later than early June 2019.

27. Dr Phillips reported that the claimant had made an unsuccessful attempt to return to work on 13 May 2019. She reported that the claimant informed her that she had now been diagnosed with FND. Dr Phillips described this as *"a common cause of neurological symptoms such as abnormal patterns, seizures, cognitive problems which are not caused by a disease of the nervous system but by a problem with the function of the nervous system."* She said that the claimant had been receiving psychotherapy and had been prescribed anti-depressant tablets by her GP. She noted that the claimant had repeated her efforts to return to work on 15 May 2019 but that too had proved unsuccessful.

28. Dr Phillips' then gave her opinion as follows:

"Following my assessment, I believe Miss Malik remains unfit for work as she has not managed to achieve stability of her functional neurological disorder. I would hope that with support from the psychotherapist, she manages to achieve stability of her health condition such that she is able to return to work in the future. It is difficult to predict any likely date of return to work as it depends on her response to treatment. However, I

suspect that timescales for a return to work would be in the region of months rather than weeks. When she is able to return to work, you may wish to allow her to return on a phased basis in terms of tasks and hours to ease her gently into work. As she has mentioned some work concerns, you may wish to have a dialogue with her, perhaps using a stress risk assessment tool as a framework for a discussion as her work concerns have the potential to act as a barrier for work.

Answers to questioned outlined in the referral:

(1) As mentioned above, she is currently unfit for work and it is difficult to determine any likely date of a return to work. I am not entirely sure that she will be able to return to work within the next two to three months.

(2) She is currently unfit for work, however, I hope that her health improves with the support of her psychotherapy such that she is able to return to work in the future. Her state of health at the time of her return to work will determine whether she is able to return to her full duties.

(3) I am unable to identify any adjustments which would facilitate a return to work at this time. However when she is fit to return to work she would benefit from a phased return.

(4) She perceives her stress to be related to work …

(5) She is receiving appropriate medical support. I do not believe she requires any further medical intervention.

(6) She suffers with migraine headaches and this may impact on her attendance. Her attendance may also suffer in relation to her functional neurological disorder.

(7) There is potential for her performance at work to suffer until she achieves stability of her functional neurological disorder and her emotional health difficulties."

29. Further fit notes were obtained by the claimant from her GP covering the period from 8 May 2019 to 4 June 2019 and then from 4 June 2019 to 2 August 2019 (pages 99 and 103). The first of these (at page 99) certified the claimant as possibly fit for work upon a phased basis. As we know from Dr Phillips' report, this was attempted on 13 and 15 May 2019 but was unsuccessful. The second of the fit notes certified her as unfit for work with a diagnosis of fatigue and tiredness.

30. On 20 June 2019, Vicky Broadhurst invited the claimant to attend a sickness absence review meeting. The letter of invite dated 20 June 2019 is at page 104. The meeting was held on 11 July 2019. It was conducted by Mrs Broadhurst. Notes of the meeting were taken by Miss Ijaz. The notes are at pages 105 and 106.

31. It was noted that the current fit note (at page 103) was due to expire on 2 August 2019. The claimant said that she would, upon its expiry, consider a phased return to work *"maybe one – two days a week and knowing from now that I'm going to return will help me prepare, subject to how I am feeling around 2 August."* It was noted that the respondent already had in place an adjustment to the claimant's workstation, that being the placing of her desk in a dark area in order to reduce the impact of artificial lighting

upon her. She said that she would prefer, upon returning to work, to be around people with whom she was familiar.

32. The invite letter at page 104 dated 20 June 2019 referred to the respondent's attendance management procedure. This was copied to the claimant. Vicky Broadhurst said in the letter that the aim of this was to help employees to meet the required attendance standards. She went on to inform the claimant *"your employment with the department could be affected if your sickness absence can no longer be supported."*

33. A similar sentiment was conveyed to the claimant by Mr Broadhurst at the conclusion of the meeting held on 11 July 2019 (page 106). By way of conclusion, it is recorded that she said that, *"The outcome of this meeting will be that I will consider all the available information to assess if the business can continue to support your absence if you are not likely to be well enough to return in a reasonable timeframe, this included dismissal consideration, however we would need to do everything we can to get you back to work before this happens."*

34. On 15 July 2019, Mrs Broadhurst wrote to the claimant (page 107) in order to follow up on the meeting of 11 July. She emphasised that there was "*a possible phased return to work after 2 August 2019 following your next visit to your GP".* She told the claimant that she was *"pleased to confirm that the department will still support your sickness absence due to the agreement to attempt a phased return to work and I will not consider dismissal at this stage. But I must explain that your absence will be reviewed regularly and I may reconsider my decision at any time if it becomes unlikely that you will return to work in a reasonable period of time."*

35. The claimant's GP certified her as fit for work upon a phased return to work basis limited to two hours per day. The relevant fit note to this effect (covering the period 7 August to 20 August 2019) is at page 108. The next fit note for the period 21 August 2019 to 3 September 2019 is at page 109. This certifies the claimant as unfit to work. This continued to be the case to 9 September 2019 (page 110). Curiously, there is then another fit note for the period 7 August to 20 August 2019 certifying the claimant as unfit for work (page 111). When asked about this in cross-examination, the claimant said that she was *"not sure what happened*" around the two contradictory sick notes for the two weeks' period from 7 August 2019. At all events, it was no part of the claimant's case that she was fit to work during August 2019.

36. On 7 August 2019, the claimant was admitted to hospital. Miss Ijaz noted this in an entry dated 9 August 2019 in the timeline document at page 216. She noted that the claimant's *"shakes and jerks were uncontrollable and severe, and she felt dizzy."* She spoke to Miss Ijaz again on 16 August 2019 (page 216). She noted that *"the shakes and jerks have calmed down"* and the claimant was able to walk again. Miss Ijaz recorded that the claimant expressed concerns for her job.

37. In paragraph 10 of her witness statement, Miss Ijaz gives evidence that the claimant attempted to return to work on 10 September, 13 September, 19 September, 23 September and 30 September 2019. Miss Ijaz referred to the salient entries in the timeline document at pages 217-219. Mrs

Broadhurst accepted that the by this stage she had first-hand knowledge of the claimant's position and that matters were serious. It was no part of the respondent's case that the claimant made anything other than a genuine attempt to return to work at this stage.

38. In paragraph 10 of her witness statement, Miss Ijaz says that when the claimant came back into work in September 2019, "*it was primarily for facilitation days. System access is disabled automatically when someone is off sick and they have to request access when they come back in. That meant there were lots of emails to go through. [The claimant] didn't do any casework on her own cases when she returned, we just wanted to ease her back in. Had [the claimant] been well enough, then she would have started with a reduced caseload, and we would have built up gradually. Indefinite leave to remain cases would not have had to go into a full caseload, we would have adjusted her cases if necessary and she wouldn't have been expected to do everything to start with or at all, there are other members of staff who have adjustments not to deal with certain cases if there is a good reason for this. We never had a conversation where we told [the claimant] she would be expected to deal with certain cases, we just wanted her back in and comfortable and we would have taken things from there."*

39. In evidence given before the Tribunal (under questioning from the Employment Judge) the claimant said that indefinite leave to remain cases are more complex than other kinds of cases about temporary leave to be in the UK. The claimant described indefinite leave to remain cases as *"EO work".* She described the other kinds of cases as *"tier 2 cases*" and this is the kind of work which she would be doing upon her return. She said that this was still highly skilled work determining individuals' entitlement to be in the UK of a limited period. That said, it appears to be common ground between the parties that indefinite leave to remain cases are the most complex case type.

40. Miss Ijaz gave a moving account of the events of 30 September 2019. In paragraph 11 of her witness statement, she says that when the claimant came in to work that day (for a facilitation day), *"she was visibly shaking and jerking to the extent that she was holding on to the wall when she came in. I gave her support walking to the office. [The claimant] indicated that she would feel more comfortable if she wasn't in the open plan office where everyone could see her, so we worked in a meeting room. It was important that [the claimant] didn't feel isolated, so I sat with her to help her feel included and part of the team. We had lunch together that day. I gave [the claimant] a laptop and we worked together in a meeting room. [The claimant's] dad came to collect her and I walked her out to her dad's car. [The claimant] never suggested to me that there was a difficulty with getting into work, her partner or her dad dropped her off, she never mentioned parking spaces being an issue. [The claimant] had told me she couldn't drive because of her shaking and jerking, having seen it first-hand I wasn't surprised. [The claimant] never mentioned that a taxi would have helped, as far as I was aware the problem wasn't that she couldn't get into work, the problem was that she wasn't well enough to work."*

41. Miss Ijaz went on in paragraph 12 to say that *"Prior to Covid laptops were only normally available to managers but it had been agreed that one would*

be sourced for [the claimant] so that she could work away from the desktop computers in the open plan office. On the occasion in September 2019, we had found a laptop for her to borrow from another member of staff as hers had not yet arrived."

42. Mrs Broadhurst says in paragraph 11 of her witness statement that she had discussed with her senior executive officer the possibility of obtaining a laptop for the claimant as a reasonable adjustment for when the claimant *"needed to work away from the team and possibly in a room with support from myself or her EO".* Mrs Broadhurst says that a borrowed laptop and access to a private room had been arranged to support the claimant's return to work on 13 September 2019. One was then ordered for her. It appears from the email of 30 September 2019 (page 112) that Vicky Broadhurst requested a laptop for the claimant to borrow that day as hers had not arrived. She agreed with Miss Ijaz that working from home was not an option at this stage and the adjustment made by the respondent at this point was for the claimant to work away from her desk and from her team in a private room, hence the need for the laptop.

43. According to the respondent's chronology of events, the claimant worked for a couple of hours upon 13 September 2019, four hours on 19 September, three hours on 23 September and then was in work between 9.15 and 14.15 on 30 September 2019.

44. In addition to these dates, it had been planned for the claimant to attend work on 25 September and 3 and 4 October 2019. Unfortunately, due to ill health, she was unable to attend work upon these days. The claimant never returned to the workplace to undertake her duties after 30 September 2019.

45. We can see from page 124 that there were text exchanges between the claimant and Miss Ijaz on 9 October 2019. The claimant asked Miss Ijaz to telephone her. Miss Ijaz did so. Unfortunately, the claimant had to inform Miss Ijaz that she had bad news to convey about her health.

46. The claimant had been meant to go into work on 9 October 2019. Unfortunately, she could not do so. Miss Ijaz noted the claimant reporting a deterioration in her condition at pages 219 and 220. Her condition had resulted in her having to go back into hospital between 9 and 14 October. (Upon the latter date, discussion took place between Mrs Broadhurst, Miss Ijaz and Clare Fudge of the respondent's HR team as to how to proceed given the claimant's continued absence. It was resolved to obtain a further OH report at this stage).

47. The claimant was certified as unfit for work for the period between 22 October 2019 and 18 November 2019 (page 131). A certificate covering the period to 3 December 2019 was then issued (page 141). Further discussions were held with the claimant during October and November 2021 (pages 221 and 222). On 31 October 2019, the claimant asked for reduced contact. Hitherto, this was weekly. This was reduced, there being two contacts in November (one of which was at the claimant's instigation) and one in December 2019. On 18 November 2019, the claimant suggested being permitted to work from home.

48. A second report from Dr Phillips was commissioned by the respondent. This is at pages 142 to 144 and is dated 13 November 2019. By way of background, Dr Phillips reported upon the claimant's physical symptoms. The claimant told her that she was coming to the end of her psychotherapy sessions which she had not found particularly helpful. However, she had benefited from the physiotherapy support and was being referred for physiotherapy and neurorehabilitation.

49. Dr Phillips opined that the claimant remained unfit for work *"as she has not yet managed to achieve stability of her functional neurological disorder."* She said that *"based on the nature of her health condition and her rate of progress so far, I expect that timescales for [the claimant's] return to work would be in the region of months rather than weeks. I doubt that she will be able to return to work within the next two to three months. I am unable to identify any adjustments which would facilitate a return to work at this time."* She goes on to say that, "*when she is able to return to work, you may wish to allow her to return on a phased basis in terms of tasks and hours to ease her gently in to work."* Dr Phillips added that, *"As there is potential for improvement of her health condition, I do not believe she is permanently incapable of undertaking her contractual duties. I therefore do not believe ill health retirement is relevant at this time. In her current state of health, she will likely struggle to undertake her duties effectively. This will likely be the case until she achieves stability of her health condition. She suffers from migraine headaches and there is potential for her attendance to suffer in relation to her migraine headaches."*

50. The claimant was certified by her GP as unfit for work because of FND for the period from 3 December 2019 to 3 January 2020. The relevant note is at page 145. A note covering the period from 3 January 2020 to 30 January 2020 is at page 146.

51. The claimant was invited to a further formal attendance review meeting. This was held on 6 February 2020. The meeting was chaired by Miss Ijaz. Mrs Broadhurst was in attendance as minute taker. The notes are at pages 155 to 156. They are mistakenly dated 6 January 2020.

52. The claimant reported experiencing some benefit from the physiotherapy sessions. She said that her GP advised her to consider taking a break from work for a period of 12 months. The notes record the claimant saying that she was aware that she was "*not eligible for a career break as such but wondered if the business might consider an unpaid break (length to be agreed if appropriate) to give her time to concentrate on her health and try to get to a point where she could return to work. She stated that she was fearful of a relapse which would not be beneficial to the business and did not want to put pressure on herself."* The claimant said that she was requesting an unpaid break from work. She recognised that she was not able to make a formal career break request.

53. The question of a career break had already been raised by the claimant (upon medical advice) on 22 January 2020 (p223). She was concerned that returning to work at that point may jeopardise her health. The question of a career break was then the subject of email correspondence between Mr Moulson and Clare Fudge (of the respondent's human resources team) on 27 January 2020 (pages 148.1 to 148.4). This appears to have been

initiated by Miss Ijaz raising the issue with Ms Fudge and Mrs Broadbent on 22 January 2020 (page 148.4) following the claimant's discussion with her that day. Miss Ijaz texted the claimant on 22 January 2020 to say that Mr Moulson has asked her to make her career break request in writing (page 503). Mr Moulson said in evidence that he had not taken the matter any further and was content to leave it to her line managers at this stage. He did not receive a written request from the claimant.

54. Returning to the meeting of 6 February 2020, Miss Ijaz asked when the claimant felt that she would be able to return to work. In reply, the claimant said that *"she hopes to be in a position to return to work within 12 months, she realised that she had made attempts to phased return in the past which had been unsuccessful, she said that she hadn't started the physio sessions at that point and needed more time then to rehabilitate and gain more energy."*

55. Miss Ijaz raised the question of reduced hours. The claimant said that *"reduced hours would help and that this would give her scope to build back up with a view to returning to her normal working pattern. She thought eight hours to start with and then build up but take as long as she needed to get back to normal."* She asked that she only be given one work stream to assist with concentration.

56. The issue of working from home then arose. The claimant said that, *"she was aware that working from home would not be an option until she has made a full return to work but if she was given the use of a laptop so she could work in a room away from stimulus then that would be beneficial."* Miss Ijaz said that she would look at requesting a laptop for the claimant to allow her to work from a room on days when she felt that she needed to do so. The claimant also said that being given just one workstream at a time would be beneficial and would enable her to better concentrate. The note at page 156 records the claimant as accepting that she may do either indefinite leave to remain or leave to remain cases.

57. The claimant consented to a further occupational health referral. She signed the relevant consent form. She also handed to Miss Ijaz a further fit note covering the period 30 January 2020 to 26 February 2020 (page 151).

58. Miss Ijaz asked the claimant whether there was anything further which could be done by the respondent to assist with her return to work. The claimant replied that she already *"had reasonable adjustments in place regarding lighting, she felt that if she could concentrate on one type of case as mentioned earlier and had the option to work in a room with a laptop when necessary that would help her return to work."*

59. On 6 February 2020 Miss Ijaz wrote to the claimant (page 152). She gave a brief summary of matters discussed at the meeting held that day. She confirmed that she would progress the third occupational health referral. She went on to say that she would give consideration to whether the claimant's sickness absence may continue to be supported or whether dismissal was appropriate. There was no reference to the issue of working from home.

60. The claimant was again certified as unfit to work by her GP for the period between 18 February 2020 and 11 March 2020. The fit note is at page 158. On 28 February 2020, the claimant texted Miss Ijaz to say that her GP supported a phased return to work over a *"very prolonged period"* (page 512).

61. On 28 February 2020 Dr Phillips reported for the third time (pages 159 to 161). She said that the claimant had informed her that the physiotherapist had *"advised her to allow further recovery for another six to nine months before returning to work."* Dr Phillips went on to report that the claimant was *"hoping to return to work in April 2020 on a prolonged phase return to work plan with temporarily reduced working hours. She said that her GP supports her decision."*

62. Happily, Dr Phillips reported that the claimant had indicated there to be an improvement in her health with fewer episodes of disabling symptoms. She was now managing some domestic chores and most of the time was able to wash and dress herself. Busy or crowded places trigger her disabling symptoms. She was able to walk without difficulty. Dr Phillips said that this was *"a marked improvement from when I last saw her."*

63. Dr Phillips opined that the claimant remained unfit for work with an uncertain prognosis. She expressed reservations about the claimant's aspiration to return to work in 2020. Dr Phillips said that the claimant would *"need to be in a more robust state of health before she returns to work."*

64. She said to the respondent that, *"if you are however willing to support her return to work in April, you may wish to allow her to return on a phased basis in terms of her tasks and hours over months rather than weeks. You may wish to adjust her workload and working hours to her coping abilities. She has suggested reducing her hours to no more than 10 hours a week. She may wish to discuss this with her employers."*

65. By way of reply to the questions posed by the respondent upon the referral, Dr Phillips said:

    - There is a potential for her attendance and performance to suffer during relapses of her functional neurological disorder. Her attendance may also suffer in relation to her migraine headaches. She commented that the claimant had derived little benefit from the psychological therapy but had benefited from the physiotherapy. Dr Phillips did not recommend any other medical interventions.

    - Dr Phillips was unable to say that the claimant was permanently incapable of undertaking her contractual duties. She raised a possibility of the respondent writing to the claimant's specialists for information.

66. In paragraph 11 of his witness statement, Mr Moulson addresses the issue of the claimant's suggestion of a career break which was raised by her in the early part of 2020. He says that the claimant did not directly ask him about a career break. Mr Moulson then referred to the respondent's career break policy (in particular pages 164 and 165). These are introduced in the policy document at page 164 as a *"form of unpaid special leave which can be requested for a number of reasons. They enable employees to balance their career and personal lives whilst preserving continuity of*

employment". He said that career breaks are not intended for people who are on long term sick but rather are aimed at those who wish to take a break for a specific purpose.

67. Career breaks appear to be distinguished from special leave within the respondent's policies. The special leave excerpt from the policy referred to by Mr Moulson in his witness statement is at page 165. One of the conditions of the granting of special leave is for the employee to have satisfactory attendance. The policy does however recognised extenuating circumstances for the fulfilment of this criterion. This includes *"domestic illness".* Mr Moulson considered that the career break policy was inapplicable given that the claimant was unwell at the material time.

68. Upon taking the oath, and before attesting as to the truth of his witness statement, Mr Moulson said that he wished to alter what he said there about pages 164 and 165. He wished to refer to the special leave policy and procedure which was produced late by the respondent. Mrs Broadhurst gave similar evidence that the appropriate document upon the issue of special leave was that filed separately. She was unsure of the provenance of pages 164 and 165. (The reader is referred to paragraphs 168 and 169 below for the evidence given by them both upon the issue of special leave. The respondent's evidence upon this issue was less than impressive, referring to documents of unknown provenance in the printed witness statements and which omitted reference to the material policy in place at the time).

69. On 24 March 2020 the claimant took issue with part of the record of the meeting of 6 February 2020 (page 166 and pages 460 to 462). The claimant said that she wished to record that she knew that a career break was not the appropriate term for her situation and wished to "*change the term to unpaid break to help with my recouping and concentration on getting my health back on track.*" She also wished to record, upon the issue of work from home, that she had been told that working from home was not an option as the respondent wished her to work as part of a team. She also corrected the record to say that she did not wish to do indefinite leave to remain cases due to their complexity but could cope with leave to remain cases. Mrs Broadhurst said that indefinite to remain cases are lengthier but not necessarily more complex. She did not take issue with the claimant's corrections, commenting that the notes of the meeting were "*not verbatim."* There was no suggestion by the respondent that the claimant did anything other than make *bona fide* corrections to the notes. In the event, when the claimant was certified as fit to work in July 2020, arrangements were made for her to undertake tier 2 leave to remain cases only upon her return.

70. The GP fit notes certifying the claimant as unfit for the period from 3 January 2020 to 26 February 2020 may be found at pages 146 and 147. The note covering the period to 11 March 2020 is at page 158. The fit note for the period to 1 April 2020 is at page 162.

71. On 18 March 2020 the claimant was invited to attend a further attendance review meeting on 26 March 2020. This was postponed because of the onset of the *Covid-19* pandemic.

72. By a letter dated 27 April 2020, the meeting was re-arranged for 5 May 2020. It took place by way of video call. The letter of invite is at page 167. Miss Ijaz said in the letter that the claimant's employment with the respondent may be affected if her sickness absence could no longer be supported and that after the meeting, she would decide whether the claimant should be dismissed.

73. Minutes of the meeting are at pages 168 and 170. Again, the meeting was chaired by Miss Ijaz. Mrs Broadhurst took notes.

74. The claimant explained that she had been unable to see her GP since March due to the pandemic. She said that she was hopeful that she would be able to get a backdated sick note to cover the post-1 April 2020 period *"when things return to normal."* The claimant said that she hoped to return to work *"as she was feeling more confident now".* She went on to say that she did not wish to have pressure put upon her to return to undertaking her normal contractual duties of 30 hours.

75. She reported that her treating consultant did not feel that she was able to undertake 10 hours per week initially. She said that the consultant had advised her to start a return upon eight hours per week with a view to building up to around 16 hours per week *"and changing her contract to reflect these hours".* The claimant said that she felt that she would be productive *"once refresher training had been given if the eight hours were split over two days to begin with."* The claimant said that her aim *"was to undertake contracted hours of around 16 per week, this could be a prolonged process from her to get from eight to 16 hours but she thought it should be feasible within four to six months."*

76. The claimant was agreeable to another occupational health referral. She said that she *"felt she would benefit from being able to work from home"* and that *"she was aware that the majority of staff were now undertaking remote working due to coronavirus."* The notes go on to record the claimant as saying that if *"she was not able to do this long term as part of her original team that she would consider moving to another team who would support this if necessary as she felt working from home would benefit her due to her mobility problems related to her condition."*

77. Miss Ijaz said that working from home was *"something she would raise for her [the claimant] as it was not thought to be an option previously, but this may have changed now that most of the workforce were remote working."* Mrs Broadhurst could not say why Miss Ijaz had not simply said that she may work from home when she was fit. For Mrs Broadhurst, the issue always was the claimant's fitness to work. The claimant said that she was *"100% committed to a return to work"* if the business would support her. Miss Ijaz replied that *"the business is in a position where they may no longer support her absence and we are now considering dismissal and that she would pass on the minutes from today's meeting to [Mr Moulson] for consideration of what was discussed today."* Miss Ijaz said to the claimant that a further meeting would then be arranged.

78. Miss Ijaz wrote to the claimant on 6 May 2020 following the meeting of 27 April 2020 (page 171). The was reference to the claimant's return to work and a change of contractual hours, but not of working from home or the possibility of the claimant working in a different team.

79. In paragraph one of his witness statement, Mr Moulson says that his first direct involvement in the matter followed the meeting held on 5 May 2020. However, Mr Moulson had been aware of the claimant's position from 4 December 2019 at the latest and, as we have seen, was involved in email correspondence concerning the claimant at the end of January 2020.

80. On 11 May 2020, Miss Ijaz emailed Mr Moulson (pages 171.2 and 171.3). She raised with him the claimant's suggestion of initially working eight hours per week upon a phased return to work with a view to gradually building up to 16 hours per week. Mr Moulson then emailed Claire Fudge, HR Advisor the next day (pages 171.1 and 171.2). Mr Moulson recorded that Claire Fudge had said that it may be difficult to justify not allowing the claimant to work from home given that this had become the norm. Mr Moulson recognised that the issue was less that of being allowed to work from home and more of whether the claimant would be able to provide reasonable service after a "*proportionate phased return."* Mr Moulson noted that the respondent's normal policy is to allow a phased return to work over a period only of 13 weeks

81. On 12 May 2020 Mr Moulson sent an email to James Turner of the respondent's human resources department. The email exchange is at pages 171.4 and 171.5. Mr Turner had, it seems, asked to be kept appraised by managers of potential dismissal cases. The claimant's case was therefore flagged up to Mr Turner by Mr Moulson. From the exchange between Mr Turner and Mr Moulson it appears that the respondent recognised the difficulty in resisting the claimant's request to work from home. Mr Turner advised Mr Moulson to "*focus on us not being able to continue to support her absence/low attendance and not where it is she works from as a reason for dismissal."*

82. Mr Moulson told Mr Turner that *"the OHS doctor confirms she remains unfit for work and doesn't caveat that in terms of being fit for work if on reduced hours."* This is, in our judgment, not a fair interpretation of Dr Phillips' opinion expressed in the report dated 28 February 2020. Dr Phillips did say that the claimant remained unfit for work. However, she went on to say that <u>if</u> the respondent was willing to support a return to work in April then this may be done upon a phased basis. Dr Phillips did not rule out the possibility of the claimant returning to work at all. She did not say that a return to work was contra-indicated medically.

83. Mr Moulson put it to Mr Turner (at page 171.4) that a prolonged phased return to work well in excess of the maximum usually permitted of 13 weeks suggested that the claimant did not feel ready to return. He also expressed concerns about the amount of manager/trainer input and whether that would be disproportionate in the case of an employee working so few hours.

84. On 13 May 2020 Mr Moulson wrote to the claimant (pages 173 and 174). He declined the claimant's request to return to work upon a phased basis at that stage. He said that it was Dr Phillips' opinion that the claimant was unfit to return to work. We have already expressed our views upon Mr Moulson's interpretation of Dr Phillips' report of 28 February 2020. He also said that phased return to works are usually limited to a maximum of 13 weeks. The claimant's suggestion of a longer phased return of four to

six months is something the respondent *"would not ordinarily agree to."* He also said that the amount of management support that would be required was disproportionate for the hours proposed by the claimant. He concluded that the respondent would now give consideration to whether her continued absence may be supported.

85. On 14 May 2020, the claimant asked Mr Moulson about the possibility of a career break (page 195.2 and 195.3). She observed that she had made a request *"around 4-6 months back."* This was presumably a reference to her request of 22 January 2020. She complained that she had received no response. She said that she wanted *"time off to concentrate on my health which comes first otherwise I am no good to nothing."* The claimant was not seeking to be paid over her career break if granted and Mrs Broadhurst conceded that the management time involved in administering such a break would be minimal. When asked about this correspondence, Mr Moulson said that by this stage, working from home had become the norm.

86. On 15 May 2020 Mr Moulson invited the claimant to an attendance review meeting to be held on 3 June 2020. Again, this was to take place by video. The claimant was informed that the purpose of the meeting was to consider whether her continued absence may be supported or whether she should be dismissed.

87. The notes of the meeting of 3 June 2020 are at pages 229 to 235. Mr Moulson was in attendance with Kelly Pickersgill who acted as a note taker. Claire Fudge was also in attendance in order to provide HR advice. Mr Moulson explained that because one possible outcome of the meeting was dismissal, it needed to be chaired by an SEO hence his involvement. Mr Moulson introduced into the meeting the background history. This appears to be reasonably accurate. In particular, the claimant's attempts to work in February, May and September of 2019 were noted. He also introduced the attendance review meetings which had taken place on 17 April 2019, 11 July 2019, 6 February 2020 and 5 May 2020.

88. Mr Moulson also said that there had been informal contact by way of *"keeping in touch"* phone calls. However, these had reduced in frequency at the claimant's request. The claimant is recorded as saying that she felt supported by the respondent.

89. Attention then turned to the three occupational health reports which the respondent had commissioned, and the consideration given to the claimant's aspirations to return to work in April 2020. He then referred to his own decision to refuse the claimant's request to return to work at that stage.

90. After a review of her medical position, Mr Moulson asked the claimant whether she was undergoing any further treatments or medication. The claimant said that she was no longer taking anti-depressants. Herbal medication was helping her. She was still undergoing treatment under the care of her neurologists.

91. Mr Moulson was concerned that the claimant had not produced a fit note covering the period from 1 April 2020. The claimant explained that she had had difficulties obtaining one because of the pandemic. In the event, the claimant obtained a fit note dated 6 July 2020 certifying her as unfit for

work for the period between 1 April 2020 and 20 July 2020 (page 267). The GP said that the claimant "*should be fit to return to work from 20 July, she will require a slow phased return. I would advise no more than four hours a day on alternate days."*

92. Upon the question of adjustments, Mr Moulson confirmed that the claimant was able to wear a visor at work and that lights had been switched off around her desk. The claimant also raised the possibility of working from home and that consideration be given to the kind of work she would undertake. She said about working from home, that "*now things have changed due to Covid-19"* that *"this might benefit her." (page 232).* She also commented that she was aware "*that people have laptops due to the virus which would be a positive scenario if she can work from home."* Mr Moulson agreed that the minutes make no express reference to working from home or the provision of a laptop. He said in evidence that the position was understood by all and that the claimant would be working from home upon her return to work.

93. The note of the meeting of 3 June 2020 records that the claimant said that she was feeling a lot better and that "*if she looks back, it has been over a year, and compared with the middle and towards the end of last year, she is better now."* The disabling symptoms had reduced. She said that she was now in a position to accept a phased return to work over 13 weeks and anticipated that she would be able to increase from eight hours over that 13 weeks' period.

94. The notes record Mr Moulson asking the claimant *"whether the functional disorder has cleared."* The claimant replied that *"the disorder is not like a cold that comes and goes each year."* She said that it had been distressing for her that she was unable to work but she felt that she was now able so to do.

95. Mr Moulson expressed concern that there was no unequivocal indication of the claimant's ability to work. The claimant said that she was willing to contact her general practitioner and/or neurological consultants to confirm the position.

96. The claimant pointed out that she had not received any sick pay since around October or November 2019. Therefore, she had been impacted financially. However, she had given priority to her health.

97. After an adjournment, Mr Moulson said that he was taking a decision not to dismiss the claimant. However, he wanted the claimant to provide a fit note covering the period from 1 April 2020. As we have seen, the claimant did so. He also proposed commissioning a further OHS report.

98. Mr Moulson's letter to the claimant confirming the outcome of the meeting of 3 June was sent to her the following day. The letter is at pages 227 and 228. He made it clear that the decision not to dismiss was conditional upon the claimant providing a fit note to cover her absence from 1 April 2020. The claimant complied with this request. It was also subject to her GP and OHS confirming the claimant's fitness to return to work upon a phased return to work basis, increasing from eight to 16 hours per week over a maximum of 13 weeks.

99. Although the claimant did comply with Mr Moulson's request to supply a fit note from her GP, there was a delay in obtaining this. As we have seen, she did not manage to obtain it until July 2020. (Given the circumstances, Mr Moulson allowed the claimant an extended period to obtain the fit note).

100. The delay in the claimant obtaining a fit note was one of the reasons which led Mr Moulson to convene a further meeting with the claimant on 30 June 2020 (pages 258 to 263). It was at this meeting that the claimant explained the difficulties she had had in obtaining the fit note.

101. The agreement reached on 3 June 2020 had been for OHS services to obtain her specialist's opinion prior to the claimant being seen by the OHS physician. This plan was altered by agreement on 30 June 2020. It was agreed that Mr Moulson would now refer the claimant for an OHS appointment and then for the OHS doctor to seek medical evidence from the claimant's specialist. At the meeting of 30 June 2020, the claimant said that she was feeling better and that, in her view, she was fit to return to work. She said that she was happy with a return to work over a 13 weeks' period starting at eight hours per week and gradually increasing this to 16 per week.

102. Mr Moulson expressed concerns at the meeting about the claimant's apparent inability to obtain the necessary information from her GP. He said that he was concerned that if he gave the claimant "*more time to provide the information especially as the GP only works two days a week and she has a busy backlog of work."* The claimant replied that *"it isn't her fault if the situation drags on"* but was optimistic about getting the necessary note within two weeks.

103. In a follow up letter dated 1 July 2020 (pages 256 and 257) Mr Moulson confirmed that the claimant would obtain a fit note covering the period from 1 April 2020. He said that he was content for the respondent to continue to support her absence pending receipt of the GP evidence and to refer the claimant for an OHS appointment prior to the OHS doctor seeking further medical evidence from her specialist. He said that he would therefore initiate the OHS appointment as a priority.

104. The standard occupational health referral form was introduced into the bundle by the respondent on the fourth day of the hearing (19 November 2021). Amongst other things, Mr Moulson commissioned a report upon the claimant's fitness to work and eligibility for ill health retirement. He also ticked the box to indicate a need for consideration of existing adjustments to ensure continued effectiveness. The *proforma* then asks the referrer to provide background information on the reason for referral. Mr Moulson wrote as follows:

"Previous OHS report dated 28 02 20 offered to contact [the claimant's] specialist for a prognosis in determining fitness for future work. [The claimant] is content to give her consent for this but would like to discuss this with the OH doctor first. A key requirement of this OH referral is therefore to subsequently seek further medical evidence from [the claimant's] specialist, after the OHS doctor has discussed her current situation with her."

105. In a covering document as part of the referral, Mr Moulson wrote, *"Following the previous OH assessment of [the claimant] dated 28 February 2020, a meeting was held with [her] on 3 June 2020 to decide whether the business would continue to support her long term absence. The Coronavirus situation delayed that meeting from taking place sooner. During that meeting [the claimant] explained that she had improved in recent months such that she now felt able to return to work subject to a phased return of 13 weeks' duration, commencing at 8 hours per week spread over two days and building up to 16 hours per week spread over two days which would become her normal working pattern thereafter."*

106. Mr Moulson made reference to the original plan for the OHS doctor to contact the claimant's specialist for a prognosis to help in determining her fitness and that that had changed so that she was to be invited for an OHS referral before the OHS doctor contacted her specialist. Mr Moulson instructed that, "*The OHS will therefore need to confirm during the consultation with [the claimant] that she remains happy to provide her consent to contact her specialist, and confirm the name and address of the specialist the OHS doctor needs to write to."*

107. Mr Moulson also attached a brief *"AO caseworker job description".* The claimant's duties were there described as being:

- *"To make decisions on immigration applications, using a computerised case working system and accessing a range of applications and online sources to support that decision taking.*
- *Delivering productivity and qualitative targets on the number of immigration decisions made.*
- *The role is office based but since the outcome of Covid-19 caseworkers are required to work from home using laptops"*

108. The significance of the specialist neurological opinion was emphasised in an email which he sent to Clare Fudge on 2 July 2020 (page 264). He said that *"the key thing is obtaining the further medical evidence from her specialist."*

109. On 6 July 2020 Mr Moulson emailed Claire Fudge (page 266). He said that the claimant had provided the GP note to confirm her fitness for a phased return from 20 July 2020 and which also confirmed that she was not fit for work between 1 April and 20 July. Plainly, therefore, (as observed by Mr Moulson) the GP was engaging in a predictive exercise forecasting that she would be fit to work two weeks from 6 July 2020.

110. In the email of 6 July 2020, Mr Moulson proposed that the 13 weeks' phased return to work plan should run from 20 July 2020 with the commissioning of the OHS report to run concurrently with the claimant's return. Claire Fudge agreed with Mr Moulson's proposal. Mr Moulson then informed Aneka Ijaz and Vicky Broadhurst of the position later the same day (page 269). Mr Moulson said that he would "*drop [the claimant] a line to confirm the start date of 20 July and that a phased plan will be with her later this week/early next at the latest for her to review and agree".*

111. Within the timeline document to which we referred earlier (at pages 206 to 225) is a phased return to work plan agreed with the claimant on 9 January

2020. We can see this at page 223. This was a plan for the claimant to return to work in January 2020 increasing her hours from four during the first week up to 30 during the 10th week. (In fact, this plan never came to pass). However, the claimant confirmed that no plan similar to this was ever sent to her by the respondent in the summer of 2020.

112. Later on 6 July 2020, Mr Moulson emailed the claimant (page 272). He said that he had asked Miss Ijaz and Mrs Broadhurst to *"pull together a draft phased return for week commencing 20 July".* He informed the claimant that the phased return and the OHS actions will run simultaneously to enable the claimant to recommence work as soon as possible.

113. At 11:15 on 17 July 2020, Miss Ijaz emailed the claimant (page 275). She said that Mr Moulson had *"made me aware that you will be returning to work next week and so a laptop has been arranged for you to collect. They have already been in contact with you and there was some confusion regarding your OHS. The OHS is not linked to your return to work, and is being carried out to ensure that we can provide you with all the support necessary. The OHS and the phased return will run simultaneously*." A text message to similar effect was sent by Miss Ijaz to the claimant at 11:43 that day (page 276). (Mrs Broadhurst said that there was no difficulty with the provision of laptops form around the end of April 2020. Working from home had by then become the norm and sufficient laptops had been commissioned by the respondent to render this viable. Mr Moulson gave evidence corroborative of this). He accepted in cross examination that there was *"a deviation"* to that which had been agreed with the claimant concerning the sequencing of reports and her return to work.

114. It was a feature of the claimant's case that at no point was she informed that she could work from home. Mr Moulson confirmed that there was no documentary evidence that she was so told.

115. On 20 July 2020 the claimant emailed Miss Ijaz (page 278). She protested that there was no confusion on her part, there being no prior mention that the OHS process and the phased return to work were to run concurrently. She said, *"there seems to be this rush all of a sudden and I question myself what was the whole meaning/point of the last two intense meetings [of 3 June and 30 June 2020]."* The claimant said, "*I won't be returning without a[n] [OHS] report."*

116. Mr Moulson emailed Ms Fudge on 20 July 2020 (pages 279 and 280). He expressed concern about the claimant's stance. He said that the claimant was *"insistent the OHS must now take place (including obtaining information from her specialist to inform the OHS findings). I suspect we'll now have to let that process conclude before deciding next steps but it seems to me that in doing so there runs the risk that despite the GP note saying she is fit, the OHS dispute this which may risk the phased return taking place."* Claire Fudge agreed with Mr Moulson that the respondent now had little option but to allow the process to run and wait for the OHS report.

117. The Tribunal finds that at no stage did the claimant agree to a phased return to work concurrently with the commissioning of the OHS report. The Tribunal cannot see any record of the claimant having agreed to proceed

in this way within the minutes of the meetings of 3 June and 30 June 2020. At any rate, the Tribunal was not taken to any such record. Indeed, the gist of matters was very much that both parties wished to obtain OHS input upon the claimant's fitness to work before she returned. Further, and significantly, no mention is made in Mr Moulson's referral to OHS to the claimant agreeing to concurrent processes.

118. On 23 July 2020, Adel Taylor emailed Mr Moulson (page 281.2). She introduced herself. She then went on to say that the claimant had found *"many discussions with management and HR regarding her work"* to be "*stressful and upsetting because she feels there is a lack of understanding in relation to her return to work and the necessary adjustments in place for her."* Adel Taylor went on to say that she was *"concerned that this process is having a negative impact on [the claimant's] health, and I suggested to [her] that an alternative to returning to work may be to leave work via a settlement agreement."* The latter proposal did not meet with the approval of Claire Fudge who said to Mr Moulson (page 281.1) that there may nonetheless be scope for a compensation payment under the Civil Service Compensation Scheme were the claimant to be dismissed for *"medical inefficiency."* Mr Moulson expressed reservation about dealing with Ms Taylor absent evidence of written authority from her from the claimant. This was never supplied.

119. Dr Phillips" fourth report dated 21 July 2020 is at pages 284 and 285. By way of background, Dr Phillips reported that the claimant remained under the care of a specialist who said that she was pleased with the claimant's progress. The claimant was *"now managing to carry out more chores at home albeit in a piecemeal fashion, she suffers with severe fatigue and a recurrence of weakness in her legs and jerking of her limbs whenever she does too many activities in the day. She takes rest breaks between each activity to allow her to recover."*

120. Dr Phillips opined that, *"Whilst [the claimant] may be fit for work albeit with adjustments to support her at work including a prolonged phased return with reduced hours, adjusted workload and homeworking, she will need to discuss with you her current views regarding return to work. In regard to ill health retirement, for this to apply, she would need to be permanently incapable to undertaking her contractual duties. As she has been making a steady, albeit slow progress in regard to her recovery, it is difficult at this time to advise that she is permanently unfit for work."*

121. Dr Phillips concluded, *"I also note that you have requested for us to commission a report from her specialist regarding her health. Unfortunately, due to the Covid-19 pandemic, addressing requests for further medical evidence would not be a priority for GPs and specialists at this time therefore there would be significant delays in getting such reports. We are therefore not commissioning GP or specialist reports at this time."*

122. Mr Moulson accepted that no effort had been made to prevail upon Dr Phillips to seek to obtain a report from her neurologist Dr Grunewald or to at least enquire of him whether he would report. This was notwithstanding his acceptance in cross examination that it was open to him to take issue with a substandard report from the external OH provider.

123. On 6 August 2020, Mr Moulson emailed Claire Fudge (page 285.2). He took the view that Dr Phillips' fourth report "*doesn't add a great deal more than we otherwise knew especially as they say they'll not commission a specialist report due to the Covid situation."* Claire Fudge said that the next step was to arrange a further meeting with the claimant.

124. On 7 August 2020, Mr Moulson wrote to the claimant (pages 287 and 288). An attendance review meeting was convened for 20 August 2020. This was to take place by way of telephone call.

125. Mr Moulson told her that her employment with the respondent could be affected if her sickness absence could no longer be supported.

126. The day before the sickness absence review meeting was scheduled, Mr Moulson received an email from Adel Taylor. The email is at page 289.2. The salient parts read as follows:

"[The claimant] is experiencing ongoing symptoms from her health condition, and I am concerned that taking part in the meeting will have a negative impact on her symptoms. I have therefore advised her not to attend tomorrow's meeting, and I [am] emailing with [the claimant's] consent to ask that the meeting goes ahead in her absence.

I understand there have been several similar meetings, although perhaps at different stages along the formal procedure route. [The claimant] has also corresponded extensively via email in order to update you on her situation and give her input on how her symptoms affect her and how best she could manage them if she returns to work. [The claimant] and I have discussed whether there is anything more that she feels she can bring to these discussions, and we both feel that there is little more that [the claimant] can say that she hasn't already said. [The claimant] finds that she generally feels exhausted after this type of meeting, and this increases her symptoms. Therefore on balance, I believe that holding the meeting in [the claimant's] absence is likely to have a less detrimental effect on her wellbeing than if she were to attend the meeting as she is unlikely to be able to add anything new to the meeting".

127. Mr Moulson decided to proceed with the meeting in the claimant's absence on 20 August 2020. The minutes are at pages 294 and 295. Kelly Pickersgill (in the capacity of notetaker) and Claire Fudge (in her capacity of HR manager) were also in attendance. Mr Moulson reviewed progress to date.

128. The minutes, according to Mr Moulson, constitute the evidence of the matters taken into account in decision-making process (together with the decision letter at pages 291 and 292). In particular, he made reference to Dr Phillips' fourth report. He says that this stated that while the claimant "*agreed she would return to work, she was now reviewing the decision and wanted to discuss this further."* Dr Phillips did not in fact say that the claimant was reviewing her wish to return to work. What she said (in the first paragraph on page 285) has been cited above in paragraph 120. There was no reference there to the claimant changing her mind about her wish to return to the workplace but only to a recommendation to seek her views about returning to work. This was a rather ambiguous statement which called for exploration with the claimant.

129. Mr Moulson took account of Adel Taylor's email of 19 August 2020 to the effect that the process was having a negative effect upon the claimant's health and that the claimant had advanced (through Adel Taylor) on 23 July 2020 of a suggestion of ending her employment by way of a settlement agreement. Upon this basis, Mr Moulson expressed himself satisfied that the claimant was not *"in a robust state of health to return to work and provide a level of service required that the business can support."* He made no reference to the career break issue, taking the view that the claimant may not be granted one as she was subject to the attendance management policy. He did not consider the provision of a career break as an adjustment to aid the claimant's return to work.

130. Mr Moulson wrote to the claimant on 20 August 2020 (pages 291 and 292). He confirmed that after taking into account all relevant information he had decided to terminate her employment with the respondent upon the basis that the claimant was unable to return to work within a timescale which he considers reasonable. He said the claimant was entitled to seven weeks' notice. However, she was not required to work out her notice period. She would be paid a sum *in lieu* of notice. The date of termination was therefore 20 August 2020. The claimant was afforded a right of appeal. He mentioned the possibility of her being paid 100% compensation under the Civil Service Compensation Scheme.

131. The claimant did not appeal against Mr Moulson's decision. Essentially, her position (as she put it before the Tribunal) was that she had no faith in the respondent. She feared that an internal appeal manager would not look at matters impartially and she chose to go down the *"ACAS and Tribunal route".*

132. The letter of dismissal was in fact emailed to the claimant towards the end of the working day on 20 August 2020. The claimant responded on 26 August 2020 (page 300). The claimant said that "*It has been a difficult road, and would like to personally thank you [Mr Moulson] for your quick response on the efficiency compensation."* Mr Moulson directed the claimant to the relevant source of information about the Civil Service Compensation Scheme (page 299). Steps were put in hand to by the respondent to apply for such a payment straightaway: page 297.1.

133. The claimant said, in evidence given under questioning from the Tribunal, that she had been led to believe that she would receive efficiency compensation in the sum of £37000. She was notified of this after she had been dismissed. She says that she was informed that this was the figure which she may expect to receive from somebody within Civil Service Pensions. That individual apologised to her for the erroneous information. The efficiency payment paid to the claimant was £3,324.07.

134. On 13 October 2020 the claimant emailed Mr Moulson (page 301.2). Her view of matters appeared to have changed as she said that she was *"disgusted with the whole situation*" after having been informed by the Civil Service Pension Scheme administrator that they had not been informed of her dismissal. She also said that she had found out that *"you guys have already requested an estimate [of compensation] back in January 2020."* She complained that she found that, "*absolutely disgusting. I was in the middle of my treatment and there was no discussion of dismissal at that*

point. At that point I couldn't even walk and you guys were already pre-planning a dismissal."

135. It appears from the exchange of emails between Claire Fudge and Mr Moulson of 13 October 2020 (at page 301.1) that there is no dispute that an estimate was commissioned in January 2020. Claire Fudge said that the estimate was requested after receipt of the occupational health report (presumably of 13 November 2019) stating that it would be two or three months before consideration could be given to the claimant commencing a return to work.

136. Mr Moulson wrote to the claimant to this effect on 14 October 2020 (page 303). He said that this was common practice and was not an indication of pre-judgment. The claimant in fact was awarded 100% compensation under the Civil Service Compensation Scheme. Such will be awarded in incapacity cases where the employer is satisfied that the employee has made reasonable efforts to return to work and no fault can be ascribed.

137. The following emerged from the evidence given by the claimant under cross-examination:

(1) Following upon the claimant's unsuccessful attempts to return to work on 13 and 15 May 2019 and given the content of Dr Phillips' report of 30 May 2019 (pages 100 to 102), she accepted that at that stage there were no reasonable adjustments which the respondent could have been made which came with a reasonable prospect of alleviating the disadvantage caused to her by her disability such that there was a reasonable prospect of her returning to work.

(2) The prospect of the claimant returning to work upon a phased return basis during the autumn and winter of 2019 did not materialise.

(3) Based upon Dr Phillips' report of 13 November 2019, realistically, there was no prospect of the claimant returning to work prior to the end of 2019.

(4) The claimant said that her focus was, naturally and understandably, upon her regaining her health. It is for this reason that she requested less contact from work. This request was made towards the end of 2019. In fact, there is an entry of 31 October 2019 (within the timeline document commencing at page 206) recording the claimant's wish not to be contacted upon a weekly basis. The claimant said that she requested monthly contact instead and fairly agreed that the respondent had acted upon this request and that the contact from the respondent had been less frequent.

(5) The claimant said that she had at no stage agreed the phased return plan compiled in January 2020 which we can see in the timeline document at page 223. She said that she would have had to check whether such was feasible in consultation with her GP.

(6) Mr Smith asked the claimant whether the respondent had asked her to put in writing her proposal for an unpaid break. The claimant replied that the respondent had made that request. However, she said that

the issue had not been raised again after 6 February 2020 because of the pandemic.

(7) The claimant said that she had been informed by the respondent that working from home was not an option (prior to the pandemic0. We have seen from page 166 (also reproduced in the bundle at page 459) that the claimant placed this upon the record: that the respondent wished for her to return to work as part of her team. Mr Smith then asked the claimant whether the respondent should have allowed her to work from home before the onset of the pandemic. The claimant replied, *"no, I'm not saying that at all."*

(8) It was put to the claimant that in her report of 28 February 2020 (at page 159) Dr Phillips had not said that the claimant was fit to work from home at that stage. The claimant appeared to accept this. She said, "*I had just completed my rehabilitation period."*

(9) The claimant maintained that the provision of a laptop coupled her with the ability to work from home could have avoided the situation culminating in her dismissal. (It was not clear when she gave this evidence to which period the claimant was referring, but we presume it is to the period after the turn of the year 2019/20 given that she accepted an inability to work prior to 2020). What is not in dispute is that the respondent was prepared only to allow the claimant to return to work following Dr Phillips' final occupational health report of 21 July 2020 (at pages 284 and 285) and that the claimant was also of the view that she would not return until declared fit by Dr Phillips and Dr Grunewald.

(10) It was put to the claimant that all caseworkers were required to work in the office and not from home prior to *Covid-19.* This the claimant disputed. She said that a number of colleagues were allowed to work from home before the claimant fell ill in February 2019.

(11) The claimant was taken to texts between her and Miss Ijaz. There are several tranches of these within the bundle. Those commencing at page 114 date from September 2019. Those within the bundle commencing at page 132 date from the end of October 2019. Those within the bundle commencing at page 175 date from December 2019 and January 2020. It was put to the claimant that nothing said by Miss Ijaz could be categorised as oppressive in nature. The claimant appeared to accept this. She said that the texts are *"part of the conversation"* but said that to give full context reference should be made to the emails around the time. The claimant said that she had asked to reduce the amount of contact. This is the case as appears from the timeline document and was acted upon by the respondent.

(12) Mr Smith suggested to the claimant that there were security implications of allowing an employee to work from home. The claimant said that she was *"100% certain"* that others had been allowed this facility prior to the onset of the pandemic. She said that there were around 3000 employees working at Vulcan House who are now working at home. She was confident that the vast majority of those would have not undergone any kind of security vetting as suggested by Mr Smith.

(13) The claimant did not accept that until February 2020, much of the work undertaken by her was paper based. She said that the computer system ATLAS had been in place for a number of years and the reliance upon paper was reducing.

(14) The claimant accepted that her GP had, on 6 July 2020, assessed the claimant only as being fit to work with effect from 20 July 2020. The claimant did not seek to contend that her GP or Dr Phillips had made incorrect assessments of her.

(15) The claimant took issue with the suggestion advanced by Mr Smith on the respondent's behalf that after 20 July 2020 the situation was *"green to go".* The claimant described the situation as being *"on amber",* pending receipt of the OHS report. The claimant suggested that the respondent was seeking to cut corners in running the two processes simultaneously. Under questioning from the Employment Judge, the claimant said that she was prepared (once certified as fit to work) to build up from 8 to 16 hours a week over the 13 weeks' phased return to work period permitted by the respondent's policy, undertaking tier 2 cases only and working from home and that working from home obviated the need to consider a change of team.

(16) The claimant accepted that it was in her contemplation to leave work pursuant to a settlement agreement. She said that Adel Taylor had provided her *"with options".* She denied having decided to leave employment or of having made any decision upon it by mid-August 2020.

(17) Mr Smith asked the claimant to surmise how an unpaid leave of absence would work in practice. He suggested that at some point the claimant would inevitably come up against a deadline which may trigger stress. The claimant said that a period should have been allowed to enable her to *"recoup".* The claimant denied telling Dr Phillips, prior to the preparation by her of the fourth report of 21 July 2020, that she had resolved to leave the respondent's employment. She said that she had told Dr Phillips that *"my brain felt scrambled".*

(18) The Employment Judge asked the claimant what was stopping her from returning to work in or around September 2019. The claimant replied that she "*felt exhausted. Had I just been given a year off I'd be in a better position".*

(19) The claimant said that she felt unable to approach the respondent with a view to postponing the meeting scheduled for 20 August 2020. She said that she *"didn't feel I wanted to speak to Nick Moulson to ask for more time."* She went on to say that she, *"didn't want to sit through another lengthy meeting."* That said, she considered herself fit to work in August 2020. In her view, Mr Moulson *"should have followed up and asked for a postponement and checked upon my welfare."*

(20) The claimant denied that Mr Moulson had all of the relevant up to date medical information before him when he made the decision to dismiss her. She said that he was without the specialist's opinions *"that he couldn't get due to the pandemic. He could have waited."* When asked what difference it would have made had he done so, the claimant

replied, *"I was under the care of three neurosurgeons. They were impressed with my progress. Occupational health services are not experts in neurosurgery".* The claimant accepted that she was aware that Dr Phillips did not have specialist opinions before her when Adel Taylor wrote on 19 August 2020.

(21) Upon the question of the email of 26 August 2020 at page 300, the claimant denied explicitly or implicitly saying that she was unable to come back to work in the foreseeable future. That said, the claimant did express regret upon the content of the email, in particular her expression of agreement with the decision taken by Mr Moulton.

(22) It was suggested to the claimant that a significant period of further unpaid absence was unrealistic by July 2020. The claimant maintained that this adjustment ought to have been made from September 2019 which would have given her the opportunity of recuperating. She rejected the suggestion from the respondent that it was inconceivable that should that facility have been offered to her that there would be no contact for a period of a year.

138. One of the several areas where there is a significant dispute of fact is the claimant's allegation that in or around November 2019, Vicky Broadhurst laughed at the claimant and asked, "*what are they going to do, put your legs up in the air?"* when a discussion between the parties turned to the topic of physiotherapy. Upon this issue, Vicky Broadhurst says in paragraph 6 of her witness statement that, based upon the timeline document commencing at page 206, the only reference to physiotherapy was during the course of a keeping in touch call which took place on 31 October 2019. She acknowledged the need to deal with the claimant sensitively given the circumstances. She commented that the claimant was always in a heightened emotional state. We observed earlier that on 16 August 2019, she had expressed concern for her job. Her anxiety was entirely understandable.

139. Mrs Broadhurst denied using the words attributed to her by the claimant. Her evidence (in paragraph 6 of her witness statement) is that she *"said something like 'I don't think it will be the kind of physiotherapy where they tie you in knots, it will be a gentle one to keep your limbs moving.'"* She goes on to say that *"We may well have all laughed after I said this, but the tone of the conversation was supportive and that at no time was I laughing at [the claimant's] illness."* Mrs Broadhurst says that she suffers from neurological problems herself and would not have made light of the claimant's condition. In paragraph 1 of her witness statement, Mrs Broadhurst described the claimant as *"a work friend, we were not close and didn't socialise out of work, but we would for example stop for a chat at the tea point. During the time I worked with [the claimant] I was never aware that there were any issues between the two of us."* The claimant maintained that her relationship with Mrs Broadhurst was a *'polite professional relationship'* (as it was put by Mr Tinnion) and not a close as Mrs Broadhurst believed it to be. Mrs Broadhurst accepted there to be a difference of opinion upon this issue.

140. Mrs Broadhurst accepted that the claimant was not '*light- hearted or jokey*' in her demeanour at work. She acknowledged the difficult time which the

claimant had gone through and her anxiety. She accepted that she had laughed at several points in the meeting but denied laughing at the claimant or her condition. She fairly accepted that had she said, "*what are they going to do, put your legs up in the air?"* when the discussion between the parties upon 31 October 202 turned to the topic of physiotherapy it would be reasonable for the claimant to consider this to be upsetting.

141. For her part, Miss Ijaz says that she was present during the call on 31 October 2019. She has no recollection of Mrs Broadhurst using the *"legs up in the air phrase"* (as Miss Ijaz put it). She does recall the claimant introducing the topic of physiotherapy and Mrs Broadhurst making a comment about it. However, she cannot remember what Mrs Broadhurst said.

142. In her grounds of claim (copied into the bundle at page 16), the claimant does not provide a date upon which Vicky Broadhurst made this comment. Her pleaded case is that *"there was laughter as Vicky could not understand why I was having physio stating "what they going to do put your legs up in the air". I was shocked and explained to Vicky that she should do more research as it is not that kind of physio, I was very upset by this comment."*

143. During the course of the case management discussion held on 11 May 2021, the claimant identified the comment as having taken place *"over the telephone in about November 2019."*

144. In connection with these proceedings, the claimant prepared a *"response to respondent's timeline".* This commences at page 430. The date of the incident is given there as 31 October 2019. The claimant correctly observed when she was cross-examined upon this issue that 31 October 2019 was not a date which emanated from her but from the respondent

145. Mr Smith then took the claimant to the tranche of texts commencing in October 2019. These are in the bundle commencing at page 132. A duplication of them also appears in the bundle commencing at page 488. On 6 November 2019 the claimant texted Miss Ijaz. She said that she wished to speak to Miss Ijaz alone and for Mrs Broadhurst not to be in the room. In notes which the claimant said that she had prepared for this case (pages 519 and 520) she says that she made this request of Miss Ijaz because *"a day prior to this Vicky Broadhurst made the comment of "what are they going to do put your legs in the air."* The claimant does not say that Vicky Broadhurst made this comment the day before her text of 5 November 2019.

146. On 1 November 2019, the claimant texted Miss Ijaz. A copy of the text is at pages 133 and 134. The claimant was complaining that her condition had wrongly been *"listed as anxiety and depressed and mental health issues"* as opposed to FND. As we can see from the text at page 135, the claimant requested only to speak directly with Miss Ijaz and not with Mrs Broadhurst. She wanted Mrs Broadhurst to be excluded from the room. The claimant did not in the text complain to Miss Ijaz about the allegedly offensive remark made by Mrs Broadhurst. On the other hand, there was plainly some sensitivity over a work-related issue causing the claimant to request the exclusion of Vicky Broadhurst from discussions between the claimant and Miss Ijaz. Mrs Broadhurst said that she had been told by Mis

Ijaz that the claimant did not welcome her continued involvement immediately after the meeting of 31 October 2019.

147. Mrs Broadhurst accepted that something had precipitated the claimant's objection to her continued involvement. It was not until she gave evidence under re-examination that she raised the possibility of it being connected with the mis-recording of her absences.

148. Looking at Miss Ijaz's timeline, the next entry after 31 October 2019 is 6 November 2019 (page 222). She records the claimant as complaining on that day about having to explain herself every time she speaks to her or Mrs Broadhurst. Miss Ijaz made no record of Mrs Broadhurst making an untoward remark.

149. The claimant denied that the request to speak to Miss Ijaz to the exclusion of Mrs Broadhurst was related to the mischaracterisation by Mrs Broadhurst of the nature of her illness. While the claimant had to accept that there is no reference in page 222 to a record of an untoward remark, she astutely observed that those were not the claimant's notes and that Miss Ijaz and Mrs Broadhurst would hardly *"put themselves in jeopardy".* To that degree, the note is self-serving. A similar point was made about the subsequent entries upon that page for 18 November and 4 December 2019. The claimant asked rhetorically why she would mention the matter again to Miss Ijaz on those days having done so, on her case, shortly after 31 October 2019.

150. The claimant accepted that she had not raised the issue with Mr Moulson at any stage. She attributed this to a wish to concentrate upon her health. She also accepted that she had raised no grievance about the matter. She said that she did not want to *"go down the HR route".*

151. Another of the issues upon which there is a conflict of evidence is upon the claimant's allegation that Mr Moulson asked in a meeting in June 2020 whether the claimant's condition *"has gone yet?"*

152. In her witness statement (in paragraph 35), the claimant says that *"my disability was discriminated against as if I had a cold/flu with remarks such as "has it gone yet?".* An observation very similar to this in fact appears within the respondent's attendance management meeting notes of 3 June 2020. We have referred to this already in paragraph 94. It will be recalled that Ms Pickersgill, the note taker, recorded Mr Moulson as asking whether the functional disorder *"has cleared"* and the claimant commenting that it is *"not like a cold that comes and goes each year."*

153. Mr Moulson denied using the phrase *"has it gone yet?"* He said that he had looked at the minutes of both of the meetings that he had with the claimant in June 2020 but was unable to find reference to such a phrase within the minutes.

154. Mr Moulson said in evidence that he would not use such a flippant remark about so serious a matter. It was suggested to Mr Moulson by Mr Tinnion that the claimant's responses to the effect that the FND was not like a cold, and she had not *"clicked her fingers and the disorder has gone"* were *'spiky and defensive"* (as Mr Tinnion put it) and thus had been provoked by something said by him.

155. The Tribunal notes that the minutes of the meeting of 3 June 2020 were sent to the claimant on 4 June 2020 (pages 227-228). The claimant emailed Mr Moulson on 12 June 2020 (page 236) but she did not take issue with the record in the notes about this matter.

156. In paragraph 8 of his witness statement, Mr Moulson expressed his regret about asking the claimant, at the meeting of 30 June 2020, whether she could give him reassurance that the situation would not *"drag on"* for a further two weeks. Mr Moulson says that "*with the benefit of hindsight, the term "drag on" could have been perceived as insensitive and was not the right word to use in the situation."* He observed that in fact the word *"drag"* is not attributed to him in any case. Indeed, as we saw in paragraph 92 the word *'drag'* emanated from the claimant. (It is a little confusing that Mr Moulson now accepts that he said this whereas the notes do not record him asking this question).

157. The other significant area of dispute between the parties is upon the issue of whether there was ever a discussion about disabled parking passes, the commissioning of taxis to and from work or the need for assistance with walking to and from the office from the car in which the claimant was transported to and from work. Mrs Broadhurst denied any discussion of these issues. She says in paragraph 17 of her witness statement that, "*It was my understanding that she was not well enough to work, not that the issue stopping her returning was getting to and from work."* She says in paragraph 18 of her witness statement that, *"The big problem we had with making alterations to assist (the claimant) in returning to work was that we couldn't implement adjustments as she wasn't well enough to return to work for any length of time."*

158. Miss Ijaz gives a similar account in paragraph 11 of her witness statement. She says that the claimant "*never suggested to me that there was a difficulty with getting into work, her partner or her dad dropped her off, she never mentioned parking spaces being an issue. [The clamant] had told me she couldn't drive because of her shaking and jerking, having seen it first-hand I wasn't surprised. [The claimant] never mentioned that a taxi would have helped, as far as I was aware the problem wasn't that she couldn't get into work, the problem was that she wasn't well enough to work."*

159. The issue of transportation and parking was ventilated with the claimant during cross-examination. There was in fact no evidence led by her to the effect that she needed a parking pass or a parking bay.

160. The claimant said that she had obtained a blue badge from the local authority in October 2019. She was unable to drive for a period of around a year between February 2019 and March or April of 2020. She accepted that she had not requested the respondent to provide a taxi for her when she attempted a return to work in September 2019. She had relied upon her father for lifts to and from work.

161. The claimant made a reasonable point that placing reliance upon her father placed an unreasonable burden upon him. She said that the respondent should have taken the initiative and thought about arranging transportation for her. Upon the question of a parking bay, she said that one should have been reserved for her "*for the future".*

162. The situation was a little unclear as neither party led any evidence about parking arrangements. However, as we understand it, a small number of parking bays are available which adjoin the building. The respondent also has spaces in a commercial car park near to the office. The claimant's case was that a bay ought to have been reserved for her use when she was fit to return to work. The claimant accepted that when her father brought her into work during September 2019, she needed assistance to go to and from his car in and out of the workplace.

163. It is worth now citing passages from Mr Moulson's supplementary witness statement.

164. In paragraph 2 he says, *"Prior to the Covid-19 pandemic, homeworking with laptops was only undertaken by managers on an ad hoc basis, and with prior agreement with their managers. Leading up to 2019 there was an increasing phasing out of paper applications as new technology and processes enabled the information from applicants to be captured electronically. In addition, the CID case working database was gradually being replaced with a new working database called ATLAS that also made homeworking feasible for caseworkers. However, in 2019 there remained no remote working guidance or policy in place to support work in this way and as such caseworkers were not permitted to work from home. A policy was being worked up with a view to implementing homeworking more generally, including caseworkers, but this was not in place until the Covid-19 pandemic necessitated homeworking by everyone." [We interpose here to say that Mr Moulson's evidence about phasing out paper applications corroborates the claimant's account upon this recorded in paragraph 137 (13)].*

165. In paragraph 3 he goes on to say that "*In August 2019 a pilot was initiated to look into the feasibility of homeworking, for example, how it affected the output of caseworkers, working patterns and the wellbeing of participants when working remotely. The first pilot was encouraging and therefore a second pilot followed to assess results further. During this time there was no remote working guidance or policy and procedures in place for caseworkers and it was not open for caseworkers other than those involved in the pilot to homework. It was intended to develop the initiative further in 2020 and to provide data that would support the necessary remote working guidance, but the Covid-19 pandemic began which meant that from late March 2020 caseworkers had to work from home as a matter of necessity."*

166. Upon his decision to dismiss the claimant Mr Moulson says the following in paragraph 5 of his witness statement:

"Following the referral of the claimant's case to myself to consider whether she was fit to return to work, I did not consider the claimant was fit until such point as the claimant provided a fit note from her GP. This was provided on 6 July 2020 and confirmed the claimant would be fit to work on a slow phased return from 20 July 2020, therefore at that point I considered the claimant would be fit to work from 20 July. However, the claimant did not commence that phased return as on 20 July 2020 she notified her line manager, Aneka Ijaz, that she would not return to work until she had spoken to the OHS doctor. In the OHS meeting on 21 July

2020 the OHS doctor reported that the claimant said that she had initially agreed with her employers to return to work but she was now reviewing this decision and would need to discuss that further. This was followed by an email from Adel Taylor of the Sheffield Occupational Health Advisory Service (SOHAS) on 23 July 2020 who spoke of the negative impact on the claimant's health the process was having and enquired whether an alternative to the claimant returning to work would be to leave her employment via a settlement agreement. This was forwarded on 19 August 2020 with a further email from Adel Taylor one day prior to a meeting I had arranged with the meeting to discuss her OHS report and to decide if the business would continue to support her absence. Adel said the claimant was experiencing ongoing symptoms from her health condition and was concerned that taking part in the meeting would have a negative impact on her symptoms. Adel confirmed the claimant gave her consent for the meeting on 20 August 2020 to take place in her absence. Although no further fit note was received from the claimant's GP, the information from the most recent OHS report and the information from Adel Taylor suggested that the claimant's health was not as sufficiently robust as initially hoped for to enable her to return to work. As it was not possible to discuss the matter further direct with the claimant because of the adverse symptoms she was experiencing, and as set out in the email from Adel, I could see no prospect of the applicant returning to work within a reasonable timeframe."

167. It may be thought surprising that the important evidence contained in paragraphs 2, 3 and 5 of his supplemental witness statement was omitted from Mr Moulson's first witness statement.

168. The following evidence emerged from the cross-examination of Vicky Broadhurst:

168.1. She had not considered the respondent's reasonable adjustments policy (introduced into the hearing bundle in February 2022) when she was dealing with the claimant's case.

168.2. Mrs Broadhurst did not dispute that during the time of her direct involvement in the matter she was subjected to a duty to make reasonable adjustments in accordance with the policy and that the respondent was subjected to the same duty throughout.

168.3. Clause 16 of the policy (at internal page 9) sets out a number of factors to determine the reasonableness of adjustments. There is no requirement for requests for adjustments to be put in writing nor for adjustments contemplated to be confined to those within the respondent's policies.

168.4. Mrs Broadhurst accepted that allowing an employee to work from home may be a reasonable adjustment. Such is contemplated in clause 17 of the policy (at internal page 10).

168.5. Mrs Broadhurst steadfastly repeated on a number of occasions that the respondent's hands were tied pending the claimant being fit to work. She said that the claimant was not fit for work during the time when she was involved. It was her position therefore that there were no reasonable adjustments which she could make to facilitate

the claimant's return to work. Turning to the issue of career breaks, it was suggested to Mrs Broadhurst that pursuant to the special leave policy and procedure of November 2019, career breaks are a form of unpaid special leave. She accepted that the claimant met the criteria in clause 2 in that she had passed her probationary period and had completed at least two years of service. Special leave may be granted to enable an employee to undertake certain activities or in special circumstances. It may also be planned or unplanned, paid or unpaid.

168.6. Mrs Broadhurst maintained that the claimant was not entitled to take advantage of a special leave policy because she was subjected to attendance management.

168.7. It was suggested to Mrs Broadhurst by Mr Tinnion that there was nothing in principle to prevent the respondent, as an adjustment, from allowing the claimant to take special leave even if she was under attendance management. Otherwise, it was suggested, the claimant would be unable to escape the attendance management policy. Mrs Broadhurst accepted this in principle but said that ultimately this would not be her decision to make. Mrs Broadhurst pointed to clause 33 of the special leave policy as endorsing her position that a career break was inapplicable to those undergoing attendance management action. Nonetheless, she conceded that a career break or special leave was an alternative to the attendance management policy as a reasonable adjustment if the circumstances were appropriate.

169. The following evidence emerged from the cross-examination of Mr Moulson:

169.1. As with Vicky Broadhurst, Mr Moulson was of the view that the claimant may not be granted a period of special leave or a career break because she was under the attendance management policy.

169.2. Mr Moulson accepted that an exception may be made if the circumstances warrant (such as in a disability case). However, he said that such a decision would be for a manager in a higher grade. He would therefore have to escalate such a matter for consideration.

169.3. Mr Moulson said that he had never known such an exception to be made. He said that he would not consider making an exception to allow the claimant a period of special leave or a career break for recuperation unless he had received advice from the human resources department that such was possible.

169.3. When asked whether this should have been considered by him, Mr Moulson said that he would *"find it strange to advise someone to apply outside the policy. As a manager, you would not go outside the policy".* He said it was outside *"my remit"* to stray outside the confines of the policy.

The issues in the case

170. In her record of a preliminary hearing held on 11 May 2021, Employment Judge Buckley set out (in paragraph 24 of the record of the hearing) the issues to be determined in the case. These are as follows:

1. ***Unfair dismissal***

1.1 What was the reason or principal reason for dismissal? The respondent says the reason was capability (long term absence).

1.2 If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.2.1 The respondent genuinely believed the claimant was no longer capable of performing her duties;
1.2.2 The respondent adequately consulted the claimant;
1.2.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
1.2.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;
1.2.5 Dismissal was within the range of reasonable responses.

2. ***Remedy for unfair dismissal***

2.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.1.1 What financial losses has the dismissal caused the claimant?
2.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
2.1.3 If not, for what period of loss should the claimant be compensated?
2.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.2 What basic award is payable to the claimant, if any?

3. ***Disability***

3.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

3.1.1 Did she have a physical or mental impairment: functional neurological disorder (FND)?

3.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

3.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

3.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

3.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

3.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

3.1.5.2 if not, were they likely to recur?

4. *Direct disability discrimination (Equality Act 2010 section 13)*

4.1 Did the respondent do the following things:

4.1.1 Vicky Broadhurst laughed and stated 'what they going to do, put your legs up in the air?" over the telephone in about November 2019.

4.1.2 Nick Moulson, even though he should have been aware of the nature of the claimant's condition, asked 'has it gone yet?' in a meeting in June 2020.

4.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who s/he says was treated better than she was.

4.3 If so, was it because of disability?

4.4 Did the respondent's treatment amount to a detriment?

5. *Discrimination arising from disability (Equality Act 2010 section 15)*

5.1 Did the respondent treat the claimant unfavourably by:

5.1.1 Vicky Broadhurst laughed and stated 'what they going to do, put your legs up in the air?" over the telephone in about November 2019.
5.1.2 Nick Moulson, even though he should have been aware of the nature of the claimant's condition, asked 'has it gone yet?' in a meeting in June 2020.
5.1.3 Dismissing the claimant

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

5.2.1 The claimant's symptoms, including, inter alia, the effect on her ability to walk and the fact that she was undergoing physiotherapy (5.1.1 and 5.1.2);
5.2.2 The claimant's inability to undertake work as normal and/or her disability related absences from work (5.1.2 and 5.1.3).

5.3 Was the unfavourable treatment because of any of those things?

5.4 Was the treatment a proportionate means of achieving a legitimate aim?

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the claimant and the respondent be balanced?

5.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6. *Reasonable Adjustments (Equality Act 2010 sections 20 & 21)*

6.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

6.2.1 A practice that case workers would work on a number of different case types (approx. 4-5 or more);

6.2.2 A practice that case workers' workload would include indefinite leave to remain cases, which were complicated cases;
6.2.3 A practice that case workers would work in a room with other people;
6.2.4 A requirement that case workers in the claimant's team would work in the office (and not from home);
6.2.5 A requirement that the claimant work in her ordinary team rather than in a team which accommodated working from home;
6.2.6 A requirement that those on sick leave would return to work within a reasonable period or face absence management and ultimately dismissal;
6.2.7 A requirement that employees would maintain acceptable levels of sickness absence under their absence management policy;
6.2.8 A practice of contacting employees for regular and/or weekly updates during sick leave;
6.2.9 A practice that a phased return would last for no longer than 13 weeks?

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:
6.3.1 The claimant could not take in as much information at one time as she would have been able to without FND (6.2.1 and 6.2.2);
6.3.2 The stimulation of a busy room could bring on her symptoms and affect her balance (6.2.3);
6.3.3 The claimant was unable to drive and had to rely on other people to drive her to work. Her condition affected her balance and her ability to work, and she did not yet have a disabled parking pass and it was difficult for her to walk the distance from the parked car to work. (6.2.4, 6.2.5);
6.3.4 The claimant's condition caused the claimant's absences from work (6.2.6, 6.2.7);
6.3.5 The frequent contact from the respondent caused disruption to her treatment because she was unable to focus on her health and concentrate on the recovery programme (6.2.8);
6.3.6 Increasing the claimant's hours to normal hours within a 13 week period was too fast and would be likely to lead to a relapse. She needed a slower pace of increase in order for the increase to be sustainable. She had to think about every normal activity which led to tiredness and exhaustion (6.2.9)?

6.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

6.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

6.5.1 Allowing her to work on one case type at a time (6.2.1). This was refused on or around 6 February 2020;

6.5.2 Allowing her not to work on indefinite leave to remain cases (6.2.2). The claimant requested this in about January 2020. To the best of her recollection the respondent did not reply to this suggestion;

6.5.3 Allowing the claimant to go to work in a separate room alone as and when needed (6.2.3). This was initially refused in about May 2020 but discussed further in a meeting in June 2020;

6.5.4 Allowing the claimant to work from home (6.2.4). This was refused in about January 2020;

6.5.5 Moving the claimant to a different department where she could work from home (6.2.5). This was refused on or around 6 February 2020;

6.5.6 Providing a taxi to take the claimant to and from work (6.2.4). This was not requested by the claimant.

6.5.7 Allow the claimant an unpaid break/career break (6.2.6 – 6.2.8). This was refused on or around 6 February 2020;

6.5.8 Reduce the frequency of contact to, for example, a monthly basis (6.2.8);

6.5.9 Exercise their discretion to allow a longer phased return period. This was refused at some point prior to June 2020 (6.2.9)?

6.6 Was it reasonable for the respondent to have to take those steps and when?

6.7 Did the respondent fail to take those steps?

7. ***Harassment related to disability (Equality Act 2010 section 26)***

7.1 Did the respondent do the following things:

7.1.1 Vicky Broadhurst laughed and stated 'what they going to do, put your legs up in the air?" over the telephone in about November 2019.

7.1.2 Nick Moulson, even though he should have been aware of the nature of the claimant's condition, asked 'has it gone yet?' in a meeting in June 2020.

7.2 If so, was that unwanted conduct?

7.3 Did it relate to disability?

7.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

8. **Remedy for discrimination.** *[We shall not list the issues that arise upon remedy as these were superseded in directions given by the Employment Judge on 26 July 2021]*

171. Upon the issue of remedy, the Employment Judge directed upon the first morning of the hearing that the remedy issues identified in Employment Judge Buckley's Order shall not be determined by the Tribunal at the hearing listed in November 2021 save for any issue that arises from the application of the principles in the case of ***Polkey v A E Dayton Services Limited*** [1987] IRLR 503 HL should the Tribunal determine that the claimant's dismissal was unfair.

The relevant law

172. We now turn to a consideration of the relevant law. We shall start with the law as it relates to the claimant's complaint of unfair dismissal. There is no dispute that the claimant was dismissed by the respondent. That being the case, it falls to the respondent to establish one of the statutory permitted reasons for the dismissal of an employee.

173. The relevant permitted reason in this case is that to be found in section 98(2)(a) of the Employment Rights Act 1996. This is a reason which relates to the capability or qualifications of the employee for performing work of the kind which they were employed by the employer to do.

174. Capability in role encompasses performance issues and sickness issues. It is the latter with which we are concerned in this case.

175. The burden of proof is upon the employer to show a potentially fair reason for the employee's dismissal. They must show that they had a genuine belief that the claimant was incapable of performing the role which she was employed by them to do.

176. Should the respondent discharge this burden, then the role of the Tribunal is to consider whether the employer's decision to dismiss the employee for that reason was a reasonable one. The Tribunal must consider whether the conclusion reached was reasonable based upon the evidence before the employer and was reached following a reasonable procedure. There is no burden of proof upon either party upon a consideration of the reasonableness of the employer's conduct.

177. In **East Lindsey District Council v Daubney** [1977] ICR 556, the Employment Appeal Tribunal stated that:

"Unless there are wholly exceptional circumstances, before an employee is dismissed on the grounds of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position."

178. Where the employee has been absent from work for some time, it is essential to consider whether the employer can be expected to wait any

longer for the employee to return (**Spencer v Paragon Wallpapers Limited** [1976] IRLR 373). A summary of the correct approach can be found in the decision of the Court of Session in **BS v Dundee City Council** [2014] IRLR 131. The main issues in an incapacity case are:

178.1 To consider whether it is reasonable to expect the employer to wait any longer for the employee to return to work.

178.2 There needs to be reasonable consultation with the employee.

178.3 The employer needs to act reasonably to obtain medical advice on the employee's position, the prognosis and when a return to work is likely.

179. Relevant considerations will be: whether other staff were available to carry out the absent employee's work; the nature of the employee's illness; the likely length of absence; the cost of continuing to employ the employee; the size of the employing organisation; and the unsatisfactory situation of having an employee on very lengthy sick leave.

180. A fair procedure will encompass: consultation with the employee; the obtaining of an up to date medical report or medical evidence; and a consideration of alternative employment.

181. Ultimately, the question in incapacity cases is whether the employer acted reasonably in concluding in the light of the position of the employee and the medical evidence that they could not wait any longer for the employee to return to work. That essentially answers the question of whether the employer acted within the range of reasonable responses in treating incapacity as a sufficient reason for the dismissal of the employee.

182. The Tribunal must be careful not to substitute its view of the correct course of action for that of the employer. In many cases there is a band of reasonable responses to the employee's conduct, within which one employer might reasonably take one view, another quite reasonably may take another. The function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band, then it is unfair.

183. The next legal issue which arises in the list of issues is the complaint of direct disability discrimination. By section 13 of the 2010 Act, a person (A) discriminates against another (B) if, because of a protected characteristic A treats B less favourably than A treats or would treat others. By section 23, on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case. Direct discrimination is prohibited in the workplace. By section 39(2), an employer must not discriminate against an employee (*inter alia*) by subjecting the employee to a detriment.

184. A complaint of direct discrimination will only succeed where the Tribunal finds that the protected characteristic was the reason (or a material reason) for the claimant's less favourable treatment. The protected characteristic need not be the only reason for the treatment, provided that

it is an effective cause of it. In essence, the Tribunal has to determine whether the claimant was less favourably treated by the respondent than others were or would have been and if so the reason for the treatment. Was the treatment because of the protected characteristic (wholly or materially) or was it for another reason?

185. The next issue that arises is the complaint of discrimination arising from disability. By section 15 (when read with section 39) of the 2010 Act, it is unlawful for an employer to treat an employee unfavourably for something arising in consequence of disability. The Equality and Human Rights Commission's *Code of Practice on Employment* (2011) provides (at paragraph 5.7) that a person is treated unfavourably if they have been put to a disadvantage. Often, this advantage would be obvious, for example where an individual is dismissed from their employment.

186. The unfavourable treatment in question must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment on the one hand and the disability on the other.

187. Where the unfavourable treatment is because of something arising in consequence of disability, it will be unlawful unless it can be objectively justified by the employer or unless the employer did not know or could not reasonably have been expected to know that the person was disabled.

188. It is open to an employer to seek to justify unfavourable treatment where the treatment is a proportionate means of achieving a legitimate aim. It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations.

189. The aim in question must be legitimate. If it is legitimate, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise between the interests of the employer and those of the employee. This is an objective test. It may be contrasted with the law of unfair dismissal where the Tribunal is assessing the reasonableness of the conduct of the employer and asking whether the employer's decision was within the range of reasonable management responses. The Tribunal accordingly may substitute its view to that of the employer when applying the objective test upon a consideration of a claim brought under section 15 of the 2010 Act. However, the Tribunal must not substitute its view when assessing the reasonableness of the employer's conduct in an unfair dismissal case.

190. That being said, in **O'Brien v Bolton St Catherine's Academy** [2017] ICR 737, CA, Underhill LJ considered the test of proportionality under the 2010 Act alongside the reasonableness test for ordinary unfair dismissal in section 98(4) of the 1996 Act. He said that in the case of dismissals for long term sickness absence (such as the instant case) the two tests should not lead to different results. Underhill LJ was clearly concerned by the prospect of a section 15 complaint in a long-term sickness case succeeding on the one hand (by application of the objective proportionality test) but an unfair dismissal claim upon the same facts failing (by application of what is generally perceived to be a less stringent range of reasonable responses test). Underhill LJ was concerned that it would be

counter intuitive in those circumstances for the section 15 claim to succeed but for the unfair dismissal claim to fail.

191. We now turn to a consideration of the principles engaged in the reasonable adjustments complaint. Employers are required to take reasonable steps to avoid a substantial disadvantage where a provision, criterion or practice applied to a disabled person puts the disabled person at a substantial disadvantage compared to those who are not disabled. The word *"substantial"* in this context means *"more than minor or trivial".*

192. The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion or practice disadvantages the disabled person. Accordingly, there is no requirement (as there is in a direct discrimination claim) to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances. A comparison can be made with non-disabled people generally.

193. The phrase *"provision, criterion or practice"* is not defined by the 2010 Act. It broadly encompasses requirements placed upon employees by employers. It can extend to formal or informal policies, rules, practices or arrangements.

194. An employer only has a duty to make adjustments if they know or could reasonably be expected to know both that the affected worker is disabled and is placed at a substantial disadvantage by the application to them of the relevant provision, criterion or practice.

195. The duty to make reasonable adjustments requires employers to take such steps as it is reasonable to have to take in order in order to make adjustments. There is no onus upon the disabled person to suggest what adjustments should be made. However, by the time that the matter comes before the Employment Tribunal, the disabled person ought to be able to identify the adjustments which they say would be of benefit. There is no requirement for the disabled person to show that on balance the adjustment would ameliorate the disadvantage. There merely has to be a prospect that the adjustment may benefit the disabled person.

196. The following are some of the factors which, according to the ECHR *Code of Practice* (paragraph 6.28) might be taken into account when deciding what is a reasonable step for an employer to have to take. These are replicated in clause 17 of the respondent's reasonable adjustments policy:

- Whether taking any particular step would be effective in preventing the substantial disadvantage.
- The practicality of the step.
- The financial costs of making the adjustments and the extent of any disruption caused.
- The extent of the employer's financial or other resources.
- The availability to the employer or financial or other systems to make an adjustment.
- The type and size of the employer.

197. Ultimately, the test of the reasonableness of any step an employer may have to take is an objective one and will depend upon the circumstances of the case. The ECHR *Code of Practice* gives some examples of reasonable adjustments in practice. These include:

- Transferring the disabled person to fill an existing vacancy.
- Altering the disabled worker's hours of work or training.
- Assigning a disabled worker to a different place of work or training or arranging home working.

198. We now turn to a consideration of the claimant's complaint of harassment related to disability. By section 26 of the 2010 Act, a person harasses another if they engage in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating the other's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. In deciding whether the conduct has the effect of violating the claimant's dignity or creating an intimidating *etc* environment, the perception of the complainant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect must all be taken into account. Harassment of an employee by an employer is made unlawful within the workplace by section 40 of the 2010 Act.

199. In contrast to a complaint of direct discrimination, a complaint of harassment does not require a comparative approach. It is not necessary for the worker to show that another person was, or would have been, treated more favourably. Instead, they have to establish a link between the harassment and the relevant protected characteristic. The EHRC *Code of Practice* notes that unwanted conduct can include a wide range of behaviour. We refer to paragraph 7.7 of the Code.

200. The Code provides in paragraph 7.8 that the word *"unwanted"* in the legislation is essentially the same as *"unwelcome"* or *"uninvited".* In **Thomas Sanderson Blinds Limited v English** (EAT) 0316/10 it was held that unwanted conduct means conduct that is unwanted by the employee. The necessary implication of this is that whether conduct is *"unwanted"* should largely be assessed subjectively from the employee's point of view. The Code also makes the point that a serious one- off incident can amount to harassment. Again, we refer to paragraph 7.8.

201. The unwanted conduct in question must have the purpose or effect of violating the claimant's dignity or creating an intimidating etc environment for them. Conduct that is intended to have that effect will be unlawful even if it does not in fact have this effect. The conduct that in fact does have that effect will be unlawful even if that was not the intention.

202. The conduct in question must relate to a relevant protected characteristic. Where a direct reference is made to an employee's protected characteristic the necessary link will usually be clearly established. Where the link between the conduct and the protected characteristic is less obvious, then Tribunals may need to analyse the precise words used, together with the context, in order to establish whether there is any negative association between the two.

203. Upon all strands of her complaints brought under the 2010 Act, it is for the claimant to provide sufficient evidence to persuade the Tribunal that discrimination or harassment has actually taken place. It is for her to show on the balance of probabilities facts from which in the absence of any other explanation the Tribunal could infer an unlawful act of discrimination or harassment has occurred. If the claimant succeeds in establishing *prima facie* case, then the burden of proof moves to the respondent to show that they did not commit the act in question. The burden of proof provisions are enacted within the 2010 Act in section 136.

204. By section 123 of the 2010 Act, proceedings must be brought before the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period.

205. Time limits are exercised strictly in employment cases. It is for the complainant to convince the Tribunal that it is just and equitable to extend time. The exercise of the discretion is the exception rather than the rule. In considering whether to exercise discretion under section 123 to extend time, all factors must be considered including in particular the length and the reason for the delay.

206. The Tribunal's discretion is a wide one. The factors which are almost always relevant are the length of and the reasons for the delay and whether the respondent suffered prejudice. There need not be a good reason for the delay. It is not the case that time cannot be extended in the absence of an explanation for the delay from the claimant. The most that can be said is whether there is any explanation or apparent reason for the delay and the nature of any reason are relevant matters to which the Tribunal ought to have regard. However, there needs to be something to convince the Tribunal that it is just and equitable to extend time. (Authority for these propositions may be found in the case of **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640).

207. Tribunals are vested with a wide discretion when applying the just and equitable test. There needs to be something to persuade the Tribunal that it is just and equitable to extend time. There is no presumption that time will be extended unless the claimant can justify a failure to present the complaint in time. The exercise of discretion is the exception rather than the rule. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.

208. The Tribunal may take into account any factor which it considers to be relevant. The strength of the claim may be a relevant factor when deciding whether to extend time. In disability cases, Tribunals may recognise that disabled claimants may find it difficult to comply with a three months' time limit.

209. It is necessary for the Tribunal to weigh the balance of prejudice between the parties. A refusal to extend time will inevitably prejudice the claimant. However, the claimant needs to show more than that the loss of the claim

because the application of the relevant limitation period will prejudice him or her. If that were to be sufficient, it would emasculate the limitation period. Plainly, Parliament has legislated for relatively short limitation periods in employment cases. The limitation period must be applied unless the claimant can convince the Tribunal that time ought to be extended.

210. The other side of the coin is that some prejudice will of course be caused to the respondent if an extension of time is granted given that the case would otherwise be dismissed. However, the prejudice caused needs to amount to more than simply that. Otherwise, such would emasculate the discretion vested in Tribunals by Parliament to consider a just and equitable extension of time.

211. As has been said, the only remedy issues to be considered at this stage are those which arise from the application of the principles in the case of **Polkey v A E Dayton Services Limited** [1987] IRLR 503 HL should the Tribunal determine that the claimant's dismissal was unfair. This issue arises in the context of the claimant's unfair dismissal complaint.

212. Should the Tribunal make a compensatory award in the claimant's favour, then it shall be in such amount as the Tribunal considers just and equitable in all the circumstances having regard to the losses sustained by her in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

213. In considering what it is just and equitable to award to the complainant by way of the compensatory award in an unfair dismissal case, the Tribunal will consider whether the employee will still have been dismissed at some point in any event. This may arise in a case where the dismissal is procedurally unfair. It may also be the case that the complainant would have been liable to dismissal in any case for some other reason (for instance, a circumstance impacting upon the employer's viability).

214. In considering the exercises as to what would have happened but for the unfair dismissal, there is no need for an all or nothing decision. If the Tribunal considers there to be doubt as to whether or not the employee would have been dismissed, this can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employer would still have lost employment at some stage. There may be sufficient evidence from the employer to show that the dismissal would have occurred when it did in any event but for procedural unfairness or alternatively that the employer would have been liable to dismissal in any case at some point. On the other hand, the evidence from the employer may be so unreliable that the exercise of seeking to reconstruct what might have been is too uncertain to make any prediction. It is open to the Tribunal to decide that the employment would have continued indefinitely in any case.

Discussion and conclusions

215. We now turn to our discussion of the case and our conclusions. We propose not to deal with the heads of claim as in the order in which they appear in the list of issues. It is logical, we think, to start with the reasonable adjustments complaint. This is because if the claimant's

complaint succeeds and the Tribunal finds there to be adjustments which would have obviated the dismissal then it will be difficult (if not impossible) for the respondent to justify the dismissal of her for the purposes of the complaint of unfavourable treatment for something arising in consequence of disability. This may also then inform the Tribunal's conclusions upon the unfair dismissal complaint per **O'Brien**.

216. In his written closing submissions (at paragraph 44) Mr Tinnion accepts that the claimant was medically certified by her own GP as not fit for work from August 2019 until 19 July 2020. Plainly, this is an appropriate concession. The purpose of the reasonable adjustments provisions in the 2010 Act is to help employees to obtain work or remain in employment. As she was medically unfit to work, there was no duty upon the respondent to make reasonable adjustments for her between August 2019 and 19 July 2020. There were no adjustments which the respondent could reasonably undertake in the light of her GP's certification to ameliorate the disadvantage caused to her because of the application to her of the provisions, criteria and practices identified in the list of issues.

217. The claimant's case is that the respondent breached the duty to make reasonable adjustments for the period between 20 July 2020 (the first day upon which she was certified as fit to work with appropriate adjustments) until the date of her dismissal on 20 August 2020. The reasonable adjustments complaint therefore must be considered in the context of the application of the relevant PCPs to the claimant over that one-month period.

218. It is logical, we think, to analyse the claimant's reasonable adjustments complaint in the order in which they appear in Mr Tinnion's written submissions. Therefore, we shall firstly deal with the PCP identified at paragraph 6.2.4 of the list of issues: *a requirement that caseworkers in the claimant's team would work in the office (and not from home).*

219. As we said in paragraph 5, there is no issue that the respondent had knowledge of the claimant's disability from 30 May 2019. No issue of knowledge therefore arises upon any of the claimant's complaints brought under the 2010 Act except her reasonable adjustments complaint. Upon the latter, it needs to be established not only that the respondent had actual or constructive knowledge of the disability but also that there was actual or constructive knowledge of the disadvantage caused to the claimant by application of the relevant PCP.

220. Mrs Broadhurst was aware of the incident in February 2019 referred to in paragraph 20. She was the minute taker of the telephone meeting held on 17 April 2019 referred to in paragraph 24. She fairly accepted that the claimant's description of her condition was suggestive of a serious and unpleasant condition. She had the opportunity of reading Dr Phillips' report dated 30 May 2019 which is summarised in paragraphs 27 and 28. Mrs Broadhurst and Miss Ijaz were then closely involved in monitoring the claimant's progress for the next year or so until Mr Moulson took over management of the case in May 2020. This included the claimant's attempt to return to work in September 2019, in particular Miss Ijaz witnessing what must have been distressing scenes on 30 September 2019.

221. Mr Moulson read the three occupational health reports which had been commissioned prior to the meeting held on 3 June 2020: we refer to paragraphs 87 to 89.

222. In these circumstances, it is difficult to conclude anything other than that Miss Ijaz, Mrs Broadhurst and Mr Moulson were all aware of the difficulties with her mobility caused by the claimant's FND. The PCP of requiring employees to work in the office and not from home therefore created a more than minor or trivial disadvantage for the claimant in comparison with those without a disability. The latter would more easily be able to attend for work in the office each day. The claimant had real difficulties in so doing. The respondent had knowledge both of the disability and the disadvantage caused by the application of the PCP in paragraph 6.2.4.

223. Prior to the onset of the Covid pandemic in March 2020, the evidence is that the respondent applied the PCP that the caseworkers would work in the office and not be permitted to work from home. That was the unchallenged evidence of Mr Moulson in paragraphs 2 and 3 of his supplementary witness statement (recited in paragraphs 164 and 165). The Tribunal did hear evidence from Mrs Broadhurst of an individual who was allowed to work from home in order to look after his sick wife (prior to the pandemic). This was the exception which proved that the rule was of general application.

224. The evidence of Mrs Broadhurst and Mr Moulson was that the PCP of requiring caseworkers to work in the office and not from home ceased to apply from around April 2020. We accept the respondent's evidence that arrangements were quickly made to commission laptops to enable working from home. This became common practice throughout the country from April 2020. The respondent's account is therefore entirely credible.

225. The claimant's case is that the respondent continued to apply a requirement to her that she should work in the office and not from home. She complains, with justification, that the respondent did not expressly say to her that she may work from home. We refer to paragraph 114 and Mr Moulson's concession upon this point.

226. The respondent's case appeared to be that the claimant ought to have known or reasonably inferred and had the expectation that she would be permitted to work from home. Although it was unsatisfactory that the respondent did not expressly convey this message to the claimant, we accept that the claimant knew that working from home was the expectation. Firstly, there is no other credible reason for the supply to the claimant of a laptop for her to collect and take away. We accept of course that the claimant was provided with a laptop pre-pandemic. The difference is that she was not permitted to take the laptop away with her but rather was only allowed to use it within the office building in a private room as an adjustment for her. Secondly, in her witness statement, the claimant's witness Adele Taylor says that the claimant was permitted to work from home. In the third paragraph upon the second page of Adele Taylor's witness statement she says that working from home *"was finally agreed, due to the pandemic."* Further, it was common knowledge that working from home had become the new norm. We refer to paragraph 92. Finally, under questioning from the Employment Judge at the end of her evidence,

the claimant said that had the arrangements made to enable her to work after 20 July 2020 borne fruit, her expectation was that she would be working from home undertaking tier 2 cases.

227. Accordingly, we accept that the respondent applied a disadvantaging PCP until April 2020. However, as the claimant was unfit to work there were no adjustments which the respondent could reasonably undertake to ameliorate the disadvantage. By the time the claimant was fit to work in July 2020, the respondent had ceased to apply the PCP to her and those in her team. The PCP now was to work from home. The claimant was fit to work. She was not disadvantaged by the application to her of the (revised) PCP. Her own account is that she was fit and able to work from home with the permitted adjustment of a phased return to work building up from eight to 16 hours over the 13 weeks phased return to work period.

228. An alternative way of looking at this issue is that the respondent did make an adjustment to the disadvantaging PCP by permitting the claimant to work from home. This was not of course a bespoke alteration or adjustment to the PCP specifically for the claimant. All workers were permitted to work from home. That cannot however detract from the fact that an amendment to the disadvantaging PCP was made to enable the claimant to work from home and which overcame her mobility issues and ameliorated the disadvantage caused to her by the requirement to attend for work at the office each day. That, coupled with the other permitted adjustments of a phased return to work objectively served to ameliorate the disadvantage caused by her mobility issues.

229. We next turn to the PCP in paragraph 6.2.5 of the list of issues: *a requirement that the claimant work in her ordinary team rather than in a team which accommodated working from home.* We have already determined that the respondent knew of the claimant's disability and the disadvantage caused to her by a requirement to work in the office due to mobility issues.

230. The difficulty for the claimant upon this issue is that, as we have found, her team was allowed to work from home (along with the other teams) from April 2020. Accordingly, there was no need to make an adjustment to allow the claimant to move teams in order that she could work from home. The claimant did indicate (for example, in the meeting of 27 April 2020) that she would consider moving to another team who would support working from home. We refer to paragraph 76. In fact, during that meeting, as we observed in the same paragraph, the claimant said that she was aware that the majority of staff were now undertaking remote working due to coronavirus. This reinforces our conclusion (upon the PCP in paragraph 6.2.4) that the claimant was aware that the respondent no longer applied the PCP of requiring work from the office. As was noted in paragraph 137(15) the claimant accepted under questioning from the Employment Judge that the ability to work from home within her own team obviated the need to consider a change of team.

231. It follows therefore that the respondent maintained the requirement for the claimant to work in her usual or ordinary team after the date upon which she was certified as fit for work. However, this requirement did not create a substantial disadvantage for the claimant because she was able to work

from home in her own team in any case. Moving teams would not therefore have ameliorated any disadvantage because the disadvantages caused by the requirements to work in the office had ceased to apply by July 2020 when she was fit to work. The disadvantages which remained notwithstanding an ability to work from home were substantially ameliorated by the respondent's agreement that she may return to work upon a phased return to work basis and work upon one work stream only at a time.

232. This segues to the third and fourth PCPs which we shall consider*: a practice that caseworkers would work on a number of different case types (approximately four to five or more); and a practice that case workers' workload would include indefinite leave to remain cases.* These are PCPs 6.2.1 and 6.2.2 in the list of issues. It is convenient to take them together.

233. Mrs Broadhurst fairly accepted that the FND created a disadvantage for the claimant by application to her of a requirement to work upon different case types at the same time. She also fairly accepted that it would be a reasonable adjustment to allow the claimant to work upon just one case type and that such would ameliorate the relevant disadvantage.

234. It is difficult to conclude other than that the respondent knew (or at least ought to have known) of the substantial disadvantage caused by the requirement to work upon a number of different case types given Dr Phillips' conclusion (in her report of 30 May 2019) that the FND created cognitive problems which resulted in tiredness. A similar opinion was advanced in the report of 13 November 2019. We therefore accept that a requirement to work upon more than one case type and to work upon more difficult cases was substantially disadvantageous to the claimant and that the respondent was aware of the disadvantage.

235. The difficulty for the claimant upon this claim is that she accepted, when asked by the Employment Judge, that she would be working upon tier 2 cases only. We refer again to paragraph 137(15). Therefore, we find that the respondent agreed to implement an adjustment to enable the claimant to work upon one case type only at a time. The claimant accepted that this was a reasonable adjustment. Indeed, she herself requested the respondent to permit her to work upon tier 2 cases only. It is unfortunate that this never came to pass due to the dismissal of the claimant on 20 August 2020. A combination of permitting the claimant to work from home on reduced hours and undertaking one case type (of lesser complexity) were reasonable adjustments for the respondent to make and which alleviated the disadvantage caused to the claimant by the application to her of PCPs 6.2.1 and 6.2.2.

236. We now turn to the PCPs in paragraphs 6.2.6 and 6.2.7 of the list of issues: *a requirement that those on sick leave would return to work within a reasonable period or face absence management and ultimately dismissal; and a requirement that employees would maintain acceptable levels of sickness absence under their absence management policy.* It is convenient to take these together.

237. As with the practice of caseworkers working on a number of different case types, the respondent accepted in their grounds of resistance the application of these PCPs to the claimant. The respondents also accepted

that the claimant's FND caused her to be absent from work. We accept the claimant's absence from work due to disability made it more likely that she would fall within the respondent's attendance management policy than would a non-disabled caseworker. The latter was less likely to undergo significant periods of absence due to ill health. Therefore, the application of the requirement for employees to maintain acceptable levels of sickness absence is one which caused a more than minor or trivial disadvantage to the claimant.

238. It was plain from Dr Phillips' report of 30 May 2019 that a significant period of absence may be expected because of the FND. It follows that those, such as the claimant, with a disability entailing periods of time off work face a disadvantage in comparison with non-disabled colleagues in maintaining acceptable levels of sickness absence under the respondent's absence management policy and then finding themselves liable to absence management. This is sufficient to fix the respondent with knowledge of the disadvantage.

239. Mrs Broadhurst again fairly accepted that allowing the claimant an unpaid career break would alleviate the disadvantage as she would then not be liable to fall within the absence management policy and procedure. Mrs Broadhurst rightly pointed out that this would not be a decision for her to make. Indeed, Mr Moulson said likewise: that allowing the claimant to go on an extended unpaid period especially by way of a career break and thus avoiding attendance management would be a decision for those of a higher grade.

240. The terms *"career break"* and *"special leave"* were used by the parties interchangeably throughout the case. Clause 7 of the special leave policy (at internal pages 3 and 4) says that career breaks are a form of unpaid special leave. However it is described, the adjustment which the claimant was seeking was to be allowed a period away from work to enable her to recuperate. In 2019, she wanted a period of time of months rather than weeks. She was happy for this to be unpaid.

241. The Tribunal therefore accepts the claimant has established there to be a substantial disadvantage for her by application of these PCPs and that the respondent had actual and if not constructive knowledge of the disadvantage. The difficulty for the claimant however is that she has confined the complaint of a failure to make reasonable adjustments to the period between 20 July and 20 August 2020. By this stage, the claimant was fit to work with adjustments.

242. Allowing the claimant to take a substantial period of time away from the workplace (albeit unpaid) during this period would not be a reasonable step for the respondent to take carrying with it a prospect of alleviating the substantial disadvantage. To allow the claimant a significant period to recuperate undertaking no work was not mandated in circumstances where her GP had certified her as fit for work. That certification was a fitness to work with adjustments. The respondent was prepared to make the adjustments of allowing the claimant to work upon one work stream at a time only and to undertake reduced hours gradually building up to 16 per week upon a phased return to work basis over 13 weeks. The claimant was permitted to work from home. To permit the claimant a significant

period of time off undertaking no work would be of no benefit to the respondent or for that matter the claimant. There was simply no medical or indeed any other requirement for the respondent to take this step given the other adjustments made for her. This was not therefore a reasonable adjustment to make during over the one-month period between 20 July and 20 August 2020.

243. Further, the claimant had benefited from a *de facto* career break from September 2019 when she made her regrettably unsuccessful attempt to return to work. By July 2020 she had been absent for a period of a further 10 months. During that time, she had exhausted her sick pay entitlement and was receiving no pay.

244. The claimant had requested a reduced amount of contact from the respondent. The respondent had agreed to contact her less frequently than on a weekly basis.

245. It was not, in our judgment, reasonable for the claimant to expect there to be no contact whatsoever. It was in our judgment reasonable for the respondent to keep in touch with the claimant albeit on an infrequent basis in order to monitor her progress. The *de facto* career break which the claimant received between September 2019 and July 2020 served at least in part to enable the claimant to recuperate such that she was fit to work with effect from 20 July 2020. (Therefore, had the claimant advanced her case upon the basis that the respondent failed to make a reasonable adjustment by not affording her a career break from September 2019, we would have found that objectively this was permitted by the respondent in any case).

246. We accept that the claimant made repeated requests for a career break after September 2019. However, the matter was not raised again after 14 May 2020. By then, the claimant was focused on returning to work as she was getting fitter. We accept entirely that she was committed to returning to work and was genuine in her intentions. Her focus in the June 2020 meetings was upon returning to work with adjustments. This appears to be recognition on the claimant's part that the notion of a career break was one which was meritorious but was of its time, and that the time to do it had been and gone.

247. The final PCP which we need to consider is that at paragraph 6.2.8 of the list of issues: *a practice of contacting employees for regular and/or weekly updates during sick leave.* We accept that this disadvantaged the claimant because the weekly keeping in touch sessions meant that she was less able to focus upon her health and that the respondent recognised that the claimant was disadvantaged by it. However, the respondent did make a reasonable adjustment by reducing the frequency of contact. As we saw, the claimant raised the issue on 31 October 2019 (page 221). Miss Ijaz spoke to the claimant twice in November 2019. However, the contact on 6 November 2019 was at the claimant's instigation. There was only one call from Miss Ijaz to the claimant in November 2019 and December 2019.

248. Miss Ijaz contacted the claimant on 4 January 2020. There was more frequent contact that month, but this was entailed by the discussion around a proposed return to work at that time. This of course did not come to pass. There was then the formal attendance review meeting on

6 February 2020. The claimant contacted Miss Ijaz on 18 February 2020 to appraise Miss Ijaz of the outcome of a consultation by the claimant with her GP. The contact in March, April and May was precipitated by the receipt of Dr Phillips' report of 28 February 2020 and arrangements for a further attendance review meeting. Upon any view, there was much less frequency of contact after the end of October 2019 than there had been before it. In our judgment, the respondent made a reasonable adjustment which served to ameliorate the disadvantage caused to the claimant of weekly keeping in touch sessions. Attribution is difficult, that it may fairly be said that the less frequent contact assisted the claimant with her recuperation such that she was fit to return to work in July 2020.

249. The only other issue which we needed to comment on upon the reasonable adjustments complaint is the suggestion made by the claimant that the respondent ought to provide a taxi to ameliorate the disadvantage caused to the claimant by the requirement for her to attend for work in the office.

250. As the claimant was unfit for work until 20 July 2020, we agree with Mr Smith that the provision of a taxi to get the claimant into work and then home at the end of the working day was not a reasonable adjustment for the respondent to make, nor was the suggestion ventilated by the claimant of reserving a parking bay for the use of the claimant or her father. The issue of the claimant's transport needs was referred to in paragraphs 157 to 162.

251. Plainly, if the claimant was unfit for work, then it would not be reasonable for the respondent to fund a taxi or allocate a parking space which she would not be using in any case. The need to fund a taxi or reserve a parking bay for her did not arise after 20 July 2020 because she was permitted to work from home.

252. In conclusion, therefore, it is the judgment of the Tribunal that the claimant's complaints that the respondent failed to comply with the duty to make reasonable adjustments fails and stands dismissed. We shall now turn to a consideration of the claimant's complaint that she was unfavourably treated for something arising in consequence of disability.

253. Paragraph 20 of their grounds of resistance, the respondent accepts that the claimant was unfavourably treated for something arising in consequence of her disability. Plainly, this is a sensible and correct concession. The claimant was dismissed because of her sickness absence. The sickness absence arose from her disability. She was dismissed because of that. Plainly therefore she was unfavourably treated for something arising in consequence of disability.

254. The issue, therefore, is one of justification. The claimant fairly and sensibly concedes that the respondent's pleaded aims are legitimate. The aims are the efficient management of the respondent's workforce and the efficient use of public money.

255. The key issue therefore is whether the claimant's dismissal was reasonably necessary to achieve one or both of those aims. As Mr Tinnion says, the question that arises is whether there was a reasonable step short of dismissal which the respondent could reasonably have taken which

would have avoided the respondent's unfavourable treatment of the claimant (by dismissing her) whilst also being a proportionate means for the respondent to achieve their two aims.

256. We do not accept the claimant's case that affording her a career break was a proportionate means of achieving the aims. We accept of course that allowing her a career break would not cost the respondent anything. However, such would not be an efficient management of the respondent's workforce given that the claimant was fit to undertake work (with adjustments) at the material time of the unfavourable treatment complained of.

257. Allowing the claimant to have some further months off work would have gone nowhere to achieving the efficient use by the respondent of its workforce. It was incumbent upon the respondent to use its workforce to its best effects in order to achieve their business aims. Permitting the claimant to work upon a phased return to work basis on reduced hours would have gone some way towards achieving the aim. Allowing her to do nothing when she was fit to do something achieves nothing and goes nowhere to achieving the respondent's aims.

258. On the other hand, there was no evidence from the respondent upon the issue of how the dismissal of the claimant on 20 August 2020 went anywhere to achieving the legitimate aims. Mr Moulson admitted that there was no evidence from the respondent upon this issue contained within his witness statement (or for that matter the witness statements of Mrs Broadhurst and Miss Ijaz).

259. The focus of Mr Smith's closing submission was upon the claimant's assertion (in paragraph 15 and Mr Tinnion's submission) that allowing the claimant a six to 12 months' unpaid career break would have avoided the dismissal on 20 August 2020. We agree with Mr Smith that the claimant had received a *de facto* career break in any case and that extending this was not a means of achieving the respondent's aims where the claimant was partially fit. The *de facto* career break had enabled her to recuperate such that she was fit to return to work with adjustments from 20 July 2020. Mr Smith made no submissions as to how the dismissal of the claimant on 20 August 2020 served to achieve the respondent's legitimate aims.

260. This is a case, therefore, where there is a paucity of evidence from the respondent in support of their case that the dismissal of the claimant was justified as proportionate in order to achieve the legitimate aims in question. The Tribunal did not have the benefit even of generalised evidence let alone any evidence tailored to the facts of the case.

261. The dismissal of the claimant on 20 August 2020 meant that the respondent had to do without the services which the claimant was able to provide. There was no issue that the claimant was anything other than a competent employee. The benefit of her work was therefore lost to the respondent. There was no evidence from the respondent that the claimant being in post served to block the recruitment of somebody else who may be able to provide, for example, a full-time service.

262. It was therefore unclear how the dismissal of the claimant served as an efficient use of the respondent's resources or a good use of public money.

The claimant in fact received the sum of £3324.07 from the respondent under the Civil Service Compensation Scheme. This expenditure would have been avoided had the claimant not been dismissed. The respondent would of course have had to remunerate the claimant once she recommenced work. However, that would not be wasted expenditure as they would be getting the benefit of the claimant's services in return. As it was, they lost the benefit of her work and had to lay out a significant sum by way of notice and compensation pay for nothing in return. This step went nowhere to achieve the efficient use of public money or efficient management of the workforce. No attempt was made by the respondent to explain how the unfavourable treatment of the claimant went towards meeting these aims and was reasonably necessary to achieve them.

263. The impact upon the claimant was significant. She lost her job and her career with the respondent. It is difficult, frankly, to see what (if any) benefit the respondent derived from the claimant's dismissal. As we say, to the contrary, the respondent lost the benefit of a good and competent employee and had to pay her a significant sum upon her departure.

264. It is also difficult to see why Mr Moulson decided to dismiss the claimant given the circumstances which prevailed on 20 August 2020. On 19 August 2020, Adele Taylor had informed Mr Moulson that attendance at the meeting the following day may be injurious to the claimant's health. On the claimant's behalf, Ms Taylor said that the claimant was unlikely to bring anything new to the meeting. Mr Moulson knew that the claimant's position was that she would return to work after an occupational health report had been received coupled with advice from her neurological specialist. This had been agreed with her. The latter had not been obtained. Mr Moulson accepted this to be a deviation for what had been agreed with the claimant in June 2020.

265. Mr Moulson was aware, from Adele Taylor's email of 23 July 2020, that the claimant was looking at options other than a return to work. As we know from paragraph 118, there was no prospect of a commercial settlement (other than there being scope for a compensation payment under the Civil Service Compensation Scheme).

266. Neither Claire Fudge nor Mr Moulson reverted to the claimant (or Adele Taylor on her behalf) to say that there was no prospect of settlement. The claimant appeared to have been unaware of the Civil Service Compensation Scheme until Mr Moulson mentioned it to her in his letter of dismissal of 20 August 2020. It was only following the dismissal that the claimant made enquiries and appears to have been misled as to how much she may expect to receive. However, that was after the event. By that stage she had already been dismissed.

267. At no stage did the claimant unequivocally say that she was not prepared to return to work. Indeed, in contrast, the discussions in June 2020 were directed returning to work with adjustments. An agreed plan of action had been reached from which the respondent unilaterally departed. The claimant had kept up her end of the bargain by furnishing a fit note from her GP certifying her as unfit to work from 1 April 2020 to 19 July 2020. She had co-operated by seeing Dr Phillips once again. The respondent did not keep up their end of the bargain. They did not obtain an opinion

from Dr Grunewald. They accepted at face value Dr Phillips' comment that specialist opinions were not being provided due to the outbreak of the Covid pandemic. There was no attempt by the respondent to push back upon this and ask Dr Phillips to approach Dr Grunewald. A simple letter or email enquiry may have borne fruit. There was no suggestion that Dr Grunewald was in any way co-operative in providing opinions.

268. It is difficult to understand why the respondent did not communicate to the claimant that if she did not return to work then she would face dismissal with the prospect only of a payment from the Civil Service Compensation Scheme (together with her notice entitlement) and that there was no prospect of a commercial settlement. We accept that the respondent was entitled to take at face value Adele Taylor's statement of 19 August 2020 that the claimant did not feel that she could add any further value at the meeting to be held the next day and that attendance may be injurious to her health. However, the respondent took the decision to dismiss the claimant in circumstances where the claimant was not fully appraised of all of the circumstances and the implications for her of not returning to work where she had agreed to a plan to facilitate her return and from which agreement the claimant had not departed.

269. Pulling all of this together, it was in our judgment disproportionate for the respondent to dismiss the claimant on 20 August 2020. The impact upon the claimant was significant. The dismissal of her did not serve to achieve any of the respondent's aims. It was premature given that the respondent had not held up their side of the agreement reached in June 2020 by obtaining specialist neurological opinion about a rare condition. We accept that the respondent may have detected some equivocation from the claimant about returning to work given that she was broaching the possibility of settlement. However, this is not the same as the claimant unequivocally saying that she did not wish to return to work. She was weighing her options. Her view may well have changed had the reality been made clear to her.

270. Had there been proper consultation, the claimant may indeed have been able to prevail upon Dr Grunewald to provide an opinion herself upon which basis she could then make an informed choice. That choice would have boiled down to losing her role and her career with the respondent or continuing with it. For these reasons, we find that the unfavourable treatment of the claimant by dismissing her for something arising in consequence of her disability is incapable of justification. This aspect of the claimant's claim therefore succeeds.

271. It is convenient, we think, to now consider the unfair dismissal complaint.

272. We have no hesitation in finding that the respondent had a genuine belief that the claimant was incapable of performing the role which she was employed by them to do. By this, we mean that the claimant was incapable of performing her role working 30 hours a week. The claimant fairly accepts that she was so incapable. Upon that basis, it follows that the respondent had reasonable grounds to believe that this was the case.

273. It follows therefore that the Tribunal's role upon the unfair dismissal complaint is to consider whether the employer's decision to dismiss the employee for that reason was a reasonable one. This entails a

consideration of whether the employer had taken reasonable steps to discover the true medical position and consulted effectively and properly with the employee.

274. For similar reasons as upon the section 15 complaint, we find that the respondent failed upon both counts. The respondent did not take steps to properly ascertain the true medical position. Mr Moulson said in the email which he sent to Claire Fudge on 2 July 2020 that *"the key thing is obtaining the further medical evidence from her specialist".* We refer to paragraph 108. In our judgment, it fell outside the range of reasonable responses for the respondent to just simply accept Dr Phillips' position that specialist reports were not being furnished because of the pandemic without making attempts to procure a report from Dr Grunewald (or even to ask the claimant to assist). It would not have been too onerous for the respondent to have asked Dr Phillips to enquire of Dr Grunewald or his secretary, make enquiries of Dr Grunewald themselves or ask the claimant for assistance given that the claimant had an ongoing relationship with him.

275. There also was no full or proper consultation with the claimant. We shall not repeat the observations which we made about this in connection with the section 15 claim. The claimant was not told, in terms, that a decision was going to be taken without specialist neurological evidence and without the claimant being appraised that a commercial settlement was out of the question.

276. It fell outside the range of reasonable responses for the employer to consider that it was not reasonable to wait any longer for the claimant to return to work. It was not costing the respondent anything (other, perhaps, than an accrual of holiday entitlement) to maintain the claimant on ill health absence. The accrual of holiday entitlement is frankly a very minor matter in the context of the size and administrative resources of the respondent. The claimant had not said that she would not return to work. The claimant had been certified as fit to work by her general practitioner. The claimant was simply wanting the respondent to adhere to the agreed plan for medical evidence to be commissioned first before a return-to-work date was agreed. This was reasonable upon the claimant's part given that she had reached agreement with the respondent and given the seriousness of the FND.

277. It fell outside the range of reasonable responses for the respondent to deviate or depart from what had been agreed without prior consultation with the claimant. Therefore, it was reasonable to expect the employer to wait longer for the claimant to return to work in order to obtain or attempt to obtain specialist opinion. The respondent's decision making fell outside the range of reasonable managerial prerogative given the circumstances. The respondent had managed without the claimant since February 2019. Other staff were available to carry out her work. There was no evidence led by the respondent that there was an urgent need to replace the claimant.

278. Mr Smith accepted that by application of the principles in **O'Brien**, the section 15 claim and the unfair dismissal claim would likely stand or fall together. We agree. Plainly, this was a long-term incapacity case. It is of

the kind that was in issue in the **O'Brien** case. Whether by application of the range of reasonable responses test (for unfair dismissal) or the objective justification test (upon the section 15 claim) the outcome is the same. Both complaints therefore succeed.

279. As we said in paragraph 169, it was agreed at the outset of the hearing in November 2021 that remedy issues would be considered at a separate remedy hearing. The exception was any issue that arises from the application of the principles in the case of **Polkey v A E Dayton Services Limited** [1987] IRLR 503 HL should the Tribunal determine that the claimant's dismissal was unfair.

280. We have determined that the claimant's dismissal was unfair for the reasons which have been explained. The question that arises therefore is whether, had a fair procedure been followed, the outcome would have been different. No evidence was led by the respondent (and the burden is upon them so to do) that the outcome would have been the same had the procedural unfairness not arisen. There was nothing to suggest that the claimant would not have returned to work (with adjustments) had the medical evidence been supportive of a return to work. We know that Dr Phillips' opinion was that the claimant was able to return to work with adjustments. We refer to paragraph 120. There was no evidence that a specialist neurological opinion would have contra-indicated a return to work.

281. We therefore conclude that but for the procedural unfairness the claimant would have returned to work upon the phased return to work plan that was agreed. There shall be no reduction from any compensatory award in the claimant's favour to reflect the chance that had a fair procedure been followed she would have been dismissed in any case.

282. There was no suggestion that the claimant may have been fairly dismissed by the respondent arising from circumstances affecting the respondent or arising from the claimant's conduct or performance independently of the circumstances with which the Tribunal has been concerned. There was, for example no suggestion that the respondent acquired information about the claimant which would have led to her being fairly dismissed anyway or that there was any pending reorganisation or similar affecting the viability of her role.

283. We now turn to the specific complaints brought by the claimant arising out of comments which she alleges were made by Mrs Broadhurst and Mr Moulson. We shall deal with the issue involving Mrs Broadhurst first. By way of reminder, this is concerned with the claimant's allegation that she said, about the claimant's physiotherapy*, "what are they going to do, put your legs up in the air".* This is brought as a complaint of direct disability discrimination, of unfavourable treatment for something arising in consequence of disability and harassment related to disability.

284. The Tribunal firstly needs to determine whether, as a fact, Vicky Broadhurst made the impugned remark.

285. We refer to paragraphs 138 to 150.

286. On balance, we find that Mrs Broadhurst did make the remark as alleged. We are satisfied that the incident took place on 31 October 2019. There

is no dispute that a telephone conference was held that day. We can see the salient entry at page 221. The claimant texted Miss Ijaz the next day. She asked to speak only with Miss Ijaz and not with Mrs Broadhurst. We agree with Mr Tinnion that something had occurred which precipitated the claimant's wish to exclude Mrs Broadhurst.

287. The Tribunal is not convinced that this was the claimant's unhappiness about the mis-recording of her diagnosis. That had been going on for some time. The claimant had not objected to Mrs Broadhurst's involvement in matters prior to 1 November 2019 upon this basis. It is logical therefore that something else happened which precipitated the claimant's reaction. Further, Mrs Broadhurst herself was less than convincing when it was put to her by Mr Tinnion that the alleged remark was *"the only horse in the race".* It was only when prompted under re-examination that Mrs Broadhurst was able to think of an alternative explanation.

288. We also find it credible that Mrs Broadhurst would make a remark along these lines. In paragraph 4 of her witness statement, she accepts that during attendance meetings there are *"laughs and jokes."* Her management style is to be supportive and light-hearted. The Tribunal makes no criticism of Mrs Broadhurst. There is nothing wrong with adopting such a management style. However, that style is consistent with the making of a flippant remark such as that alleged by the claimant.

289. The respondent's case was not assisted by the absence of Miss Ijaz. No criticism is made by the Tribunal of the respondent or Miss Ijaz. It is to the respondent's credit that they did not seek a further adjournment of the case to enable Miss Ijaz to attend to give evidence. However, the respondent must have known that the consequence of this was that the Tribunal would not have the benefit from hearing from her. In any case, Miss Ijaz's evidence was equivocal upon this issue. On the one hand, she said that she had no recollection of Mrs Broadhurst using the *"legs up in the air phrase"* (as it was put). On the other hand, Miss Ijaz was unable to remember the comment that was made by Mrs Broadhurst about physiotherapy. It is difficult to see how Miss Ijaz is able to recollect Mrs Broadhurst not saying something while at the same time being unable to recollect what it was that she did say. Such is far from convincing evidence.

290. We also consider that the claimant made a very good point about the omission of the impugned remark from the respondent's record at page 221. She was right, in our judgment, to observe that the respondent would hardly have recorded such a remark. To that degree, the record of events recorded in page 216 is self-serving. The respondent did not send a record of the discussion to the claimant for agreement.

291. For all of these reasons, therefore, we find as a fact that Vicky Broadhurst did say to the claimant, about her physiotherapy, *"what are they going to do, put your legs up in the air?"* Therefore, having determined as a fact that this was said, we must now apply the relevant legal tests to determine the claimant's claims.

292. We find that the direct discrimination complaint must fail. No evidence was led by the claimant of an actual comparator without a disability in the same

or similar circumstances to her and who was more favourably treated by Mrs Broadhurst. No evidence was led, for example, that an individual with a serious condition not amounting to a disability was dealt with by Mrs Broadhurst with a different managerial style. There was no evidence led by the claimant which would lead the Tribunal to infer how such a non-disabled comparator would have been treated in the absence of there being an actual comparator. She failed to satisfy the burden upon her to show a *prima facie* case of direct discrimination. We accept this to be Mrs Broadhurst's management style. We accept therefore that she would have adopted it regardless of the protected characteristics of the individual with whom she is dealing. The reason why the remark was said was because that is Mrs Broadhurst's style. It was nothing to do with the claimant's disability.

293. Upon the harassment complaint, we accept the claimant's case that this was unwanted conduct. It was uninvited and unwelcome. We agree with Mr Tinnion that the claimant is of a different disposition to Mrs Broadhurst. Mrs Broadhurst accepted that the claimant was not *"light-hearted or jokey"* in her demeanour at work (see paragraph 140). Again, there can be no criticism of the claimant. This is her character. She is of a different character to Mrs Broadhurst. We also accept that the claimant, unsurprisingly, was extremely concerned about the FND which had had a huge impact upon her life.

294. The remark made by Mrs Broadhurst clearly related to the claimant's disability. The subject of the discussion was physiotherapy which was aimed at assisting the claimant with the FND.

295. We find that the unwanted conduct which related to the claimant's disability was not done by Mrs Broadhurst with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Mrs Broadhurst's purpose on 31 October 2019 was to try to put the claimant at ease and to be supportive. Regrettably, this may have been misguided given the serious nature of the claimant's condition and given the claimant's character.

296. However, we find that the comment did have the effect of violating the claimant's dignity. We do not find that it reasonably had the effect of creating an intimidating *etc* environment with the claimant. We find upon the latter point because the claimant was not in work. She was therefore not exposed to a work environment. She was recuperating at home.

297. That she was not subjected to an intimidating *etc* environment is immaterial as she has succeeded in establishing that the comment had the effect of violating her dignity in any case. We find that the claimant subjectively perceived the conduct to be in violation of her dignity. This had been a serious and disabling condition. The claimant could reasonably take the view that Mrs Broadhurst was seeking to make light of it. We also consider that objectively it was reasonable for the conduct to have the effect of violating the claimant's dignity. Mrs Broadhurst fairly accepted in cross-examination that were the Tribunal to determine that she had said it (which we do) it was upsetting and a violation of her dignity. When it was put to her in cross-examination by Mr Tinnion that if she had

made the remark, would she accept that it was upsetting and violating of the claimant's dignity she replied, *"of course it would."*

298. We therefore conclude that the harassment complaint succeeds in part in so far as it is brought upon the basis of the effect Mrs Broadhurst's conduct. It succeeds to the extent that the claimant has established that the remark was made and that it had the effect of violating the claimant's dignity. It fails upon the basis the remark had the purpose of violating the claimant's dignity and creating an intimidating *etc* environment for her and that it had the effect of creating an intimidating *etc* environment for her.

299. We then turn to the section 15 claim brought upon this basis. We have determined that the remark was made. It follows therefore that there was unfavourable treatment of the claimant as it was a detriment to her. The unfavourable treatment was something arising in consequence of disability as the need for the physiotherapy in the first place arose out of the FND. It is difficult to see how the making of Mrs Broadhurst's remark was in pursuit of a legitimate aim. None was pleaded in the amended grounds of resistance. None was advocated by Mr Smith in his closing submissions.

300. Even if we were to accept that the remark was in pursuit of a legitimate aim (such as to put the employee at ease during a difficult process) it is difficult to see how that was a proportionate means of achieving the aim. Mrs Broadhurst was aware of the claimant's character. She was fully aware of how disabling and serious had been the FND. Although it was not her intention to do so, standing back, it ought to have been clear to Mrs Broadhurst that making remarks which may be perceived by the claimant to make light of her condition would not serve to put the claimant at ease and may in fact have the reverse effect: (indeed it did so). It was unlikely to help in returning the claimant to work in pursuit of the legitimate aims. Therefore, this aspect of the claim also succeeds.

301. We then turn to the complaint of harassment and unfavourable treatment for something arising in consequence of disability from Mr Moulson's alleged remark when, at the meeting of 3 June 2020, he asked *"has it gone yet?".* Again, the first thing for us to do is to determine whether, on the facts, this was said.

302. We find as a fact that Mr Moulson did not say, by reference to the FND, *"has it gone yet?".* The most compelling evidence against the claimant upon this issue is that the notes of the meeting of 3 June 2020 were sent to the claimant on 4 June 2020. The letter of 4 June 2020 is at pages 227 and 228. The claimant did reply with some remarks and observations on 12 June 2020 (page 236). However, she did not seek to correct the record that Mr Moulson asked, about the FND, whether it had cleared. She did not write back and say Mr Moulson did not say that rather he had said *"has it gone yet?".*

303. Mr Tinnion put it to Mr Moulson to ask him whether a condition had *"cleared"* or had *"gone yet*" were synonymous. There is much in that submission. However, the claimant's case is clearly brought upon the basis that Mr Moulson asked the claimant whether the FND had *"gone yet".* It is not now open to the claimant to argue that by asking whether it had *"cleared"* such constitutes unlawful harassment related to disability. There was no application to amend her claim in this way.

304. It was put to Mr Moulson that the claimant gave a somewhat spikey and defensive response when asked about the FND. We agree with Mr Tinnion's characterisation of the claimant's response. However, that rubs up against a difficulty that Mr Moulson asking whether the condition had *"cleared"* as opposed to *"had gone"* would in our judgment have precipitated the same response. That must be the logical conclusion if the expressions are synonymous.

305. Mr Moulson impressed the Tribunal as a cautious and careful individual. We find it against the probabilities that he would have crassly asked the claimant if her condition had *"gone".*

306. Therefore, as we find as a fact that Mr Moulson did not say, about the claimant's FND, *"has it gone"* it follows that the complaints of harassment related to disability and of unfavourable treatment arising in consequence of disability upon this issue both fail.

307. We now turn to issues of jurisdiction. No issues arises upon the unfair dismissal complaint or the complaint of unfavourable treatment for something arising in consequence of disability pertaining to the dismissal of the claimant. The dismissal was on 20 August 2020. The claimant presented her claim to the Employment Tribunal on 20 November 2020 after having first contacted ACAS for early conciliation on 13 October 2020. The early conciliation certificate produced pursuant to the Employment Tribunals Act 1996 is dated 3 November 2020.

308. We find that the complaints of a failure to make reasonable adjustments were brought in time. There was a continuing course of conduct dealing with the issue of adjustments to facilitate the claimant's return to work. This continuing course of conduct ended with her dismissal on 20 August 2020. The same people (Miss Ijaz, Mrs Broadhurst and Mr Moulson) were primarily involved. We therefore agree with the claimant's counsel that the reasonable adjustments complaints were brought in time. The Tribunal has jurisdiction to consider them.

309. This leaves the complaints arising out of the comments made by Mrs Broadhurst and Mr Moulson. We shall look firstly at the comment which we find as a fact was made by Mrs Broadhurst on 31 October 2019.

310. Mr Tinnion fairly accepts that the complaint was brought outside the limitation period in section 123 of the 1996 Act. It was a one-off act. The claimant needed to have commenced Employment Tribunal proceedings no later than 30 January 2020 together with the additional period for time spent in early conciliation. She did not do so. She only approached ACAS for early conciliation on 13 October 2020 by which time this complaint had fallen outside the limitation period.

311. In our judgment, it is just and equitable to extend time to vest the Tribunal with jurisdiction to consider the complaints which arise out of Mrs Broadhurst's remark. Firstly, the claimant was seriously unwell towards the end of 2019. This was attributable to disability. It is unrealistic for the claimant to have commenced Employment Tribunal proceedings shortly after an unsuccessful attempt to return to work in September 2019 and when she was seriously affected by the condition.

312. Secondly, the claimant's complaint is meritorious. We have found as a fact that Vicky Broadhurst did make this remark. There is a wider public interest in determining disability discrimination and harassment complaints on their merits.

313. Further, Mrs Broadhurst was intimately involved with matters until May 2020. Additionally, there was a continuing course of conduct after May 2020 until the claimant's dismissal. This is not a case of a one-off and isolated act of harassment alone unconnected with anything else, but is one which occurred against a backdrop of a continuous course of dealings between the parties.

314. There is no forensic prejudice to the respondent of allowing the claims to proceed. The inability of Miss Ijaz to attend to give evidence was not attributable to any delay on the claimant's part. Miss Ijaz's inability to attend was due to personal issues. She did attend ready to give evidence in November 2021. Due to unforeseen circumstances, there was only time in November 2021 to deal with the claimant's evidence. Mrs Broadhurst gave evidence. There was no suggestion by the respondent that memories had faded to create a forensic prejudice.

315. The prejudice to the claimant of not being allowed to argue a meritoriously claim is significant. She would lose the right to pursue her claim. That in and of itself cannot be determinative. Otherwise, the limitation period would be denuded of much of its purpose. However, that is a factor which can be put into the balance along with other features which favour the granting of an extension. Those are that the complaint is meritorious, there is no forensic prejudice suffered by the respondent attributable to the delay and that the claimant suffered a serious neurological condition which significantly impacted upon her abilities to bring a complaint within the limitation period.

316. Similar considerations persuade the Tribunal that there is jurisdiction to consider the complaints raised by the claimant about Mr Moulson. That complaint has failed on the facts. However, the complaint was arguable. The delay is relatively insignificant. The remark was alleged to have made on 3 June 2020. The claimant commenced ACAS conciliation around six weeks out of time. She was still impacted by the disability as she remained unfit to work. Again, there was no forensic prejudice to the respondent. Indeed, to the contrary, the respondent had documented the exchange upon which basis they were successfully able to resist the claimant's claim.

317. The Tribunal shall now convene a remedy hearing. It will, in our judgment, serve the overriding objective of dealing with cases proportionately and efficiently for there to be a case management discussion held by telephone with the Employment Judge in order to discuss the remedy issues that arise and to give case management directions accordingly. The parties are therefore directed to write to the Tribunal with dates to avoid over the next three months. The parties are directed so to do within 21 days of the date of

promulgation set out below. Amongst other things, upon the unfair dismissal complaint, the Tribunal will need to consider the issue of reinstatement or re-engagement which are the primary remedies upon an unfair dismissal complaint.

Employment Judge Brain

Date: 15 March 2022