EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102041/2020

Held remotely by CVP on 6, 7, 8, 9, 10 December 2021 and 7 and 8 February 2022

Employment Judge P O'Donnell
Tribunal Member S Anderson
Tribunal Member D McFarlane

Ms Joanna Murray	**Claimant** **In person**
Tesco Personal Finance Plc	**Respondent** **Represented by** **Mr MacDougall,** **Counsel (instructed by** **Pinsent Masons)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claims of unfair dismissal and the claims under the Equality Act 2010 are not well-founded and are hereby dismissed.

REASONS

Introduction

1. The Claimant has brought complaints of unfair dismissal and disability discrimination against the Respondent. The discrimination claims relate to 13 alleged acts of discrimination set out in a Scott Schedule which are said

to amount to a range of prohibited conduct; discrimination arising from disability, breach of the duty to make reasonable adjustments, harassment and victimisation. The Respondent concedes that, at the relevant time, the Claimant was disabled as defined in the Equality Act but they resist the claims on the substantive issues.

2. The Tribunal heard evidence at a final hearing which took place remotely by way of Cloud Video Platform (CVP) on 6-10 December 2021 and 7-8 February 2022. Parties then lodged written submissions and the Tribunal met to deliberate on 28 February 2022.

Preliminary issues

3. At the start of the hearing on 6 December 2021, the Tribunal addressed a number of preliminary issues including strike-out applications by the Respondent in respect of claims for deduction of wages and case management issues clarifying the issues to be determined at the hearing. The Tribunal set out its decision on these matters in an earlier judgment dated 20 January 2022 and does not intend to repeat the contents of that earlier judgment which is referred to for its terms.

4. Prior to the continued hearing on 7 February 2022, the Tribunal received a number of pieces of correspondence from the Claimant (which generated correspondence from the Respondent in reply) which had to be addressed at the outset of the hearing.

5. First, the Claimant lodged what was described as an “impact statement” which set out various matters relating to her disability, its effects on her and the effect which the Respondent’s alleged conduct was said to have had on the Claimant. The Tribunal was not clear as to the purpose of this document given that the Respondent had conceded she was disabled at the relevant time and the hearing was only going to deal with liability with remedy reserved to a further hearing if required.

6. The Claimant explained that she had been advised to produce this after seeking legal advice in the period between the two hearing diets. She said that it was intended to support her claim and explain how her condition affected her.

7. The Respondent opposed the impact statement being introduced at this late stage. Witness evidence was being given orally and not by witness statement.

8. The Tribunal was mindful of the Claimant's party litigant status and she was clearly following advice she had been given. The Tribunal did not consider that this was "evidence" in the sense of a new contemporaneous document being introduced at a very late stage but was a document produced for the purposes of the claim akin to a witness statement. In keeping with the Overriding Objective, the Tribunal decided that it would be appropriate to allow the Impact Statement to be lodged to form part of the Claimant's evidence-in-chief with the caveat that it had no special status and would be treated in the same way as any oral evidence given on the same matters.

9. Second, the Claimant had sought an Order for production of a document from the Respondent described as an occupational health report from 2016. The Respondent opposed this application, primarily because they could not find any such document in their archives and also given the lateness of the application coming after their witnesses had given their evidence and they had closed their case.

10. The Tribunal refused the application on the basis that it was not in keeping with the interests of justice to order a party to produce a document which is not in their possession. However, even if the document had been available, the Tribunal would have refused the application given how late it was being made, coming after the Respondent had closed their case and this document had not been put to their witnesses.

11. The Tribunal clarified that either party could make submissions about the fact that this document could not be found and the Tribunal would consider what weight, if any, to give to any such submissions.

12. Finally, the Claimant had lodged two documents described as “skeleton argument” and “legal submissions” which she clarified formed her written submissions. The Tribunal had noted that these documents, on the face of it, sought to expand her discrimination claims beyond the 13 alleged acts of discrimination set out in the Scott Schedule at pp90-95 of the bundle.

13. The Claimant explained that this was not her intent and that she had, in trying to summarise matters, inadvertently created this impression. She confirmed that her discrimination claim only related to the matters set out in the Scott Schedule.

Evidence

14. The Tribunal heard evidence from the following witnesses:-

    a. The Claimant.
    b. Karen Lightfoot who was the Claimant’s line manager at the time her absence began.
    c. Susan McCarry who managed the Claimant’s absence.
    d. Natalie O’Donnell who made the decision to dismiss the Claimant.
    e. David Laverie who dealt with a grievance raised by the Claimant during her absence.

15. There was a bundle of documents prepared by the Respondent which contained the vast bulk of the documents to which the Tribunal were taken during the evidence. Page numbers below are a reference to page numbers in this bundle.

16. The Claimant produced a supplementary bundle which was unpaginated. Where reference is made to any document in this bundle then it will be described in full.

17. This was not a case where there was a significant dispute about the relevant facts relating to the absence management process followed by the Respondent leading to the Claimant's dismissal.

18. Any dispute which arose was not, for the most part, about what happened or what was said in meetings or correspondence but about how these should be interpreted or perceived. There were a number of instances where the Claimant had a genuine but mistaken perception or interpretation of what had been said in correspondence that was not borne out by any plain and reasonable reading of the relevant correspondence when considered in context. The Tribunal will set out this out in more detail in its decision below.

19. Where there was any dispute of fact about what was said at any of the meetings which were held in relation to the Claimant's absence, the Tribunal preferred the evidence of the Respondent's witnesses which was supported by contemporaneous notes.

20. There are two matters relating to the relevance of evidence which the Tribunal requires to address.

21. First, the Claimant makes various complaints about the conduct of her union representative which, on the face of it, she seeks to attribute to the Respondent. For example, much of her complaints about the first wellness meeting arise from what is said to be a failure by her union representative to properly explain what that meeting was involved. There are similar complaints about what was said to her in relation to the grievance meeting. The Respondent is not liable for the actions of this individual in his role as a union representative and so any evidence about what he may or may not have said to the Claimant about these meetings is not relevant to the questions of whether the Respondent has acted unlawfully (either in terms of the unfair dismissal claim or the claims under the Equality Act).

22. Second, the Claimant led evidence and made submissions about events which occurred some time ago. It is quite clear to the Tribunal that these

matters were of great significance to the Claimant and she clearly considered that these were connected to the claims which were before the Tribunal. However, other than providing background information, the Tribunal did not consider that these issues were relevant to the matters which it had to determine; the managers involved in the earlier matters were not involved in the absence management process; similarly, the managers involved in the absence management process were not involved in the earlier matters; there was no evidence before the Tribunal that those earlier matters had any bearing on how the absence management process was conducted or on the ultimate decision to dismiss the Claimant.

23. In these circumstances, the Tribunal does not intend to make any findings of fact about these earlier matters and they have not had any bearing on its decision relating to the claims to be determined.

Findings in fact

24. The Tribunal made the following relevant findings in fact.

25. The Claimant started her employment with the Respondent on 14 December 2015 in the role of customer services representative. She initially worked in a telephone-based role in the Respondent's fraud prevention team. She then worked in an office role in the fraud chargeback team before returning to a telephone-based role in the fraud prevention team.

26. The Claimant commenced a period of sickness absence in July 2018 which continued until her dismissal in February 2020. The Claimant had had previous periods of absence from work due to health reasons.

27. The Claimant's final period of absence arose from circumstances where her manager at the time, Karen Lightfoot (KL), sent emails to staff in her team with feedback on calls which KL had reviewed. The purpose of the email was to provide something in advance of one-to-one meetings to discuss what had gone well in the calls and what could be improved.

28. The Claimant was upset at the feedback which she received. KL met with the Claimant on the same day that the feedback was sent and the Claimant stated that she did not appreciate the email and was worried about it. The Claimant went home early and called in sick the next day. She then commenced a period of sickness absence which continued for the rest of her employment. This absence was covered by a sequence of fit notes from the Claimant's doctor which started with the fit note at p265.

29. A meeting was arranged between the Claimant and KL to take place on 14 September 2018. This meeting was described in evidence as a "wellness meeting" or as "absence catch up". There were options for this meeting to take place in the office, at the Claimant's home or some mutually agreed location; it was agreed that this would take place in the café at the Tesco store in Maryhill, Glasgow.

30. The meeting took place as planned with the Claimant and KL present along with Cat Robinson as a note taker. A note of the meeting is at pp269-271. KL started the meeting by asking the Claimant how she was feeling. The Claimant replied explaining that she was very tired and had a four week sick line, she was to be reviewed by her GP on 4 October and described having pain in her chest and hands.

31. There was a discussion about the Claimant's condition in which she explained that she was attending counselling. KL asked whether the Claimant had thought about whether she would want to return to the same role or to a different one when she came back to work. The Claimant replied that she did not know and that she had talked about this with her union representative.

32. The Claimant went on to describe how she had felt on receiving the feedback from KL which had triggered her absence explaining that it made her feel anxious and in a panic. KL went on to explain that the feedback was given to everyone in the same way. The meeting continued with a discussion of previous roles held by the Claimant and how she might be

affected by work. During the course of the meeting, the Claimant signed a form (p268) authorising the Respondent to obtain an occupation health report.

33. The Claimant found this meeting to be upsetting. The Tribunal should record that this was not how KL perceived the meeting. The Claimant, however, was upset at having to discuss the matters which arose in the meeting and had not understood from her discussions with her trade union representative that this is how this meeting would proceed.

34. The Claimant decided to raise a grievance about the September meeting and did so through her union representative. She provided an email to her representative dated 17 October 2018 which he forwarded to Joyce Mason (HR) to initiate the grievance (pp277-279).

35. David Laverie (DL), who at the time was a customer service manager in the Respondent's customer service team, was appointed to investigate the grievance. He met with KL and Cat Robinson to take statements from them (pp282-285).

36. Whilst the grievance process was continuing, the Respondent received an occupational health report dated 13 November 2018 (pp286A-B). The report confirmed that the Claimant had been absent due to severe anxiety and depression and that she described a number of work-related matters which had caused her stress including the meeting which was the subject of the grievance. The report stated that a conclusion of the grievance process as soon as possible to remove this as a source of stress would be desirable and that the Claimant was fit to attend meetings regarding this if certain adjustments, such as extra time or breaks, were allowed.

37. The report goes to state that no adjustments which would assist in a return to work could be identified and neither could a date for a return to work with the prognosis being unclear.

38. DL met with the Claimant and her union representative in relation to her grievance on 5 December 2018 and a note of this meeting is at pp287-291.

39. The outcome of the grievance was communicated to the Claimant by a letter from DL dated 5 February 2019. He concluded that, whilst the Claimant had a genuine perception that she had been treated unfavourably at the September meeting, there was no inappropriate conduct by KL. He did accept that well-intended comments could inadvertently cause upset and so feedback would be given to KL to consider other's perceptions of what is being said.

40. DL decided that it would be appropriate to appoint a different manager to deal with the Claimant's absence to try to rebuild trust. He appointed Susan McCarry (SMcC) to provide support to the Claimant.

41. The letter of 5 February 2019 concluded by advising the Claimant of her right to appeal explaining that she should do so within 7 days. The Claimant sent an email to DL on 18 February 2019 (pp326-327) advising that she wished to appeal, asking for more information about the process and indicating that she would be asking for external help.

42. DL replied by email dated 20 February 2019 (pp325-326) providing more detailed information about the process. The Claimant then sent an email dated 11 March 2019 (pp323-325) setting out the detail of the basis of her appeal. DL replied on 18 March (p323) advising that the next step would be for a manager to be appointed to investigate the appeal. The Claimant replied by email of the same date (p322) stating that she would look at what DL had written and would get back to him under explanation that she needed help with her grievance. This sequence of correspondence concludes with an email from DL dated 18 March 2019 (p321) advising that he appreciated that the Claimant would want to engage with her health professionals and other support so he would not arrange any further meetings in relation to the appeal until the Claimant had come back to him as she had said she would.

43. In the event, the Claimant did not pursue the appeal for some time. The next mention of the appeal was in an email from the Claimant to SMcC dated 10 December 2019 (pp349-350) where she comments that DL had allowed her 10 months to progress the appeal. At this point, a more senior manager, Natalie O'Donnell, was managing the Claimant's absence and in an email dated 17 December 2019 (pp366-367) she offered the Claimant a final opportunity to progress the appeal. The Claimant was given 7 days to respond confirming whether or not she wished to take the appeal further and she did not do so.

44. Returning to the chronology of the absence management process, SMcC made first contact with the Claimant on 19 March 2019. SMcC kept a contemporaneous log of her contacts with the Claimant which was produced at pp304-312. The Tribunal does not intend to set out the detail of this log, which is referred to for its terms, but does note that it shows SMcC making contact with the Claimant on a regular basis during the period April to August 2019.

45. A further occupational health report was obtained by the Respondent dated 20 August 2019 (pp329-330). This report explained that the Claimant continued to describe mental health symptoms which adversely impacted her day-to-day life and that she had recently been diagnosed with severe social anxiety. The report confirmed that the Claimant remained unfit for work and that no date for a return to work could be identified. It was suggested that more information could be obtained from the Claimant's GP that might clarify the position and that the Claimant had given consent to the occupational health doctor to contact her GP in relation to this.

46. A further wellness meeting was held on 13 September 2019. The Claimant was accompanied by her son and SMcC attended along with a note taker. The note of the meeting is at pp332-334:-

    a. SMcC asked the Claimant how her counselling had been going and she replied that she had been referred for cognitive behaviour therapy which was due to start next week. She explained that her

doctors believed she has social anxiety which had not been diagnosed previously.

b. There was a discussion of the occupational health report from August and the Claimant confirmed that her GP had provided a response to the request for further information.

c. The Claimant stated that the occupational health doctor had assumed that the Respondent would terminate her employment. SMcC explained that dismissal would be the last resort if the Claimant could not return to work and they would think about any adjustments that could support her back to work.

d. There was a discussion about the effects of the Claimant's condition and she explained that she could sometimes get confused or forget conversations. She preferred to have things written down. SMcC said that going forward she would email the Claimant before contacting her and that the Claimant could email a copy of her fit notes if that was easier for her.

47. A copy of the minutes were sent to the Claimant by SMcC by email dated 24 September 2019 (Claimant's bundle).

48. The Respondent received a further letter from the occupational health doctor dated 16 September 2019 (p335) confirming receipt of the report from the GP and recommending a further review in the next few weeks.

49. On 9 October 2019, SMcC had a telephone conversation with the Claimant seeking her consent for a further occupational health appointment. During this conversation, the Claimant advised SMcC that she had not looked over the note from the previous meeting between them and wanted to go through these with her son. SMcC advised the Claimant that if she had any changes she wanted to make then she could let her know.

50. A further occupational health review took place on 23 October 2019 and the occupational health doctor's findings were set out in a letter of the same date (pp338-339). The letter states that it is the doctor's opinion that the

Claimant remained unfit for work in any capacity and that a *"near or clear return to work date"* could not be given.

51. SMcC spoke to the Claimant on 29 October 2019 after receipt of the occupational health report and advised her that the next stage would be a final absence meeting that could lead to dismissal. She raised the possibility of a career break as an alternative. This discussion was followed up by an email of the same date (p340) which enclosed more information about a career break and gave the Claimant a template version of an invite to a final absence meeting. The email also gave the Claimant details of ACAS as a source of independent legal advice.

52. The Claimant did not pursue the option of a career break.

53. By letter dated 25 November 2019 (pp341-342), SMcC confirmed to the Claimant that the next step would be a formal absence meeting and that this would be conducted by a Work Level 2 manager in line with the Respondent's policies. The manager in question was identified as Natalie O'Donnell (NOD). The letter goes on to note that the Claimant had previously indicated that she was not fit to attend such a meeting and offers options for this to be postponed if the Claimant was likely to become fit in the near future, to conduct it by telephone if she was not able to attend in person or to conduct it in the Claimant's absence with her providing anything she wished to raise in writing.

54. The Claimant replied to this by email dated 3 December 2019 (p343). The Claimant makes complaints about a lack of continuity in terms of who had dealt with different meetings and confirms that she could not come to any meeting as she was not well enough to attend.

55. By letter dated 10 December 2019 (pp345-346), sent to the Claimant by email that day, NOD introduces herself to the Claimant and explains her role in the process. She acknowledges the Claimant's position that she is unable to attend meetings and again offers the options of conducting the meeting by telephone or by way of written statements in the Claimant's

absence. The letter summarises the current position in relation to the Claimant's absence and advises that a meeting has been arranged for 12 December 2019 to discuss matters further which the Claimant can attend in person, by phone or by way of written submissions. Further information about this meeting, including the Claimant's right to be accompanied, the purpose of the meeting and the possibility that the Claimant could be dismissed, is also provided. The letter concludes by inviting the Claimant to contact NOD if she has any questions or concerns.

56. The Claimant emails SMcC regarding the letter from NOD at 23.10 on 10 December 2019 (pp349-350). This email states that the Claimant will not attend the meeting on 12 December 2019 due to her health. It goes on to set out various complaints about the first wellness meeting in August 2018 which were the subject of the Claimant's grievance, complaints about management and the trade union and a statement that the Claimant's trust in the Respondent was gone. The Claimant asks whether she should have ensured that her and her son's points from the meeting in September 2019 had been included in the minutes of that meeting. The Claimant also complains about the involvement of NOD as being someone she has never met before and not being *"professional HR"*. The email asks a rhetorical question about what support the Claimant had been offered other than the extended period to appeal her grievance. The email concludes with the Claimant confirming that she is willing to answer any questions in writing and indicates that she would "*respond fully*".

57. The Claimant received an automated out of office response to this email and so at 23.16 on 10 December she forwarded the email to DL. The email was sent on to NOD on 11 December who replied by email dated 12 December 2019 at 10.36 (p351). She explains that the absence policy requires that a certain level of manager leads any long term absence meetings as the reason why she has now become involved in the process. NOD notes that the Claimant is willing to answer questions in writing and so NOD informs the Claimant that she will prepare a list of questions and send those to her as soon as possible giving a timescale to reply. NOD goes to state that she will take account of the answers to those questions

and the other information available to her (including the occupational health reports, any previous meetings and the content of the Claimant's emails) in considering her decision. The email confirms that the meeting planned for that day would not go ahead and concludes by confirming that NOD should be the Claimant's main point of contact from now on.

58. On 17 December 2019, NOD sends an email to the Claimant (pp366-367) with questions about her current health position. The content of the email are referred to for its terms and, in summary, NOD asks if the Claimant agrees with the assessment of the occupational health doctors that she was not fit to return to work, what role she would see herself in if she did return, what the Respondent could do to help her feel supported, what effect her treatment was having and how her conditions affected her generally. The Claimant was asked to respond within 7 days.

59. The Claimant replied by email dated 18 December 2019 (p366) referring NOD to *"my previous emails"* which she said answered these questions.

60. NOD replied to this by email dated 13 January 2020 (p369) acknowledging that the Claimant had provided information in the past but explaining that she was seeking to understand the current position in case things had changed. She offered to call the Claimant or meet face to face if that would assist. The email concluded by asking for a response within a further 7 days.

61. The Claimant replied by email dated 15 January 2020 (p369) stating that she can answer some of the questions and again referring to previous emails as demonstrating the struggles she had had with her health. The Claimant had embedded her answers in NOD's email of 17 December so that it could be seen which answer related to which question (pp370-371). The answers from the Claimant were very brief, mostly falling into two responses; that she was following the advice of her doctor and mental health worker; that she could not answer the question.

62. Whilst the absence management process was continuing, an issue arose with the Claimant's pay. Payments were made to her by the Respondent in November and December 2019 which, it is common ground, were made in error because the Claimant had exhausted her entitlement to sick pay by this time.

63. The Claimant emailed NOD regarding this issue on 16 December 2019 (p364) explaining that this had impacted on her Universal Credit payments and asking NOD to look into this.

64. NOD contacted the Respondent's Colleague Help Team regarding this issue. This was done through an online portal rather than by email and there was not an email address which she could provide to the Claimant for direct contact to be made. A response was received by her which she communicated to the Claimant by email dated 6 January 2020 (pp363-364). NOD had copied and pasted the response she had received into an email to the Claimant and asked the Claimant to provide details of any financial impact on her so that this could be remedied by the Respondent.

65. On 27 January 2020, the Claimant emailed NOD (p362) regarding this issue asking for contact details for "payroll" so she could speak to them directly. She explained that she did not have log in details, payslips or other information about any new payroll system. NOD replied by email approximately an hour later (p362) providing a phone number for Colleague Help who could give her information on the new system that would allow her access to her payslips.

66. On the same day, the Claimant contacted Lauren Coyle (HR) regarding this issue and received an out of office reply.

67. On 5 February 2020, there is a further exchange of emails between the Claimant and NOD regarding this issue as follows (pp353-354):-

    a. At 14.48, the Claimant emails Ms O'Donnell to say that she is still waiting for access to payroll.

b. At 14.57, Ms O'Donnell replies asking the Claimant if she had been able to contact Colleague Help to arrange this. She also confirms that she had ordered the Claimant's pay slips to be sent to her and asked if these had been received.

c. The Claimant replies at 15.02 to say that she had advised Ms O'Donnell of her illness and difficulties.

d. At 15.04, Ms O'Donnell replies to the Claimant stating that she had provided the Claimant with the contact details for Colleague Help and asking if the Claimant was not able to do this.

e. The Claimant replies at 15.21 to say that, if Ms O'Donnell had read her previous emails, she would see that the Claimant could not do this.

f. Ms O'Donnell replies at 15.48 to say that she had read these emails and had understood from them that the Claimant did not want unnecessary contact but not that this meant that she could not make contact to make these arrangements.

g. At 16.41, Ms O'Donnell emails the Claimant to confirm that she has now spoken to Colleague Help to make arrangements for the Claimant to have the access she was seeking to her pay information. She also confirms that the Claimant's payslips had been posted to her and should be received within 5-7 days.

68. On 16 February 2020, the Claimant emails NOD to advise that a further payment has been made to her in error (p359). NOD raises this with Colleague Help and emails the Claimant on 17 February 2020 (p352) to apologise and confirm that she was taking steps to have the issue resolved.

69. On 18 February 2020, the Claimant emails NOD (pp368-369) to say that she has not heard anything about *"this"*. In the context of the chain of emails, this is a reference to the absence meeting that was to be held in the Claimant's absence.

70. NOD replies by email on 19 February 2020 (p368) to say that the meeting had taken place and the outcome would be issued in the next week.

71. On 28 February 2020, the Claimant emails NOD to say that she has not received anything and NOD replies shortly after that to apologise for the delay which she attributes to her being on leave. She states that the letter confirming the outcome of the absence meeting would be posted that day.

72. On 4 March 2020, the Claimant received a letter from the Respondent's central services confirming that her employment had come to an end. This was not the letter referred to by NOD in her email of 28 February and was a letter automatically generated by the Respondent's systems when an employee leaves employment.

73. On 5 March 2020, the Claimant received a letter from NOD dated 28 February 2020 (pp378A-B) setting out the reasons for her decision to dismiss the Claimant. The letter confirms that the absence management meeting took place on 10 February 2020 in the absence of the Claimant under explanation that the Claimant had indicated that she would be unable to attend any meeting and she knew the meeting would go ahead in her absence,

74. The letter goes on to set out a summary of the process followed in relation to the Claimant's absence highlighting the meetings which had been held during this time and the most recent opinion from the occupational health doctor. NOD confirmed that she had carried out a review of "*a review of all meeting notes, email interactions, occupational health reports and calls since the start of your absence"* and taken into account the length of the Claimant's absence and the lack of a foreseeable date of a return to work. NOD confirms that she has concluded that there was no reasonable prospect of the Claimant returning to work in the near future nor were there any adjustments which could be made to support a return. NOD took particular account of the most recent occupational health assessment and the Claimant's own view of her condition in reaching this conclusion.

75. In these circumstances, the letter explains that NOD had decided to dismiss the Claimant in the grounds of ill health capability with the date of dismissal being 28 February 2020.

76. The letter goes on to set out details of the Claimant's pay in lieu of notice and gives details of how she can exercise her right of appeal. In the event, the Claimant did not appeal the decision to dismiss her.

Respondent's submissions

77. Counsel for the Respondent lodged submissions setting out what were considered to be the relevant legal provisions ahead of the continued hearing in February 2022. For the sake of brevity, the Tribunal does not intend to repeat these which were not disputed by the Claimant and they have been noted.

78. After the evidence was heard, the Respondent lodged further written submissions specific to the issues in this case.

79. The submissions begin by noting that there is very little dispute on the material facts but, where there was any dispute, it was submitted that this should be resolved in favour of the Respondent. Although the Claimant disputed the accuracy of various documents, it was submitted that she could often not remember whether the matters noted in those documents were said or not.

80. No criticism of the Claimant is intended by this submission given the severe stress and anxiety she was experiencing; it was submitted that these difficulties impacted on her recall of events and undermines the reliability of her evidence.

81. Turning to the claim of unfair dismissal, it is submitted that the reason for dismissal is set out in the letter of dismissal dated 28 February 2020 as being ill health capability. It was noted that two versions of this letter emerged during the evidence but that the reason for dismissal is the same in both versions.

82. It was submitted that the Respondent made the decision to dismiss in circumstances where the Claimant had been absent for a period of 19 months and the medical evidence confirmed there was no foreseeable date for a return to work in any capacity.

83. There was no evidence led to suggest that dismissal was for any other reason than that given in the letter of dismissal.

84. It was, therefore, submitted that the Respondent has demonstrated that there was a potentially fair reason for dismissal in terms of s98(1)(a) & (b) ERA.

85. Turning to the reasonableness of the decision to dismiss, it was submitted that there were two key elements to this; whether the Respondent could be expected to wait any longer for the Claimant to return; whether a fair procedure was followed.

86. In relation to the first element, the submissions set out the various factors which the Tribunal has to take into account including the likely length of the absence, whether other employees are available to carry out the work, the continuing cost of employing the absent worker and the size of the organisation.

87. It was accepted that the Respondent was a large organisation with other staff available to carry out the work but it was submitted that this was outweighed by the other factors in this case; the long period of time which the Claimant had been absent (when considered in the context that she had only been employed for four years); the absence of any foreseeable return to work.

88. In particular, the nature of the Claimant's illness making it unlikely that she could ever return to work given that the trigger for her absence was an email providing feedback on her work which led to her, on her own evidence, walking out of work and not returning. Once she was absent, the Claimant met with her manager (a reference to the wellness meeting) which resulted

in a grievance. These were said to be inherent elements of working for the Respondent which would always be present. The Claimant herself indicated on more than one occasion that she did not want to return to work.

89. The Respondent continued to owe duties to the Claimant as an employee even when she was absent and this situation could not continue indefinitely.

90. In these circumstances, it was submitted that the Respondent could not be expected to wait any longer for the Claimant to return. It was noted that at no point during her absence had the Claimant expressed a desire to return.

91. In terms of fair procedure, the submissions set out the matters which it was said the Tribunal should take into consideration; consultation with the employee; medical investigation; consideration of other options.

92. It was submitted that any form of consultation with the Claimant was difficult; the first meeting after her absence resulted in a complaint; at the grievance meeting the Claimant stated that she did not believe what Mr Laverie was telling her and that she did not trust anyone from the Respondent's organisation.

93. Despite these difficulties, the Respondent continued to engage with the Claimant. Reference was made to the steps taken by Ms McCarry to contact the Claimant as set out in her log which included occupational health reports, a wellness meeting, the offer of a career break, an invite to the final absence meeting and the offer of written submissions as an alternative to that meeting.

94. In relation to the medical investigation, reference was made to the occupational health reports obtained by the Respondent which included a review of the Claimant's medical records and the conclusion of the last report that the Claimant was medically unfit for work in any capacity and that the doctor could not identify a date for a return to work.

95. It was submitted that the Respondent did take steps to encourage a return to work when they changed the Claimant's manager after her grievance. The options for the Respondent were limited given the conclusion that the Claimant was unfit for work in any capacity but an offer of a career break was made.

96. In these circumstances, it is said that the procedure followed was fair and any criticism of the process would not render the dismissal unfair.

97. For all these reasons, it was submitted that the Claimant's dismissal was fair.

98. The submissions then turn to the claims of disability discrimination. It is noted that the allegations of discrimination are set out in the Scott Schedule at pp90-96 and fall into two broad categories; issues regarding a point of contact whilst the Claimant was absent; issues arising from a payroll error.

99. The submissions then address each of the allegations in turn:-

    a. The first allegation related to a failure by the Respondent to revise minutes of the meeting on 13 September 2019 when requested. In her evidence, the Claimant accepted that she did not send an email making such a request and so it was submitted that there could be no discrimination in respect of this matter.
    b. The second allegation relates to an email sent by the Claimant on 3 December 2019 which she complains was not read until 10 December. It is alleged that having only one point of contact amounted to discrimination. It was submitted that the email did not require a response; it did not ask for information and stated that the Claimant would not attend any further meetings. The lack of a response to an email that did not require one cannot amount to discrimination. It was not credible that the Claimant had only one point of contact; she was able to contact someone else and there was evidence heard about a helpline which the Claimant contacted in the past. It was noted that the Claimant had been absent for 17

months at this point and there had been no prior issue with only having one point of contact.

c. The third allegation is said to be largely the same complaint as the second allegation and the same points are relied upon. The submissions set out the sequence of email contact relevant to this issue and it is submitted that this does not amount to a disadvantage to the Claimant.

d. The fourth allegation relates to email correspondence on 10 December 2019 and reference is made to the sequence of emails to support the proposition that this cannot be reasonably described as a delay. In any event, this does not amount to a practice and there is no evidence of this being done intentionally.

e. The fifth allegation arises from the payroll error which Ms O'Donnell accepted was the Respondent's error. The submissions set out the steps taken by Ms O'Donnell to rectify the error. It was submitted that this was an error which had consequences for the Claimant but there was no causal link between the Claimant's disability and the error.

f. The sixth allegation relates to Ms O'Donnell asking the Claimant to provide further information regarding her health and the complaint of discrimination relates to the 7 day period for the Claimant to reply being too short. It was submitted that the questions were clear, concise and capable of being answered and the Claimant was given to 15 January 2020 to respond. In these circumstances, it was said that the Claimant was not placed at a disadvantage.

g. In relation to the seventh allegation (the submissions refer to as the eight item in the Scott Schedule but this is either a typographical error or is a reference to the fact that there was an allegation which was deleted from the Schedule but still appeared in the "track changes"), it was submitted that any suggestion that the payroll error was discrimination is artificial. The contact made by Ms O'Donnell with the Claimant in relation to this issue had the purpose of seeking to rectify the error and ensure there was no financial detriment to the Claimant. There was no discrimination in this. The Claimant may have perceived that this amounted to

harassment but the Tribunal need to find that it was reasonable for the conduct to have that effect. There was also no causal connection with the Claimant's disability.

h. The eighth allegation relates to an email of 7 January 2020. Reference is made to the whole correspondence of which this email forms a part and it is submitted that, properly construed, this email was seeking to allow the Claimant to participate in the final absence meeting by writing. Rather than being an act of discrimination, it was seeking to assist the Claimant. In terms of victimisation, it was submitted that the Claimant had not carried out a protected act.

i. In relation to the ninth allegation, it was submitted that this related to the payroll issue and reference was made to what had already been said regarding this. In any event, the email on which this allegation was based was not produced in evidence.

j. The same reference to earlier submissions was made in respect of the tenth allegation on the basis that it also related to the payroll issue.

k. As regards, the victimisation claim in respect of the eleventh allegation, it was again submitted that no protected act had been carried out by the Claimant. It was also submitted that the email in question had to be read in its proper context and there was no connection between any alleged delay and the Claimant's disability.

l. In relation to the twelfth allegation, it was submitted that the Claimant was aware that she would receive the outcome of the final absence meeting and was aware that this decision was to be made in her absence.

m. To the extent that the thirteenth allegation relates to alleged errors in the letter of dismissal, it was submitted that this was addressed in evidence when it emerged that there were two versions of the letter. Any errors in the letter cannot be said to discrimination arising from the Claimant's disability.

100. Whilst there may have been some errors in the dismissal process, it was submitted that these cannot be said to have arisen in consequence of the Claimant's disability and there required to be a causal link between the disability and the alleged acts of discrimination.

Claimant's submissions

101. The Claimant produced two documents, one entitled "skeleton argument" and the other entitled "legal submissions", which, read together, formed her submissions.

102. Much of both of these documents are involved in setting out the facts of the case on which the Claimant relied. The Tribunal has set out its findings in facts above and so, for the sake of brevity, it does not intend to repeat itself. It has noted the findings of fact that the Claimant has invited the Tribunal to make.

103. The documents also contain submissions and assertions about matters which do not form part of the Claimant's discrimination claims as set out in the Scott Schedule. For example, there are various comments in relation to the duty to make reasonable adjustments where it is alleged that the Respondent did not make adjustments which would have assisted the Claimant to return to work such as an alternative role. Similarly, there are assertions that the Claimant was singled out because she had brought complaints against managers in the past or that the grievance process followed in 2019 did not follow ACAS guidelines. However, these matters do not form part of the Claimant's pled case and so the Tribunal does not intend to set these out.

104. In relation to the absence management process and other matters which occurred during her absence, the Claimant raises the following issues as supporting her unfair dismissal and discrimination claims:-

    a. There was no attempt to identify the reasons for the Claimant's absence and find a role to which she could return to work.

b. Susan McCarry is said to have suddenly disappeared from the process with no explanation.

c. The Claimant was isolated with no-one to turn to for assistance other than Susan McCarry.

d. The Claimant was subjected to treatment by Natalie O'Donnell which made her feel degraded and humiliated. Ms O'Donnell isolated the Claimant and provided information or made requests in ways which created anxiety for the Claimant.

e. There was no support or information provided to the Claimant when she needed assistance. It was submitted that access to HR was blocked and the Claimant was asked to make contact by telephone.

f. It was submitted that the process was intentionally delayed.

g. Having to communicate with the head of the department meant that the Claimant was intimidated.

h. The decision to dismiss and the process followed was not reasonable. In particular, the email and questions from Ms O'Donnell.

i. The dismissal letter is said to be full of inaccuracies.

j. The PCP of only providing one point of contact placed the Claimant at a substantial disadvantage because it exacerbated her illness.

k. The PCP of providing only 7 days for the Claimant to respond to an invitation to a final absence meeting place the Claimant at a substantial disadvantage because it implied she would be dismissed and this increased her anxiety.

105. The Claimant was given the opportunity to make comments on the submissions made on behalf of the Respondent but indicated that she had no comments to make.

Relevant Law

106. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

107. The initial burden of proof in such a claim is placed on the Respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are five reasons listed in s98 and, for the purposes of this claim, the relevant reason is capability.

108. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

109. Where the issue of capability relates to a medical condition then a proper investigation would involve an employer gathering evidence about the effects of the condition and the prognosis of how long these are likely to last. This can include evidence from medical advisers (*East Lindsey District Council v Daubney* [1977] IRLR 181) but should also involve discussion with the employee.

110. On the question of whether the procedure followed by the employer was reasonable, the case of *Sainsbury's Supermarket v Hitt* [2003] IRLR 30 is authority for the proposition that the band of reasonable responses test applies to conduct of the process leading to dismissal.

111. In considering whether dismissal was a fair sanction then the Tribunal applies the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

112. An employer should consider alternatives to dismissal (*Merseyside and North Wales Electricity Board v Taylor* [1975] IRLR 60) such as alternative roles which the employee may be capable of performing. However, in the context of an unfair dismissal claim, there is not a requirement for the employer to create a role for the employee (*Taylorplan Catering (Scotland) Ltd v McInally* [1980] IRLR 53).

113. The employer's need for employees to be fit to carry out their duties can be an important factor in determining whether any dismissal is fair (*Taylorplan*).

This can be even more significant where such requirements are a term of the contract (see, for example, *Leonard v Fergus and Haynes Civil Engineering Ltd* [1979] IRLR 235).

114. Disability is one of the protected characteristics covered by the Equality Act 2010 and section 6 of the Act defines disability as a physical or mental condition which has long-term, substantial adverse effects on a person's day-to-day living activities.

115. The definition of discrimination arising from disability in the 2010 Act is as follows:-

> *"**15 Discrimination arising from disability***
> *(1) A person (A) discriminates against a disabled person (B) if—*
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

116. In order for there to be unfavourable treatment, the Claimant must be subjected to some form of detriment. The question of whether there is a detriment requires the Tribunal to determine whether "by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work" (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL).

117. Guidance as to how to apply the test under s15 was given in *Pnaiser v NHS England [2016]* IRLR 170, EAT:-

a. Was there unfavourable treatment and by whom?
b. What caused the treatment, or what was the reason for it?

c. Was the cause/reason 'something' arising in consequence of the Claimant's disability?

This stage of the test involves an objective question and does not depend on the thought processes of the alleged discriminator.

d. The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.

118. In terms of justification, the EAT in *MacCulloch v ICI* [2008] IRLR 846 set out four principles to be applied by the Tribunal. These have since been approved by the Court of Appeal in *Lockwood v DWP* [2013] IRLR 941:-

"(1) The burden of proof is on the Respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].

(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable

response" test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."

119. The duty to make reasonable adjustments is set out in s20 of the Equality Act with s21 making a breach of the duty an unlawful act. The relevant provisions of s20 are:-

> ***"20 Duty to make adjustments***
>
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice* (PCP) *of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(4) …*
>
> *(5) …*
>
> *(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.*
>
> *(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty."*

120. Schedule 8, paragraph 20(1)(b) of the Equality Act states that an employer is not subject to the duty if they did not know or could not reasonably know that the Claimant is disabled or that they would be likely to be placed at the disadvantage referred to in s20(3).

121. In relation to the duty to make adjustments, the degree to which any adjustment would overcome the disadvantage to the Claimant is relevant to whether the adjustment is reasonable (*HM Prison Service v Johnson* [2007] IRLR 951). Further, the duty is intended to integrate disabled people into the workplace and this is also relevant to whether any adjustment is reasonable (*O'Hanlon v Revenue and Customs Comrs* [2007] IRLR 404).

122. Unlike the position for unfair dismissal claims, the duty to make reasonable adjustments can require an employer to create a role for the disabled employee in exceptional circumstances (*Chief Constable of South Yorkshire Police v Jelic* [2010] IRLR 744).

123. Harassment is defined in s26 of the Equality Act 2010:-

> *"**Harassment***
> *(1) A person (A) harasses another (B) if—*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of—*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
> *(2) …*
> *(3) …*
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect.*
> *(5) The relevant protected characteristics are—*
> *…*
> *disability;*
> *…"*

124. In *Hartley v Foreign and Commonwealth Office* UKEAT/0033/15 (27 May 2016, unreported) it was held that the question whether there is harassment

must be considered in the light of all the circumstances of the case. Where the claim is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording.

125. However, even where certain elements of the test for harassment are met (for example, unwanted conduct and the violation of the Claimant's dignity), the Tribunal must still consider the "related to" question and make clear findings as to why any conduct is related to a protected characteristic (*UNITE the Union v Nailard* [2018] IRLR 730; *Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495, EAT).

126. The test for victimisation is set out in s27 of the Equality Act 2010:-

> ***"27 Victimisation***
> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
> *(a) B does a protected act, or*
> *(b) A believes that B has done, or may do, a protected act.*
> *(2) Each of the following is a protected act—*
> *(a) bringing proceedings under this Act;*
> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act."*

Decision – unfair dismissal

127. The first question for the Tribunal in determining the claim for unfair dismissal is whether there is a potentially fair reason for dismissal. The reason for dismissal set out in the letter of dismissal is the Claimant's long-term absence from work with no foreseeable return to work and the Tribunal finds that this was the reason for dismissal; it is satisfied from the evidence of Ms O'Donnell that this was the operative reason in her mind when making

the decision to dismiss and there was no evidence before the Tribunal that the Claimant was dismissed for any other reason.

128. This reason clearly falls within "capability" and so the Tribunal finds that the Respondent has discharged the burden of proving that there was a potentially fair reason for dismissal.

129. Turning to the procedure followed by the Respondent in investigating the Claimant's absence and whether she would be fit to return to work, the Tribunal notes that the Respondent obtained occupational health reports which clearly and unambiguously stated that she was unfit for work and that there was no foreseeable return to work. The Tribunal notes that the Claimant's medical records and a report from her GP were obtained as part of the occupational health assessment and so any assessment was based on the full evidence which could be made available.

130. Further, the Respondent met with the Claimant on a number of occasions to discuss her absence and gave her the opportunity to attend the final absence meeting. When the Claimant indicated that she was not fit to attend this meeting, the Respondent gave her the opportunity to provide up-to-date information on her health in writing.

131. In these circumstances, the Tribunal considers that the Respondent did follow a fair procedure in investigating the Claimant's absence (and return to work). It is very difficult to identify what else the Respondent could have done in relation to the process which it followed. At most, it might be said that an up-to-date occupation health report could have been obtained in February 2020 but there was no evidence, at the time or subsequently, that the Claimant's health had significantly improved to the extent that a return to work was foreseeable in February 2020. There was certainly nothing produced by the Claimant to Ms O'Donnell which suggested that the position had changed at all since the last occupational health report and, indeed, the information which the Claimant provided indicated that she remained unfit for work with no likely return to work.

132. In terms of alternatives to dismissal, this is not a case where the Claimant could have returned to work in an alternative role. The clear evidence from the occupational health reports were that the Claimant was unfit to return to work in any role and the Claimant did not suggest otherwise to the Respondent.

133. Further, there was nothing put to Ms O'Donnell (or Ms McCarry before her) by the Claimant that there were steps which could have been taken which would have allowed her to return to work. Although the Claimant makes broad complaints about a lack of support from the Respondent, there is nothing in the contemporaneous correspondence which sets out any concrete steps which she says could facilitate to a return to work.

134. Despite this, the Respondent did seek to identify alternatives and suggested a career break which was, ultimately, not an option which the Claimant wanted to pursue.

135. To the extent to which it may be said that the Claimant's absence arose from work related matters and that the Respondent should have "gone the extra mile", the Tribunal does note that the Respondent allowed the Claimant a very long period to recover (17-18 months) before dismissing her. Other than that, it is difficult to see what more the Respondent could have done that would have avoided the Claimant's dismissal.

136. In these circumstances, the Tribunal does not consider that there were any alternatives to dismissal which could have been offered to the Claimant.

137. The Tribunal considers that, taking account the length of the Claimant's absence, the lack of any foreseeable return to work and the absence of any alternatives to dismissal, dismissal was within the band of reasonable responses open to the employer.

138. The Tribunal does bear in mind that the Respondent is a large organisation which would have the resources to cope with the Claimant's absence but, even then, it could not be expected to continue to employ the Claimant

indefinitely when she had been absent for so long and appeared unlikely to return.

139. Some minor criticisms could be made of the Respondent's procedure, for example, the Claimant being issued with an automatic letter advising her of the end of her employment before she had received the letter from Ms O'Donnell giving the reasons for her dismissal. However, none of these had a material impact on the decision to dismiss and the Tribunal does not consider that these render the dismissal procedurally unfair.

140. For all these reasons, the Tribunal does not consider that the claim of unfair dismissal is well-founded and it is hereby dismissed.

Decision – disability discrimination

141. Given the number of alleged acts of discrimination and the fact that they are presented as separate matters, the Tribunal intends to address each allegation in turn and determine whether it amounts to unlawful discrimination as pled by the Claimant. In doing so, however, the Tribunal bears in mind that it needs to look at the evidence presented to it as a whole in assessing matters such as whether to draw inferences as to the reason for any detriment and not concentrate on just the evidence surrounding each incident.

142. One matter of broad application to all the acts of discrimination is the alleged motivation of the Respondent for the various actions described below. There is a theme running through the entries in the Claimant's Scott Schedule that the Respondent was taking actions which were deliberately intended to prevent her from returning to the workplace. Whilst the Tribunal considers that the Claimant has a genuine perception that this was the case, there is no direct evidence of this and the Tribunal considers that there is no evidence from which it considers it could draw such an inference. Nothing in the evidence before the Tribunal provides any basis on which a reasonable objective observer could conclude that the Respondent was seeking to deliberately prevent the Claimant returning to work.

Minutes of the meeting of 13 September 2019

143. The first alleged act of discrimination relates to the minutes of the meeting between the Claimant and Susan McCarry held on 13 September 2019 (p332-334). The Claimant alleges that she had emailed Ms McCarry after receiving these minutes to ask for revisions to be made but that these were not made. This is alleged to amount to discrimination arising from disability with the unfavourable treatment being the failure to make the revisions made by the Claimant.

144. However, the Claimant produced no evidence that she made such a request. There was no email or other type of correspondence in either bundle in which the Claimant requested any revisions to these minutes. In the Claimant's supplementary bundle, there was an email chain starting on 24 September 2019 with an email from Ms McCarry to the Claimant enclosing the minutes and then an email dated 26 September 2019 from the Claimant to her son forwarding these. There was, however, nothing from the Claimant to Ms McCarry in reply asking for revisions.

145. The Tribunal also notes that in her email to SMcC of 10 December 2019, the Claimant asks if she *"should"* have ensured that her and her son's points were included in the minutes of the meeting (p350) which implies that she had not done so.

146. Further, in her cross-examination of Ms McCarry, the Claimant did not put it to the witness that there had been any request made for the minutes to be revised. The Tribunal bears in mind that the Claimant is a party litigant but the Judge had explained to the Claimant that she needed to put her case to the witnesses and, given that this is one of the alleged acts of discrimination, it was something which the Tribunal expected would be put to Ms McCarry.

147. Finally, during her own evidence, in cross-examination, the Claimant replied to questions regarding a request to revise these minutes by stating that she did not actually make such a request.

148. In these circumstances, there is no evidence on which the Tribunal could make any finding in fact that the Claimant requested a revision to the minutes of the meeting of 13 September 2019. The Respondent could not, therefore, have refused such a request and so the unfavourable treatment alleged in relation to this act of discrimination did not, as a matter of fact, take place.

149. For that reason, this allegation of discrimination arising from disability is not upheld.

150. The Tribunal should be clear that it does not consider that the Claimant deliberately sought to mislead the Tribunal in relation to this matter. The Tribunal bears in mind that the effects of her mental health conditions were having a considerable impact at the relevant time. The Tribunal considers that the Claimant has genuinely misremembered events.

Correspondence regarding failure to reply to meeting invitations

151. The second alleged act of discrimination relates to correspondence on or around 3 December 2019 which the Claimant alleges she received from the Respondent stating that she had failed to respond to invitations to meeting. It is said that this amounts to discrimination arising from disability.

152. Again, this correspondence was not produced in either bundle. The Scott Schedule makes reference to the Claimant emailing Susan McCarry in response to this correspondence but no such email was produced in the bundles and nothing regarding this was put to Ms McCarry when the Claimant cross-examined.

153. The Claimant's oral evidence on this alleged act of discrimination was somewhat confused. She did not make reference to this issue in her

evidence-in-chief and it only arose in cross-examination. She was taken to emails at p343 and p348 but confirmed that neither of these were the email she said she sent in response to the letter regarding her failure to reply to meeting invitations. In response to a question from the Judge, she confirmed that she had not produced the emails referred to in the Scott Schedule.

154. At pp305-312, there is a contemporaneous log kept by Ms McCarry recording her meetings and correspondence with the Claimant regarding the absence management process. No correspondence is recorded in this log regarding a failure by the Claimant to respond to meeting invitations or any correspondence from the Claimant to Ms McCarry about such correspondence.

155. In these circumstances, the Tribunal does not consider that there is sufficient evidence from which the Tribunal could make a finding of fact that the Claimant was sent correspondence stating that she had not replied to meeting invitations. The Tribunal, therefore, finds that the alleged unfavourable treatment on which this allegation of discrimination is based did not occur as alleged. On that basis, this allegation of discrimination arising from disability is not upheld.

156. As set out above, this is another matter where the Tribunal does not consider that there has been any deliberate attempt by the Claimant to mislead the Tribunal and that she has genuinely misremembered events from a time where she was under considerable stress and was being impacted by her health conditions.

157. This allegation is also said to amount to a breach of the duty to make reasonable adjustments and the Scott Schedule makes reference to a PCP of only giving the Claimant one point of contact. The Tribunal had some difficulty in seeing how this PCP arose in the context of alleged correspondence stating that the Claimant had not replied to meeting invitations; this PCP is raised in relation to other alleged acts of

discrimination and the Tribunal considered that the Claimant has confused and conflated these matters.

158. The Tribunal considers that it would make more sense to fully address any alleged breach of the duty to make reasonable adjustments relating to the Claimant having only one point of contact when it addresses those acts of discrimination to which this clearly and expressly relates. What can be said at this point is that, for the reasons set out below, the Tribunal does not consider that there has been a breach of the duty in relation to this alleged act of discrimination. In such circumstances, to the extent that the allegation that the Claimant was sent correspondence stating that she had failed to respond to meeting invitations is said to amount to a breach of the duty to make reasonable adjustment, this element of the claim is not upheld.

Claimant's email of 10 December 2019

159. The third alleged act of discrimination relates to the Claimant's email to Susan McCarry dated 10 December 2019 (p349). This was sent in response to Natalie O'Donnell's letter of 10 December 2019 (p345) seeking to make arrangements for the final absence meeting. The Claimant received an out of office reply indicating that Ms McCarry was on leave.

160. The Claimant alleges that this amounts to a breach of the duty to make a reasonable adjustment. She states that the Respondent applied a PCP of only providing one point of contact for someone on sick leave placed her at a substantial disadvantage. Although it is not expressly pled in the Scott Schedule, the Tribunal has proceeded on the basis that the disadvantage arises when, as in this instance, the point of contact is out of the office and the Claimant is said to have no-one to contact regarding any issues relating to her employment.

161. The Tribunal considers that, as a matter of fact, the Claimant was not placed at this substantial disadvantage in this instance. The reasons for this are two-fold. First, the Claimant, on receiving the out of office message, forwarded the email to David Laverie (pp348-349) only a few minutes after

sending the initial email to Ms McCarry. Second, at the time at which the initial email was sent, the Claimant had been informed that Natalie O'Donnell was taking over the absence management process and had been provided with Ms O'Donnell's contact details. Indeed, the Claimant's email was sent in response to the letter advising her of Ms O'Donnell's involvement and so this was within her knowledge.

162. In these circumstances, to the extent that the disadvantage is the absence of the Claimant's previous point of contact, the Tribunal does not consider that the Claimant was disadvantaged. She did have others whom she could contact, either on her own initiative (that is, Mr Laverie) or by contacting the person whom she had been informed was now dealing with her case (that is, Ms O'Donnell).

163. The duty to make reasonable adjustments was not, therefore, engaged in relation to this matter and so, for that reason alone, the claim in relation to this alleged act is not well-founded.

164. However, even if there had been a disadvantage to the Claimant, the Tribunal considers that the Respondent would not have been subject to the duty to make reasonable adjustment in terms of Schedule 8, paragraph 20(1)(b) of the Equality Act; there was no evidence before the Tribunal that the Respondent had either express or constructive knowledge that the Claimant was at any disadvantage because she only had one point of contact.

165. There was certainly no evidence led at the hearing that the Claimant expressly told anyone at the Respondent that this PCP placed her at a disadvantage; the Claimant did not give evidence to this effect, it was not put to any of the Respondent's witnesses that the Claimant had informed them of this and there was no correspondence in the bundles in which this is said.

166. In terms of constructive knowledge, there was no evidence from which it could be said that the Respondent could reasonably have known that the

Claimant was at a substantial disadvantage in relation to the single point of contact. From their perspective, the Claimant had been able to forward any correspondence to alternative persons on her own initiative or had been provided with a contact person who was available.

167. For this reason, the Tribunal considers that the duty to make reasonable adjustments would not have applied to the Respondent in respect of the second and third alleged acts of discrimination.

168. The Claimant, in her evidence, stated that she was disadvantaged by having to speak to the head of the department (that is, Ms O'Donnell) which she said she found intimidating. This does not form part of her pled case as set out in the Scott Schedule; it involves an entirely different PCP and a different disadvantage from what is set out in the Schedule. On the basis that this does not form part of the claim, the Tribunal does not intend to address this.

Respondent's reply to the Claimant's email of 10 December 2019

169. The fourth alleged act of discrimination also relates to the email of 10 December 2019 (p349) and the time it took for the Respondent to respond to this. A substantive response was sent by Ms O'Donnell on 12 December 2019 (p351).

170. The Claimant alleges that this amounts to a breach of the duty to make reasonable adjustments. The Claimant states that the Respondent applied a PCP of delaying their replies to her emails which placed her at a substantial disadvantage of increasing her anxiety (which is said to be self-evident). It is said that a reasonable adjustment would have been to reply immediately.

171. Whilst it is correct to say that the Claimant did not receive an immediate reply to her email of 10 December, the Tribunal does not consider that there is any evidence that the Respondent was deliberately delaying its replies to correspondence from the Claimant. Looking at the correspondence as a

whole, it is clear that the time between any communication from the Claimant and a reply from someone within the Respondent varied with no discernible pattern; some replies were very swift and others took longer. The Tribunal considers that the evidence before it demonstrated that the Respondent replied as soon as possible and there was no deliberate delay.

172. In the specific context of this allegation, it is important to look at when the Claimant's emails of 10 December 2019 (both the initial email to Ms McCarry and the email forwarding this to Mr Laverie) were sent. Both emails were sent after 11pm and so it is inevitable that there would not be an immediate response.

173. The Tribunal notes that Mr Laverie forwarded the email on the morning of 11 December 2019 (p348) and the reply from Ms O'Donnell to the Claimant was sent on the morning of 12 December (p351). Whilst appreciating that the Claimant was anxious about correspondence being addressed, the Tribunal does not consider this to be an excessive period of time (effectively one working day) for the Respondent to reply.

174. In these circumstances, the Tribunal finds that the Respondent did not apply a PCP of delaying their replies to the Claimant in relation to their response to the Claimant's email of 10 December 2019. The duty to make reasonable adjustments was, therefore, not engaged in relation to this matter.

175. Even if the duty to make reasonable adjustments had been engaged and breached in relation to replies to correspondence, the Tribunal does not consider that an adjustment of making an immediate reply would be reasonable.

176. The Claimant did not give any evidence or make submissions as to what was meant by "immediate" or what period she would consider reasonable. A period of time for a response which the Claimant considered would be reasonable was not put to any of the Respondent's witnesses.

177. To the extent that this is a reference to an instantaneous response, the Tribunal considers that this is simply not feasible and it cannot be reasonable to expect anyone to reply to an email instantaneously. Putting aside the fact that the specific email of 10 December was sent late at night and so an immediate reply could not be reasonably expected, it would also not be reasonable to expect instantaneous replies to email sent during the working day; people may be in meetings, on the telephone, at lunch or some other type of break, engaged in another piece of work or may need time to prepare their reply (which could include obtaining information not in their possession).

178. In the absence of any evidence as to what would have been a reasonable period for a reply to the Claimant's email of 10 December 2019 (or any other correspondence) that would have overcome any disadvantage to the Claimant, the Tribunal considers that the Respondent had not breached the duty to make reasonable adjustments (if it had been engaged) by replying to the Claimant in the period which they did.

179. The Claimant's Scott Schedule also raises an issue regarding an alleged failure by the Respondent to respond to questions in the Claimant's email of 10 December regarding what adjustments had been made to facilitate a return to work and about information said to be missing from the minutes of the meeting of 13 September 2019.

180. These matters are not framed as an act of discrimination. The entry on the Schedule only refers to reasonable adjustments as set out above and these matters are not expressly said to be part of the PCP set out above nor can the Schedule be read in such a way that the Tribunal can infer how these are said to form part of the claim set out in this entry in the schedule.

181. On that basis alone, the Tribunal would not address this allegation. However, there is also no factual basis to this allegation. On any reading of the email of 10 December 2019 (pp349-350), it does not contain any questions about reasonable adjustments or raise any issue of information missing from the minutes in clear terms; there is a rhetorical question about

what support the Claimant has received other than allowing her time to recover enough to appeal her grievance; there is a comment about whether the minutes from the *"informal meeting"* (a reference to the 13 September 2019 meeting) will be used and whether she should have ensured her points were included.

182. The Tribunal can well understand why the Respondent did not read these as being questions which required a direct response. When read in the context of the email as a whole, they form part of a general complaint that the Claimant makes about the process to date and, as stated above, are framed as rhetorical questions rather than requests for information.

Access to payslips and pay information

183. The fifth alleged act of discrimination relates to the Claimant's ability to access payslips or other pay information when salary payments were made to her in error in December 2019. The Claimant alleges that she could not access payslips or speak to someone to obtain pay information due to the fact that she was absent. She alleges that this amounted to discrimination arising from disability.

184. It was clear from the evidence that the Claimant was, in fact, able to contact Ms O'Donnell regarding this issue and was provided with information about the erroneous payments made to her. The Tribunal was taken to a chain of emails between the Claimant and Ms O'Donnell starting on 16 December 2019 and continuing to 17 February 2020 (there are two email chains relating to this in the bundle, pp352-357 & pp358-364, with the Tribunal being referred to both and some duplication between them) in which the Claimant raised the issue regarding these payments, Ms O'Donnell raised the matter with the Colleague Help Team on the Claimant's behalf and provided the Claimant with the response to this query. Ms O'Donnell also provided the Claimant with telephone contact details for the Colleague Help Team in order that she could contact them directly (although the Claimant did not do so). Finally, Ms O'Donnell arranged for the Claimant's payslips to be sent to her.

185. In these circumstances, it is difficult to see what it was the Claimant was unable to access due to her absence. Whilst she did not initially have direct access to Colleague Help, she was able to contact Ms O'Donnell regarding this issue who took it up on her behalf. In any event when contact details were provided to her she did not make contact with this team. Ms O'Donnell subsequently contacted the Colleague Help team to arrange for the Claimant to have online access to her payslips.

186. The Tribunal considers that the Claimant was not, as a matter of fact, denied access to payroll information; she was able to contact Ms O'Donnell in order to query the erroneous payments, the matter was taken up by Ms O'Donnell on the Claimant's behalf and she was given the contact details for the Colleague Help team which would have allowed her to deal with the matter directly.

187. In the Tribunal's view, a reasonable worker would not consider that they had been disadvantaged in such circumstances and so there was no detriment to the Claimant. For that reason, this claim of disability discrimination is not upheld.

Period for providing further information to Natalie O'Donnell

188. The sixth alleged act of discrimination relates to the period of 7 days set out in Ms O'Donnell's email of 17 December 2019 (p366) asking for the Claimant to provide further information in relation to her health and absence for consideration at the final absence meeting. It is said that there was a breach of the duty to make reasonable adjustments in relation to this.

189. The Tribunal does consider that the request for the Claimant to respond within 7 days does amount to a PCP applied by the Respondent.

190. The Scott Schedule (p93) does not specify a disadvantage to the Claimant as a disabled person arising from the 7 day period; it makes reference to

the Claimant potentially being dismissed at the final absence meeting as a disadvantage but makes no link between this and the period to respond.

191. To the extent to which it might be said that the Claimant was unable to respond in such a short period then this is not sustainable on the evidence before the Tribunal; the Claimant provided an initial response to Ms O'Donnell's email by email dated 18 December 2019 (p366) indicating that she considered her previous emails provided a response to these questions. Ms O'Donnell renewed her request for information by email dated 13 January 2020 in order to have up-to-date information and the Claimant provided this information by email dated 15 January 2020.

192. In these circumstances, there is no evidence before the Tribunal that the Claimant was disadvantaged by the 7 day period for a response; she responded to the initial request on the very next day and responded to the renewed request within 2 days.

193. There is also no evidence on which the Tribunal could conclude that Ms O'Donnell would have known that, if there had been any disadvantage, there was such a disadvantage. The Claimant never requested a longer period to respond (although she was effectively given one) nor was there anything which would indicate to Ms O'Donnell that the Claimant had difficulty in responding in such a period given that the Claimant responded to the relevant correspondence timeously.

194. For both these reasons, the Tribunal does not consider that the duty to make reasonable adjustments was engaged in relation to the period of 7 days to respond to the request for further information and so the claim that there was a breach of the duty in this regard is not well founded.

Email from Natalie O'Donnell dated 6 January 2020

195. The seventh alleged act of discrimination relates to an email from Ms O'Donnell to the Claimant dated 6 January 2020 (pp363-364) providing the Claimant with a response in relation to her query about the erroneous

payments made to her. It is alleged that this email amounted to discrimination arising from disability and harassment on the basis that the contact details for the payroll department had been removed from the email making it impossible for her to outline her concerns.

196. The Tribunal has already set out above its decision that the Claimant was not, in fact, prevented from raising her query regarding these payments and was able to pursue this through Ms O'Donnell and ultimately was given direct contact details for Colleague Help to allow her to speak to them directly.

197. To the extent that it is being said that the contact information for payroll (it would have been the Colleague Help team) had been deliberately removed then there was no evidence to this effect and this was never put to Ms O'Donnell in cross-examination. The evidence from Ms O'Donnell that the response she received did not come from an email but rather through a web portal. In such circumstances, the Tribunal finds there was no email address for Ms O'Donnell to remove and there is no evidential basis on which it could find that she had done so.

198. Further, there was no evidence that the way in which Ms O'Donnell wrote the email of 6 January 2020 was related to the Claimant's disability or was because of something arising from her disability. Nothing to this effect was put to Ms O'Donnell in cross-examination and, looking at the evidence as a whole, there was nothing from which the Tribunal could draw an inference to this effect.

199. For these reasons, the Tribunal does not consider that the terms of the email of 6 January 2020 amounts to either discrimination arising from disability or harassment and those claims are not well-founded.

200. During the course of her evidence, the Claimant asserted that a request in the email of 6 January 2020 for her to provide information about any financial loss she had suffered as a result of the erroneous payments in

order that the Respondent could make sure she was not out of pocket also amounted to discrimination.

201. This was not part of the Claimant's pled case and so the Tribunal does not strictly need to address this issue. However, it does comment that, if this had been pled, the Tribunal would not consider that this amounted to unfavourable treatment for the purposes of a discrimination arising from disability claim because a reasonable employee would not consider that they were being disadvantaged in circumstances where their employer was seeking to ensure that they did not suffer a financial loss due to an error by the employer. Similarly, whilst the Claimant genuinely perceived that this request had the effect of creating a hostile or other prohibited environment for the purposes of a claim of harassment, the Tribunal, taking account of all of the facts, does not consider that it was reasonable for such a request to have the relevant effect where it was being done to assist her.

202. In any event, there was no evidence that the reason why the request was made was because of something arising from disability or related to the Claimant's disability. There was nothing to suggest that it was done for any other reason than to assist the Claimant and remedy any financial loss the Claimant had suffered.

Email from Natalie O'Donnell purportedly dated 7 January 2020

203. The eighth alleged act of discrimination relates to an email which the Scott Schedule (p94) states was sent by Ms O'Donnell to the Claimant on 7 January 2020. There was no email of this date produced in the bundle but, based on the description of the content of the email in the Schedule, the Tribunal considered that it was a reference to Ms O'Donnell's email of 13 January 2020 (p369). The Tribunal has proceeded on the basis that there is a typographical error in the Scott Schedule and that the email of 13 January 2020 is what is being referred to in relation to this alleged act of discrimination.

204. The email in question was a request from Ms O'Donnell for a response to the questions she had posed in her email of 17 December 2019 regarding the up-to-date position (p366-367). It is said that the sending of the email of 13 January amounts to victimisation and harassment.

205. In relation to the claim of victimisation, there was no evidence before the Tribunal that the Claimant had carried out a protected act; the Claimant did not, in either her evidence or submissions, make an express reference to something done by her which was said to be a protected act.

206. However, the Tribunal, recognising that the Claimant was a party litigant, did not leave it at that and gave consideration as to whether any of the correspondence or verbal discussions about which it heard in evidence was capable of being a protected act. There was certainly nothing which fell within the scope of s27(2)(a), (b) or (c) of the Equality Act. The Tribunal gave consideration as to whether the grievance dealt with by Mr Laverie could fall within the scope of s27(2)(d) but concluded that there was nothing in that which could reasonably be read as amounting to a complaint about the breach of the Equality Act; the grievance related to how the Claimant felt she had been treated by the Respondent and how it had impacted her health but did not make any complaint which, in effect, amounted to a complaint about a breach of the Equality Act. The Tribunal could not identify any other matter raised by the Claimant which was capable of falling within the scope of s27(2).

207. The Claimant does allege in the Scott Schedule that the Respondent was taking steps to delay the process in order to render any claim she could bring to the Tribunal out of time. Although it is not expressly pled, the Tribunal has, therefore, proceeded on the basis that the claim of victimisation is based not on a protected act which happened prior to the alleged acts of victimisation but on the basis that she may do a protected act in the future (that is, bring proceedings to the Employment Tribunal as she has done).

208. However, there is no evidence, either express or from which the Tribunal could draw an inference that the relevant acts by the Respondent were done because the Claimant may bring a claim under the Equality Act. There was nothing in the correspondence which discussed or even mentioned Tribunal proceedings; the Claimant does not expressly mention bringing a claim under the Act; the Claimant does mention being upset about being dismissed due to ill health in a telephone conversation with Ms McCarry on 9 October 2019 but Ms McCarry replies that this would only be done where there were no alternative; Ms McCarry in her email of 29 October 2019 expressly directs the Claimant to ACAS as a source of independent legal advice which is an unusual step if the Respondent was seeking to prevent the Claimant taking legal action; there was nothing in the emails between managers that mentions any potential future proceedings, let alone anything which indicated that these managers were conscious of the relevant time limits.

209. It was certainly not put to Ms O'Donnell in express terms that she was influenced by a potential future claim or time limits. She did candidly accept in cross examination that she could have taken action more swiftly at the end of the absence management process in February 2020 but the Tribunal does not consider that this, on its own, is enough to draw the necessary inference.

210. In relation to this particular allegation, the Tribunal does note that the period between Ms O'Donnell's email of 17 December 2019 and the renewed request on 7 January 2020 covers the Christmas and New Year period. It is not surprising that there was a short delay at such a time.

211. There was evidence before the Tribunal that the Respondent was willing to allow the Claimant an extended period to appeal the decision of Mr Laverie in relation to her grievance. The Tribunal considers that this demonstrates that the Respondent was not seeking to delay the progress of the internal processes and were, in fact, extending the process to allow the Claimant more time than they would normally allow an employee.

212. The Tribunal, therefore, finds that there was no evidential basis on which it could conclude that the fact of a potential claim in the future had any effect on the Respondent's actions.

213. In circumstances where there is no protected act in the past then there is no basis at all to a claim of victimisation. Further, there is no evidence that a potential future claim was the cause of any of the acts by the Respondent said to amount to victimisation. The claim of victimisation is, therefore, not well founded.

214. Turning to the harassment claim, the email of 13 January is conduct which is related to the Claimant's disability given that it was sent as part of an absence management process where the absence was caused by the Claimant's disability.

215. However, the Tribunal does not consider that this was unwanted conduct given that the Claimant had indicated in the second last paragraph of her email of 10 December 2019 (p350) that if any questions relevant to the final absence meeting were put to her in writing then she would respond in full. The Tribunal considers that the Claimant was, therefore, inviting written questions and so it cannot be said that the Respondent was engaged in unwanted conduct when they accepted that invitation.

216. To the extent that the Claimant is seeking to say that it was the renewed request in the 13 January email for answers to the questions posed in the 17 December email which was unwanted given her response on 18 December (p366), the Tribunal considers that the matter has to be viewed as a whole.

217. In particular, the Tribunal can well understand why Ms O'Donnell renewed her request on 13 January; the Claimant's response on 18 December did not provide specific answers to the questions posed by Ms O'Donnell and simply made a general reference to the Claimant's previous emails with no explanation of which emails are being referenced or what information in those emails the Claimant considered answered Ms O'Donnell's questions.

It puts Ms O'Donnell in the difficult position of having to go back through the Claimant's earlier emails (with no guide as to how far back she should go) and effectively guess at what information the Claimant considers answers the questions Ms O'Donnell had posed.

218. Further, earlier emails would contain historical information and the position may have changed. Ms O'Donnell was, quite properly, seeking an up-to-date position from the Claimant in relation to her health issues.

219. The Tribunal does not consider that each email in the chain of correspondence should be viewed in isolation and they should be read as a whole. In those circumstances, the Respondent was asking for information which the Claimant had indicated she was willing to provide and when they did not receive a clear response then they renewed that request. The Tribunal does not consider that this amounts to unwanted conduct where the Claimant had indicated that she would respond in full to any request for information.

220. In any event, the Tribunal does not consider that the request for information from Ms O'Donnell had the prohibited purpose or effect in terms of s26(1)(b) of the Equality Act.

221. The clear purpose of the request from Ms O'Donnell was to gather up-to-date information about the Claimant's health in order that she had all relevant information for consideration at the final absence meeting. This is a perfectly proper purpose which does not fall foul of s26(1)(b).

222. In terms of effect, whilst the Tribunal considers that the Claimant genuinely feels upset about the request for information being renewed, it does not consider that, looking at the whole circumstances of the case, it was reasonable for the request to have that effect; the request was being made in circumstances where the Claimant had indicated that she would respond and where her initial response did not, as set out above, provide clear answers to the questions posed by Ms O'Donnell. The Tribunal also takes

account of the fact that the Claimant was able to respond to the renewed request within a short period and providing clear answers.

223. In the Scott Schedule, the Claimant asserts that the renewed request indicated that her concerns were not being taken into account and that this created the prohibited effect. Again, whilst the Tribunal is satisfied that this was the Claimant's genuine perception, it does not consider that it was reasonable for the email of 13 January to have the prohibited effect. Ms O'Donnell expressly acknowledges that the Claimant has previously provided information at the start of the second paragraph of her email and explains that she is seeking to understand the current position given that some emails from the Claimant had been sent some time ago. The Tribunal does not consider that this can reasonably be read to say that Ms O'Donnell was not taking account of those earlier emails.

224. For all these reasons, the Tribunal finds that the harassment claim is not well founded.

Receipt of "unknown email" by the Claimant

225. The ninth alleged act of discrimination relates to what is described on the Scott Schedule (p94) as an "unknown email" which the Claimant received on 27 January 2020 in response to an email she sent to Lauren Coyle regarding the issue of the payments made to her in error. It is said that the "unknown email" indicated that Ms Coyle no longer worked for the Respondent and that this amounted to discrimination arising from disability on the basis that the Claimant was not in the office and could not know who was still employed by the Respondent.

226. The Claimant did not produce a copy of the relevant emails and did not give any evidence about this issue in her evidence-in-chief. The matter was raised in the cross-examination in which the Claimant, when being asked what the issue was in relation to this matter, stated that, as a result of Ms Coyle having left the Respondent, was disadvantaged by only having Ms O'Donnell to contact.

227. The Tribunal considers that it has a very limited evidential basis on which it can make findings in relation to this allegation. The burden of proof is on the Claimant and the Tribunal does not consider that she has discharged it in relation to this allegation in terms of proving that there was unfavourable treatment which was caused by something arising from disability.

228. It is not clear why the Claimant was contacting Ms Coyle about a matter which Ms O'Donnell had been dealing with for over a month at this point; Ms Coyle does not appear in any of the previous correspondence and was not copied into the Claimant's initial email of 16 December 2019 raising this issue (p364). On the face of it, Ms Coyle had had no involvement in this matter at all.

229. There is also no obvious reason why the Claimant needed to involve Ms Coyle. For example, there was no evidence that Ms O'Donnell was not responding to the Claimant's emails which might prompt her to contact an alternative person.

230. The Tribunal has no evidence as to what the Claimant sought to raise with Ms Coyle but had she raised this with Ms O'Donnell, who was her point of contact, then the issue about which she complains would not have arisen. The Respondent was not subjecting the Claimant to any unfavourable treatment in this regard. It may have been different if Ms Coyle had been the nominated point of contact and the Claimant had not been informed of her departure but that is not the case. Rather, the Claimant sought to contact someone other than her nominated contact and the Respondent cannot be held responsible for any disadvantage which arises from the Claimant's choice.

231. The Tribunal does not consider that the Claimant was subject to any disadvantage in having Ms O'Donnell as her point of contact; there is no evidence that, for example, Ms O'Donnell was not progressing the matter or that the Claimant was in any way discouraged or prevented from communicating with Ms O'Donnell.

232. Further, as at 27 January 2020, Ms O'Donnell had provided the Claimant with the contact details for Colleague Help and so the Claimant did have someone other than Ms O'Donnell who she could contact.

233. The Tribunal has already addressed the issues of a single point of contact, access to pay information and having contact details for Colleague Help above and found that any claim of discrimination relating to these was not well-founded. To the extent that this allegation is based on the same or similar arguments made in relation to those matters then the Tribunal relies on the same reasoning as set out above.

234. For all these reasons, the Tribunal finds that this claim under the Equality Act is not well founded.

Email from Natalie O'Donnell dated 5 February 2020

235. The tenth alleged act of discrimination relates to an email sent by Ms O'Donnell to the Claimant on 5 February 2020 at 15.48 which is said to amount to harassment on the basis that it is alleged that Ms O'Donnell sought to use the fact that the Claimant had previously said (in 2018) that she did not want unnecessary contact from the Respondent as an excuse for not addressing the issue of the payments made in error.

236. The Tribunal does not consider that this is a proper and reasonable reading of this email when it is considered in context. It is part of an exchange of emails between the Claimant and Ms O'Donnell on 5 February (pp353-354) which is initiated by the Claimant. The Tribunal has already set out this exchange in its findings in fact and does not intend to repeat it. Those findings are referred to for their terms.

237. The Tribunal considers that, when the relevant email is read in the context of the whole email exchange, Ms O'Donnell is not seeking to excuse inaction on her (or the Respondent's) part. The Claimant had sought access to pay information and Ms O'Donnell had provided her with the

contact details for the team (that is, Colleague Help) to arrange this. The Tribunal notes that the Claimant had in an email of 27 January 2020 at 13.08 asked to speak to someone in payroll and the contact details were provided in response to this request. In those circumstances, there was nothing to suggest to Ms O'Donnell that the Claimant was expecting her to make those arrangements until the email exchange of 5 February.

238. To put it another way, there was no inaction by Ms O'Donnell to be excused as there was nothing to suggest that she needed to take action until the exchange on 5 February. The relevant email was simply Ms O'Donnell confirming her understanding of the position and it is important to note that once the Claimant's position was clarified, Ms O'Donnell took immediate action on this.

239. The Tribunal does consider that the email in question was, arguably, not unwanted conduct. The Claimant initiated the email exchange that led to this email and, to some extent, there has to be some scope for Ms O'Donnell to respond to the issue being raised. The relevant email is not inherently offensive and simply sets out Ms O'Donnell's understanding of the position.

240. In any event, even taking the Claimant's case at its highest, the Tribunal does not consider that this email had the prohibited purpose or effect necessary for it to amount to harassment.

241. There was no evidence at all that Ms O'Donnell's purpose was anything other than to reply to the Claimant's email and confirm her understanding. It was put to her in cross examination that Ms O'Donnell was taunting or mocking the Claimant in this email exchange. Ms O'Donnell denied that, stating that she did not know what else she could have done. The Tribunal accepted this denial as credible and reliable.

242. In terms of effect, again, whilst the Tribunal considers that the Claimant has had a genuine perception of a prohibited effect (and purpose), when this email is considered in all the circumstances of the whole email exchange it was not reasonable for the email to have a prohibited effect. The email

exchange simply clarified both parties' understanding of the position and it is notable that Ms O'Donnell then immediately took the action which the Claimant was asking her to take. The Tribunal does not consider that it is reasonable for such an exchange to violate someone's dignity or create a hostile, offensive or other environment for them.

243. For these reasons, the Tribunal considers that the claim based on this allegation is not well-founded.

Email from Natalie O'Donnell dated 19 February 2020

244. The eleventh allegation relates to an email which Ms O'Donnell sent to the Claimant on 19 February 2020 (p368) confirming that the final absence meeting had taken place. It is said that this amounts to an act of victimisation on the same basis as the eighth alleged act of discrimination.

245. The Tribunal has set out above the reasons why the claim of victimisation in respect of the eighth act was not well founded and it relies on the same reasons in holding that the claim of victimisation in respect of this allegation is also not well founded.

Letter from Respondent to the Claimant received on 4 March 2020

246. The twelfth alleged act of discrimination relates to a letter sent to the Claimant by the Respondent which was received by the Claimant on 4 March 2020 confirming that she had been dismissed. It is said that this letter amounts to discrimination arising from disability.

247. A copy of this letter was not produced by the Claimant and she only referred to it in her oral evidence describing it as an automated letter. It was not disputed by the Respondent that such a letter was sent.

248. It is important to note that the Scott Schedule does not plead a case that the decision to dismiss itself is an act of discrimination and, rather, it is said that the sending of this letter is the act of discrimination.

249. It is alleged that this amounts to discrimination arising from disability on two grounds.

250. First, it is said that the letter did not contain any rationale for the Claimant's dismissal. The Tribunal accepts this assertion at face value as there is no evidence which disputes this. However, the Claimant subsequently received, on 5 March 2020, a letter dated 28 February 2020 which does contain the rationale for her dismissal and so the Tribunal considers that the Claimant was provided with the reasons for her dismissal when the correspondence is considered as a whole and so the Tribunal does not consider that this amounts to unfavourable treatment.

251. Second, it is said that the letter amounts to discrimination arising from disability because the decision to dismiss her was made while she was absent from work and she was not advised of the date of the meeting at which the decision was made nor was she invited to this meeting.

252. The Tribunal considers that this is an allegation of discrimination that goes beyond the sending of the letter and is, rather, a complaint about the manner in which the final absence meeting was arranged and conducted.

253. When the whole circumstances of the case are considered, the Claimant was invited to the final absence meeting. It is correct that she was not invited to the specific meeting that Ms O'Donnell held but the Claimant was invited, in earlier correspondence, to attend the final absence meeting when it took place (with options given to her to attend remotely) but had expressly and unambiguously stated that she was not able to attend any such meeting (whether in person or remotely). This is not a case where the Respondent simply proceeded to a final meeting without telling the Claimant about it at all. She was given the opportunity to attend and declined that opportunity.

254. In these circumstances, the Tribunal does not consider that a reasonable worker would consider that they had been disadvantaged by a meeting

proceeding in their absence in circumstances where they had been given an opportunity to attend a final absence meeting but had declined to do so.

255. For these reasons, the Tribunal finds that the claim of discrimination arising from disability in respect of this allegation is not well-founded.

Letter from the Respondent to the Claimant dated 28 February 2020

256. The thirteenth, and final, alleged act of discrimination related to the letter dated 28 February 2020 (pp378A-B) confirming the reasons for the Claimant's dismissal which is said to amount to discrimination arising from disability.

257. Again, the Tribunal bears in mind that the actual decision to dismiss is not said to be an act of discrimination and, rather, it is the contents of the letter which form the basis of the claim in relation to this allegation.

258. The first matter raised by the Claimant is that the letter to dismiss relies on a comment made by her at the grievance meeting with David Laverie to the effect that she did not want to return to work with the Respondent to justify the Claimant's dismissal.

259. It is important to consider the context in which this comment is referenced in the letter. The reference to this comment appears as part of a short narrative summarising what had happened in the absence management process but is not expressly referenced in the second paragraph on p378B where Ms O'Donnell sets out her reasons for dismissing the Claimant. The factors relied on are the length of the Claimant's absence and the lack of any foreseeable date for a return to work. Taking the Claimant's case at its highest, the latter reason would be broad enough to encompass any comment by the Claimant that she did not want to return but it would also include the occupational health reports which stated that a date for return to work was not imminent or even foreseeable. There is no evidence that this comment by the Claimant was a significant, let alone determinative, factor in Ms O'Donnell's decision.

260. To put it another way, there is no evidence that had this comment never been mentioned in the letter then a different decision would have been made. It is difficult to see how the reference to this comment disadvantaged the Claimant or how a reasonable worker would consider they had been disadvantaged in such circumstances.

261. The second matter raised by the Claimant is an allegation that the letter of dismissal does not indicate that Ms O'Donnell had taken into account the information which the Claimant asked her to in an email of 18 December 2019 (p366).

262. The Tribunal considers that it is important to take into account what was actually said by the Claimant in the email at p366. This simply makes reference to the Claimant's *"previous emails"* as containing answers to the questions Ms O'Donnell asked in her email of 17 December 2019 (p366-367). It does not make reference to any specific email from the Claimant or reference to any specific information which the Claimant wants Ms O'Donnell to take into account.

263. This stands in contrast to what is pled in the Scott Schedule where it is said that Ms O'Donnell was being asked to take into account four specific matters; medical information; details of the Claimant's health difficulties; detail of the impact that the Claimant's work had on her health; many requests for HR support. To the extent that this allegation of discrimination is based on an assertion that Ms O'Donnell was being asked to take into account these specific matters then the Tribunal considers that, as a matter of fact, she was not. At most, she was being asked to review all of the Claimant's previous emails without any direction as to what information in those emails the Claimant considered relevant or wished to rely on.

264. In any event, it is not true that the letter of dismissal did not give an indication that the Claimant's previous emails had not being considered by Ms O'Donnell. The second paragraph of p378B opens with a statement that there had been *"a review of <u>all</u> meeting notes, <u>email interactions</u>,*

occupational health reports and calls since the start of your absence" (emphasis added) before the decision to dismiss had been made. On the face of it, the letter does indicate that Ms O'Donnell had taken into account all of the Claimant's emails. Further, there was no evidence led before the Tribunal to contradict what is said in the letter.

265. In these circumstances, the Tribunal considers that this allegation of discrimination did not actually happen and so this claim of discrimination is not well founded.

Summary

266. For the reasons set out, the Tribunal finds that each of the alleged acts of discrimination forming the Claimant's claim under the Equality Act are not well founded and the claims under the Equality Act are hereby dismissed.

Employment Judge: Peter O'Donnell
Date of Judgment: 17 March 2022
Entered in register: 17 March 2022
and copied to parties