

ANNEX TO JUDGMENT: AGREED LIST OF ISSUES

1. Complaints

- 1.1 Claim 1 (as amended)
 - 1.1.1 Direct gender reassignment discrimination;
 - 1.1.2 Direct disability discrimination;
 - 1.1.3 Harassment related to gender reassignment;
 - 1.1.4 Harassment related to disability;
 - 1.1.5 A failure to make reasonable adjustments;
 - 1.1.6 Victimisation.
- 1.2 Claim 2
 - 1.2.1 Direct gender reassignment discrimination;
 - 1.2.2 Direct disability discrimination;
 - 1.2.3 A failure to make reasonable adjustments.
- 1.3 Claim 3
 - 1.3.1 Direct gender reassignment discrimination;
 - 1.3.2 Direct disability discrimination;
 - 1.3.3 A failure to make reasonable adjustments;
 - 1.3.4 Victimisation.
- 1.4 Claim 4
 - 1.4.1 Direct race discrimination;
 - 1.4.2 Direct gender reassignment discrimination;
 - 1.4.3 Direct disability discrimination;
 - 1.4.4 Harassment related to sex and of a sexual nature (s.26(1)&(3));
 - 1.4.5 Victimisation.

2. The Issues

- 2.1 Disability – the Respondents admit that the Claimant was disabled by virtue of anxiety and depression at the time of the events that the claims are about.
- 2.2 The Claimant is also relying on dyslexia as a disability in Claim 2. The Respondent has previously admitted that the Claimant is disabled by virtue of dyslexia.

3. Jurisdiction

- 3.1 In relation to claim 3, insofar as the Claimant's claims against the First Respondent relate to the steps taken to investigate the Changing Room Incident and/or the contents of the statements that were provided

voluntarily and/or the steps that were taken to support her following the Changing Room Incident and her finding the two notes in her locker:

- 3.1.1 Have those parts of the claims have been brought outside of the time limit imposed for the presentation of such complaints having regard to the Claimant's assertion that she was subjected to a discriminatory act extending over a period which did not end until the conclusion of the ABAW appeal process?
- 3.1.2 If so, is it just and equitable for the Tribunal to extend time for submission of those parts of the Claimant's discrimination claim?
- 3.2 In relation to claim 3, insofar as the Claimant's claims against Ms Westwood relate to Ms Westwood's request that the Claimant provide a sample of her handwriting and/or the steps that Ms Westwood took to support her following the Changing Room Incident and her finding the two notes in her locker:
 - 3.2.1 those parts of the claims have been brought outside of the time limit imposed for the presentation of such complaints.
 - 3.2.2 In light of this, is it just and equitable for the Tribunal to extend time for submission of those parts of the Claimant's discrimination claim?
- 3.3 Insofar as the Claimant's claims against (a) Ms Townsend and Ms Hawkshaw rely upon alleged acts of discrimination which occurred on or before 18 June 2021; and (b) against the First Respondent rely upon alleged acts of discrimination which occurred on or before 28 July 2021:
 - 3.3.1 The claim against Ms Hawkshaw for an alleged act of discrimination on 17 June 2021 is one-day out of time and the claims against the First Respondent are more significantly out of time.
 - 3.3.2 In light of this, is it just and equitable for the Tribunal to extend time for submission of those parts of the Claimant's discrimination claim?
 - 3.3.3 Further, have those parts of the claims against Ms Townsend been brought outside of the time limit imposed for the presentation of such complaints?
 - 3.3.4 If so, is it just and equitable for the Tribunal to extend time for submission of those parts of the Claimant's discrimination claim?
- 3.4 [In relation to the Claimant's claim of direct disability discrimination against the First Respondent for pleading the statutory defence, does the Tribunal have jurisdiction to hear that part of the claim on the grounds of judicial proceedings immunity? – Claim to be withdrawn after which this issue can be removed]

4. **The Admitted Incidents (claim 1)**

- 4.1 For the purposes of this list of issues the Admitted Incidents (admitted by the First Respondent) are:
 - 4.1.1 On 28 July 2020 a conversation took place in the ladies changing rooms in the CPU as described in paragraph 25 of the First Respondent's Grounds of Resistance in relation to Claim 1, which was overheard by the Claimant who was in a toilet cubicle at the time ("the Changing Room Incident").
 - 4.1.2 On 28 July 2020 a note, which stated "get out you tranny freak", was found in the Claimant's locker in the ladies changing rooms in

the CPU.

- 4.1.3 On 11 August 2020 a second note, which stated "get out tranny", was found in the Claimant's locker in the ladies changing rooms in the CPU.

5. **Admitted Treatment (claims 3 & 4)**

- 5.1 For the purposes of this list of issues, the Admitted Treatment (admitted by the First Respondent) is:

- 5.1.1 The Changing Room Incident took place. (Claim 3)
- 5.1.2 The First Respondent did not take any action against Ms Cook or Ms Marshall in respect of the Changing Room Incident. (Claim 3)
- 5.1.3 Ms Westwood requested that the Claimant provide a sample of her handwriting. (Claim 3)
- 5.1.4 Ms Townsend told Ms Hawkshaw that the Claimant had made a comment to her on 10 June 2021 about the Claimant taking off her underwear at work and had then done an action to imply that she had wrung her underwear out. (Claim 4)
- 5.1.5 During a conversation with the Claimant on or around 17 June 2021, Ms Hawkshaw told the Claimant that she could not behave like a child and spit her dummy out, and apologised for making that comment. (Claim 4)
- 5.1.6 During a meeting on 25 June 2021, Ms Hawkshaw discussed with the Claimant a comment that the Claimant had allegedly made to Ms Townsend on 10 June 2021 about taking off her underwear at work and doing an action to imply that she had wrung her underwear out, and asked the Claimant questions about the alleged comment and action. (Claim 4)
- 5.1.7 Ms Hawkshaw informed the Claimant that she had triggered Stage 3 of the Occasions Based Absence Management Procedure in the MA Policy and would be invited to attend a Stage 3 meeting. (Claim 4)
- 5.1.8 Ms Hawkshaw invited the Claimant to an attendance review meeting under the Continuous Absence Management Procedure in the MA Policy. (Claim 4)
- 5.1.9 Ms Hawkshaw invited the Claimant to attend a Stage 3 meeting under the MA Policy. (Claim 4)

6. **Direct gender reassignment discrimination against the First Respondent (Equality Act 2010 section 13)**

- 6.1 It is not disputed that the Claimant has the protected characteristic of gender reassignment.
- 6.2 Did the First Respondent do the following things:
- 6.2.1 The Admitted Incidents (vicariously, by reason of section 109 of the Equality Act 2010)?
- 6.2.2 Treat the internal investigation into the Claimant's complaints of bullying as an afterthought by dealing with it last in a meeting

between Ms Westwood and the Claimant on 4 August 2020?

- 6.2.3 Ask the Claimant to provide a handwriting sample in relation to the second note left in her locker?
- 6.2.4 Fail to fully investigate the second note incident, by failing to take handwriting samples from other staff as part of the investigation?
- 6.2.5 Delay in offering the Claimant a date for an appeal hearing in respect of her appeal against the outcome of the investigation? (Claim 1 as amended)
- 6.2.6 Delay in providing the Claimant with the outcome to her formal grievance? (Claim 1 as amended)
- 6.2.7 Fail to discount the Claimant's absence from her record? (Claim 1 as amended)
- 6.2.8 Delay in offering the Claimant a date for an appeal hearing in respect of her grievance appeal? (Claim 2)
- 6.2.9 In relation to her grievance appeal, find that the Claimant had not been discriminated against by being invited to attend a Stage 3 meeting under the Respondent's Managing Attendance Policy ("MA Policy")? (Claim 2)
- 6.2.10 In relation to her grievance appeal, hold that the grievance appeal manager (Mr Andrew Jones) had no discretion to reimburse the Claimant's lost wages? (Claim 2)
- 6.2.11 In relation to the outcome of her grievance appeal, fail to consider that there was a grant open to the Claimant (to recover her lost wages)? (Claim 2)
- 6.2.12 Indicate that the Claimant would be invited to a Stage 3 meeting under the Respondent's MA Policy following absences in May and June 2021? (Claim 2)
- 6.2.13 Make comments, specifically comments made by Mr Ashton, during the appeal hearing in relation to the taking of a handwriting sample from the Claimant; those alleged comments being (i) there was enough tension in the department so taking handwriting samples would have made matters worse and not necessarily got to the bottom of who had written the note; (ii) to take handwriting samples from everyone else would cause the Claimant distress; and (iii) to take handwriting samples would cause further tension in the CPU? (Claim2)
- 6.2.14 Request the Claimant to provide a handwriting sample? (Claim 2)
- 6.2.15 The Admitted Treatment (vicariously, by reason of section 109 of the Equality Act 2010 save for 5.1.2)? (Claims 3 & 4)
- 6.2.16 Fail to investigate the Changing Room Incident and/or the contents of the statements that were provided voluntarily? (Claim 3)
- 6.2.17 Fail to take steps to support the Claimant following the Changing Room Incident and the Claimant finding the two notes in her locker? (Claim 3)
- 6.2.18 Place the Claimant in an unsafe working environment? (Claim 4)

6.3 If so, were any of those things less favourable treatment?

6.4 Also, in respect of the grievance appeal outcome, did Mr Jones' refusal to dis-apply the MA Policy and/or his alleged failure to take account of the reasons for the Claimant's absences and/or the length of time that he took to deal with the grievance appeal amount to less favourable treatment? (Claim 3)

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

In respect of the "handwriting incident" the Claimant says she was treated worse than actual comparators, namely those who were not required to provide a handwriting sample. In relation to her other allegations, she relies upon a hypothetical comparator.

6.5 If so, was it because of gender reassignment?

7. Direct disability discrimination against the First Respondent (Equality Act 2010 section 13) – anxiety and depression

7.1 Did the First Respondent do the following:

7.1.1 The Admitted Treatment (vicariously, by reason of section 109 of the Equality Act 2010 save for 5.1.2)? (Claims 3 & 4)

7.1.2 Fail to investigate the Changing Room Incident and/or the contents of the statements that were provided voluntarily? (Claim 3)

7.1.3 Fail to take steps to support the Claimant following the Changing Room Incident and the Claimant finding the two notes in her locker? (Claim 3)?

7.1.4 Fail to pay the Claimant correctly on her leaving the Respondent's employment (although this was rectified)?

7.1.5 [Plead the statutory defence? (the First Respondent accepts that it did so plead and will argue judicial proceedings immunity) – Claim to be withdrawn after which this issue can be removed]

7.1.6 Place the Claimant in an unsafe working environment? (Claim 4)

7.2 In addition, did John Ashton tell Sally Edwards that the Claimant would be subject to a welfare meeting instead of an Stage 3 meeting for her absence relating to the CPU incidents, and did the First Respondent revoke this?

7.3 If so, were any of those things less favourable treatment?

7.4 If so, was it because of the Claimant's disability, namely anxiety and depression?

8. Allegations of direct discrimination against Ms Cook and Ms Marshall (R2 and R3 in claim 3)

8.1 Did Ms Cook and/or Ms Marshall have any involvement in the Changing Room Incident?

8.2 If so, was this less favourable treatment?

8.3 If so, was it because of the Claimant's gender reassignment?

9. **Allegations of direct discrimination against Ms Westwood (R4 in claim 3)**

9.1 Ms Westwood admits that she requested that the Claimant provide a sample of her handwriting to Ms Westwood.

9.2 In addition, did Ms Westwood fail to take steps to support the Claimant following the Changing Room Incident and the Claimant finding the two notes in her locker?

9.3 In relation to 9.1 and 9.2 (insofar as the answer to 9.2 is "yes"), was this less favourable treatment?

9.4 If so, was it because of the Claimant's gender reassignment?

10. **Allegations of direct discrimination against Mr Jones (R5 in claim 3)**

10.1 In respect of the grievance appeal outcome, did Mr Jones' refusal to dis-apply the MA Policy and/or his alleged failure to take account of the reasons for the Claimant's absences amount to less favourable treatment? (Claim 3)

10.2 Further, Mr Jones take too long to deal with the grievance appeal? If so, did this amount to less favourable treatment? (Claim 3)

10.3 If the answer to 10.1 and/or 10.2 is yes, was the less favourable treatment because of the Claimant's disability and/or her gender reassignment?

11. **Allegations of direct discrimination against Ms Hawkshaw (R3 in claim 4)**

11.1 Ms Hawkshaw admits that:

11.1.1 During a conversation with the Claimant on or around 17 June 2021, she told the Claimant that she could not behave like a child and spit her dummy out. She also accepts that she apologised for making that comment.

11.1.2 She informed the Claimant that she had triggered Stage 3 of the Occasions Based Absence Management Procedure in the MA Policy and would be invited to attend a Stage 3 meeting.

11.1.3 She invited the Claimant to an attendance review meeting under the Continuous Absence Management Procedure in the MA Policy; and

11.1.4 She invited the Claimant to attend a Stage 3 meeting under the MA Policy.

11.2 Were any of those things less favourable treatment?

11.3 If so, was the less favourable treatment because of:

11.3.1 In the case of 11.1.1, the Claimant's disability, namely her anxiety and depression;

11.3.2 In the case of 11.1.2, 11.1.3 and 11.1.4, of the Claimant's gender reassignment and/or disability, namely her anxiety and depression? N.B. In this respect, the Claimant alleges that "but for" her disability and/or gender reassignment related absences, she would not have been subjected to the MA Policy rather than her gender reassignment and/or disability being the reason/s why Ms

Hawkshaw carried out the process.

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

12.1 Did the Respondent treat the Claimant unfavourably by:

12.1.1 Failing to pay her full sick pay;

12.1.2 Threatening to apply absence management sanctions

12.2 Did the Claimant's sickness absence arise in consequence of her disability? Or was it because of the Admitted Incidents?

12.3 Was the unfavourable treatment because of any of those things? i.e. did the Respondent fail to pay the Claimant full sick pay and/or threaten to apply absence management sanctions because of her sickness absence?

12.4 Was the treatment a proportionate means of achieving a legitimate aim? This may involve consideration of whether the Respondent's actions in relation to the Admitted Incidents caused or contributed to the Claimant's sickness absence. In particular, the Tribunal will consider:

12.4.1 Was the treatment an appropriate and reasonably necessary way to achieve the legitimate aim;

12.4.2 Could something less discriminatory have been done instead;

12.4.3 How should the needs of the Claimant and the Respondent be balanced?

13. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21) – anxiety & depression**

13.1 Is Mr Jones (R5 in claim 3) liable to the Claimant for any failure to make reasonable adjustments?

13.2 Did the First Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

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

13.3.1 The application of its attendance/absence management policy;

13.3.2 A PCP not to take account of the reasons for absences in the application of that policy;

13.3.3 The application of its sick pay policy;

13.3.4 A requirement that the Claimant work 37.5 hours per week.

13.4 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability? If so, how?

13.5 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

- 13.6 What steps could have been taken to avoid the disadvantage? The Claimant suggests:
- 13.6.1 The Respondent could have disapplied certain triggers for absence management;
 - 13.6.2 The Respondent could have continued to pay full sick pay;
 - 13.6.3 The Respondent could have allowed her to continue working two days per week;
 - 13.6.4 The Respondent could have discounted the Claimant's absence from her record (Claim 1 as amended and Claim 2);
 - 13.6.5 The Respondent could have reimbursed the Claimant her lost wages (Claim 1 as amended and Claim 2).
- 13.7 Was it reasonable for the Respondent to have to take those steps? This may include a consideration of the reasons for the Claimant's sickness absence.
- 13.8 Did the Respondent fail to take those steps?
14. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21) – dyslexia (Claim 2)**
- 14.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?
 - 14.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:
 - 14.2.1 The Respondent's practice and method of communicating grievance and grievance appeal decisions.
 - 14.3 Did the PCP(s) put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability? If so, how?
 - 14.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?
 - 14.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:
 - 14.5.1 The Respondent could have sent her a copy of the grievance appeal outcome on yellow paper.
 - 14.6 Was it reasonable for the Respondent to have to take those steps? This may include a consideration of the reasons for the Claimant's sickness absence.
 - 14.7 Did the Respondent fail to take those steps?
15. **Harassment related to gender reassignment (Equality Act 2010 section 26)**
- 15.1 Did the Respondent do the following things:
 - 15.1.1 The Admitted Incidents (vicariously, by way of section 109 EQA)?
 - 15.1.2 Treat the internal investigation into the Claimant's complaints of bullying as an afterthought by dealing with it last in a meeting

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between Ms Westwood and the Claimant on 4 August 2020?

15.1.3 Ask the Claimant to provide a handwriting sample in relation to the second note left in the Claimant's locker?

15.1.4 Apply the attendance management policy to the Claimant?

15.1.5 Fail to discount the Claimant's absence from her record? (Claim 1 as amended)

15.2 If so, was that unwanted conduct?

15.3 Did it relate to gender reassignment?

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

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

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

16.1 Did the Respondent do the following things:

16.1.1 Apply the attendance management policy to the Claimant?

16.1.2 Fail to discount the Claimant's absence from her record? (Claim 1 as amended)

16.2 If so, was that unwanted conduct?

16.3 Did it relate to disability?

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

16.5 If not, did it have that effect?

16.6 The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

17. Victimisation (Equality Act 2010 section 27)

17.1 Did the Claimant do a protected act as follows:

17.1.1 Raise a grievance about the Admitted Incidents?

17.2 Did the First Respondent do the following things:

17.2.1 Invite the Claimant to a stage 3 meeting under its absence management policy?

17.2.2 Apply the absence management policy to the Claimant?

17.2.3 Ask the Claimant to provide a handwriting sample in relation to the second note left in her locker? (Claim 2)

17.2.4 Fail to discount the Claimant's absence from her record? (Claim 2)

17.2.5 Indicate that the Claimant would be invited to a Stage 3 meeting under the Respondent's MA Policy following absences in May and

June 2021? (Claim 2)

- 17.2.6 Reject the Claimant's grievance appeal by a decision made by Mr Andrew Jones? (Claim 2)
- 17.3 By doing so, did it subject the Claimant to detriment?
- 17.4 If so, was it because the Claimant did a protected act?
- 17.5 Ms Westwood admits that she requested that the Claimant provide a sample of her handwriting to Ms Westwood
- 17.6 In her doing so, did the First Respondent and/or Ms Westwood subject the Claimant to a detriment?
- 17.7 If so, was it because the Claimant did a protected act?
- 17.8 Did the First Respondent and/or Mr Jones subject the Claimant to a detriment by refusing to dis-apply the MA Policy and/or failing to take account of the reasons for the Claimant's absences and/or taking too long to deal with the grievance appeal?
- 17.9 If so, was it because the Claimant did a protected act?
- 17.10 The First Respondent and Ms Hawkshaw admit the following:
- 17.10.1 Ms Hawkshaw informed the Claimant that she had triggered Stage 3 of the Occasions Based Absence Management Procedure in the MA Policy and would be invited to attend a Stage 3 meeting.
- 17.10.2 Ms Hawkshaw invited the Claimant to an attendance review meeting under the Continuous Absence Management Procedure in the MA Policy.
- 17.10.3 Ms Hawkshaw invited the Claimant to attend a Stage 3 meeting under the MA Policy.
- 17.11 In doing any of those things, did the First Respondent and/or Ms Hawkshaw subject the Claimant to detriment?
- 17.12 If so, was it because the Claimant did a protected act?
18. **Harassment related to sex (Equality Act 2010 sections 26(1) & 26(3))**
- 18.1 The First Respondent admits that:
- 18.1.1 Ms Townsend told Ms Hawkshaw that the Claimant had made a comment to her on 10 June 2021 about the Claimant taking off her underwear at work and had then done an action to imply that she had wrung her underwear out; and
- 18.1.2 During a meeting on 25 June 2021, Ms Hawkshaw discussed with the Claimant a comment that the Claimant had allegedly made to Ms Townsend on 10 June 2021 about taking off her underwear at work and doing an action to imply that she had wrung her underwear out, and asked the Claimant questions about the alleged comment and action.
- 18.2 Ms Townsend admits that she told Ms Hawkshaw that the Claimant had made a comment to her on 10 June 2021 about the Claimant taking off her underwear at work and had then done an action to imply that she had

wrung her underwear out.

- 18.3 Ms Hawkshaw admits that during a meeting on 25 June 2021, she discussed with the Claimant a comment that the Claimant had allegedly made to Ms Townsend on 10 June 2021 about taking off her underwear at work and doing an action to imply that she had wrung her underwear out, and that she asked the Claimant questions about the alleged comment and action.
 - 18.4 Were any of these actions unwanted conduct on the part of the First Respondent and/or Ms Townsend and/or Ms Hawkshaw?
 - 18.5 If so, did it relate to the Claimant's sex and/or was it of a sexual nature?
 - 18.6 Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?
 - 18.7 If the answers to 20.5 and 20.6 above are "yes", did Ms Townsend and/or Ms Hawkshaw treat the Claimant less favourably because of the Claimant's rejection of or submission to the conduct? The Claimant alleges that she was placed on the MA Policy because she had rejected the original unwanted conduct in relation to the "underwear incident" and that this amounted to less favourable treatment of her because of that rejection.
19. **Direct race discrimination**

[Not determined by this Tribunal.]

20. **Statutory defence – Claim 1 (as amended) only**

20.1 Where the Respondent is potentially liable vicariously for the actions of its employees in the course of their employment (section 109(1) EQA), had it taken all reasonable steps to prevent the employees doing those acts or from doing acts of that description (section 109(4) EQA)?

21. **Remedy**

21.1 In respect of remedy, the Claimant asks the Tribunal to consider:

21.1.1 Insofar as the actions of Ms Townsend and Ms Hawkshaw are found to be discriminatory, did they cause the Claimant to go on sick leave with stress?

21.1.2 Insofar as the actions of the Respondents are found to be discriminatory, did they cause Claimant's gender reassignment surgery to be delayed?