Case Number: 3319551/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms C Giandinoto	v	British Airways plc

Heard at: Watford, by Cloud Video Platform

On: 27-30 June, 1, 4-6 July and (in private) 7 July 2022

Before: Employment Judge Hyams

Members: Mrs J Hancock
Mr C Surrey

Representation:

For the claimant: In person
For the respondent: Ms B Venkata, of counsel

UNANIMOUS RESERVED JUDGMENT ON LIABILITY

1. The claimant's dismissal was not unfair (whether within the meaning of section 98 of the Employment Rights Act 1996 or section 103A of that Act).

2. The claimant's claims of breaches of the Equality Act 2010 do not succeed and are dismissed. The respondent did not in dismissing the claimant discriminate against her within the meaning of sections 13, 15 or 19 of that Act, and it did not harass her within the meaning of section 26 of that Act.

3. The claimant's other claims, i.e. in respect of conduct preceding 23 March 2019, are out of time and therefore are outside the jurisdiction of the tribunal. They are therefore dismissed.

REASONS

Introduction

1 In these reasons we first state the claims that were being pressed by the time of the start of the hearing before us, which was 27 June 2022. In doing so, we give a brief history of those claims. We then state our findings of fact on material matters. Having done so, we refer to the relevant law. We then state our

conclusions on the claimant's claims in turn, taking them in the order to which we refer to them in the following section below.

The claims

2 By a claim form presented on 22 June 2019, the claimant claimed (by ticking the applicable boxes in section 8 of the claim form) that she had been dismissed unfairly and discriminated against "on the grounds of" ... "race" and "disability" and that she was owed "other payments". The claim form was accompanied by a document that had no title but started with a heading "Unfair Dismissal". There were then 23 numbered paragraphs after which there was a heading "Discrimination". The parts of the section following that heading relating to the claim of race discrimination were no longer relevant by the time of the liability hearing which we conducted. That was because the claim of discrimination because of race had by then been withdrawn and (on 3 March 2021, in the document at pages 122-123 of the hearing bundle) dismissed on its withdrawal by the claimant. The same was true of the claim of unpaid wages, which was also dismissed on its withdrawal in that document.

3 The claimant was employed as a member of the respondent's cabin crew. She was dismissed on notice by a letter dated 2 January 2019, with the notice taking effect on 27 March 2019. There was a period of early conciliation. The period started when ACAS was approached by the claimant on 9 January 2019. The early conciliation certificate was issued on 9 February 2019. Since (as we say in paragraph 2 above) the claim form was presented on 22 June 2019, the claim was within the primary time limit period of three months (which was in the circumstances not extended by any period of early conciliation) only in respect of events on or after 23 March 2019.

4 There was a bundle of documents before us which by the end of the hearing had in it 1385 pages. Any reference below to a page is, unless otherwise stated, a reference to a page of that bundle. At pages 67-92 there was a document stating the claimant's case in more detail. It was sent under cover of the email at page 65, which was dated 2 November 2019.

5 There were two preliminary case management hearings. The first was conducted by Employment Judge ("EJ") Loy on 27 November 2020. There was a record of that hearing at pages 118-121. It was signed by Regional Employment Judge Foxwell on behalf of EJ Loy on 3 March 2021, under rule 63 of the Employment Tribunals Rules of Procedure 2013. EJ Loy had listed a hearing to determine whether the claimant was disabled within the meaning of the EqA 2010 and to deal with any further case management that was required. That hearing was listed to take place on 1 June 2021. In paragraph 6 of the record of the hearing of 27 November 2020, EJ Loy recorded that the claimant had 'produced a further document entitled "Further and better particulars" which ran to some 19 pages.' EJ Loy continued:

> "The covering email to that document withdrew the claims of race discrimination and unlawful deduction from wages, in respect of which dismissal judgment will be issued separately. Details set out in the 25 November 2020 document included whistleblowing claims."

6 By order number 1 of those made by EJ Loy, it was determined that the claimant's case was now 'definitively set out in her document dated 25 November 2020 entitled "Further and Better Particulars", and that that document incorporated "the entirety of the claimant's case." Those further particulars (to which we refer below as "the claimant's further particulars") were at pages 97-115.

7 The hearing of 1 June 2021 took place and was conducted by EJ Manley. She recorded this in paragraph 2 of her case management summary, at page 127:

> "The background to the case is as set out in the preliminary hearing held in November 2020, being claims for unfair dismissal, public interest disclosure and disability discrimination. The respondent has conceded that the claimant was a disabled person by reason of depression and PTSD at the material time. Following further particulars, an application to be allowed to amend the claim and the respondent's amended response, the parties will be in a position to draft a comprehensive list of issues for the final hearing."

8 That concession was formally recorded by the respondent in paragraph 32 of its amended grounds of resistance (at page 47), which were dated (on page 49) 22 June 2021. During the hearing of 27 June to 6 July 2022 before us, it became clear to us that the respondent's concession that the claimant was suffering from "PTSD", i.e. post-traumatic stress disorder, and depression at the material times (i.e. at the times to which the claim related, rather than the whole of the claimant's continuous employment with the respondent), was not supported by the contemporaneous medical and other documentation. We made that clear during the first week of the hearing. On the final day of that hearing, on behalf of the respondent Ms Venkata formally resiled from, or withdrew, that concession. That withdrawal caused the claimant considerable distress. We understood that distress and, through EJ Hyams, explained that the issue of whether or not the claimant was disabled within the meaning of section 6 of the EqA 2010 was jurisdictional in that if she was in our view not so disabled then some of her claims of a breach of that Act could not (unless the respondent was bound by its concession that she was so disabled) be pursued, and that we would need to decide whether to permit the respondent to resile from its concession that she was disabled by reason of depression and PTSD at the material times. We consider in paragraph 143 below some case law relating to resiling from a concession, and in paragraph 153 below we state our conclusion on the question

whether the respondent was bound by its concession that the claimant was disabled at the material times.

9 The application to amend the claim to which EJ Manley referred in the part of her case management summary which we have set out in paragraph 7 above was (as the claimant confirmed to us on 6 July 2022) in fact considered at the hearing of 1 June 2021, as was indicated by EJ Manley's orders following that hearing. Those orders were set out on page 128, and they included these:

> "1. The application to amend the claim to include a claim for indirect disability discrimination is allowed.
>
> 2. The application to amend the claim to include a claim for victimisation is not allowed.
>
> 3. The respondent has leave to present an amended response by 22 June 2021.
>
> ...
>
> 6. The parties will seek to agree a comprehensive list of legal and factual issues for the hearing and send it to the tribunal by 30 September 2021."

10 It appeared that the list of issues at pages 138-144 (entitled "Agreed list of issues"; we refer to it below as such) was the document that resulted from order number 6. Ms Venkata told us that the list was not in fact agreed, at least in several respects. The list referred back to the claimant's further particulars in several places. The list stated claims of the following sorts, in the following manner, which we have in some cases recast with a view to enabling them to be fitted into the relevant statutory framework. We have also in the following paragraphs of this section of these reasons made some comments about the claims and the issues arising in them.

Automatically unfair dismissal

11 The claimant claimed that she had been dismissed automatically unfairly within the meaning of section 103A of the Employment Rights Act 1996 because of the making by her of a disclosure within the meaning of section 43B(1)(d) of that Act by "reporting"

11.1 "an alleged breach of Health and Safety and failures to follow corresponding procedure to Kris Major of the Health and Safety Committee on 16/08/2018";

11.2 "an alleged breach of health and safety to Dolores Lee chair of Unite Bassa on 03/07/2018"; and

11.3 "an alleged breach of health and safety to Megali Allport IBM 30/06/2018".

12 That "alleged breach of health and safety" was an accident of which the claimant was the only victim. It had occurred on 30 June 2018 and resulted from another member of the respondent's staff, Ms Ann Walker (known as Ms Fiona Walker), causing a handle on a door to an aircraft to hit the claimant on the back of her head and her shoulder with some force. We return to that accident in paragraphs 74-76 below.

"Ordinary" unfair dismissal

13 It is the claimant's case that she was dismissed unfairly within the meaning of section 98 of the ERA 1996. It is the respondent's case that the claimant was dismissed for capability as a result of her sickness absence record. It was the claimant's case that her dismissal was unfair for the reasons stated in paragraph 88a-88t of her further particulars. We did not need to set out those particulars here. In summary, they were that

13.1 the respondent had not followed its own absence management procedure properly;

13.2 the respondent had failed to make reasonable adjustments for the claimant's disabilities;

13.3 the respondent's analysis of the claimant's past absences was inaccurate;

13.4 the respondent took into account absences which the respondent ought to have decided not to take into account because they were for things which meant that the claimant was not allowed to work as a member of an aircraft's cabin crew (such as blocked ears resulting from a cold or influenza, since flying with such blocked ears could lead to the eardrum bursting);

13.5 the respondent had taken into account in determining that the claimant should be dismissed a period of absence related to what the claimant called in paragraph 88j "a life-time event", namely her parents suffering a serious road traffic accident;

13.6 the respondent had, in deciding that the claimant should be dismissed, taken into account days when the claimant had not been required to work;

13.7 the respondent had failed to take advice from the respondent's occupational health service (abbreviated to, and referred to by us from now

on, as "BAHS") before deciding whether to (using the respondent's procedure's relevant word) "discount" specific absences of the claimant;

13.8 the respondent had based its decision that the claimant should be dismissed in part on the proposition that the claimant had refused to engage with BAHS;

13.9 the respondent had decided that the claimant should be dismissed for capability without (see paragraph 88o on page 109) "[calling] a pause to the process to investigate the accident at work in 2018";

13.10 the respondent had in deciding that the claimant should be dismissed taken into account her absences from work because of that accident; and finally (as claimed in paragraph 88t on page 109):

13.11 "the Respondent illegally dismissed me from my employment because I made a claim for personal injury. Instead of accepting liability for the accident, the Respondent applied the consequent days off and used them to dismiss me."

Direct disability discrimination

14 The claim of direct disability discrimination had to be gleaned from what was stated in paragraphs 10-13 of the list of issues, at page 140, and paragraph 97a-p of the claimant's further particulars at pages 110-111. A claim of direct discrimination within the meaning of section 13 of the EqA 2010 where the protected characteristic is disability is often better advanced as a claim of a breach of section 15 of the EqA 2010, and the claimant made the latter claim here. We refer to it further below. The claim of direct disability discrimination was based on the proposition in the opening words of paragraph 97 on page 110 that "the following acts" were "less favourable treatment because of [the claimant's] disabilities", followed by subparagraphs a-p. In paragraph a, there was this text:

> "No fair adjustment implemented in a timely effective manner to promote recovery, manage workload and allow time scale for symptoms to manifest further. In fact these were delayed by Carl (scheduling department manager) when he instead prioritised flying duties over my recovery and disabilities."

15 That was a claim in respect of events which long pre-dated the claimant's dismissal. Accordingly, it was only in time if we extended time on the basis that it was just and equitable to do so or it was part of conduct extending over a period within the meaning of section 123(3)(a) of the EqA 2010. However, by reason of the decision of the Court of Appeal in *Matuszowicz v Kingston upon Hull City Council* [2009] IRLR 288, a failure to make a reasonable adjustment has to be regarded as having occurred at a particular time. In any event, the content of

paragraph 97a of the further particulars was in reality a claim that there had been a failure to comply with sections 20 and 21 of the EqA 2010, which was now relied on as a claim of direct discrimination within the meaning of section 13 of that Act. That was incoherent. Reading that claim sensibly, i.e. taking a common-sense interpretation of it, it was a claim of a breach of section 15 in regard to the claimant's dismissal.

16 Most of the rest of the subparagraphs of paragraph 97 of the claimant's further particulars were similar in that they were best regarded as a claim of a breach of some provision of the EqA 2010 other than section 13. That was true of paragraphs b, c, d, e, f, g (which, despite using the word "victimised", was not in fact a claim of a breach of section 27 of the EqA 2010; in any event the content of paragraph 97g was so general that it was impossible to see it as a coherent claim of a breach of the EqA 2010 in itself), h, i, j (which was also very general), k, l, m and p (which was in fact in terms a claim of a breach of section 15). Paragraphs 97n and 97o bear repeating here. They were in these terms:

> "n. I was treated different because of my disability. The employee who caused my injury at work did not suffer any detriment or disciplinary investigation. At the material time she was still employed by the Respondent. I was made to believe that the ARI [i.e. meetings at which the claimant's absences were considered] were an opportunity to implement fair adjustments but instead the Respondent apportioned blame on me for my time off and did not make reasonable adjustments or take ownership of the injury they were responsible for. I am the disabled employee and yet I was dismissed and the other member of staff was not even asked to attend the meetings or answer questions. Instead she was given a voluntary way out while I was discriminated against and eventually dismissed.
>
> o. I was made to talk about these events every single meeting I had with the Respondent which has a severe impact on me. Despite this I cooperated with their investigations. The Respondent, including Caroline Connor, already had information about my disabilities and the incident forms/risk assessments from my accident and still chose to put me through this."

17 As for precisely what was/were the claimant's disability/disabilities, while that question was not determinative of the claim of direct discrimination within the meaning of section 13, it was helpful to consider what the respondent knew about any of the claimant's impairments which did indeed fall within the definition of disability within the meaning of section 6 of the EqA 2010 and the reasons for such of the impairments of which the respondent was aware.

18 In that regard, we saw from the documents before us which the claimant had disclosed that she had not had PTSD diagnosed in any way until 26 March 2019,

when her medical general practitioner ("GP") recorded such diagnosis, largely, it appeared from page 991, on the basis of what the claimant told the GP. We set out that entry in paragraph 111 below.

Discrimination arising from disability

19 The claimant claimed (as stated in paragraph 14 of the agreed list of issues at page 140) that she was discriminated against within the meaning of section 15 of the EqA 2010 through the respondent doing the things stated in paragraph 101 of the claimant's further particulars at page 112, namely:

> "a. not discounting a number of my absence, for example my alleged absence between 11/10/2017 – 21/10/2017 for acute stress and anxiety which is caused by my disabilities.
> b. dismissing me for intermittent absences, some of which arose because of my disabilities
> c. dismissing me in particular using the absence caused by the accident, when this had exacerbated my disabilities
> d. not waiting to see what effect the accident had on my disabilities given the nature of the injury I suffered.
> e. the dismissal was disproportionate given that my actual absences did not trigger the absence management policy to the extent the Respondent alleges, if at all."

20 We did not accept that the agreed list of issues in paragraphs 15-18 on page 141 stated the applicable issues properly. That was because there was no focus on precisely what was the claimant's disability at the material times, including by the time of the claimant's dismissal, and whether that disability was known, or ought reasonably to have been known, to the respondent at those material times. We did, however, accept that the key question was as stated in paragraph 17 on page 141, which was whether the claimant's dismissal was a proportionate means of achieving a legitimate aim. The aim relied on by the respondent was stated to be that it had to "support staff who are absent due to sickness so far as reasonable, managing staff absence to facilitate a return to work with regular and sustained attendance and considering termination fairly where absence can no longer reasonably be supported".

Indirect disability discrimination

21 The claimant's indirect discrimination claim, made under section 19 of the EqA 2010, was stated in paragraphs 19-23 of the agreed list of issues at pages 141-142. We saw it as adding nothing to the claim of a breach of section 15 of that Act. That was because, assuming that (as the respondent appeared to be inclined to accept) there was indeed a provision, criterion or practice within the

meaning of section 19 applied here, in the form of "the triggers used under Section 3 of EG300 (namely 2 or more occasions of absence in any rolling 3 months, or 4.5% of available working hours in a rolling 12-month period)", the key question was the same as that which arose for determination in the application of section 15, if that section was applicable. That question was whether the claimant's dismissal was a proportionate means of achieving a legitimate aim.

Harassment

22 The claim of harassment was stated in the agreed list of issues at page 143 in the following way:

> "24. Did [the] Respondent engage in unwanted conduct toward the Claimant? The unwanted conduct relied upon is the Respondent's use of the absence management policy as [a] way of managing the Claimant out [of] the business, failure to apply discounts for absences caused by disabilities and the matters set out in paragraph 113 a to f of the Further and Better Particulars.
>
> 25. Was the alleged conduct related to the Claimant's disability?
>
> 26. Did the alleged conduct have the purpose of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
>
> 27. Did the alleged conduct have the effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account the perception of the Claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect."

23 Paragraph 113 of the claimant's further and better particulars was on page 114 and was in these terms:

> "The Respondent's conduct was oppressive and unacceptable and had the effect of violating my dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment (section 26 EQA):
>
> a. By deliberately concealing vital information/evidence in relation to Accident on 30/06/2018. Incidents forms and risk assessments were only released to me at the end of November 2018, despite requesting them several times from the Respondent
>
> b. The Respondent did not investigate complaints/grievances that I raised and instead they apportioned blame on me

c. A failure to put in place reasonable adjustments for me given my disabilities and instead seeking to manage me out of the business

d. Making me feel as if everything was my fault with no consideration for my health and disabilities at all.

e. Putting me through an unfair absence management process.

f. Telling me I could not call in for support during this process."

24 All of those alleged acts or omissions occurred before 23 March 2019.

The evidence which we heard and read

25 On behalf of the respondent, we heard oral evidence from

25.1 Mr Daniel Varani, who was employed by the respondent as an Inflight Business Manager and was the claimant's line manager until the first part of 2018,

25.2 Ms Caroline Gabriel who was also employed by the respondent as an Inflight Business Manager and was (as Ms Caroline Connor; we refer to her below nevertheless as Ms Gabriel) the claimant's line manager from the first part of 2018 until the claimant's dismissal, and

25.3 Ms Anne Pilgrim, who was at the material time (to which we refer below; Ms Pilgrim determined in the manner which we describe below the claimant's appeal against the determination of Ms Gabriel that the claimant had triggered one of the stages of the respondent's absence management procedure) employed by the respondent as an "Area Manager for Mixed Fleet in IFCE".

26 On behalf of the claimant we heard oral evidence from the claimant herself and from

26.1 Mr Kris Major, who was in 2018 (1) a Unite the Union representative in relation to the respondent's cabin crew via the British Airways Stewards and Stewardesses Association ("BASSA"), and (2) a member of the respondent's IFCE Health and Safety committee; and

26.2 Ms Tanya Cumming, who was the claimant's Unite the Union representative via BASSA in 2018 and 2019.

27 In addition to the contents of the hearing bundle as it stood at the start of the hearing, on 27 June 2022, we took into account all additional documents which

were sent to us during the hearing by both parties. We refer to the relevant documents which we took into account below only so far as necessary. Similarly, in our findings of fact below we refer only to the facts which were of particular importance to our determinations.

Our findings of fact

The claimant's continuous employment

28 The claimant's continuous employment with the respondent started on 19 October 2004 when she joined the cabin crew workforce of the airline known as British Midland International ("BMI"). On 8 June 2012, the claimant's contract of employment was transferred from BMI to the respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246.

The claimant's working hours

29 The claimant's employment was at that time part-time. She worked then, and continued to work until her dismissal by the respondent in the circumstances which we describe below, as a half-time employee, i.e. working 50% of the working hours of an equivalent full-time employee.

30 It was the claimant's evidence at the end of the hearing before us that she had started to work part-time on 26 February 2010 because she was at that time disabled by reason of depression. The fact that she had started at that point to be a part-time employee of BMI was evidenced by the letter from BMI to the claimant of that date at page 207. That letter did not mention any reason for the claimant's commencement (which was to take effect on 10 April 2010) of part-time working. However, we saw that at page 596 there was a letter from BMI to the claimant also dated 26 February 2010, in which the claimant was given formal notice of redundancy, with the notice taking effect on 30 October 2010. During that notice period, the claimant was, the letter at page 596 stated, required to work, and if alternative employment was found for her, then the notice would be revoked.

31 We also saw that the claimant was recorded in the notes at pages 853-859, which were notes of the meeting conducted by Ms Gabriel on 13 December 2018 after which the claimant was dismissed on notice, to have said (at page 855) that she "got part time because of" the reasons stated on that page, namely that she had had "a mini face transplant" of her "nose and cheekbones" in January 2017 because when she was aged 22 she had been "attacked by a guy who was schizophrenic" who had "caused trauma to [her] face" which had led to her face starting to collapse, which in turn had affected her sinuses.

The claimant's medical history before she started to be employed by the respondent in 2012

32 The precise reason for the claimant working part-time was not relevant, and we mention it only because the claimant set a lot of store on it in the hearing before us. What was important was that the claimant's relevant medical records (which she had disclosed to the respondent only during these proceedings, i.e. and not while she was an employee of the respondent or BMI) showed that she had suffered from what was diagnosed by her GP in 2009 as depression and that she was prescribed several anti-depressants for it in that year and 2010.

33 It was also material that the claimant's medical records showed (most clearly at pages 970-971) that the claimant had (as she told us) in early 2010 stopped taking conventional medication for her depression and started taking (as prescribed for her by her GP) "St John's Wort Capsules 333 mg".

34 On 26 February 2010, the GP's notes at page 971 showed, the claimant had a consultation with her GP, Dr Brassey, when she told him that she had that morning been told that she had been made redundant. The notes on that page for that consultation included these words:

> "Apparently to make a claim under the Disability Discrimination act, she owuld [sic] need to have an impairment with a duration of longer than 12 months
> Will be kept on until October this year
> Yet to start the St John's Wort.
> PMHx of OCD in her 20s and anorexia
> Medication: Zopiclone Tablets 7.5 gm
> ...
> Advised to see employment lawyer for an opinion".

35 There was an entry dated 18 March 2010 on the same page which was apparently entered automatically, and it was for the "Cancellation for drug St John's Wort Capsules 333 mg ... Reason for cancellation not specified".

36 The next entry was for 27 March 2010, and was the final entry on page 971. That recorded "Cancellation for drug Zopiclone Tablets 7.5 mg. ... Reason for cancellation not specified".

37 There was an entry for 6 April 2010 on page 972 referring to the claimant still taking St John's Wort and it making a "minor difference". There was also a reference to Zopiclone being prescribed but on 5 May 2010 that prescription was again recorded to have been cancelled.

38 There was at page 973 a reference to the cancellation of a prescription for Temazepam on 19 June 2010, but that prescription was (we saw from page 974)

renewed on 6 August 2010 and it was renewed on 9 September 2010 when Fluoxetine was also prescribed. However, on 8 October 2010, both of those prescriptions were cancelled and we could not see any evidence of them being renewed subsequently.

39 The claimant did not give evidence (and she was asked by EJ Hyams during the hearing about this) to the effect that she had after 2010 been prescribed medication for depression until 22 January 2019, as recorded in the notes at page 989 which we set out in paragraph 110 below.

The respondent's Absence Management Process

40 At pages 408-419 there was a copy of the respondent's "Local Procedures for Cabin Crew Attendance at Work". On page 415 there was a table stating the "triggers, per contract type, which apply for Cabin Crew working arrangements". For a 50% contract, there were these triggers:

40.1 2 or more "Occasions of absence in rolling 3 months";

40.2 "4.5% of available working hours in a rolling 12 months", which

40.2.1 did not include "MBTs, Off days or other non-working days", and

40.2.2 amounted in the claimant's case to 5 days.

41 The final column in the table on page 415 was headed "2.25% allowable occasion" and that too did not include "MBTs, Off days or other non-working days". That 2.25% was in the claimant's case stated to be 3 days.

42 Paragraphs 7 and 8 on page 416 were in these terms:

"**7. Requests for Discount**

After a period of absence there are defined circumstances in which you may request an exceptional discount from the EG300: Absence Management Policy, prior to an Absence Review Interview.

Your request for a discount must be made using the online Absence Discount Request form within 2 days of reporting fit.

Requests from CSDs will be forwarded to your Line Manager for consideration and response.

Your request for exceptional discount will be considered by the IFCE Ground Support Hub/Inflight Business Manager and a reply will be sent to

you by ESS mail. The reply will normally be sent on the same day, but may on occasion take longer.

Please note that the IFCE Ground Support Hub/Inflight Business Manager will not be able to enter into discussion on this decision. If you wish to discuss the matter further, there will be an opportunity to do so if you reach a trigger in the EG300 Absence Management Policy and attend an Absence Review Interview.

Any absence that has been discounted will still be recorded as an occasion of absence, but will not be counted towards a trigger in the EG300 Absence Management Policy.

8. Applying Discretion

All discounts are a the [sic] discretion of the Ground Support Hub/Inflight Business Manager and there is no automatic right to have any absence discounted.

The IFCE Ground Support Hub/Inflight Business Manager has the authority to discount certain occasions of absence from the triggering process. In doing so they will refer to the decision making framework for the application of discretion. They will also take advice from Policy & Casework Support, and in some circumstances from British Airways Health Services."

43 There was at pages 312-328 a copy of the "EG300: Absence management policy". It was dated "April 2018". At pages 329-351 there was a document entitled "EN300: Managing absence due to sickness or injury" and it was also dated "April 2018".

44 In paragraphs 7 and 8 of her witness statement, Ms Gabriel explained the way in which the two documents were intended to be read and applied. Those paragraphs (which we accepted) were as follows:

> "7. EG300 is applied in accordance with 'EN300: Managing absence due to sickness or injury' ('EN300') (pages 329-351) which details the method of applying the principles of EG300 and both EG300 and EN300 are supportive of one another.
>
> 8. EN300 has to be read alongside EG300 and line managers are required to follow the process detailed in EN300 to manage absences."

45 In paragraph 58 of her witness statement, Ms Gabriel said this about the rationale for the application of the absence management procedures:

> "Absences have a huge impact on the business as they require standby coverage, flights become under crewed, there's an impact on overtime and they reduce the availability of leave for other colleagues, as colleagues are then required to cover any sickness absences. All absences have a significant impact on our ability to run a stable operation."

46 Apart from the possible impact of staff working overtime, the claimant accepted the accuracy of that passage. The claimant said that the standby staff were not paid overtime. However, the claimant was forced to accept, as we did, that if a member of staff was paid for a sickness absence and a member of the standby staff was engaged, then that did incur a cost to the respondent which would not have been incurred if the sickness absence had not occurred. That was because standby staff were not paid unless they worked.

47 The terms of EG300 were relied on by the claimant in support of her propositions to which we refer in paragraph 13 above that the respondent had not applied its own absence management policy when it decided that she should be dismissed. We need therefore to refer to and so far as necessary set out the critical parts of that policy document.

48 Section 3 of the document was at pages 319-323. Paragraphs 3.1 to 3.4 were in these terms.

> "*3.1 Trigger points*
> Triggers are used to identify points at which the line manager will discuss with the employee their absence record and are defined in an addendum to this policy. When an employee reaches a trigger point, the line manager will conduct an investigation into the employee's absence record. It is important that the employee co-operates fully in any investigation in order that the employee's absence record is fully understood by the line manager. As a result of the investigation the line manager may take further action under this policy or EG901 Disciplinary Procedures.
>
> *3.2 Exceptional circumstances*
> Following a return to work discussion line managers have the authority to discount certain occasions of absence from the triggering process prior to an Absence Review Interview. The nature and context of the absence will be taken into account by the line manager. The line manager will make the decision having taken advice from Policy and Casework Support. Any occasion of absence that has been discounted by the line manager will be recorded.
>
> *3.3 Equality Act 2010*
> Any absences related to a disability under the Equality Act will be recorded and a Return to Work Discussion held after every occasion of absence.

> The absence related to the disability would normally be discounted from the triggering process. Should the employee's absence reach a level where the line manager believes the employee may not be able to perform their current job the employee maybe required to attend an Absence Review Interview or a periodic review with their line manager.
>
> *3.4 Absence when the employee reaches a trigger point*
> Employees are required to maintain an acceptable level of attendance. If, however, they fail to do so and the employee's absence record reaches any of the trigger points, they will be managed under this policy.
>
> Line managers have the authority to discount certain occasions of absence from the triggering process. If a line manager is asked to do this by an employee in respect of an occasion of absence that would, otherwise, trigger movement to the next stage of the process, the line manager will take BAHS advice before deciding whether to exercise or deny this discretion.
>
> Every occasion of absence will be noted in the employee's overall absence record, even if it is discounted from the triggering process."

49 Paragraph 3.5 provided for "Absence Review Interviews (ARIs)". On page 320 this was said:

> "If the employee's absence, although in excess of 21 consecutive days is not likely to be long term or affect their ability to do their job the employee's absence should be managed under Section 3 or 5 of this policy".

50 On page 321, this was said:

> "If the employee does not reach any further triggers within 12 months they will exit the process."

51 At pages 327-328, the triggers were stated (in Appendix 1) to be:

> "• 2 or more occasions of absence in any rolling 3 months
>
> • 4.5% of available working hours in a rolling 12 months
>
> • absence which exceeds 21 consecutive days, refer to Section 4 of this Policy".

52 On page 328, Appendix 2 provided this:

> "If an employee reaches 4.5% of available working hours trigger in a single occasion of absence then in their improvement plan the employee will be

allowed one further occasion of absence of up to 2.25% of their available working hours."

53 There were four "stages" in section 3 of EG300. The final one was stated on page 323 and made it clear that "dismissal could be the outcome at the final stage ARI".

54 Section 4 of EG300 was at pages 323-326 and was stated in paragraph 4.1 on page 323 to be applicable "Where an employee is unable to do their job to the standard reasonably required by British Airways due to the employee's medical incapacity". However, it was then said that

> "If a line manager believes on reasonable grounds that:
> - the employee's absence, although in excess of 21 consecutive days is not likely to be long term or affect their ability to do their job the employee's absence should be managed under Section 3 or 5 of this policy."

55 Section 5 of the policy was at pages 326-327 and was headed "Misconduct". Its opening paragraph was this:

> "An employee who behaves in such a way that it appears to the company that their absence is not legitimate, will be dealt with under EG901 Disciplinary Procedures, for example,
>
> - An unacceptable pattern of absence i.e., the amount of absence is not necessarily a concern, but the days taken as absence indicate possible misconduct, e.g.,
>   - regular days of the week
>   - linked to public holidays or yearly calendar events
>   - school holidays
>   - before or after annual leave
>   - first/last day of shift/roster
>   - shift types e.g., earlies/lates/night
>   - when rostered to particular duties."

56 At page 206 there was an extract from a document apparently published on 1 October 2007 and entitled "Procedures for Cabin Crew". Most of the page was a reference to EN300. The reference must have been to an earlier version of EN300 than the one which was in the bundle, to the relevant part of which we refer in the next paragraph below. The main part of page 206 was relied on by the claimant heavily and was in these terms:

> "**EN300 Managing Absence due to sickness or injury – Discretion**
> EN300 states: *The usual outcome of an ARI would be to confirm the improvement plan, however it may be felt that an improvement plan is not*

appropriate. In managing absence it is important that the actions of line managers are considered fair and reasonable. In deciding whether they may discount an occasion of absence, the line manager should consider its nature and context and after appropriate consultation with People Manager Advice, make a balanced judgement.

'Nature' of the sickness/injury

In such cases the absence is a particular occasion of sickness or injury that is exceptional by its nature. Examples of occasions of sickness that may be considered exceptional are those that are 'one off' or have occurred through an unusual life event.

'Context' of the sickness/injury

The manager will review the employee's absence record to date and in doing so, will consider the number of occasions and days the employee has been absent from work due to sickness or injury. The line manager will consider factors such as whether the absence is directly linked to a recent injury at work, whether a pattern of absence is emerging and whether advice from BAHS would assist in decision-making and the support of the individual.

It is accepted that the regulatory framework (Flying Crew Orders, JAR OPS, Air Navigation Order) details conditions that would exclude crew from being able to carry out their cabin crew duties. These include the following:

- *Colds and Flu resulting in blocked ears*
- *Diarrhoea & Vomiting*
- *One-off life events (for example, surgery, broken limb, one-off injury, severe emotional trauma)*
- *Down-route sickness (where reported to Global Lifeline.) Information from the Senior Cabin Crew member will also be taken into account.*
- *Pregnancy related sickness.*

The normal practice will be for an occasion of absence relating to one of these conditions to be discounted, however, the line manager will endeavour to look at all the circumstances when making this decision. Where applicable, discounting should take place prior to an ARI."

57 That was not reflected in full in the current version of EN300. Instead, there was this passage at pages 339-340.

"**Discretion**

The usual outcome of an ARI would be to confirm the improvement plan, however it may be felt that an improvement plan is not appropriate. In managing absence it is important that the actions of line managers are considered fair and reasonable. In deciding whether they may discount an occasion of absence, the line manager should consider its nature and context and after appropriate consultation with Policy and Casework

Support, make a balanced judgement. See Appendix E - application of discretion.

Nature of the sickness/injury
In such cases the absence is a particular occasion of sickness or injury that is exceptional by its nature. Examples of occasions of sickness that may be considered exceptional are those that are 'one off' or have occurred through an unusual life event.

Context of the sickness/injury
The manager will review the employee's absence record to date and in doing so, will consider the number of occasions and days the employee has been absent from work due to sickness or injury. The line manager will consider factors such as whether the absence is directly linked to a recent injury at work, whether a pattern of absence is emerging and whether advice from BAHS would assist in decision making and the support of the individual.

The following are examples where line managers may wish to use their authority to discount occasions of absence:

- broken limbs
- surgery
- cancer
- pregnancy related sickness

NB: This list is not exhaustive

It is accepted that there are regulatory frameworks which detail conditions that may exclude an employee from being able to carry out their duties. These occasions of absence will be recorded.

If an employee reaches the stage 3 or final stage absence review interview the line manager must conduct a thorough review of the employee's absence record to date as part of the decision making process to ensure they are being fair to the employee in all the circumstances. The line manager will review the areas listed below to consider whether any occasions of absence will be discounted:

- the overall nature and context of the absence

- the impact of any regulations on a persons ability to perform their job with regard to current regulatory advice

- application of the process to date

- trigger decisions

If there was a recurring trend of an illness covered under the regulatory framework it may not preclude the employee from moving into the stage 3 or final stage Absence Review interview.

When a line manager is considering the use of their authority to discount any occasion of absence they must seek advice from BAHS and Policy and Casework Support.

If the improvement plan is met and no additional triggers are reached within 12 months from the date the improvement plan commenced, the employee exits the process. If after the 12 months have elapsed the triggers are reached again the employee would go back to stage 1.

If an improvement plan was not met under any of the stages, the employee will be asked to attend a further interview under the next appropriate stage of the EG300: Absence management policy (Employment Guide)."

58 The respondent had a policy numbered EG406 and entitled "Time off for Dependants". It was dated September 2013 and was at pages 230-231. It contained the following passage.

"**Policy**

Employees will be granted a reasonable amount of time off for dependants in accordance with this policy. Time off for dependants includes compassionate leave.

Definitions

Dependant means, in relation to an employee:

- ☐ a spouse, civil partner or partner;
- ☐ a child;
- ☐ a parent;
- ☐ a person who lives in the same household as the employee, other than his or her employee, tenant, lodger or boarder.
- ☐ other people who reasonably rely upon the employee if they fall ill, have an accident, are assaulted or suffer disruption to their normal care arrangements.

Principles

If employees know in advance that they are going to need time off, they should pursue other leave arrangements and can discuss which one is the

> most appropriate with his/her line manager. Time off for dependants is a right allowing employees to take a reasonable amount of time off to deal with certain UNEXPECTED or SUDDEN EMERGENCIES and to make any necessary longer term care arrangements for their dependants.
>
> Line managers depending on the merits of the case and the frequency of requests, grant up to a maximum of 5 days paid leave per annum. This is NOT an automatic right to an extra 5 days paid leave per year. If an employee works part time then the paid leave will be pro-rated according to their contracted hours.
>
> This right is for unforeseen matters. Such leave will normally be granted with basic pay, following a discussion with the employee's line manager to confirm that dependants' leave is applicable. Should any leave granted be found not to be compliant with this policy the manager will discuss the most appropriate leave to be taken."

The claimant's period of employment with the respondent

The initial period of the claimant's employment with the respondent

59 When the claimant's employment with the respondent started, she was required to attend what she called in paragraph 8 of her witness statement a "conversion/familiarisation course at British Airways training centre". The whole of that paragraph was this:

> "On 11th June at the end of day three during a conversion/ familiarisation course at British Airways training centre, I sustained an injury to right knee on Boeing 767. No medical assistance was provided. In fact following this accident I travelled back home by underground on my own and was later taken by ambulance to A&E. As a result of such accident I sustained psychological trauma (PTSD) triggering my depression. This was all known to the Respondent. The Respondent further knew from the medical evidence that I had suffered a panic attack at the time, which was as a result of my disabilities."

60 We were unable to find in the claimant's very full medical records any reference to the claimant "sustain[ing] psychological trauma (PTSD)" by reason of the accident which she suffered on 11 June 2012, or (as we indicate in paragraphs 32-39 above) any reference to the claimant suffering from depression at any time after 11 June 2012 until 22 January 2019. In addition, we saw no reference in the claimant's medical records to the claimant having suffered a panic attack before 17 January 2019. The claimant was first recorded to have had a panic attack in the letter dated 6 March 2019 at pages 1120-1121, where (in addition to it being recorded that "Ms Giandinoto described her recent workplace injury as a trigger to PTSD"), this was recorded:

> "On 17th January she booked an emergency appointment with her GP due to experiencing a panic attack; patient was in a 24/7 suicide watch. Ms Giandinoto denied active thoughts of suicide; but felt disconnected. No plans, no preparations. She named her responsibility to others and supportive family as a strong protective factors."

61 There was an entry in the claimant's GP's notes for a consultation on 17 January 2019. The consultation was noted at page 989. It was recorded to have been with Dr Brassey and was in these terms (i.e. and only these terms; for the sake of clarity we have in the rest of these reasons put the words "History", "Examination", "Diagnosis" and "Plan" in the entries from the claimant's GP's records in bold font):

> '**History** Was dismissed by BA after her injury and not having met her "improvement plan" is pursuing a claim with BA FOR THE INJURY Increasing stress since the incident
> **Diagnosis** Stress-related problem [: IBIL)] [? The lettering and punctuation in the square brackets were not clear]
> **Plan** MDDUS advised that she be referred to Occupational Health by her lawyer who can contact us at the same time
> Zolpidem 10mg tablets - 28 tablet take one at night when required for short term use only'.

62 In those circumstances, we did not accept paragraph 8 of the claimant's witness statement. Rather, we concluded that the claimant's injury of 11 June 2012 (for which she made a successful claim for damages) did not lead to any return of the claimant's depression, it did not leave the claimant with PTSD, and it did not cause any panic attack.

63 During 2012, the claimant was absent from work because of the injury for a period of (it was recorded in the Absence Summary at pages 600-604) 121 days. That was for the period from 12 June 2012 to 10 October 2012. The document recorded the number of days lost to sickness as 43.22, which was 38.1% of the claimant's time off.

64 We omit from our findings of fact about the material events the claimant's work history from 11 October 2012 to 27 April 2017. The reason for omitting from our description of the facts the events which occurred during that period is that the relevant events here were those which led to the decision made on behalf of the respondent that the claimant should be dismissed. That decision was made by Ms Gabriel after a meeting which took place on 13 December 2018 and was communicated to the claimant in the long and detailed letter dated 2 January 2019 at pages 875-890. We found that meticulous and detailed letter to contain an accurate statement of both Ms Gabriel's reasons for her decision that the claimant should be dismissed and the factual situations which were the

foundation for that decision. Thus, where we set out a passage from that letter below, we do so on the basis that the content of the passage is one of our factual findings.

The initial series of events which eventually led to the claimant's dismissal

The claimant's absences on 28-29 April 2017 and 1 May 2017

65 At pages 875-876, Ms Gabriel wrote this:

> "The absences which triggered Stage 1 of the EG300 Absence Management Policy were from:
>
> - Friday 28-April-2017 to Saturday 29-April-2017 (1 duty day)
> - Monday 01-May-2017 (1 duty day)
>
> I reminded you that during your Stage 3 Absence Review Interview you did not remember the reason for either of these occasions of absence. In response, you confirmed that you don't recall the reasons, however believed that this was a continuous absence."

66 We found the description of Ms Gabriel on the rest of page 876 to be illuminating and accurate. We agreed with her analysis that the claimant had indeed had two occasions of absence for the purposes of EG300.

The claimant's absence of 19 July 2017 and some of her subsequent absences

67 On page 877, Ms Gabriel wrote:

> "You triggered Stage 2 following an occasion of absence on Wednesday 19-July-2017 (1 duty day). You completed a discretionary absence request form stating you had suspected food poisoning and suffered from diarrhoea and vomiting. Your request was considered, and your absence was discounted for triggering purposes, however, remains recorded. I note that this occasion of absence follows 17 days off.
>
> You triggered Stage 2 again, as you did not meet your improvement plan under stage 1. You had three further occasions of absence on Saturday 23-September-2017 (1 duty day), Wednesday 11-0ctober-2017 to Saturday 21-0ctober-2017 (9 duty days) and Monday 18-December-2017 (1 duty day). Your occasion of absence in October 2017 reached the 4.5% of your available working hours in a rolling 12- month trigger."

68 The next paragraph in Ms Gabriel's letter recounted what the claimant had told her on 13 December 2018 as recorded in the notes of that meeting at the bottom

of page 856. The next three paragraphs on page 877 were important and were in these terms:

> "I advised you, for clarification, that on Saturday 23-September-2017 you asked CCAS [the respondent's Cabin Crew Attendance Support team] for the unpaid leave allocated to be reversed and amended to sickness, so you would not lose any pay. You confirmed during our meeting that 'I didn't want to lose money, I wasn't sick ... I was told my IBM would then sort it.' You and your Trade Union Representative advised me that you weren't sick during this period, however I understand that you were stressed during this time and unfit to work.
>
> Later in this discussion, you changed your mind about reversing the unpaid leave day and stated you wished to go sick instead of having unpaid leave to avoid you being deducted money. In addition, you asked CCAS how you could report sick and fit to ensure only one duty day of absence was recorded.
>
> You reported sick with the DOMS at 02:16am on Saturday 23-September-2017, and from reviewing this information on your file you reported sick, contrary to your statements during our meeting that you were not sick. I appreciate this must have been a very difficult time for you, however I believe that your Inflight Business Manager and Cabin Crew Attendance Support gave you adequate support under these circumstances."

69 Those circumstances were that the claimant's parents were hit while, as pedestrians, crossing a road (at a proper crossing point). The claimant's parents lived in Sicily, and the claimant had at least two siblings who lived and worked in Sicily. Ms Gabriel's letter contained, at the top of page 878, the following succinct statement of the material events which happened after the claimant had reported sick on 23 September 2017.

> "Once you had reported fit on 24-September-2017, your IBM Daniel Varani liaised with you and Scheduling to move your annual leave to give you a period of five annual leave days and unpaid leave days from Wednesday 11-0ctober-2017 to Saturday 21-October-2017. As you were concerned about the financial implications of taking unpaid leave, Daniel contacted Scheduling to cover three days of unpaid leave with three days of annual leave, leaving 3 days of unpaid leave remaining. Despite this support you reported sick on Wednesday 11-October-2017 to Saturday 21-October-2017 (9 duty days) stating the situation with your parents caused you stress and anxiety.
>
> You provided a GP certificate covering this period of absence which stated, 'acute adjustment disorder/stress.' On your return to work, you completed

> a claim of leave form and reclaimed 6 days of annual leave over this period of absence.
>
> You then reported sick on Monday 18-December-2017 (1 duty day). You confirmed that this occasion of absence was due to blocked ears. You submitted a discretionary absence request form, your request was considered however it was declined. I note that had an Absence Review Interview been held following your previous occasion of absence after you reported fit on 22-October-2017 and an improvement plan set, your absence on Monday 18-December-2017 (1 duty day) would have triggered Stage 3. I also note that this occasion of absence occurred before your 14 part time days off."

70 The "GP certificate" referred to in the second paragraph of that passage was at page 1104. It was received by the respondent on 9 November 2017. It was dated 30 October 2017. It was signed by Dr Brassey and it was plainly retrospective, relying only on what the claimant said to Dr Brassey on 30 October 2017 about how the claimant had been during the period to which it related, namely 11-21 October 2017 inclusive. During the hearing before us, the claimant said in oral evidence that she had called Dr Brassey during that period of 11-21 October 2017, but there was no record of that in the GP's notes for the claimant, and on 6 July 2022, the claimant sent us a photograph of a document in the following terms:

> "Consultation Information Sheet
> 05 Jul 2022
> ...
> 05 Jul 2022 16:29 ...
>
> > **History**: Rang her; says the tribunal is going well and is giving them her submission tomorrow. Worried about a possible data entry error on 14th July 2017 where the weight inputted does not appear to correspond with her own weight. Also worried, curiously, that a leter [sic] October 2017 Med3 sicknote after parents' RTA diagnosed with acute adjustment disorder/acute stress disorder but unclear what the problem is with such a retrospective diagnosis based on the history."

71 The reference to a "possible data entry error" was made there because of the following circumstances. There was in the bundle a reference to the claimant having had a "new" "Major Episode" of "Depressive disorder" in "2018". That was at page 1207. That page was part of a long document entitled "Airmid UK - Full Record", which was stated at its start (page 1170) to have been "Produced on 01 Sep 2021". The entry stating that the claimant had a "new" "Major Episode" of "Depressive disorder", in "2018", unlike the other entries in the document starting at page 1170, did not have a day and a month. There was also on page 1207 an entry for 14 July 2017 which stated the claimant's (or at least the

relevant patient's) weight as 66.3 kilograms and the patient's height as 1.702m. However, a year later, in the entry on page 1206 for 11 June 2018, the person to whom the notes related was stated to weigh 49 kilograms and to be 1.63m in height. A difference in weight would not for present purposes be exceptional, but a difference in height would be. In oral evidence, when the claimant had her attention drawn to this entry and the one for the apparent episode of a major depressive disorder in 2018, the claimant said that she had scoliosis and that that would explain the differences in height. However, the entry recording a major depressive disorder in 2018 was not reflected in the claimant's GP's detailed medical notes for 2018, which were at pages 986-989. The mistaken record of the claimant's height and (it now appeared) weight, was, however, at the top of page 986. Eventually, the claimant appeared to accept, but in any event we concluded, that the entry for "2018" at the top of page 1207 was erroneous and that the claimant did not have any episode of a major depressive disorder in 2018.

72 Returning to our statement of our findings of fact about the relevant events in chronological order, in the passage at the end of page 878, Ms Gabriel accurately reported what happened as a result of the claimant's absences in September to December 2017:

> "Your Stage 2 Absence Review Interview was initially scheduled on 10-April-2018 by your IBM Daniel Varani, due to the reason for your absence. Subsequently, I became your Inflight Business Manager in March 2018, and you advised Cabin Crew Attendance Support on 26-March-2018 that you wished for this meeting to be held in your absence. I held your Stage 2 Absence Review Interview in your absence on 05-April-2018 at your request, and I set a Stage 2 improvement plan from 19-December-2017 to 18-December-2018 having triggered 4.5% of your available working hours within a rolling 12 months. Given that you are part-time 50%, this equates to 5 or more duty days within a rolling 12 months, and you triggered Stage 2 with five occasions of absence totalling 13 duty days within a rolling 12 months. Your level of absence was more than twice the trigger point for your contract type."

73 The claimant then, in June and July 2018 had further absences, and those absences triggered Stage 3 of EG300. Ms Gabriel described those absences and the reasons for them in the main part of page 879, which was in these terms:

> "• Friday 01-June-2018 (1 duty day)
> • Monday 04-June-2018 to Friday 08-June-2018 (2 duty days)
> • Saturday 30-June-2018 to Tuesday 31-July-2018 (11 duty days)
>
> You triggered a Stage 3 Absence Review Interview as you did not meet your improvement plan under stage 2. The first occasion of absence which triggered Stage 3 was on Friday 01-June-2018 (1 duty day). You

subsequently reported sick on two further occasions from Monday 04-June-2018 to Friday 08-June-2018 (2 duty days) and from Saturday 30-June-2018 to Tuesday 31-July-2018 (11 duty days).

The absence on Friday 01-June-2018 (1 duty day) was due to blocked ears. You applied for this occasion of absence to be discounted, your request was considered however declined.

During our meeting, you said you had a GP certificate for your occasion of absence on Friday 01-June-2018, and you showed me the certification which stated 'UTRI'- an upper respiratory tract infection. You advised me that during your Stage 3 Appeal Meeting with Area Manager Anne Pilgrim on 01st November 2018, that you were told by Anne that had you called CCAS on this day you would have been given a medical day.

In reviewing Anne's appeal outcome, I can see no reference to your point made. However, Anne stated in her outcome, 'I have also checked all the dates below and can confirm that you have reported sick for all the dates above, whether or not you remember doing so.'

I stated to you that when you had seen your GP, you would have already reported sick, and on reviewing your file I can confirm you called CCAS on Thursday 31-May-2018 at 23:08 to report sick for the BA648 to Corfu on Friday 01-June-2018. You then told me that your ears were not blocked, however on reviewing your discount request form, you wrote 'my left ear was severed blocked.' [We checked and the word used by the claimant was indeed "severed".] You explained that because you booked an appointment with your GP, and your ear was successfully syringed, you were not sick as it was remedied on the same day.

Your Trade Union Representative also stated that you felt 'discomfort' and tried to get a later report to enable you to ensure your ears were not blocked, however this was declined. There is no evidence of this conversation on your operational file.

At this stage of the meeting, you advised me that you are 'Equality Act covered' and have been since you were employed by BMI. When asked for what condition you were covered by under the 2010 Equality Act you stated, 'my face; my Specialist keeps checking on me for my job as flying.'"

74 We refer in paragraph 88 below to what Ms Gabriel said at page 879 in response to that paragraph and related matters. Before doing so, we say that the passage of Ms Gabriel's letter at page 880 was in our view an entirely accurate description of the claimant's second absence of June 2018 (2 duty days between Monday 4 June 2018 and Friday 8 June 2018) (which was "due to [the claimant] being unwell down route in Larnaca with blocked ears"). It was also an accurate

description of the claimant's third absence of June 2018, which started on 30 June 2018 and continued until 31 July 2018. That absence occurred because the claimant suffered the injury at work to which we refer in paragraph 12 above. It occurred as a result of an action taken by a Cabin Service Director, i.e. to whom the claimant reported on the flight in question, in regard to a door of the aircraft on which the claimant was welcoming passengers. We were told that the respondent had before 27 June 2022 admitted liability for the accident. There was at pages 927 onwards a series of documents (each of which built on, and repeated, the content of one or more earlier documents) created on and after 1 July 2018. They contained a full and thorough account of the accident that had happened and its aftermath. The claimant was hit by the handle of the door. By way of example as a description of how that happened, there was this passage at the bottom of the left hand column on page 927:

> "Injury caused by internal operating handle:
> During the process of closing door 2 left XXX was struck on the head and back of the upper arm by the internal operating handle. The flight crew requested the presence of a DOM. After approx 5 minutes it was decided a paramedic was required as XXX was in pain and in shock."

75 At page 930, there was this description of the accident:

> "Metal door lever stuck down top of the head and shoulder
> xxx was standing on the aircraft doing the boarding on the left side of the door (from inside the aircraft). The CSD aaa stepped out of the aircraft to do something then before coming back on the aircraft she noticed that the flap on the outside of the door was raised.
> As a result she pushed it down causing the inside metal door level to suddenly go down. xxx was still standing inside the aircraft at the same boarding position when the metal door lever struck xxx on the left side of xxx's head. xxx believes it bounced back then hit xxx again on her left should and down her left arm. xxx's working position was number 2."

76 At page 987, the claimant's GP's notes included a record made by Dr Brassey on 2 July 2018 in these terms:

> "**History**. Note by Louis Brassey GP Had a work accident when pulling down the lever to operate the aircraft door, when the lever banged her on the right side of the head and gave her a bruise (visible) on the back of the left upper arm No *c*
> **Examination** Having headaches 138 / 87mmHg
> **Diagnosis** Post-concussional syndrome (XE267)
> **Plan**: For conservative tx
> Med3 (2010) issued by hand. may be fit for work (XaX1S) ... Valid from 02 Jul 2018 to 01 Aug 2018
> **Diagnosis**. Post Concussional Syndrome".

The final written warning

77 On 25 September 2018, Ms Gabriel met the claimant at an Absence Review Interview. There were notes of that meeting at pages 747-751. At the end of the meeting, Ms Gabriel gave the claimant a final written warning as recorded in the outcome letter dated 2 October 2018 at pages 757-763. The warning was stated on page 762 and was accompanied by an improvement plan. The plan was in the following terms.

> "As you can see your absence has reached the 4.5% trigger for your type of contract with 36 duty days and as a result, I have set a twelve-month Improvement Plan from 01-August-2018 to 31-July-2019 and issued a Final Written Warning.
>
> This means that if you should have another occasion of absence in the first six months of the Improvement Plan you are likely to again reach a trigger in the Attendance Policy. In this case you will be called to another ARI and may move to the Final Stage of the EG300 Absence Management Policy.
>
> If you should reach one of the EG300 triggers in the second six months of the Improvement Plan you will have to attend another Absence Review Meeting. The likelihood then is that a further Stage 3 Improvement Plan will be set.
>
> Please note that this letter is a Final Written Warning, which will be held on file for twelve months and then disregarded if you do not reach any further triggers. The aim of this is to encourage you to demonstrate improved attendance. You should be aware, however, that if you are unable to meet the terms of the Improvement Plan this may lead to the termination of your employment with British Airways."

78 We saw that in the notes of the meeting of 25 September 2018, at page 749, there was this exchange (CG being the claimant, CC being Ms Gabriel, and TU being, according to Ms Cumming, her):

> "TU: I think she knows that something needs to change, she has now taken up Yoga to help. In my view 3 of these should have been discounted (points to absences on 23-Sept-2017, 04-June-2018 and 30-June-2018). This is in accordance with EG300.
>
> CG: Our relationship always very good, before you set the Stage 3. I hope you don't think I was abrupt or challenging, I was upset?
>
> CC: I take that onboard, everyone has different circumstances. I do take that onboard.

> CG: There has been a lot of times I haven't wanted to go sick. I have had situations outside my control. Blocked ears, D&V, AAW, all of these are outside of my control."

The claimant's appeal against that final written warning

79 On 9 October 2018, the claimant appealed against that final written warning. She did so in the email at pages 764-765. Her reasons for doing so were these:

79.1 "There is a discrepancy in days classed as duty days"

79.2 "There's been no duty of care. Through out."

79.3 "Stage 1 should not be triggered. There wasn't an absence on the 1st May 2017".

79.4 "There's been no clarity to my accident at work 30/6/18 - 31/7/18 I was signed off for a month. This hasn't been discounted under the framework."

79.5 "My down route sickness has not been discounted 4/6/18 - 8/6/18 where global life line were involved."

79.6 "23/9/17 classed as sickness by my IBM, it was in fact DPL."

79.7 "Mentioning how I've had support for 166 days, that was section 4, not to be used as a tool against me."

79.8 "I also feel that I may be covered by the Equality Act and this hasn't been taken into consideration, only used to push me further through the EG 300 process."

80 Ms Pilgrim was asked to consider that appeal. On 1 November 2018, she held a meeting with the claimant to hear from the claimant in person about it. There were notes of the meeting at pages 768-771. They were a mixture of prepared, typed, notes for Ms Pilgrim's own use and her handwritten notes of what was said at it. At the top of page 771, Ms Pilgrim had written "May be covered by Equality Act". Ms Pilgrim's determination of the claimant's appeal (she dismissed it) was stated in the letter from her to the claimant dated 21 November 2018 at pages 801-807. Ms Pilgrim did not in terms refer to the claimant's claim that she was "covered by the Equality Act", but on page 802, under the heading "2. There's been no duty of care throughout", Ms Pilgrim wrote this:

> "This is an interesting allegation, during the appeal meeting on the 01 November 2018, you were very private with the information which you

shared with me, to better understand your appeal it may have been better to be more open.

Duty of care is also a very individual experience, based on what I have read in the crew management system, I can see a significant amount of support from the company, the Operation Support Team have supported you on several occasions with time off and or roster adjustments. You have also been referred to British Airways Health Services on several occasions.

It is my genuine belief that the relationships you have had with previous managers may differ to the relationship which you have with Caroline Connor, however given the nature and level of your absence I agree with the approach which has been taken to manage your attendance in accordance with our recognised procedures. It is my genuine belief that you have received adequate duty of care and, I therefore do not uphold this appeal point."

81 In oral evidence, Ms Pilgrim said that the claimant had during the meeting of 1 November 2018 said "nothing in relation to depression" and that the only thing that came to mind as having been said by the claimant in relation to the EqA 2010 was about "a sensitive situation" concerning the claimant's face. That was consistent with the evidence of Ms Gabriel about what the claimant had said to her, as recorded in paragraph 73 above, as the reason why the claimant thought that she was "covered by the Equality Act 2010". It was also consistent with what the notes of the meeting with Mr Devlin to which we return below recorded the claimant to have said on (the claimant accepted this, although the notes were undated) 8 February 2019. That note was at page 918. We return to it in paragraph 99 below. We mention it now because it was material to our conclusion that the claimant referred, when speaking to Ms Gabriel, Ms Pilgrim and Mr Devlin about the application of the EqA 2010, only to her face and the operation on it which she described on 8 February 2019 as recorded in the note at page 918 as "reconstruction of nose and cheekbone, 25th Jan 2017". There was, in fact, no record of that operation in the claimant's GP's medical records. However, the claimant said that she had had the operation done privately, and we accepted her evidence about that operation.

82 In the course of determining the appeal, Ms Pilgrim had a meeting with Ms Gabriel (who was still at the time Ms Connor, and who is referred to in the notes as "C.C."). The notes of the meeting were at pages 780-783 and the meeting was noted to have taken place on 8 November 2018. There was at the top of page 780 as the first numbered entry:

"Can you talk me through the management of Claudia

C.C - Claudia is a challenging crew member. Very demanding of my time with calls, emails and texts. She cannot see from a business perspective why things are managed the way that they are. I have hardly heard from her since stage 3."

83 At pages 781-782, there was this record:

"**8. Did you have a handover from her previous manager?**

C.C. – No, I didn't.

8.a Has Daniel Virani subsequently mentioned his relationship with Claudia?

C.C. He mentioned a good relationship due to both able to communicate in Italian. Claudia was not mentioned in the handover. I liased with Daniel Virani about her parents road traffic accident however he did state that she was a challenging crew member to manage.

A.P. ASKED C.C What she considers challenging to mean

C.C. – When someone does not believe in management decisions or the process that they are being managed in. Someone who has an unrealistic expectation of their manager in terms of the management process and one to one attention. Someone who appears to apportion blame on others rather than taking ownership."

84 In her closing written submissions, the claimant wrote this:

"Varani denied he said that about being Italian or I was a challenging crew member to manage."

85 EJ Hyams' notes of the cross-examination of Mr Varani contained this passage (tidied up for present purposes):

"Q: You said to Caroline Connor that I was a challenging crew member to manage?
A: In relation to the comment about being challenging that was about me having a conversation with you on the phone where I agreed to do an action such as moving leave to a block but at the time I was doing that you were having conversations with the crewing team and discussing something different and you had then later when I had done something reported sick and that was challenging to manage. I did not say that you were a challenging person to manage.

Q: Did you say it or not?

A: No. I did not say that you were a challenging individual.

Q: Did you say that our relationship was good because we could speak in Italian?
A: No; it was simply that I enjoyed you giving me an opportunity to let me struggle in Italian with you and if our relationship had not been good then I do not think that you would have tolerated that."

The final trigger

86 Ms Gabriel's letter of 2 January 2019 stated the thing that triggered the final stage of section 3 of the EG300 procedure on page 881. The sequence of events which led to the meeting of 13 December 2018 to which we refer above as recorded on that page was this:

> "You triggered a Final Stage Absence Review Interview as you did not meet your improvement plan under Stage 3. You had a further occasion of absence from Saturday 17-November-2018 to Wednesday 21-November-2018 (1 duty day). You reported sick for your annual leave day on Saturday 17-November-2018. You initially spoke to Eurofleet IBM Jane Anwyl, and you advised her that you had sickness and diarrhoea and had already emailed me to advise me of the reasons for your absence. You emailed me on 17-November-2018 advising you had sickness and diarrhoea, and that you had contacted your GP over the phone, who advised you that your symptoms should clear within 48 hours.
>
> I replied to your email on 18-November-2018 stating I would call you on my return to the office on 19-November-2018 to see whether you required any support. I left you a voicemail on 19-November-2018, and you subsequently sent me a detailed email on 19-November-2018 regarding your recuperation, and I replied asking for you to let me know if you needed any support and reminding you to provide GP certification should your absence extend over 7 days.
>
> You subsequently reported fit on 22-November-2018, and I sent you an email offering you my support, in addition to that of Crew care and Help direct. You submitted a discretionary absence discount request form for this occasion of absence. Your request was considered however declined. You subsequently phoned CCAS on 28-November-2018 to express your dissatisfaction with their decision. I advised you that you triggered Final Stage with 4.5% of available working hours within a rolling 12 months, having had five occasions of absence within 11 months totalling 16 duty days, over three times the trigger point for your contract type.
>
> Once you reported fit, I was notified via email that you were required to attend a Final Stage Absence Review Interview with me. Due to you having

> part-time days off and annual leave days following your duty on 16-December-2018 you would not be returning to work until 01-February-2019. We met in CRC on 05-December-2018, and you agreed to me removing your link on 13-December-2018 in order to hold this meeting before you were out of the business for several weeks."

87 We have added the underlining in the first paragraph of that passage because it was striking to us in that it showed that the claimant, who worked only part-time, was willing to risk being dismissed as a result of her claiming backdated sick pay in respect of a day of annual leave. In fact, we saw that the claimant's GP's records at page 988 showed (if they were accurate) that the claimant had not called her GP on 17 November 2018 but that she had called the GP on 21 November 2018.

The claimant's final BAHS referral and what happened as a result of it

88 At page 879 of her letter of 2 January 2019, having referred to the EqA 2010, Ms Gabriel continued (in the passage starting at the bottom of page 879):

> "Although I am unable to form a judgement as to whether you are covered by the Equality Act 2010, I asked in my last BAHS referral sent on 03-0ctober-2018 if you were likely to be protected by the disability provisions of the Equality Act 2010. However, as you did not advise Occupational Health Advisor Maideyi Dumbura of a suitable time and date for a consultation, due to your rostered duties, I was unable to seek advice from Occupational Health. Whilst it is recognised that employees will occasionally have reasons to be absent from work as a result of sickness it is expect that all employees will demonstrate a reasonable attendance in line with the expectations set out in EG300 Section 3. British Airways Policies are designed to assist compliance with the 2010 Equality Act."

89 The claimant gave evidence to us that she had spoken to Ms Dumbura at some point in the final part of 2018 and agreed with her that she would go and see Ms Dumbura after January 2019, when she (the claimant) had had some new medical advice. In paragraphs 115-116 of her witness statement, the claimant said this:

> "115. On 07/11/18 Maideyi Tembura called again and requested a meeting whilst I was getting ready for my Beirut duty. I advised her I was unable to attend as I was on working patten. We agreed a meeting after the Christmas holidays to allow post-concussion syndrome symptoms to manifest further and an appointment with Maxillofacial specialist to take place. I was due to return to work on 01/02/19, however I found out that the referral was closed in December.

116. My understanding is that the second referral to BAHS was pending, as referred to by Caroline Connor in her final stage outcome letter. The Respondent knew I was waiting to see medical professionals. This included seeing a Neurologist to assess head injury before I was due to return on 01/02/2019. The Respondent had essentially unilaterally stopped the reasonable adjustment process despite agreeing to wait for the medical information."

90 In oral evidence the claimant said that she was not willing to go and see Ms Dumbura (not Tembura) during her working hours as she was flying during those hours, and that she was not willing to go to see Ms Dumbura during her non-working and non-rostered days. She then said (in answer to a question asked by EJ Hyams towards the end of her oral evidence) that she had spoken to Ms Dumbura on 8 November 2018.

91 There was in the bundle at pages 465-590 a "Crew History Report" relating to the claimant which was generated on 30 July 2019. On pages 577-578 there was a small series of entries, in these terms:

"Email sent 05/11 as no response received [to the referral of 3 October 2018 to which we refer in paragraph 88 above]:

'Dear Maideyi,

Hope this email finds you well.

You may remember previously seeing a member of my team Claudia Giandinoto (173753) in August, however she believes she still requires ongoing support. I re-referred her on 03/10/18 requesting a face to face consultation with you however have not yet received a response and has disappeared off my 'tracking list.' Do I need to re-refer her?

Many thanks for your assistance.

Kind regards,

Caroline Connor
Inflight Business Manager'

Response received 05/11:

'Hi Caroline,

I phoned her and she was unable to come and see me due to her roster. I will try her again and book and appointment to see me. I still have the form, so you don't have to resubmit.

> Kind regards
>
> Maideyi' (Note Taken by Caroline Connor)
>
> Response reviewed 03/12-
>
> NFA by OHA required due 'ESS since October and unable to secure an appointment- flying' (Note Taken by Caroline Connor)".

92 Having considered the evidence of the claimant and Ms Gabriel about whether or not the claimant had agreed with Ms Dumbura that she (the claimant) would go and see Ms Dumbura on or after 1 February 2019, we accepted the evidence of Ms Gabriel that Ms Dumbura had not told her at any time that the claimant was going to see her (Ms Dumbura) on or after 1 February 2019. We also saw that the claimant did not say to Ms Gabriel during her meeting with her on 13 December 2018 that she had agreed with Ms Dumbura that she (the claimant) would be seeing Ms Dumbura on or after 1 February 2019. Nor was there any reference to the claimant intending to see Ms Dumbura at that time in any other document recording what had happened before the claimant's dismissal was confirmed by Mr Devlin in the circumstances to which we return below. In those circumstances, we did not accept the claimant's evidence that she had agreed with Ms Dumbura that she would see Ms Dumbura after January 2019.

Ms Gabriel's decision that the claimant's employment should be terminated, and the reasons for it

93 Ms Gabriel recorded on pages 882-883 her decision in regard to the continuation or otherwise of the claimant's employment, and the reasons for that decision. The whole of the passage on those pages was relevant, but we noted in particular the following parts of it.

94 On page 882, having analysed the situation as it would have stood if (as Ms Cumming said should have been done) "the three occasions of absence on 23-September-2017 to 23-September-2017 (1 duty day), 04-June-2018 to 08-June-2018 (2 duty days) and 30-June-2018 to 31-July-2018 (11 duty days) [had] been discounted from the process", and concluded (in our view accurately) that the claimant would still have been at the final stage of section 3 of EG300, Ms Gabriel said this:

> "You stated that you have consistently been absent due to 'situations outside my control. Blocked ears, D&V (diarrhoea and vomiting), AAW (accident at work), all of these are outside of my control.' I appreciate, as per the opening paragraph of EG300 Absence Management Policy, that 'it is recognised that employees will occasionally have reasons to be absent from work through sickness or injury.' However, on reviewing all occasions

of absence between Stage 1 and Final Stage, the majority of your occasions of absence are for reasons listed in EN300- 'Procedures for Cabin Crew attendance at work as defined by EG300 Absence Management Policy' i.e. 'colds, flu resulting in blocked ears; diarrhoea and vomiting; one off life event; down route sickness where reported to Global Lifeline.' Given that your absence levels are both exceptionally high and unsustainable, it would be unreasonable of me, in managing your absence, to discount 7 occasions of absence totalling 26 duty days within a period of 14 months."

95 Having then given her reasons for concluding that the application of section 4 of EG300 was not appropriate, Ms Gabriel said these things.

"To offer you additional support, I re-referred you to BAHS on 03-0ctober-2018 as you stated during your Stage 3 Absence Review Interview that you no longer wished to disclose medical information to me, however believed you required ongoing support. Occupational Health Advisor, Maideyi Dumbura tried to arrange a consultation with you over a period of 2 months, however you advised Maideyi that were unable to attend a consultation as a result of your rostered flying duties. It is disappointing that you did not follow up on this. The onus was on you during this time to engage with BAHS to receive further occupational support.

At the end of the meeting, you stated that you need to take more responsibility having read your Stage 3 Appeal Outcome. However, during your Final Stage Absence Review Interview, you did not take ownership for your unsustainable attendance levels, frequently asking why occasions of absence had not been discounted, in addition to believing that you should be 'protected' moving forward by being entered in to Section 4.

I have attached Appendix 1, which includes a summary of your absences and improvement plans at Stage 1, 2, 3 and the Final Stage of EG300, and further information regarding the process and your absence history.

Having carefully reviewed everything we discussed, I believe that you have been treated fairly throughout the process and you have been given the opportunity to improve your attendance at each stage, however your levels of absence remain unacceptable. You have been made aware of the possible outcomes if your absence continued and have been offered support from British Airways Health Service and Help Direct. My decision is based on your on-going absence which cannot be sustained in accordance with EG300 Section 3. Therefore, I have concluded that the appropriate sanction is to terminate your employment with notice. In reaching this decision I have carefully followed the principles in the contractual EG300 Absence Management Policy. However, I have also

considered whether in more general terms it is fair to dismiss in your case and I have concluded that it is.

Your notice entitlement is 12 weeks. You are not required to work your notice period and it will be paid in lieu, therefore your employment will end with immediate effect on 27th March 2019."

The claimant's appeal against her dismissal

96 On 3 January 2019, the claimant appealed against her dismissal. Her reasons for appealing were set out in her email of that date at page 906 and were these:

"I recognise that my sickness level is above average however I believe this has been used against be as a punitive measure during the following sickness;

4 June - 8 June 2018 - 2 days. This was sickness down route, global lifeline was contacted and advice me to seek medical help.
The IBM can use their discretion in discounting sickness down route when global lifeline has been contacted and advice again flying. I question why Caroline decided against this?

30 June - 31 July 2018 -11 days. Accident at work. I accept that accidents can happen in the work place however my expectation is that I am safe a[t] work. This accident was due to a human error by the CSD. I do not understand how and why this accident that is not a fault of mine can be used against me to terminate my contract.

I believe I have been treated differently from other crew members in this case as such and accident should have been discounted".

97 Mr Seamus Devlin, who was employed by the respondent as IFCE Fleet Manager, heard the appeal. He conducted an appeal hearing on 8 February 2019, having invited the claimant to that hearing in a letter of which there was a copy at page 905. That letter was probably printed out on the day of the appeal hearing as it bore the date of 8 February 2019. The claimant did not complain that she was given insufficient notice of the hearing.

98 There was a note-taker at the appeal hearing, as we could see from the document(s) at pages 911-913. The first two of those pages were a prepared typed note, which Mr Devlin evidently intended to read from at the hearing and which had some handwritten notes on them. The third page was the only other document before us which contained handwritten notes of the hearing. There were, however, carefully-typed notes of the hearing at pages 914-920.

99 So far as material, there was in those notes this passage on pages 918-919, starting with the claimant saying that she had "shared specific information" with Ms Gabriel during the final stage 3 meeting of 13 December 2018:

> "I shared specific information; my doctor informed in detail about my specialist, which I am happy to share again, regarding operation on my face 2 years before, reconstruction of nose and cheekbone, 25th Jan 2017.
>
> I am worried the post traumatic trauma of nearly being hit on the face, again I am sharing this information with you, I authorise you access to my personal file, I am transparent. It's disturbing me to have this journey to go through. Without prejudice treat me as individual. I believe in the equality act 2010 and I have stated this in my outcome.
>
> SD – I don't know if you are?
>
> CG – You can't be ignorant over this we are all covered, equality falls into different categories. I am I was covered as disability.
>
> TC – Coming from bmi her sickness filed would have transferred would have covered Claudia.
>
> SD – To be clear as I don't want to lose where we are. You talked about how you felt obstructed and I will follow that up. And whether you are covered under the equality act. You said in bmi do you have letter/documents?
>
> CG – Yes, I have a letter
>
> SD – Will you email it to me?
>
> CG – No, I am covered.
>
> SD – That's fine if you are covered we should a copy that would have come across from bmi."

100 There were in the bundle in several places copies of the records that "came across from bmi". The most relevant document was at pages 91-92, which was entitled "Cabin Crew Medical Assessment in accordance with EU-OPS 1 /3.995 and The Working Time (amendment) Regulations 2003" which had, on the second page, a series of boxes for particular conditions: there were 32 boxes by which there were boxes for "Yes" and "No". There was also a "Remarks" box. The box for "Suffered from psychological illness, anxiety, depression, stress or other disorders" was ticked "Yes". In the "Remarks" box, however, there was only this: "GASTROINTERATES, INSOMNIA".

101 Mr Devlin's response to the claimant's appeal was set out in the letter dated 5 March 2019 at pages 921-924. Mr Devlin's response to the claimant's first ground of appeal concluded in the passage at the top of page 923 in the following terms:

> "I have reviewed the medical notes on CMS (Crew Management System) as well as the letters and information on your attendance file. It is clear from the notes on CMS that both Caroline Connor IBM and Magali Allport IBM had offered you separately a BAHS referral on 2nd and 3rd July 2018 following the Accident at Work. You declined these offers and I can see no information as to why this was the case. In my view both Magali Allport IBM and Caroline Connor IBM encouraged you to engage with BAHS at the time as they would be able to provide advice and review likely timescales if applicable.
>
> However, Caroline felt it prudent to refer you to BAHS again following your return to work in August 2018 because of you disclosing that you were currently taking a codeine-based medication following surgery in January 2017. There is no information on CMS as to why you had not previously disclosed this until this time. As you are aware, the subsequent BAHS report from Maideye Dumbura Occupational Health Advisor (OHA) was unable to advise whether any symptoms currently experienced would be long-term.
>
> On 3rd October 2018 Caroline re-referred you to BAHS. You explained to Caroline that you no longer wished to disclose medical information to her. Caroline respected this decision and to support you initiated this latest medical referral. I note that you did not engage with BAHS at this time. Maideye had tried to arrange a face to face appointment with you but you were unable to provide her with a date when she could meet with you. Maideye subsequently closed off the referral on 3rd December 2018 as you still hadn't provided a date when you could meet with her."

102 Mr Devlin also dismissed the claimant's second ground of appeal.

103 It was the claimant's case that Mr Devlin's letter dated 5 March 2019 at pages 921-924 was sent in response to the fact that her solicitors had sent to the respondent a letter of claim concerning the personal injury that she had suffered on 30 June 2018 to which we refer in paragraphs 13 and 74-76 above. That letter of claim was sent to us by the claimant in partially obscured form on 5 July 2022 and then again in Word format as sent to the claimant on 6 July 2022, i.e. during the second week of the hearing before us. The letter was dated 6 March 2019 and was stated to have been sent by first class post.

104 The claimant then sent us a blurred photograph of an envelope of which she had apparently taken a photograph on her mobile telephone on 8 March 2019 at

12:20. However, while the envelope had on it a sticker stating that it was "Special Delivery Guaranteed by 1pm", and was addressed to the claimant, we could not see any date on the envelope itself, possibly because it was too blurred for the text of the date to be seen, and possibly because it did not bear a date.

105 Mr Devlin's letter was plainly printed out and signed by him in hard copy format, i.e. it did not have a digital signature on it, it had what appeared to be his original signature. It could have been signed by him on 5 March 2019 and then sent on a day after that, either by Mr Devlin himself or by a member of the respondent's administrative staff.

106 While we did not hear any oral evidence from Mr Devlin, we found it highly unlikely that he would have backdated his letter to the claimant, dismissing her appeal, merely because the respondent had on 7 March 2019 received the letter of claim. The letter of claim did not in fact say anything material to our deliberations about the claimant's health. It was relatively brief overall and merely said these things about the impact of the accident on the claimants' health:

> "As a result of being hit by the lever, our client suffered post-concussion syndrome, soft tissue injuries to her left shoulder and a psychological injury."
>
> "Our client is still experiencing concussion-related symptoms and psychological problems. The prognosis is currently guarded."

107 In all of the circumstances, we concluded that (1) the claimant had not satisfied us on the balance of probabilities that Mr Devlin had backdated his letter at pages 921-924, and (2) on the balance of probabilities that Mr Devlin had signed that letter on the date which it bore, namely 5 March 2019. We also concluded that the letter contained Mr Devlin's complete reasons for dismissing the claimant's appeal against her dismissal.

The relevant entries in the claimant's medical records for the final period of her employment by the respondent

108 The claimant's GP's records for the claimant for 2018 and January to March of 2019 were at pages 986-992. We have already (in paragraphs 60 and 61 above) set out several of the relevant entries in those records. We now set out the other relevant parts, to which we return in our conclusions.

109 In the entry at the top of page 989 for 30 November 2018, there were these words:

> "**History** Headaches on and off since the head injury over the last few weeks. Was dazed afterwards.

> **Diagnosis** Post concussional syndrome (XE2b7)
> **Plan** for symptomatic tx having an element of PTSD".

110 There was the following entry for 22 January 2019 on page 989.

> "**History** Thinks has been getting worse in terms of mood and stress. Is dealing with a dispute withg [sic] BA. Thinks she might have had an element of Post-concussion syndrome following the initial blow to the head which then degenerated with an unsympathetic response by her management. Awaiting IAPT f/u
> **Examination**: PHQ-9 24/27 Lachrymose (unlike her)
> **Diagnosis**: Low Mood
> **Plan**: Trial sertraline and screen bloods and review next available
> Medication review done (XaF8d) -
> (R) Sertraline 50mg tablets - 28 tablet - od
> Sertraline 50mg tablets - 56 tablet - od".

111 There was the following entry for 26 March 2019 on page 991.

> "**History** Has started her Personal injury claim and awaiting a Work Tribunal For Disability Discrimination Having menorrhagia ongoing, and has nbeeding operative treatment for this, and also Anorexia Nervos aand [sic] depression.
> PTSD following bereavement in 2010 when needed anti depressants. which went on for 2 years The PTSD was also set off at work when had the work injury on the slide and then again when hit by the door, of the airoplane [sic]
> **Examination** PTSD on the basis of traumatic memories, panic attacks when thinks about the episodes and avoidance behaviour and psychology when thinking about the incidents
> **Diagnosis** Post-traumatic stress disorder (X00Sf)
> **Plan** Has not been taking sertraline as unable to afford it review next available
> Medication review done (XaF8d) -
> Zopiclone 7.5mg tablets - 21 tablet - Take one at night when required FOR SHORT TERM USE ONLY".

References in the claimant's medical records to a bereavement in 2009

112 At page 957, in the claimant's GP's records for the claimant, there were these words in an entry for 30 June 2009:

> "Problem title Break - through bleeding
> **History** Recent bereavement in the family
> Has had a break-through bleed for the last few days finds it hard to tell if the Sertraline is working under the circumstances. Hard to concentrate

Needing the zopiclone to sleep."

113 There was a copy of the first page of a medical report on page 1014. The report was dated 3 December 2009 and it included these words:

> "In terms of past medical history, she has had Dysmenorrhoea on and off for a few years, which has now settles [sic] down. She did this year have a serious bereavement of a family member and had to go back to Italy eventually as she was quite affected at the time, but has now got over it and this was never really an ongoing issue needing treatment."

Relevant law

The law of unfair dismissal

114 We saw no need to lengthen this already long set of reasons by referring extensively to the relevant statutory provisions and case law relating to the law of unfair dismissal. Section 98 of the ERA 1996 law required us to first decide what was the real reason for the claimant's dismissal and then to decide whether it was one of the potentially fair ones, "capability" being such a fair reason. Section 103A of the ERA 1996 required us, when considering the claimant's claim of automatically unfair dismissal, to consider whether the fact that the claimant had made a disclosure within the meaning of section 43A of that Act was the reason, or if not the reason, the principal reason, for her dismissal.

115 We reminded ourselves of what the Court of Appeal said in *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323 about what constitutes the reason for the dismissal. There, at 330B-C, Cairns LJ said this:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

116 The case law concerning the determination of the fairness of the dismissal required us to avoid putting ourselves in the shoes of the respondent and deciding for ourselves whether the claimant's dismissal was unfair within the meaning of section 98(4) of the ERA 1996, and, instead, to apply a "range of reasonable responses of a reasonable employer" test when adjudging the fairness of the respondent's decision to dismiss the claimant. That test applies at all stages of the process of analysing the reasoning of the employer in deciding to dismiss the employee. The best authority for that is the decision of the Court of Appeal in *J Sainsbury plc v Hitt* [2003] ICR 111.

The law of disability discrimination

The definition of a disability

117 Before a claim of a breach of sections 15 and 19 of the EqA 2010 can be made, a claimant has to satisfy the tribunal that he or she is disabled. That issue has to be decided by reference to section 6 of, and Schedule 1 to, the Equality Act 2010, together with such guidance as might be applicable in the Secretary of State's guidance issued under section 6(5) of that Act and relevant case law.

118 Section 6(1) provides:

> "(1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

119 Paragraph 2 of Schedule 1 provides:

> "(1) The effect of an impairment is long-term if—
>
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months, or
>
> (c) it is likely to last for the rest of the life of the person affected.
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

120 The word "substantial" in section 6(1)(b) means, according to section 212(1) of the EqA 2010, "more than minor or trivial".

121 The question whether a person had a disability at any particular time is to be determined by reference to the evidence in existence at that time: it is not to be determined by reference to evidence which arises later than that time: *All Answers Ltd v W* [2021] EWCA Civ 606, [2021] IRLR 612. That case makes it clear also that the relevant time by reference to which the question whether a person was disabled is to be assessed, is the time of the claimed discriminatory conduct.

122 The proper approach to take in deciding whether it was at the material time likely that an impairment would last for (for example) 12 months was stated particularly

pithily by Her Honour Judge Eady QC (as she then was) in paragraph 25 of her judgment sitting in the Employment Appeal Tribunal ("EAT") in the case of *Parnaby v Leicester City Council* UKEAT/0025/19/BA, where she said this:

> "Looking back at what happened after the relevant acts of which complaint was made would not, however, be the correct approach when determining what was the likely effect; likelihood is not something to be determined with hindsight. "

123 In paragraphs 41 and 42 of the judgment of the EAT in *J v DLA Piper UK LLP* [2010] ICR 1052, this was said by Underhill J (as he then was).

> '(2) "Clinical Depression"
>
> **41** The facts of the present case make it necessary to make two general points about depression as an impairment. We do so with some caution since the medical evidence before the Tribunal did not contain any general discussion of depression. We have to rely primarily on the inferences that can be drawn from such medical evidence as there is, together with the Guidance and the case-law and the general knowledge acquired from our own experience of depressive illness in the field of employment law and practice. However, we have considered it legitimate to consider also the Report of the Joint Committee on the Disability Discrimination Bill (i.e. what became the 2005 Act). Mr Laddie sent us paras. 71-79 of the Report following the hearing (see n. 6 below); but the whole of paras. 65-99, and some of the materials referred to in it (in particular the introductory section of the draft NICE guideline on depression), which are available online, seemed to us to be useful. We should make it clear that we have referred to these materials as background only and have not relied on them in deciding any disputed matter on this appeal.
>
> **42** The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, as summarised at para. 33 (3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs ["clinical depression"] is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second [" as Dr Brener puts it, Sunday night syndrome, or as Dr Gill puts it, a possible medicalisation of employment problems"] is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events". [Endnote 5: But NB that "clinical" depression may also be triggered by adverse circumstances or

events, so that the distinction can *not* be neatly characterised as being between cases where the symptoms can be shown to be caused/triggered by adverse circumstances or events and cases where they cannot.] We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived.'

Section 15 of the EqA 2010: discrimination arising from a disability

124 Section 15 of the EqA 2020 provides so far as relevant:

"(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."

125 That section requires a tribunal to ask

125.1 whether the claimant's disability caused, led to the consequence that there was, or resulted in, "something", and

125.2 if so, whether the respondent treated the claimant unfavourably because of that "something".

126 In *Pnaiser v NHS England* [2016] IRLR 170, Simler P (as she then was) sitting in the EAT gave, in paragraph 31 of her judgment, some valuable guidance about the manner in which the question whether there has been unfavourable treatment for the purposes of section 15 of the EqA 2010 should be addressed. That guidance confirmed our understanding that the focus in a claim of

discrimination within the meaning of section 15 is on the claimant's claimed disability or disabilities.

Proportionality

127 As for whether or not unfavourable treatment was a proportionate means of achieving a legitimate aim, there is in paragraph L[377.01] of *Harvey on Industrial Relations and Employment Law* ("*Harvey*") this helpful passage.

> "The EAT in *Hensman v Ministry of Defence* UKEAT/0067/14/DM, [2014] EqLR 670 applied the justification test as described in *Hardy and Hansons Plc v Lax* [2005] ICR 1565, CA to a claim of discrimination under EqA 2010 s 15. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. (Applied *Monmouthshire County Council v Harris* UKEAT/0010/15 (23 October 2015, unreported)). As stated expressly in the EAT judgment in *City of York Council v Grosset* UKEAT/0015/16 (1 November 2016, unreported), the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The *Court of Appeal in Grosset* ([2018] EWCA Civ 1105, [2018] IRLR 746) upheld this reasoning, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'.

128 In paragraph L[377.06] of *Harvey*, this is said:

> 'In *Birtenshaw v Oldfield* [2019] IRLR 946, EAT, the tribunal upheld a claim of discrimination arising from disability where a job offer was withdrawn after receipt of an OH report which gave the decision-maker cause to doubt whether the applicant was mentally well enough to do the job – which could involve working with vulnerable children. The EAT warned that a tribunal's consideration of the objective of proportionality question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim, provided he has acted rationally and responsibly. He was satisfied that the ET had however awarded such respect, and satisfied that it had not erred when finding that more proportionate means could have achieved the objective of ensuring staff were fit for their work. Contrasting the necessary exercises when considering claims of reasonable adjustments as opposed to s 15 justification Soole J, held (at [36]–[37]):

> "Under s 20 the duty comprised in each of the three requirements is to take such steps as it is reasonable to have to take in order to achieve an objective, ie to avoid the identified disadvantage (s 20(3) and (4)) or to provide the auxiliary aid (s 20(5)). In consequence the chance of success in achieving the objective is one of the factors to weigh up when assessing the question of reasonableness: see *South Staffordshire [& Shropshire Healthcare NHS Foundation Trust v Billingsley* UKEAT/0341/15 (29 April 2016, unreported)] and the cited authorities.
>
> Under s 15(1)(b) the question is whether the unfavourable treatment is a proportionate means of achieving a different objective, ie the relevant legitimate aim. As summarised by HHJ Eady QC in *Ali [v Torrosian (t/a Bedford Hill Family Practice)* [2018] UKEAT/0029/18 (2 May 2018, unreported)], the authorities on this objective balancing exercise show that to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim: see paras 16 and 17. Although there may be evidential difficulties for a Respondent in discharging the burden of showing objective justification when it has failed to expressly carry out this exercise at the time, the ultimate question for the Tribunal is whether it has done so: see para 27."'

Section 19 of the EqA 2010; indirect discrimination

129 Section 19 of the EqA 2010 provides:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and

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

Direct discrimination within the meaning of section 13 of the EqA 2010

130 A claim of direct discrimination within the meaning of section 13 of the EqA 2010 is of less favourable treatment because of a protected characteristic than would have occurred if the claimant had not had that protected characteristic. This is a claim of an unlawful motivation, the motivation being the fact that the claimant had the protected characteristic in question.

131 Proving a person's motivation is usually difficult, for obvious reasons. That is why section 136 of the EqA 2010 was enacted. It provides:

"(1) This section applies to any proceedings relating to a contravention of this Act.

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

132 When applying section 136, it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's evidence about, but not its explanation for, the treatment. That is clear from paragraphs 19-47 of the judgment of Leggatt JSC (with which Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblin agreed) in the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] ICR 1263.

133 However, as the House of Lords said in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, in some cases the best way to approach the question whether or not there has been direct discrimination within the meaning of section 13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred.

134 If there is no evidence from which the inference could be drawn that a claimant's treatment was to any extent because of a protected characteristic, then the claim of direct discrimination is likely, if not very likely, or possibly even bound, to fail.

Harassment within the meaning of section 26 of the EqA 2010

135 The law of harassment within the meaning of section 26 of the EqA 2010 might be thought to raise issues which are different from those which apply when considering a claim of direct discrimination within the meaning of section 13. However, the test for determining whether or not conduct was "unwanted conduct related to a relevant protected characteristic" within the meaning of section 26 is in many cases the same as that which applies when considering a claim of direct discrimination. That is for the following reasons.

136 Section 26 of the EqA 2010 provides so far as relevant:

> "(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.
>
> ...
>
> (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."

137 There is in the judgment of Underhill LJ in *Unite the Union v Nailard* [2019] ICR 28 a very helpful discussion about the impact (or otherwise) of the use of the words "unwanted conduct related to a relevant protected characteristic" in section 26(1) of the EqA 2010 instead of the words in section 13, namely "because of a protected characteristic". That discussion shows that only rarely will a claim of harassment add anything to a claim of discrimination. In addition, as Underhill LJ confirmed in paragraphs 83-101 of that judgment, a mental element is required in a claim of harassment as much as in a claim of direct discrimination.

138 The provisions of section 26 of the EqA 2010 have been considered by appellate courts on a number of occasions in helpful ways, including by the Employment Appeal Tribunal in *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 and the Court of Appeal in *Land Registry v Grant (Equality and Human Rights*

Commission intervening) [2011] ICR 1390, where Elias LJ said in relation to the claimed harassment in that case:

> "the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

139 In paragraph 22 of *Dhaliwal*, the Employment Appeal Tribunal (Underhill P presiding) said this:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

The time limit for making a claim to an employment tribunal of a breach of the EqA 2010

140 The primary time limit for making a claim of discrimination contrary to 39 of the EqA 2010 is three months, but time may be extended if it is just and equitable to do so. In determining the latter question, the principles in the relevant case law (most notably *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 237) must be applied. There, in the headnote, the following helpful comment of Sedley LJ was set out:

> "There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing employment tribunal proceedings, and Auld LJ is not to be read as having said in *Robertson* [i.e. *Robertson v Bexley Community Centre* [2003] IRLR 434] that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact and judgment, to be answered

case by case by the tribunal of first instance which is empowered to answer it."

141 However, it is clear that there has to be an evidential foundation for a decision that it is just and equitable to extend time.

142 In paragraph 37 of his judgment in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 27, [2021] ICR D5, with which Moylan and Newey LJJ agreed, Underhill LJ said this:

> 'The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes [in ([1995] UKEAT 413/94]) "the length of, and the reasons for, the delay". If it checks those factors against the list in [*British Coal Corporation v Keeble* [1997] UKEAT 496/98, [1997] IRLR 336], well and good; but I would not recommend taking it as the framework for its thinking.'

Withdrawing an admission

143 In paragraphs PI[361[-[362] of *Harvey* there is this very helpful passage concerning the withdrawal of an admission. The discussion concerns withdrawing an admission in an initial response to a claim, but the discussion was helpful to the circumstances here, as described in paragraphs 7 and 8 above.

> "**[361]** As the rules are silent on the question of withdrawing admissions in a response, it has been held that tribunals will be assisted on an application to withdraw a concession or admission by the provisions of CPR Pt 14 and in particular to the factors set out in PD 14 para 7.2 (added by amendment with effect from 6 April 2007) *(Nowicka-Price v Chief Constable of Gwent Constabulary* UKEAT/0268/09 (3 August 2009, unreported)). Those factors are that, in deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including the following:
>
> (a) the grounds on which the applicant seeks to withdraw the admission, including whether or not new evidence has come to light which was not available at the time the admission was made;
>
> (b) the conduct of the parties, including any conduct which led the party making the admission to withdraw it;

(c) the prejudice that may be caused to any person if the admission is withdrawn;

(d) the prejudice that may be caused to any person if the application is refused;

(e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;

(f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the offer was made; and

(g) the interests of the administration of justice.

According to Judge McMullen QC in *Nowicka-Price*, assistance will also be provided by the judgment of Sumner J in *Braybrook v Basildon & Thurrock University NHS Trust* [2004] EWHC 3436 (QB), where, at [45], the learned judge set out the principles which derived from the cases and the CPR prior to the introduction of PD 14 para 7. Most of those principles were in fact incorporated into that paragraph but in some respects Sumner J's formulation is more precise. For example, he stressed that the application to withdraw the admission must be made in good faith, and that consideration should be given to the prospects of success 'of any issue arising from the withdrawal of an admission', and he identified particular aspects of the public interest to be considered, such as the avoidance of 'satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring'. He also pointed out that 'the nearer any application is to a final hearing, the less chance of success it will have even if the party making the application can establish clear prejudice', and that 'this may be decisive if the application is made shortly before the hearing'.

[362] In *Nowicka-Price* the respondent was permitted to withdraw a blanket admission made in his response to the claimant's numerous sex discrimination, harassment and victimisation claims, by amending the response to include a detailed rebuttal of most of the claims. Upholding the employment judge's decision on this point, Judge McMullen QC held that there was no lack of good faith on the part of the respondent and no manipulation for the purposes of strategic manoeuvring. The factor that weighed most heavily, however, was that this was a fact-sensitive discrimination case involving a police authority and it was in the public interest that it should be heard and not disposed of at a [preliminary hearing]. Moreover, being fact-sensitive, it was impossible at that interim stage to assess the prospects of success of the claimant's claim once the respondent was released from his admission.

> The CPR do not of course bind the tribunal. SI 2013/1237 Sch 1 r 41 provides that the tribunal may regulate its own procedure and shall conduct the hearing in a manner which it considers fair having regard to the overriding objective in r 2. A strict application of CPR Pt 14 PD para 7.2 is not required provided the tribunal approaches the question of withdrawal judicially and properly balances the prejudice between the parties."

Our conclusions and our reasons for them

Introduction

144 As EJ Hyams said to the claimant at the start of the hearing, her case would in all probability not have been brought if she had not been dismissed, and in reality it was about her dismissal. That did not mean that it was only about the fairness of the dismissal. But it did mean that ideally the main focus of the case would have been on the questions (1) whether the claimant's dismissal was unfair and (2) whether or not her dismissal was discriminatory within the meaning of section 15 of the EqA 2010 and therefore in breach of section 39(2)(c) of that Act.

145 While the claimant had not claimed that her dismissal was a breach of section 20 of the EqA 2010, she did press what was an equivalent claim under section 19 of that Act in so far as it had any bearing on her claim that her dismissal was a breach of the EqA 2010.

146 However, all of the claims made under the EqA 2010, apart from the claims of direct discrimination within the meaning of section 13 and of harassment within the meaning of section 26, depended on us making a finding of fact that the claimant was disabled within the meaning of that Act at the material times, namely, for the reasons stated in paragraphs 117-122 above, at the time when the acts of the respondent which it is claimed contravened the EqA 2010 were done.

147 Even if we found that the claimant was disabled within the meaning of the EqA 2010 at any such time, it was nevertheless necessary for all of the claims made of a breach of that Act for the claimed wrongdoer (i.e. the person whose acts were said to be in breach of that Act) to know of the claimant's disability.

Was the claimant disabled at any material time? Was it just for the respondent to resile from its concession that she was?

148 The claimant's claimed disabilities at the start of the hearing before us at least were depression and PTSD. During the hearing before us, the claimant on several occasions referred to her post-concussion syndrome in terms which indicated that she thought that she could rely on it as a disability within the meaning of the EqA 2010. However, she did not in fact rely on it as a disability, and that appeared to us to be appropriate. During the claimant's EG300

meetings, she plainly thought that her facial condition which was operated on in January 2017 as we describe in paragraphs 31 and 101 above was such a disability. She was, it appeared, subsequently advised (in our view correctly) that it was not such a disability.

149 During the course of the hearing, in the circumstances which we describe in paragraph 71 above, it became clear that the claimant's medical records as put before us included at least one materially inaccurate entry, for a "new" "Major Episode" of "Depressive disorder" in "2018".

150 In addition, the claimant's medical records showed that there was nothing remotely like a diagnosis of PTSD until 26 March 2019 (see paragraphs 109-111 above). A further relevant factor was that that diagnosis of 26 March 2019 was that of a GP and was based purely on the claimant's description at that time, which included an assertion by the claimant that the bereavement of 2010 to which she referred had triggered PTSD, and as can be seen from the extracts which we have set out in paragraphs 112-113 above, that was an inaccurate assertion.

151 Thus, it was possible that the acceptance that the claimant was disabled by reason of depression and PTSD was based on an incomplete analysis of the claimant's medical records. However, the concession may well have been based on the claimant's "Disability impact statement" at pages 1298-1310 in which, among other things, the claimant asserted (wrongly, as we say in paragraphs 60-62 above) that she suffered PTSD from her injury of 2012.

152 In addition, the question whether the claimant had a disability within the meaning of the EqA 2010 was in our view best regarded as being jurisdictional in the sense that if she did not have such a disability then at least some of her claims could not be pressed.

153 In those circumstances, we concluded that it was right (i.e. in the interests of justice) to permit the respondent to resile from its concession that the claimant was at any material time disabled within the meaning of the EqA 2010 and to decide that question ourselves.

154 Having done that, we concluded on the evidence before us that the claimant was not at any time before she was dismissed on notice on 2 January 2019 suffering from an impairment which satisfied the definition of a disability in section 6 of the EqA 2010 read with Schedule 1 to that Act. In the period between then and 27 March 2019, when the claimant's notice took effect, she reported to her GP symptoms which he diagnosed as being depression, and she was prescribed medication for that depression. However, we concluded on the evidence before us that

154.1 the condition of depression from which the claimant had suffered in 2010 was triggered by a bereavement which had long since ceased to affect the claimant,

154.2 that bereavement and its effect were (as the extract set out in paragraph 113 above showed) "never really an ongoing issue needing treatment", and

154.3 it was not likely that the claimant's new condition of depression would last for more than 12 months or for the rest of the life of the claimant.

155 In addition, we were not satisfied on the balance of probabilities on the evidence before us that the claimant was suffering from PTSD on (or before) 26 March 2019, as diagnosed by her GP on that date in the manner which we have set out in paragraph 111 above. That was in part because that diagnosis was based in large part on what we found were incorrect assertions of the claimant. It was also because the diagnosis was not made by a specialist doctor or psychologist.

156 The incorrect assertions of the claimant to which we refer in the preceding paragraph above were that she had suffered from PTSD (1) after her family bereavement of 2009 and (2) as a result of her accident in 2012. We make a specific finding of fact in the latter regard in paragraphs 60-62 above (and we return to it in paragraph 151 above). We do not make a finding of fact above about the absence of a connection between that bereavement and PTSD, but that is because there was no evidence in the medical and other contemporaneous records before us of such a connection. Given that factor and the fact that the content of the medical report that we have set out in paragraph 113 above was markedly inconsistent with there being such a connection, we concluded that the claimant did not suffer from PTSD in 2010 because of her family bereavement.

157 In those circumstances, we concluded that the claimant was at no material time before 28 March 2019 disabled within the meaning of the EqA 2010.

If we had found that the claimant was disabled at the material times, could the respondent reasonably have been expected to know that she was disabled at those times?

158 However, even if we had come to the conclusion that the claimant was in fact disabled before 28 March 2019 by reason of either depression or PTSD, we would have concluded that the respondent did not know of that depression or PTSD before 28 March 2019 and that it could not reasonably have been expected to know of either of those conditions. That was because the most that the respondent had in its possession by way of relevant documentation to which the attention of the relevant decision-makers was drawn before 28 March 2019 was at pages 88-92, which contained so far as relevant at most only the material

which we have set out or referred to in paragraph 100 above, and that material was in our view not enough to put the respondent on notice that the claimant might be suffering from a mental condition that amounted to an impairment which constituted a disability within the meaning of section 6 of the EqA 2010. Even on 8 February 2019, the claimant did no more than, as we record in paragraph 99 above, refer to "the post traumatic trauma of nearly being hit on the face" in June 2018. If those words were correctly recorded then they made no sense in themselves. If in fact the words used by the claimant had been "post-traumatic stress" then that would have been an assertion which was not reflected in the claimant's medical records at the time. There was on 8 February 2019 no reference in her medical records to the claimant suffering from PTSD.

159 The claimant may well have suffered a trauma in the form of an immediate thought such as "What if the metal door-handle had hit my nose or cheek?" at the time, i.e. 30 June 2018, but it would be odd to call that "post-traumatic stress". The first time that the claimant was recorded to have asserted that the door-handle injury triggered PTSD was in the letter of 6 March 2019 at pages 1120-1121 to which we refer in paragraph 60 above.

160 Even the claimant's letter of claim of 6 March 2019 referred to no more than "psychological injury" and "psychological problems": see paragraph 106 above.

161 In all of those circumstances, there was in our view insufficient material to mean that the respondent (using the words of section 15(2) of the EqA 2010) "could ... reasonably have been expected to know" at any time before 28 March 2019 that the claimant had a mental health condition that amounted to a disability within the meaning of the EqA 2010.

The fairness of the claimant's dismissal

162 As for the fairness of the claimant's dismissal, we came to the conclusions that (1) the reason for the claimant's dismissal was precisely as stated in the penultimate paragraph of the extract from Ms Gabriel's letter of 2 January 2019 set out in paragraph 95 above, so that the reason was her capability, and (2) the only way in which it could reasonably be argued that the dismissal was unfair was on the basis that it was in the circumstances outside the range of reasonable responses of a reasonable employer. We came to the second of those conclusions in part on the basis that there was in our view no breach of the respondent's EG300 and EN300 procedure and guidance. In coming to that conclusion, we rejected the claimant's criticisms in paragraphs 88a, 88b, 88e, 88h, 88i, 88j, 88k, 88l, 88p and (so far as relevant 88t) of her further particulars at pages 108-109, of the manner in which Ms Gabriel came to the conclusion that the claimant should be dismissed. We also based our second conclusion stated in the first sentence of this paragraph on a separate conclusion that the exercise of the discretion afforded to a manager under the EG300 and EN300 documents to "discount" an absence for the purposes of EG300 was in this case

exercised by the decision-makers (both Ms Gabriel and, on appeal, Mr Devlin) in a manner which was well within the range of reasonable responses of a reasonable employer. Thus, we rejected on the facts the criticisms of the claimant in paragraphs 88g, 88h, 88j, 88p and 88s of her further particulars.

163 In addition, we rejected the other criticisms of the claimant in paragraph 88 of her further particulars. That was for the following reasons.

163.1 As we say above, we concluded that the claimant was not disabled at any material time. Accordingly the criticism in paragraph 88c was misplaced.

163.2 We concluded that the respondent did not take into account "absences which were either inaccurate and/or were not covered by the absence management policy and/or were outside the rolling period" as alleged in paragraph 88f. If and to the extent that the respondent took into account historic absences, i.e. those which preceded 2017, it did not in our view act outside the range of reasonable responses of a reasonable employer.

163.3 We concluded that the respondent did not act outside the range of reasonable responses of a reasonable employer in concluding that the claimant had failed to "engage with BAHS" in the manner which we have set out in paragraph 95 above. The reality was, in the circumstances to which we refer in paragraphs 88-92 above, that the claimant had not gone to see Ms Dumbura, despite being given the opportunity to do so, between 3 October 2018 and 13 December 2018. We therefore rejected the claimant's criticism in paragraph 88m of her further particulars that "The Respondent's allegation that my refusal to engage with BAHS caused/contributed to my dismissal is untrue and inaccurate." The rest of paragraph 88m ("The absence days for the accident and other absences had been wrongly calculated and attributed to me for the purposes of absence management and BAHS would not have changed this. This would also not have prevented me contracting the Norovirus.") added nothing to the claimant's other criticisms in paragraph 88 of her further particulars.

163.4 We had no breach of the respondent's appeal procedure drawn to our attention during the hearing, and in any event we saw nothing in the manner in which the respondent considered the claimant's appeal against her dismissal to be outside the range of reasonable responses of a reasonable employer. Thus we rejected the claimant's criticism in paragraph 88n of her further particulars.

163.5 We saw no justification for the assertion in paragraph 88o of those particulars that "The Respondent did not call a pause to the process to

investigate the accident at work in 2018 which they should have done; an accident for which they have admitted liability." We also concluded that it was not outside the range of reasonable responses of a reasonable employer to "[attribute] this period of absence ... to [the claimant's] absence record and [rely on it in part as a justification for dismissing the claimant]", as the claimant implicitly claimed in the final sentence of paragraph 88o. Even if that absence had been ignored, the respondent could not be said in the circumstances to which we refer in paragraphs 94 and 95 above to have acted outside the range of reasonable responses of a reasonable employer in deciding that the next stage of EG300 had been triggered.

163.6 The claimant's criticism in paragraph 88q of her further particulars that the respondent was obliged to "make a referral to the HSE" (i.e. the Health and Safety Executive) and "instead dismissed [the claimant]" was not well-founded. That was because the respondent was not obliged to make a referral to the HSE but in any event we found that the claimant was not dismissed to any extent because she had in any way asserted that there had been a failure to take reasonable care for her safety. That was for the following reasons. It was obvious that there had been an accident for which the respondent might well be liable, and there was nothing in the circumstances before us, i.e. we could see no facts before us, which would have justified us in deciding that the claimant had been dismissed to any extent (1) because she had suffered the accident on 30 June 2018 to which we refer in paragraphs 74-76 above, or (2) because she had (whether implicitly or explicitly) when speaking to Ms Allport referred to the fact that there may have been a failure by Ms Walker to take reasonable care for her (the claimant's) safety.

163.7 The proposition that the claimant was (as she claimed in paragraph 88r of her further particulars) dismissed by the respondent instead of informing the respondent's insurers of the matter was in no way supported by the evidence before us, and we rejected it.

163.8 We turn now to the assertion in paragraph 88t of the claimant's further particulars that "the Respondent illegally dismissed me from my employment because I made a claim for personal injury. Instead of accepting liability for the accident, the Respondent applied the consequent days off and used them to dismiss me." There was nothing in the facts as we found them to support that proposition. That was for the following reasons. There was nothing in the circumstances before us, i.e. we could see no facts before us, which would have justified us in deciding that the claimant had been dismissed to any extent because she had made a claim for damages for personal injury. In any event, the fact that the claimant had sent the respondent a letter of claim was,

we found for the reasons stated in paragraph 107 above, not known to Mr Devlin when he dismissed the claimant's appeal against her dismissal, and of course Ms Gabriel could not have known on 2 January 2019 of the letter of claim which was sent on 6 March 2019.

164 For the avoidance of doubt, we concluded that the respondent did indeed (contrary to the claim in paragraph 88d of the claimant's further particulars, at page 108) "consider [the claimant's] mitigating circumstances."

165 So, was the claimant's dismissal outside the range of reasonable responses of a reasonable employer? In our view, it was not. It was in our view firmly within the range of reasonable responses of a reasonable employer, not least because the claimant was given full and fair warning that if she was absent because of sickness after being given the final written warning to which we refer in paragraph 77 above, then she might be dismissed, but also because in our view Ms Gabriel's reasons to which we refer in paragraphs 93-95 above were, in the circumstances as we have found them in paragraphs 45 and 46 above, objectively justified.

166 For the avoidance of doubt, given our conclusions stated in paragraph 163.6 above, the claim that the claimant was dismissed automatically unfairly within the meaning of section 103A of the ERA 1996 could not, and did not, succeed. Also for the avoidance of doubt, we did not regard what the claimant said to either Mr Major or Ms Lee about the accident of 30 June 2018 as having been said to the respondent, but in any event, we concluded that she said nothing to them which went materially further than what she had said to Ms Allport about that accident.

Was the claimant's dismissal a breach of section 15 of the EqA 2010?

167 Having concluded that the claimant was not at any material time disabled within the meaning of the EqA 2010, we were bound to conclude that her dismissal was not in reach of section 15 of the EqA 2010.

Was the claimant discriminated against directly or harassed?

168 We saw no evidence before us, and certainly no facts, from which we could have drawn the inference that the claimant's mental health conditions (whatever they were) were thought by either Ms Gabriel or (despite the fact that he did not appear as a witness before us) Mr Devlin to be a disability within the meaning of the EqA 2010. We also saw no evidence or facts from which we could have drawn the conclusion that either of those persons thought that the claimant might be disabled within the meaning of the EqA 2010 and either

168.1 treated her to any material extent less favourably because she might be disabled or

168.2 (with the protected characteristic of disability in mind) either (1) acted with the purpose of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or (2) did something that had that effect.

169 In so far as Ms Gabriel was concerned, in addition we concluded that the real reason for her decision to dismiss the claimant was purely as stated in the penultimate paragraph of the extract from Ms Gabriel's letter of 2 January 2019 set out in paragraph 95 above.

The claim of indirect discrimination

170 Given that we concluded that the claimant was not disabled within the meaning of section 6 of the EqA 2010, the claimant's claim of indirect discrimination within the meaning of section 19 of that Act had to, and did, fail.

Was there conduct extending over a period which ended on or after 23 March 2019 and, if not, was it just and equitable to extend time for making the claimant's claims of breaches of the EqA 2010 other than in relation to her dismissal?

171 We were unable to identify any relevant conduct which extended over a period here. That was not least because although there were in existence policies in the form of the respondent's documents EG300 and EN300, which continued in existence up to and including 23 March 2019, the things about which the claimant complained were single acts.

172 In addition, in the circumstances that

172.1 the claimant knew in 2012 about the law of disability discrimination (see paragraph 34 above);

172.2 the claimant was advised by her trade union throughout the process which led to her dismissal;

172.3 the claimant herself referred on various occasions during that process to the EqA 2010; and

172.4 the claims of a breach of the EqA 2010 were in any event not supported by the contemporaneous documentation before us,

we concluded that it was not just and equitable to extend time for the making of any claim about the conduct of the respondent which preceded 23 March 2019.

173 Accordingly, we concluded that the claim was in time only in respect of the claimant's dismissal.

In conclusion

174 For all of the above reasons, the claimant's claims were all not well-founded and had to be dismissed.

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Employment Judge Hyams

Date: 14 July 2022

SENT TO THE PARTIES ON

18/7/2022

N Gotecha

FOR THE TRIBUNAL OFFICE