EMPLOYMENT TRIBUNALS

Claimant: **Mrs P Omonkhegbe**

Respondent: **Transport for London**

Heard at: **London South Employment Tribunal**

On: **20 – 24, 27 - 28 June 2022, in chambers 29 June 2022 – 1 July 2022**

Before: **Employment Judge Dyal, Ms Foster-Norman, Mr Shaw**

Representation:

Claimant: **in person**

Respondent: **Ms Urquhart, Counsel**

PREAMBLE

1. The parties were anxious for the tribunal to deliver its judgment prior to the Claimant's anticipated return to work from maternity leave in August 2022. It has endeavoured to do so.

2. However, the tribunal wishes to make clear that the Judgment and Reasons below do not resolve, nor do they attempt to resolve, such current issues as there may now be between the parties upon the Claimant's return to work (whether related to reasonable adjustments, flexible working or otherwise). The tribunal's judgment and reasons deal only with the issues that were before it in these proceedings.

RESERVED JUDGMENT

1. By consent the Claim form is amended to include the complaints in the List of Issues (appended hereto).
2. By consent the complaints at paragraph 7.1 and 10.1 of the List of Issues are dismissed upon withdrawal.
3. The complaint at paragraph 20.1 of the List of Issues, being a complaint of pregnancy discrimination contrary to s.18 Equality Act 2010 in respect of working hours, succeeds:
    a. It is well founded on its facts;
    b. It was presented outside the primary limitation period but it is just and equitable to extend time.
4. The complaints otherwise fail and are dismissed.

CASE MANAGEMENT ORDERS

1. The parties should now liaise and seek to agree remedy.
2. If they are not able to agree remedy by 1 September 2022, they should write to the tribunal requesting a remedy hearing.

REASONS

Introduction

1. The matter came before the tribunal for its final hearing.

The issues

2. The claim form is very brief and does not identify the Claimant's complaints with any detail. There were two Preliminary Hearings in advance of the Final Hearing which attempted to address the particulars of the claim and thus the issues in the case.

3. The parties had liaised in advance of the hearing and presented the tribunal with a draft List of Issues.

4. We had a lengthy discussion of the issues on day 1 at the outset of the hearing. In the course of the discussion:

    4.1. The Claimant withdrew the complaints at paragraphs 7.1 and 10.1 of the List of Issues and agreed for them to be dismissed upon withdrawal. Subject to that, the Claimant confirmed that the List of Issues represented the complaints she wished to make;

4.2. The Claimant agreed to clarify the date on which she said she became a disabled person within the meaning of the Equality Act 2010;
4.3. The Respondent took the point that a small number of allegations on the List of Issues post-dated the claim form and could not therefore have been identified in the claim form. The Respondent had dealt with those matters in its witness evidence and would reflect on whether or not it objected to the Claimant pursuing them;
4.4. The tribunal noted that the Respondent had not set out the detail of its justification defences but that it needed to. The Respondent agreed to add the same to a further draft of the lists.

5. Later on day 1:

5.1. the Claimant clarified the date on which she says she became disabled;
5.2. a further draft of the list of issues was produced that identified the detail of the justification defences the Respondent pursued;
5.3. the Respondent indicated that it would not take a pleading point in relation to the matters that post-dated the claim form.

6. At the outset of day 2 there was a further discussion of the issues in light of the developments. It was agreed that the way in which the Respondent had identified the legitimate aims relied upon did not pose any surprises and was consistent with the general shape of its case to date. Some changes were agreed to paragraph 12 to properly reflect the test for harassment. The list of issues was agreed. The final draft appears in the appendix to these reasons.

7. The tribunal suggested that since the parties were agreed that the final list of issues represented the issues the tribunal should resolve, it would make sense to grant the Claimant permission to amend the claim form to include the complaints on the list of issues. The parties agreed and permission to amend in those terms was granted by consent.

The hearing

8. *Employee A documents and privacy orders*:

8.1. The Respondent initially applied to disclose certain documents in relation to Employee A to the tribunal alone and not the Claimant. That application was deferred until day 2 of the hearing.
8.2. Following an initial discussion of the application and the Employment Judge referring the parties to some authority, the application was further deferred until 2pm.
8.3. The Respondent's considered position was that it needed to disclose the documents to the Claimant but that privacy orders should be made and that there should be limitations on the way in which the Claimant inspected the documents (in the tribunal room only).
8.4. We considered the application carefully. We made privacy orders (under separate cover) and gave reasons for doing so orally at the time. We ordered that the Claimant be allowed to inspect the documents in the usual way (i.e., by being given copies.) We also ordered that the Claimant could only use the

documents disclosed for the purposes of pursuing this claim. These orders are made under separate cover and detailed reasons for them were given orally at the time.

9. *Documents before the tribunal*:

   9.1. The parties presented the tribunal with an agreed bundle running to around 700 pages. A number of documents were added to the bundle in the course of the hearing, all by consent;
   9.2. There were written witness statements for each of the witnesses identified below;
   9.3. The Respondent's counsel produced an opening note and a closing skeleton argument.

10. *Witnesses the tribunal heard from*:

    For the Claimant:

    10.1. The Claimant herself,
    10.2. Joyce Bosa (by videolink),
    10.3. Susan Vaughan (by videolink).

    For the Respondent:

    10.4. Edyta Stevenson,
    10.5. Khalil Sarr,
    10.6. Declan Calvey,
    10.7. Anand Nandha,
    10.8. Jason Ross,
    10.9. Graham Daly,
    10.10. Carlo Delgaudio,
    10.11. Richie Folkes,
    10.12. Natasha Young.

Reasonable adjustments to the hearing

11. The Claimant suffers from depression. There were a number of occasions on which her demeanour significantly changed and she appeared to be struggling with the process of being cross-examined. We took unscheduled breaks at those points after which the Claimant appeared to have recovered to her baseline level.

12. The cross-examination of the Claimant concluded at the end of day 3. It was clear at that point that the Claimant's case was likely to conclude within around an hour on day 4. The tribunal canvassed the possibility of adjourning for the day, on day 4, once the Claimant's case had concluded in order to give her a good break between completing her case and commencing the Respondent's case. The Claimant indicated that this would be beneficial to her and the Respondent had no objection. We therefore took that course.

Presentation of the case

13. The case was conducted in a civilised and appropriate manner which the tribunal was grateful for. Ms Urquhart cross-examined the Claimant in a non-confrontational way that was appropriate in the circumstances. We wish to pay particular tribute to the Claimant's cross-examination skills. She cross-examined each of the Respondent's witnesses with a sharp focus on the issue in the case. She was well prepared and had page references and the like at her fingertips. The whole tribunal panel was impressed with her cross-examination skills and considered them to be perhaps the best of any litigant in person they had respectively seen.

14. Both sides made closing submissions to which we had careful regard.

Application to amend

15. Over the weekend, which fell between day 5 and 6 of this hearing, the Claimant applied to amend to include a complaint of indirect sex discrimination in respect of the refusal to allow her flexible working application in 2017. When making the application orally she indicated that the PCP she relied upon was a *'requirement to work on Saturdays'*.

16. By this stage of the hearing, the Claimant's case had been completed and 3 out of 9 of the Respondent's witnesses had completed their evidence. Among those three were the people who decided the Claimant's flexible working application and her appeal against the rejection of it.

17. The Claimant indicated that the application arose when it did because over the weekend she had been reading case-law and noted that the claimants in some of those cases had complained of indirect sex discrimination. She thought she therefore may need to too. She said it had been difficult for her in advance of this to get her teeth into the case through a combination of pregnancy, childcare and mental health problems.

18. The application was opposed by the Respondent.

19. The tribunal has a discretion to allow applications to amend. In ***Selkent Bus Co Ltd v Moore*** *[1996] ICR 836,* Mummery J, gave guidance as to the main factors that need to be considered when considering an application to amend. This guidance, which has itself been explained in subsequent case-law identifies the following key-factors:

    1.1 Nature of the proposed amendment;
    1.2 Timing and manner of the application to amend;
    1.3 Applicability of time limits;
    1.4 The balance of hardship.

20. In ***TGWU v Safeway Stores Ltd*** (2007) UKEAT/0092/07, Underhill P (as he was) reviewed the authorities and concluded that on a correct reading of ***Selkent*** the fact that an amendment would introduce a claim that was out of time was not

decisive against allowing the amendment. It was but a factor to be taken into account in the balancing exercise

21. In ***Abercrombie and others v Aga Rangemaster Ltd*** *[2014] ICR 209* Underhill LJ, with whom the rest of the Court agreed, said:

> *…It is perhaps worth emphasising that head (5) of Mummery J's guidance in Selkent's case was not intended as prescribing some kind of a tick-box exercise. As he makes clear, it is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance which he identifies under head (4)…*
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> *"…the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and the old, the less likely it is that it will be permitted. It is thus well recognized that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted."*
>
> *[…]*
>
> *"Mummery LJ says in his guidance in Selkent Bus Co Ltd v Moore [1996] ICR 836 that the fact that a fresh claim would have been out of time (as will generally be the case, given the short time limits applicable in employment tribunal proceedings) is a relevant factor in considering the exercise of the discretion whether to amend. That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and a fortiori in a relabeling case – justice does not require the same approach."*

22. ***New Star Asset Management Holdings Ltd v Evershed*** [2010] EWCA Civ 870 the CA emphasised the importance of considering whether or not a proposed amendment raised new issues of fact.

23. In ***Vaughan v Modality Partnershi****p* [2021] IRLR 97, HHJ Tayler said this:

> *14. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what*

will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.

Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later.

24. It is well known that a complaint of direct discrimination does not automatically include a complaint of indirect discrimination *(Ali v Office for National Statistics).*

25. *Balance of prejudice.* In our view there is some prejudice to the Claimant if the application is refused. Making an indirect sex discrimination complaint in relation to a flexible working application is in principle a cogent way of complaining about the rejection of that application. Often it is the most cogent way of making the complaint. To some extent that prejudice might be tempered by the fact that the Claimant has complained about the flexible working request in various other ways that are before us. However, in reality that does not by any means remove all of the prejudice since it is certainly possible for those claims to fail in circumstances in which an indirect sex discrimination could succeed. So we accept there is prejudice to the Claimant.

26. On the other hand, we see great prejudice to the Respondent. The proposed claim, although relating to the underlying subject matter as is already in issue, poses some very different, very fact sensitive and new questions the tribunal would have to answer if the application were allowed. The issue of group disadvantage to women as compared to men – which arises acutely in an indirect sex discrimination claim - requires an evidential inquiry that is not required by the list of issues in its current form. It is also an evidential inquiry that the Respondent had not prepared to deal with in its disclosure, its witness evidence and its case preparation, nor in its presentation of the case to the point of the application being made.

27. We formed the view that if we were to allow the application to amend we could not possibly do so without requiring a further disclosure exercise, a further round of pleading and a further opportunity to lead witness evidence from both witnesses that dealt with the Claimant's flexible working application (and they had already given evidence) and potentially others. There is no way this could have happened in the course of the listing that we had which was tight already.

28. Our view therefore was that if we were to allow the application it would inevitably mean adjourning the proceedings part-heard in circumstances in which we have heard over half of the evidence. It would not be possible to reassemble this panel for many months, at the least, by which time we would inevitably have lost the immediacy of the evidence we have already heard if we remembered it at all. The further listing would need to be a long one to re-read into the case and complete the evidence. That is highly, highly undesirable.

29. We are satisfied that adjourning would be highly prejudicial to the respondent who has prepared for this hearing and attended ready to complete it. It would also be prejudicial to the administration of justice generally – there are huge demands on the tribunal's resources at the present time and it would be far better from an administration of justice perspective to complete the case in its current listing.

30. Further, the prejudice to the Claimant has to be set in its proper context:

    30.1. The Claim was presented as long ago as April 2020 and the flexible application dates back to 2017;
    30.2. There have been two case management hearings;
    30.3. The issues were confirmed and agreed at the outset;
    30.4. On the list of issues are other complaints of indirect discrimination so the concept of this cause of action has been known to the claimant for some time.

31. Although we readily accept that the Claimant has other pressures and difficulties in her life, we are satisfied that given the chronology she has had ample opportunity to consider and state her case in good time in advance of this hearing.

32. *Nature of application.* This has already been dealt with effectively in the analysis of prejudice. But briefly, this is not a mere relabelling exercise. It relates to an issue already before us (the flexible working application) but adds averments that would require new, different and broader factual inquiry, particularly in relation to the impact of the PCP on women as a group compared to men as a group. This is a complex factual issue and it is notable that the working pattern the Claimant challenges is already a part-time working pattern. It is working on Saturday that she challenges and not a more straightforward/well trodden type PCP such as a requirement of full-time work.

33. Timing and manner of application. As described above the application is made extremely late and in circumstances in which it cannot be allowed without causing serious disruption to the litigation.

34. Time limits. On the face of it the matter is out of time although at the time of dealing with the application that was a moot point because it remained possible that there was a continuing act bringing the subject matter of the proposed amendment int time. We therefore placed no weight on time limits.

35. On balance it is very clear that we should refuse the application to amend notwithstanding the obvious prejudice to the Claimant. The prejudice to the Respondent is yet greater and the circumstances in which the prejudice to the Claimant arises (i.e., following a long and fair opportunity to raise indirect sex discrimination at an earlier stage) is highly material.

Findings of fact

36. The tribunal made the following findings of fact on the balance of probabilities.

Background

37. The Respondent is Transport for London. It is a large employer providing essential transport services in the London area. The Claimant's employment with the Respondent commenced on 27 February 2017 in the role of Operations Officer (also known as Compliance Officer) in the Enforcement and On-street Directorate (later known as Compliance, Policing, Operations and Security ("CPOS") Directorate).

38. The Claimant commenced her duties following initial training on 26 April 2017. The role involved carrying out compliance checks on taxis and private hire vehicles on-street. She was contracted to work 20 hours per week.

39. At this time there were four standard shifts available for Operations Officers:

    39.1. Rostered roles working hours between 6am and 10pm, Monday to Sunday;
    39.2. Part-time, midday shifts working from 1.30pm to 6.30pm, Wednesday to Saturday. This is the shift to which the Claimant was assigned.
    39.3. Part-time late shifts working in the evening, Wednesday to Saturday;
    39.4. Part-time night shifts working during the night, Tuesday to Saturday.

40. These shifts patterns were introduced in 2016. They were introduced in order to increase resources on Saturdays which was a busy day for taxis and private hire vehicles. The Claimant was recruited with this in mind. Some employees whose employment pre-dated 2016, continued working legacy shift patterns that were different to those identified above.

41. Operations officers worked in pairs when doing on-street work. If there was an odd number then there would be pairs and one group of three. So the absence of a single employee could affect the number of teams on the street.

42. The reporting line for an Operations Officer was to an Assistant Operations Manager (band 2), who in turn reported to an Operations Manager (band 3) who in turn reported to a Senior Operations Manager (band 4). At the outset of her

employment, Ms Stevenson was the Claimant's Assistant Operations Manager (also known as Assistant Compliance Manager or ACM).

2017

43. In May 2017, the Claimant informed Ms Stevenson that she was pregnant. She was immediately taken off of street duties from 18 May and given office based duties instead.

44. On 24 May 2017 a *Risk Assessment for New and Expectant Mothers* was carried out in relation to the Claimant and her work by Ms Catriona Walker, a Health and Safety specialist. One of the areas of assessment was as follows:

5.	**Working Hours, Volume of Work & Work Related Pressure**	• Undertaking tasks associated with role. • Mental and Physical Fatigue.	NEM	• Work life balance policy. • Guidance, Support & Advice from Occupational Health. • Trauma and counselling services are also offered • OH - Stress Reduction Programme • Managing stress – employee guide. • Audio relaxation exercises. • Drug and Alcohol Advisory Service. • HR policy regarding harassment, Bullying & discrimination in place. • HR Maternity guidelines provided. • No operational duties outside of office	2	2	4	• Hours and volume of work should be discussed between Line Manager & NEM and where necessary make reasonable adjustments i.e. travel outside peak times.	

45. The Claimant commenced a period pregnancy related sick-leave with pubic symphysis and back pain on 5 July 2017. She was referred to Occupational Health (OH) on 30 August 2017 in anticipation of a return to work on 13 September 2017. No report however was obtained prior to her return to work.

46. The Claimant had a return to work meeting with Ms Stevenson. The meeting commenced on 13 September 2017. At the meeting, among other things the Claimant suggested she was not fit to return to work but that she had no choice but to do so because her sick pay was reducing.. She confirmed that she remained signed off from her other employment (which was with the Financial Ombudsman Service.) The meeting was therefore adjourned to obtain advice from the Claimant's GP as to her fitness to return to work.

47. The Claimant's GP provided a Fit Note on 14 September 2017. It indicated that the Claimant was fit for work with adjustments. It stated "*to return to lighter duties 2 hours for 2 days per week".* The Fit Note applied to the period 14 September to 12 October 2017.

48. The return to work meeting resumed on 14 September 2017. At the meeting Ms Stevenson agreed to adjust the Claimant's hours in accordance with the GP's advice for the following three weeks pending OH advice. An appointment with OH was scheduled for 27 September 2017. She indicated the following phased return plan had been put in place:

WC 11.09 2 days / 2 hours a day office work (as per GP advice)
WC 18.09 2 days / 2 hours a day office work
WC 25.09 2 days / 2 hours a day office work
WC 02.10 3 days / 3 hours a day office work
WC 09.10 4 days / 4 hours a day office work
WC 16.10 4 days / 4 hours a day office work
WC 23.10 4 days / 5 hours a day office work – full duties.

49. Ms Stevenson said a meeting would be held weekly to see how the Claimant was getting on with increasing her hours, that they could be altered to meet the Claimant's needs, and that the aim was to gradually work back up to normal hours. The Claimant said she did not think she would be able to do that.

50. On 28 September 2017 the OH advisor wrote to the Respondent stating:

> Ms Vaughan did not attend her appointment at Occupational Health today. An appointment is not being rebooked as upon review of your referral I note that she is currently pregnant and your referral relates to her being unwell as a result of symptoms related to her pregnancy.
>
> As you know, as she is pregnant you are required to perform the appropriate Workplace Risk Assessment for New and Expectant Mothers and should be guided by the outcome of your risk assessment as to the tasks that would be appropriate for her upon her return to work.

51. The OH referral had not mentioned that a risk assessment had been carried out in May 2017.

52. On 29 September 2017, Ms Stevenson emailed the Claimant and noted she had not attended the OH appointment. She asked the Claimant to work to the phased return plan discussed on 14 September 2017 and she reiterated the same plan. She asked the Claimant to liaise with Mr Abdul Shahid her temporary ACM to discuss how she was coping. Ms Stevenson herself was about to go on maternity leave (and did go on maternity leave on around 2 October 2017). Mr Shahid became the Claimant's line manager during her absence.

53. The Claimant immediately responded on 29 September 2017 that she was "*struggling as it is*" and that she wanted a slower progression back to work pending OH advice. She suggested working 2 days / 2 hours until w/c 16 October when that could grow to 2 days / 3 hours.

54. Ms Stevenson responded, notifying the Claimant what OH had said and stating "*As I have mentioned during the return to work you are on phased return to work and if at any point you are feeling that you are not coping with the increased hours please speak to your ACM."*

55. Ms Stevenson explained in her oral evidence that from her own experience of pregnancy she knew that how you felt varied from day to day. She therefore wanted the Claimant to give the incremental hours a try and see how she went.

56. In the week commencing 2 October 2017 the Claimant worked 3 days a week, 3 hours per day as Ms Stevenson had instructed her to, despite her protest. On 6 October 2017, the Claimant emailed Mr Shahid and said "*I've done the 3 days this week. And I've honestly struggled. This may be due to the fact I've done the days compressed. So I will attempt the 3 days again next week more staggered, so I do Monday, Wednesday and Friday and see if that is less strenuous."*

57. The Claimant was seen by OH on 20 October 2017. The report indicated that the Claimant said she had been suffering from symphysis pubis dysfunction and gave some explanation of what that was. It also advised that this was a condition that tended to get worse as the pregnancy progressed. The occupational advice was as follows:

- I am of the opinion that Miss Vaughan would be suitable for an office based role for the duration of her pregnancy.
- Miss Vaughan's condition, SPD is ongoing however, with work adjustments and correct medical intervention her I anticipate that her absences may be minimised.
- I would suggest that a DSE assessment be carried out to support her back. Understandably, Miss Vaughan is keen to remain at work and support her family and mental wellbeing.
- I agree with Miss Vaughan working 3 day on 4 hours until she goes away for her annual leave in 6 weeks time, if you are able to continue accommodation.
- The NHS has some information which may help you understand SPD. Please see visit www.nhs.uk/conditions/pregnancy-and-baby/pages/pelvic-pain-pregnant...

58. The parties agreed, and we therefore find, that from around the time of the OH report onwards the Claimant worked 3 days a week, 4 hours per day until she commenced a period of annual which led directly into maternity leave which commenced on 2 January 2018. She gave birth on 4 January 2018.

2018

59. On 13 November 2018, the Claimant submitted a statutory flexible working application. At this point the Claimant remained on maternity leave:

    59.1. Her existing work pattern was 1.30pm – 6.30pm, Wednesday to Saturday
    59.2. She proposed working 1.30pm – 6.30pm, Wednesday to Friday.

60. In advance of the meeting to discuss the application, Ms Stevenson prepared some questions. Having been the Claimant's manager, she knew that the Claimant was married. One of the questions she prepared was "*is there anybody else helping with the childcare? Husband? Or grandparent?".*

61. The Claimant attended a meeting with Ms Stevenson to discuss the application on 5 December 2018. At the meeting the Claimant explained she had no childcare on Saturdays and did not want to send the baby to a childminder. The Clamant had three children under 5 years of age. Ms Stevenson asked if a family member could assist. The Claimant said her husband worked on Saturdays, her mother had passed away and her father lived in the North.

62. The flexible working request was refused. The reason given was that it would have a detrimental impact on performance. It was said that Saturdays were demanding days for the business and the team and was a day on which there

were often annual leave requests. There would be insufficient cover. A further reason given was inability to employ additional staff/burden of additional cost of staff just for Saturdays.

63. The Claimant's GP records record in the entry for 13 December 2018 that the Claimant had a history of depression the "last few months". This consultation with the GP came about because, on that date the Claimant's health visitor who was conducting a one year review on the baby, was so concerned about the Claimant's mental health she contacted the GP.

64. On 18 December 2018, the Claimant made an application for parental leave to commence on 2 January 2019, i.e., to commence at the end of maternity leave. This was approved.

65. On 31 December 2018, the Claimant appealed the outcome of her flexible working application.

2019

66. On 2 January 2019, the Claimant's maternity leave ended and her parental leave commenced.

67. On around 8 January 2019, the Claimant was assessed by MIND and as a result was offered IAPT Primary Care Psychological Therapy.

68. The Claimant's parental leave was due to end on 26 January 2019. However on 21 January 2019, the Claimant commenced a period of certified sickness absence. The Fit Note indicated she was unfit for work because of depression. It gave the period of unfitness as 56 days.

69. On 28 January 2019, the Claimant attended an appeal meeting in relation to her flexible working request. The meeting was chaired by Mr Khalil Sarr.

70. At the meeting Mr Sarr noted that one of the issues the Claimant had raised was financial constraints (in relation to the cost of childcare.) He asked her to talk him through this. The Claimant did this and in the course of doing so said that her husband worked on Saturdays. Mr Sarr asked what hours he worked. The Claimant said he was self-employed and worked in construction so his hours varied. Mr Sarr also asked if the Claimant's husband could alter his hours or work from home. The Claimant said he could not and also explained that childcare was more expensive on Saturdays. The Claimant's representative said: *"my member has depression and she is currently signed off work".*

71. In the course of the meeting the Claimant became very irritated she had been asked about her husband and complained that she had been. The Claimant also indicated that her relationship with Ms Stevenson had "completely deteriorated". In light of that, at the meeting Mr Sarr arranged for the Claimant to have an interim line manager, Mr Declan Calvey.

72. On 5 February 2019, the Claimant was notified that her flexible working appeal had been unsuccessful. Responding to the Claimant's grounds of appeal, Mr Sarr said that:

    72.1. While the costs of childcare may be greater now the Claimant had a third child, she had been recruited to a position brought in to help cover Saturdays;
    72.2. He did not accept the Claimant's argument that, since she had been on maternity leave thus not working Saturdays if she had continued not working Saturdays, there would be no detriment to the business. That was because, when an employee went on maternity leave the business targets reduced accordingly.
    72.3. That there was an additional cost to covering Saturdays if the Claimant did not work them.

73. Mr Sarr said that he had taken the Claimant's circumstances into account and that business need meant that he could not agree the request because there would be insufficient head count and that would affect the team performance and targets. Mr Sarr said his decision was final.

74. On 13 March 2019, the Claimant attended a case conference meeting with Mr Calvey under the Respondent's managing absence procedure. She was accompanied by Ms Bosa, Unite the Union, Rep. At the meeting the Claimant said she was having therapy for depression and anxiety and that her dosage of citalopram (an anti-depressant) had been increased. She said her anxiety and depression had got worse in the last 5 – 6 weeks. The Claimant stated that she was seeing her GP every two weeks to review her medication and assess her condition. She said she was having counselling once a week for seven weeks and had been referred for a further bloc of seven sessions.

75. The Claimant was asked to give an account of an average day and she said:

    I have a low mood and a lack of motivation to do most things. I struggle doing day to day and the struggles and pressure makes me irritable and frustrated. The main problem is I can identify things that needs to be done, but I don't have the motivation to do them. I am functioning, but emotionally I am not stable and that is challenging when dealing with children under five years old so that adds extra stress. That makes me feel more depressed because I feel that I am failing as a parent. 186

    How long have you felt like this?

    PV- It began when I was pregnant with my first child I noticed that in November 2017 and has got progressively worse since.

    DC- What reasonable adjustments would you need if you came back to work?

    PV- I don't know at this point. At the moment I feel aggrieved from the organisation. If the organisation wants me to show vulnerability I would find it difficult as I felt they threw it in my face. My point is I want the organisation to

support me, but they rejected my flexi working request. I would return to work even if I was not at my maximum capabilities as it might help me. Some of my depression and anxiety comes from doing noting, as I have no motivation.

76. At the meeting there was also a broad discussion of what might be done to enable the Claimant to return to work. The Claimant was not sure. Ms Bosa asked whether Mr Calvey could look into the Claimant returning to work in a different part of the business. The Claimant suggested this should await the outcome of mediation.

77. A mediation meeting between the Claimant and Ms Stevenson was also schedule for 13 March 2019. However, in the event, this did not proceed as the Claimant did not feel well enough.

78. On 1 April 2019, the Claimant sent Mr Calvey an OH report that had been produced in relation to her employment with her other employer. The report was dated 11 March 2019. It:

    78.1. Gave a history including that the Claimant reported mental health symptoms going back to 2017;
    78.2. Indicated that a well validated assessment on the day of the consultation suggested she had severe depression;
    78.3. Opined that the Claimant was unfit for work. A follow-up in 6 weeks was advised. The duration of the Claimant's absence was unpredictable and depended on her response to treatment and capacity to cope.

79. On 16 April 2019, the Claimant was seen by the Respondent's OH advisor who reported:

    On discussion Patience explained that her symptoms began towards the end of her third pregnancy and have gradually built up over time due to a combination of work and personal stresses. Patience was seen by her GP and started on antidepressants; this has been increased in the last two weeks and can take up to six weeks before having full effect. Patience has been having weekly counselling which have been beneficial however it is often very difficult to arrange child care for these. Currently Patience reports symptoms of low mood, panic attacks and problems sleeping. She reports that the personal stresses are likely to be ongoing.

80. The Claimant attended a second case conference with Mr Calvey on 15 May 2019. The Claimant explained that her state was similar to before. She continued with counselling. She indicated that she was still on medication.

81. The Claimant said she was on 40mg of citalopram and this was the highest dosage. Ms Bosa asked for the Claimant's flexible working application to be reviewed in light of the Claimant's circumstances.

82. There was a discussion of what could be done to return the Claimant to work. Mr Calvey suggested that the Claimant could return to work on alternative duties for a maximum of 9 weeks which reflected the Respondent's policy that alternative

duties were limited to 9 weeks. However, she would also need to be retrained on her substantive job before returning to it because of the period of absence. He pointed out that the Claimant also had a substantial annual leave entitlement. Putting these three things together the implication was that it would be some months before the Claimant had to actually carry out her substantive duties.

83. On 18 May 2019, the Claimant raised a grievance. In it the Claimant complained that the Respondent was discriminating against her under the Equality Act 2010 as a result of her disability by failing to make reasonable adjustments. She complained that the outcome of the second case conference was prolonging matters because it posed only a temporary solution in the form of 9 weeks of adjusted duties. The resolution she sought was for an *"official and reasonable working agreement*" for her case which she said should be permanent and accommodating hours. She also set out in some detail the anti-depressant medication regime she was on, noting that her dosage had had to be increased over time.

84. On 28 May 2019, Mr Anand responded to the Claimant's grievance. He stated that

> "*As the matter of your absence and return to duty is managed in accordance with the attendance at work policy, I cannot see how this can be dealt with as a grievance on the basis that you are not satisfied with the outcome of your case conference discussions. However, if you can evidence how you have been discriminated in the process i.e. treating you differently to another because of your disability, then I can appoint someone to hear this as a grievance.*
>
> *As explained and according to your email the issue you have described is that you are not happy with the outcome of your case conference and you expect your line manager to make a different adjustment to what you have been given. I have also considered that you have been offered alternative duties for 9 more weeks which is the standard time someone can be placed on light duties during which time it is hoped that you can adjust back into work as per your existing terms and conditions. The 9 weeks is reasonable and your manager will need to understand whether there has been any improvement to your condition as we cannot indefinitely sustain a situation where you are unable to return to your role as a compliance officer…."*

85. Ms Bosa attempted to assist the Claimant through informal negotiations with the Respondent. In this context she spoke to Mr Nandha and put a possible resolution to him: a working pattern for the Claimant of Tuesday to Friday on a temporary basis pending an organisation wide restructure which was then out for consultation and was likely to be implemented in the coming months. Mr Nandha was initially attracted to this. On 31 May 2019, he emailed Mr Sarr and said:

> *I spoke to Joyce and she has come with a proposal which sounds fairly reasonable. Could we accommodate the above on a Tuesday to Friday part time shift as a temporary local arrangement up to launch of new structure?*

She would lose unsocial hours allowance and would report to a day shift acm on the Tuesday and work with them or one of the mid shift guys for 5 hours.

86. Mr Sarr responded: "*That's reasonable but just bear in mind there is a queue waiting to see her outcome and they will all put in their request. Can we discuss it on Monday after the DMM?".* The reference to the queue was a reference to other employees who were also interested in getting dispensation to cease working on Saturdays.

87. In the meantime, also on 31 May 2019, Ms Bosa told the Claimant that she had spoken to Mr Nandha and that it may be possible for the Claimant to work Tue-Fri, 1:30 – 6:30pm.

88. Mr Sarr and Mr Nandha then spoke about the matter. Mr Sarr's view was that it would be unwise to change the Claimant's shift pattern to remove Saturday because it would set a difficult precedent. It would incentivise other employees to seek similar alterations to their shift patterns which would generate significant work to deal with. This he thought it undesirable since organisational change was afoot in any event, and there was little point in investing time and energy into altering shift arrangements in the short term since they were generally under review. Moreover, there was another way in which, until the organisational change happened, the Claimant could avoid Saturdays. She had built up a lot of annual leave and she could be given permission to use it to avoid Saturdays. Mr Sarr and Mr Nandha settled on this course and accordingly the proposal that had initially been put by Ms Bosa was refused.

89. Mr Nandha told Ms Bosa this in an email dated 4 June 2019. He noted that the Claimant was going to take some annual level which meant that it would be 10 – 12 weeks before she would need to return to her substantive duties. Prior to doing that there would be an OH referral to assess her fitness to do so and if she was not fit she could return to sick-leave and the case conferences would resume. He said it was reasonable to continue with the return to work plan and then consider whether "*any temporary arrangement*" was likely to help the Claimant return to full duties once she had another OH assessment.

90. Ms Bosa responded, expressing disappointment at the decision. In short she said that temporary changes were insufficient and given the Claimant's "*mental health condition and disability*" that a permanent new working arrangement was needed. She stated that there had been a failure to make reasonable adjustments.

91. On 7 June 2019, the Claimant had a return to work meeting with Mr Calvey. He notified her that she would return on 11 June 2019 and carry out return to work activities like reactivating her accounts and eLearning. Then the Claimant would be on annual leave for a short period. Then he would look to deploy her on alternative duties in the licensing department under Ms Caroline Essl, OH advice permitting, on around 23 June 2019.

92. The Claimant saw Occupational Health on 20 June 2019:

92.1. The Claimant had stabilised on anti-depressants which she had found very beneficial. (In our view this is a clear indicator that the Claimant's medication was having a very positive impact and that if she were not on this medication she would probably not have improved in anything like that way that she did);
92.2. Her symptoms had therefore improved;
92.3. The Claimant was fit for office based duties;
92.4. It was difficult to predict if she would be fit for street based duties after 9 weeks.

93. The Claimant was on annual leave between 30 June 2019 and 3 August 2019. This did not count towards the 9 weeks of alternative duties. In fact the clock did not start on those duties until the return from annual leave on 7 August 2019.

94. Towards the end of the 9 weeks of alternative duties, the Claimant told Mr Calvey that she did not feel able to return to her substantive duties. She asked if she could be considered for redeployment.

95. In this context, redeployment has a particular meaning. It arises under the Respondent's Attendance at Work policy and is only available to employees who are medically unfit for their substantive role. Thus a further appointment was made with OH to advise on this.

96. In around August 2019, Mr Calvey's role changed and he moved to a different department as part of the organisational change process. However, he remained the Claimant's temporary line manager.

97. In October 2019, again as part of the organisational change, Mr Jason Ross, moved into the CPOS directorate and became the Operations Manager above Ms Stevenson. He was therefore the second line manager for the Claimant's substantive role.

98. On 3 October 2019, the Claimant met informally with Mr Calvey and Mr Ross. In the course of that meeting, the Claimant she said that she had been offered a secondment for 3 months and that she was not looking forward to returning to her substantive role as she felt her relationship with the department had broken down. The Claimant had arranged this secondment through Ms Essl. Ms Essl had told her that she expected the secondment to commence in November.

99. Mr Ross emailed Mr Nandha and asked him if he would have any objection to the Claimant taking the secondment. Mr Nandha did not respond in writing to this email. However, Mr Nandha spoke to Mr Ross and told him that he thought it was a great opportunity for the Claimant.

100. The Claimant's case is that the Respondent, principally through Mr Nandha, planned to block her from taking this secondment as part of a wider animus against her. In essence, from her point of view things went quiet in relation to the secondment until she threatened employment tribunal proceedings on 19 November 2019 which she infers then spooked the Respondent into relenting and allowing her to take the secondment. She notes that the secondment policy

refers to getting line manager permission and therefore considers it suspicious that that Mr Nandha's view was canvassed.

101. On balance, we do not accept that version of events and find that in fact, there was nothing untoward going on here. There was a slight delay in the commencement of the secondment but not for any malign reason.

102. An important piece of context is that whilst awaiting confirmation for the secondment the Claimant remained on alternative duties with Ms Essl. That was despite the 9 week period of those duties having expired. Mr Calvey allowed this so as to hold the position.

103. By this stage Mr Calvey had left the department and Mr Ross was new to it. It was perfectly sensible and advisable for them to consult Mr Nandha to see whether the Claimant going on secondment would work for the department. The secondment policy requires the employee to obtain line manager permission but it does not say or imply that the line manager must not consult up the chain. It is perfectly sensible to do so.

104. In the week prior to 29 October 2019, Ms Essl and Mr Calvey spoke and Ms Essl proposed the secondment to Mr Calvey. She confirmed this in writing to him on 29 October 2019 and asked for his approval.

105. Mr Calvey spoke to Mr Nandha. Mr Nandha's evidence is that he was in favour of the secondment. Although he was challenged on this, we found his evidence credible. It is implausible that he would block the secondment since doing so would only create an immediate problem for him to deal with in the department for no apparent reason.

106. However, before agreeing to the secondment it was clearly sensible to obtain OH advise on the Claimant's fitness to undertake it not least because the secondment involved working full time. Mr Calvey therefore deferred a definitive response to Ms Essl pending that advice. He duly referred the Claimant to OH.

107. On 5 November 2019, the Claimant saw Occupational Health. The advisor reported:

> *On assessment today Patience's presented with severe anxiety and low mood. She reports that she has been having panic attacks as well as symptoms of insomnia. She has recently had her antidepressants increased to help manage her symptoms and these appear to be beneficial. She explained that she is managing with all work tasks currently without issue.*

108. The report indicated that the Claimant was not fit for her full duties but was fit for redeployment.

109. On 14 November 2019, Ms Essl chased Mr Calvey for a response. He responded to say that he was meeting the Claimant to discuss the OH report on Monday (which was 19 November 2019). This was true. He said he hoped to revert having spoken to the Claimant. Thus, prior to the Claimant threatening

tribunal proceedings on 19 November 2019, it was evidently the plan that Mr Calvey would give an answer on the secondment following the meeting of 19 November 2018.

110. At the meeting of 19 November 2019 a range of matters were discussed and the Claimant did get angry and did threaten employment tribunal proceedings. Two of the things discussed were the OH report and the secondment. The Claimant indicated that she wanted the secondment. The OH report indicated she was fit for it. The day after the meeting Mr Calvey confirmed with Ms Essl that the Claimant had permission to undertake the secondment. The secondment duly commenced on 2 December 2019, that is very shortly after the start date originally mooted by Ms Essl, being November 2019

111. In our view there is nothing suspicious, unusual or surprising in this chronology of events. The Claimant commenced her secondment on 2 December 2019 and continued in it until 1 March 2020.

112. It is also necessary to say something more about the discussion at the meeting of 19 November 2019. In the meeting, Ms Bosa said that she had discovered that another employee, Employee A, had had a flexible working arrangement approved. The Claimant said there was a hate campaign against her as a black female. She also described it as a "*hate crime*". In the context of returning to her substantive post, the Claimant said "*I can't go out and work for people who don't care about my wellbeing. Management wanting me to go out to kill myself working. Management do not care about me*." There a reference to suicide but it is a reference to what the Claimant says management want her to do, rather than her saying it was something she herself had an ideas about doing.

113. The Claimant made clear she did not want to return to her old department but wanted to redeployment. Mr Calvey said he did not want the Claimant to go down the redeployment route yet as he was considering other options. We find he was genuinely concerned about the Claimant and concerned about the downside of the redeployment route - which was that in the event of a suitable opportunity not being found, dismissal was a possibility. Mr Calvey also suggested mediation but the Claimant declined.

Employee A

114. It is necessary to make some findings in relation to Employee A. Employee A is white, with a non-British heritage.

115. Employee A made a flexible working request in which she asked to be taken off night shift work and instead to work fixed day time hours. This request was rejected. The relevant events commence whilst the rejection was under appeal.

116. On 7 November 2019, Employee A emailed Mr Nandha. Employee A said that they were feeling suicidal and suffered from PTSD and depression, that the flexible working decision had been extremely detrimental and that they were feeling suicidal. Employee A said "…*I feel I am being dismissed off, and until I*

actual commit an act of harm against myself my situation will not be takes seriously as this is evident since I have requested to move to the day team."

117. We accept that this was a very alarming email and that Mr Nandha found it as such. In response to this email Mr Nandha arranged to meet Employee A the following day. They met and he tried to provide some reassurance that a solution could be found.

118. On 12 November 2019, Mr Nandha said in an email to Paul Smith that he had not intervened in the case but had simply listened to Employee A and reassured her to meet with the appeal manager. However, having regard to the situation that presented and to Mr Nandha's oral evidence and seniority, in our view the reality is that Mr Nandha did make clear his view clear to the person dealing with the appeal that he was sympathetic to the flexible working request.

119. On 19 November 2019, Employee A was seen in OH. The advisor reported:

> As you probably know, Employee A suffers with depression which requires treatment and psychological support. On examination today she reported symptomatic with moderate signs of depression. She also continues with her treatment with no side-effects so far.
>
> In response to the questions posed in your referral:
>
> 1. I agree with her doctor that working at night is proving very difficult for her and is impairing her recovery and a main factor in her condition.
>
> 2. Based on today's assessment she remains fit for work. I recommend that moving to daytime hours will help to manage her condition and symptoms better. Therefore you should discuss this support measure as to whether this is suitable for your team.

120. Employee A had a flexible working meeting with the appeal officer on 14 November 2019. He wrote to her and stated that she could indeed work Monday – Friday, fixed hours on a day-shift.

Recruitment of Mr Nandha's daughter

121. The Claimant believes that Mr Nandha secured a role for his daughter at TfL in the licensing team. This is because there was a reference at a meeting to her getting the role by an 'alternative route'. We find however, that he did not. He did give his daughter's CV to the General Manager of the licensing team and ask if she might be a suitable candidate. She was. He was advised that she should register with Hayes, a recruitment agency, and that she would be notified of any openings by that agency. That is what she did. When an opening came up, Mr Nandha's daughter applied for it through Hayes, was interviewed (not by Mr Nandha) along with other candidates . She was successful. Mr Nandha was not involved in the recruitment process. The role that she was recruited to was a temporary role, known internally as Non-Permanent Labour. It did not attract job security. We find it is factually incorrect to say that Mr Nandha got his daughter this job. He simply showed someone her CV and she was recruited through usual means.

122. Once Mr Nandha's daughter joined the team, the Clamant decided to cease sitting with the team. She says that this was to avoid a 'conflict of interest'. However, in our view there was no conflict of interest. Mr Nandha's daughter had nothing to do with the dispute between the Claimant and the Respondent.

2020

123. On 5 February 2020, the Claimant met Mr Calvey for an informal discussion. By now the end of the Claimant's secondment was approaching and thought needed to be given to what would come next. To that end, Mr Calvey had found the Claimant a job opportunity in the Vehicles Department. The reporting line would be to Mr Richie Folkes (Assistant Operations Manager) and Mr Carlo Delgaudio (Operations Manager). This role did not involve working Saturdays but rather full-time Monday to Friday (just as the Claimant's secondment had). He put this to the Claimant. Then on 7 February 2020, he confirmed the conversation by email. He stated in the email "*During your secondment I have heard really good feedback and we would really like you to continue your TFL journey in the vehicles area."*

124. The Claimant responded indicating that she did not want that role because, she said, the relationship with senior management had deteriorated too much and "*doesn't provide me with a feeling of safety either for myself or members of the public*". She said she wanted a fresh start away from 'street work' through redeployment.

125. On 13 February 2020, Mr Calvey contacted the OH advisor seeking advice. The advisor suggested that generally advice should be sought from HR and said this "*it is likely that on return to the same area if nothing has resolved that [the Claimant] will have further episodes of symptoms*."

126. On 26 February 2020, the Claimant attended a case review meeting with Mr Calvey. In the meeting the Claimant's representative Mr Crawford (who had by now taken over the case from Ms Bosa) said that the job opportunity that Mr Calvey had proposed was not acceptable because the Claimant did not want to be under Mr Nandha. They discussed the possibility of redeployment. At the meeting, the Claimant said that she "hated" Mr Nandha, that he was a bully and that he had sourced a job for his daughter. She indicated she wanted redeployment. It was pointed out that if after 13 weeks in redeployment the Claimant had not found a suitable role, she might be liable to dismissal. The Claimant then said there was nothing wrong with her and she was fit to return to work. Mr Crawford said that the Claimant would not enter medical redeployment. She wanted voluntary redeployment. However, the HR advisor, Mr Phlora, told her that this was not possible. If she went into redeployment it would be on the basis that she was unfit for her substantive role and it would be subject to a risk of termination in the event of not finding alternative employment.

127. Mr Calvey, who was continuing to look for a solution, asked if the Claimant would accept a role in CPOS under a different manager. The Claimant said it would depend on the role and hours. Mr Calvey resolved to see what more he could do to assist the Claimant.

128. After the meeting Mr Calvey emailed the Claimant. He attached the grievance policy and asked her to consider it in light of what she had said about Mr Nandha.

129. In a further meeting on 4 March 2020 with Mr Calvey, the Claimant was told that as she had said she was fit to return to work he would not be moving her to medical redeployment. Since her secondment had come to an end, she would instead return to her substantive role. He also said that he had looked into finding the Claimant alternative work, Monday to Friday in vehicles under a different management structure and as the Claimant did not want Mr Nandha as her manager, he would put steps in place for her to have a different senior manager in the interim. He also told the Claimant that her existing grievance would be investigated.

130. Mr Calvey then explained the arrangements for the Claimant's coming period of work in which she would be undertaking retraining for her substantive role. He said that as Saturdays were difficult she could work Tuesday – Friday during the training period. The Claimant was angry and said "*this is a waste of time…".* The meeting ended with the Claimant declining to answer any further questions from Mr Calvey.

131. On 4 March 2020 the Claimant emailed Mr Calvey:

131.1. She complained that she had been given inadequate notice from a childcare perspective of returning to work 4 days per week (i.e.. the retraining for her substantive role). This was curious as the Claimant had hitherto been working 5 days a week on secondment;
131.2. The Claimant complained that Mr Calvey he had gone back on his word by not putting her in redeployment. This was curious as the Claimant's position had been that she was fit for work and Mr Crawford had said she would not be put on medical redeployment;
131.3. She said that Mr Calvey he was not qualified to assess her fitness to return to her work in the same role and department;
131.4. She enclosed a link to a story about a nurse who had committed suicide and a further link to www.hazards.org/suicide.

132. In the meantime on 5 March 2020, the Claimant raised a further grievance which she directed to Mr Daly:

132.1. The Claimant complained of discrimination on ground of maternity, marital status, part time worker and disability;
132.2. Complained her application for flexible work had been denied but that of another employee approved;
132.3. Made some broad allegations against Mr Nanda to the effect that he had exploited his position in order to exacerbate Claimant's disability. She also alleged that he had failed to deal with the Claimant's first grievance. She referred to having a range of evidence in a range of forms. She also complained of nepotism alleging that Mr Nandha in relation to Mr Nandha's daughter's employment.

133. Mr Calvey was very concerned by the Claimant's emails and contacted OH by email on 6 March 2020 for advice. He included in his request for advice the links to the story about a nurse who committed suicide and the link to www.hazards.org/suicide and asked for advice in relation to that. The OH advisor gave further advice:

> *In regards to medical redeployment, when I previously saw Patience in the department she appeared fit to work and it was the particular role itself that she did not want to return to. As such medical redeployment would not be appropriate from my perspective. I would suggest that you speak with HR for further advice in regards to redeployment and different roles available. It is ultimately a management decision as to what can be accommodated and redeployment.*
>
> *During the call you mentioned that Patience did not wish to see Occupational Health. Without her consent we would be unable to see her again in the department.*
>
> *In regards to the emails from Patience. I would advise that you speak with Patience in regards to these. If you have any concerns about suicide when talking with her I would advise that you get her consent to speak to her GP or a health professional for further support.*

134. On 6 March 2020, Mr Calvey wrote to the Claimant with a summary of where things had got to;

134.1. The Claimant's secondment in licensing had ended;
134.2. OH had said she was fit to do her role but that there were stresses that needed to be addressed;
134.3. That she had said at a meeting on 26 February 2020 "*there is nothing wrong with me, I am fit to work".*
134.4. That the Claimant's view was her previous grievance against Mr Nandha had not been addressed.

135. The route forward was:

135.1. The Claimant would not be put in medical re-deployment;
135.2. Mr Calvey would ask for the original complaint against Mr Nandha to be investigated by a different manager;
135.3. The Claimant would have refresher training. She could work flexibly during the training but thereafter would be expected to work her contracted shifts, subject to any fresh flexible working request.
135.4. That he had previously offered a role Monday – Friday in vehicles with core office ours with a different line management structure, including, on an interim basis a different band 4 (thus not Mr Nandha – in practice it would have been Mr Burch).
135.5. He also provided the Claimant with the number for the employee assistance advice line.

136. On 6 March 2020, Mr Daly responded to the Claimant asking her who the grievance was against and for details of specific incidents.

137. On 11 March 2020, the Claimant provided further details of her grievance. She said *"My grievance is against Anand Nandha and the process of how I've been treated and the manner in which the implementation of the policy has been applied between December 2018 to March 2020 . Where policy hasn't fit, selective application has been applied to support the objectives of making my life as difficult as possible. Not a specific individual per se and I do not known what conversations have been had away from the meetings being held that I was present for."* She gave a chronological, bullet point list of complaints. Two complaints named Mr Nandha. The first was that he had stated that he failed to see how the issues raised in the Claimant's first grievance amounted to a grievance. The second related to dealings with ACAS.

138. Mr Daly spoke to Mr Nandha to "*ensure my understanding was right that Mr Nandha had only been involved in the steps followed regarding TfLs process*". Mr Nandha told him that he had only spoken to the Claimant briefly regarding the processes surrounding her sickness absence and exchanged a couple of emails. On this basis Mr Daly says that he was satisfied that Mr Nandha's involvement was limited to "*part of [the claimant's] concerns about the process followed rather than any specific mistreatment by Mr Nandha*".

139. Mr Daly then sought advice from HR on whether there was a sufficient basis within the Claimant's correspondence to pursue a formal grievance. The written correspondence from HR was unilluminating with the first HR officer passing Mr Daly's request for advice to Mr Phlora, and Mr Phlora responding by simply asking if Mr Daly could identify someone to hear the grievance. Mr Daly responded to that email querying what HR's position on the advice sought was and noting that, in relation to the allegation that Mr Nandha had failed to progress the Claimant's first grievance, there had been on HR advice on that topic at the time and nothing appeared to have changed. He was unclear then whether the advice was now that the grievance should progress. Mr Daly then spoke to Mr Phlora and "agreed that [the Claimant's] grievance on the process could be heard." In our view, tellingly, Mr Daly added this in an email:

> *"We are about to initiate a very time consuming process for a Band 5 manager somewhere in the business and I want to be sure that this is the right course of action?"*

140. In his oral evidence, Mr Daly explained that, when there is a grievance against a band 4 employee it has to be dealt with by an external band 5. Band 5 is a very senior grade. Translating that to this case, if the grievance was treated as being against Mr Nandha, then Mr Daly would have needed to assign it to an external band 5. If it was treated simply as a grievance about '*process'* then it could be dealt with by an internal band 4. We return to the significance of this below.

141. Because of the period of absence the Claimant had to undertake retraining in her role. This commenced on 11 March 2020. The Claimant's line management passed to Mr Richie Folkes.

142. On 12 March 2020, the Claimant attended the office known as *Palestra* near Blackfriars. The operations teams were based on the 9th floor. It was a busy floor, that was arranged open-plan with hotdesking. The Clamant left her desk briefly and when she returned Mr Nandha was in her seat speaking to members of the team. Mr Nandha had not realised it was the Claimant's chair, and when he saw her walking towards him and appreciated that it was, he got out of the chair immediately. The Claimant became very upset and left the office and went home. Before leaving she tried to call Mr Folkes but did not reach him. The Claimant also sent an email to Mr Ross and Mr Daly saying that she had felt, upset, uncomfortable and anxious and that she had asked for a more safe environment to work.

143. Later that day Mr Ross, who was no longer the Claimant's manager telephoned the Claimant to discuss her leaving. He did this because she had emailed him. The details of the conversation are disputed.

143.1. The Claimant alleges that Mr Ross falsely accused her of shouting. She considers that he misconstrued appropriate speech on her part because he applied a negative stereotype of black women being loud and aggressive. She said to him at the time, when he referred to her shouting "*maybe he was confusing my natural tone as a black woman for an elevated voice".* The Claimant also contends that Mr Ross was shouting at her and that one of the things he shouted was that he had "*worked in the military and he could shout better than [she] could".* The Claimant's sister gave evidence on this matter (she heard part of the call because the claimant had it on speakerphone) and she broadly corroborated the Claimant's account.

143.2. Mr Ross's account is that the Claimant was, simply, shouting and that is why he referred to her shouting. He says that it was a difficult conversation and that both parties were talking over the other. He says that he did not shout at all. He accepts that he referred to having been in the military and saying words to the effect that he could therefore shout louder than the Claimant. But his evidence is that he spoke these words and did no more than speak firmly perhaps with a slightly elevated voice.

144. In our view, on balance, it is likely that the Claimant was shouting in the call and we so find. It is clear that she was extremely upset by the day's events to the point that an extremely minor incident if it can even be called an incident (Mr Nandha briefly sitting in her chair) had caused her to leave the workplace and go home. It is her own evidence (in her impact statement) that she had a tendency to lash out with words when experiencing high stress. Shouting on this call would be consistent with that. The fact she was shouting was the reason that Mr Ross referred to her as shouting and was also the reason he referred to his ability to being able to shout. We not accept that any sort of stereotyping was in play in Mr Ross's assessment that the Claimant was shouting.

145. We also find that Mr Ross raised his voice. Having heard him give evidence we can say that he has a naturally loud voice and he himself accepted that he may have elevated his voice. The claimant was confrontational on the call, was trying to end the call without accepting any wrongdoing in leaving the office, and

we think it likely that Mr Ross did elevate his voice in the course of speaking to her. He was trying, against a strong current, to get the message across that it had been unacceptable for the Claimant to leave the office.

146. Mr Ross followed up the telephone call with email essentially stating that it had been unacceptable for the Claimant to leave the office.

147. The Claimant wrote to Mr Daly about this incident on 12 March 2020 complaining that she was being asked to sit on the 9th floor at Palestra. Mr Daly responded to the effect that the 9th floor was not an unsafe environment.

148. On 12 March 2020, Mr Delgaudio decided that the Claimant's retraining programme should take place at premises near Baker Street. This avoided the need for her to work at *Palestra* for the time being.

149. On 13 March 2020, the Claimant made an application for parental leave.

150. On 18 March 2020, the Claimant commenced a period of self-isolation as her son had suspected Covid. Mr Folkes emailed the Claimant and among other things said he would keep in touch by telephone. The Claimant responded that was "fine".

151. On 19 March 2020, the Claimant received a letter offering her a role as Team Administrator on a secondment basis in another team. On this day she spoke to Mr Folkes and told him that she had secured the secondment. Mr Folkes congratulated her. Mr Folkes notified Mr Delgaudio.

152. The Claimant had not previously informed Mr Folkes, or Mr Delgaudio, that she had applied for a secondment. She had deliberately kept it quiet because she wanted the details in writing before mentioning it to her line management. She was of the view that her previous secondment had been suppressed and that there had been a plan to block her from taking it.

153. On 23 March 2020, the United Kingdom entered the first lockdown of the Pandemic. All Operations Officers were taken off normal duties and put on stand-by to support the pandemic response. There was uncertainty initially about what they would be doing.

154. It soon became clear that what they would be doing would be tasks such as, providing assistance at Nightingale Hospitals, ensuring doctors and nurses knew how to get from their hotels to the hospital, and monitoring social distancing at bus stops and stations.

155. On 26 March 2020, Mr Delgaudio told that Claimant that she would not be released for secondment. He said… "*we are currently working in an exceptional situation which has had an effect on our available resource levels. I am also conscious that you have just returned from a secondment and have recently started refresher training to resume your substantive role as an Ops Officer*." This was an extremely difficult and uncertain time, including for the Respondent. In that department resource levels were extremely low. Many operations officers

were shielding and self-isolating. So secondments were all but entirely ruled out. Mr Delgaudio's own words in evidence to us, we accept capture the situation:

> *"timing of secondment was 3 days after lockdown. It was very very manic. Officers going off for all kinds of reasons. Resources requests coming from everywhere. Any one fit to work we needed them."*

156. The Claimant expressed disappointment with the decision. She also withdrew her request for parental leave.

157. On 27 March 2020, Mr Delgaudio wrote to the Claimant giving an indication of the logistics of how the Claimant's work would proceed.

158. Also on that 27 March 2020 the Claimant emailed Mr Daly, complaining that she was not being released for her secondment and asking for it to be added to her grievance.

159. Mr Daly, wrote to the Claimant on 7 April 2020 stating that:

> With regard to the email you sent me on the 11 March, although you did provide more information, you state that your grievance is against Anand Nandha and the process. Having taken HR advice I will not be following this grievance against Anand Nandha on the basis of insufficient evidence, which is two email exchanges. However, the main issues of your grievance appear to be with the process of how you've been treated and the manner in which the implementation of the policy has been applied. I am satisfied that this is being picked up and dealt with by Mark Burch. He has appointed a manager to undertake the investigation and we will pursue this as soon as possible and in the most expedient way given the current situation we find ourselves.
>
> Regarding the decision not to release you on secondment, this is in keeping with our CPOS Operations approach to all of our operational staff and other colleagues have had requests denied for the same reasons.

160. The Claimant responded that she was unclear why he was saying there was a lack of evidence, given that the investigation had not commenced and she had further evidence to give.

161. Mr Daly responded on 8 April 2020:

> Your wellbeing is important to us and these are extra-ordinary times. I can assure you that your grievance matters will be heard and as you are aware we have started this process through Mark Burch. He will be looking into your grievance as whole, incorporating all your outstanding issues. You can then provide all the evidence to the appointed managers and at the grievance meeting for consideration.

162. He told the Claimant that the grievance would be dealt with by Mr Burch (a band 4).

163. In our view, what Mr Daly did was something of a 'fudge'. On the one hand he was saying that the grievance against Mr Nandha could not proceed. But on the other he was saying that the Claimant's concerns would all be considered under the heading of 'the process' - yet those concerns included concerns about Mr Nandha's decision-making in 'the process'. In our view this fudge occurred because Mr Daly, at the height of the pandemic, did not want to appoint a band 5 to deal with the grievance because band 5's were extremely senior, busy and in short supply.

164. The Claimant then liaised with Mr Burch in relation to the progression of her grievance. It was essentially put on hold as a result of the pandemic.

165. In around early April 2020, Mr Folkes told the Claimant that her work would involve assisting at the Nightingale Hospital, showing doctors and nurses how to get from their hotel to the hospital. The Claimant expressed concern about childcare, but Mr Folkes explained that she would be sent a choice of hours and he could be quite flexible. The Claimant said her mother in law lived with her and she could look after the children for a few hours, along with her husband.

166. The Claimant asked to be furloughed but Mr Folkes declined as his understanding at this point in time was that furlough for Operations Officers was limited to those who were extremely vulnerable and that childcare needs were not a basis for furlough. The Claimant therefore renewed her parental leave request to commence on 27 May 2020.

167. On 30 April 2020, Mr Folkes sent the Claimant the dates and times for her shifts the following week. This reflected the availability she had given for inclusion on the emergency rota. The Claimant was allocated one shift on 4 May 2020. Curiously, the Claimant did not respond to this email to indicate that there was a difficulty with working that shift. The Claimant did not attend this shift.

168. On 4 May 2020, Mr Folkes told the Claimant she had missed a shift. The Claimant was really angry about this and emailed Mr Burch, Mr Daly and Mr Folkes. She said that she had been told that she would not be deployable until 11 May 2020 and was still undertaking training. She characterised this as an example of bullying, harassment and mismanagement. She said that her understanding was that she was not a keyworker and that she had notified the Respondent she should be furloughed.

169. Mr Delgaudio responded stating that Operations Officers could not volunteer for furlough as they were needed for on-street support and supporting key worker operations. He also sent her some further advice regarding childcare for key workers.

170. In our view, the conflict here, was the product of a simple misunderstanding. The Claimant probably had been told that she would not be deployed until she finished her training. However, the training she was doing was refresher training for her substantive role. It was not for the emergency duties. There was no need for her to complete the training she was doing to be deployed to emergency duties. The work Mr Folkes tried to deploy her to was emergency duties. The Claimant probably was told she would be given a week’s notice of deployment. She was in fact given a bit less than that but she was only assigned one shift and it was on a date that she had indicated availability for.

171. On 11 May 2020, the Claimant emailed Mr Folkes and Delgaudio and referred to then recent guidance that those without childcare qualified for furlough. She stressed that she did not have childcare. Mr Delgaudio responded the following day stating that he had arranged for the Claimant to go on furlough. The Claimant then commenced a period of furlough.

172. On 29 June 2020, the Claimant emailed Mr Folkes asking when her furlough would end. On 2 July 2020, Mr Folkes told the Claimant that her furlough would end on 5 July 2020.

173. However, on 3 July 2020, the Claimant commenced a period of certified sick-leave with hyperemesis Gravidarum/low mood. Mr Folkes responded to the Claimant's email sending him the fit note stating that he would give her a call later in the week.

174. Mr Folkes, called the Claimant during her sick leave to keep in touch with her and ask about her health. On 27 July 2020 the Claimant emailed him and stated that she had received his voicemail and was "*not entirely sure what we would be discussing over the phone as we've had this conversation multiple times and my position remains the same".*

175. Also on 27 July 2020 the Claimant emailed Mr Burch in effect asking for her grievance hearing to be scheduled and expressing concern about the delay. On the third of August 2020 Mr Burch reverted with a series of dates. There was a lot of back and forth in relation to dates but one was eventually found.

176. On 18 August 2020, Mr Folkes emailed the Claimant stating that he appreciated he had the sick notes but that he had tried to call her out of concern for her health and that he hoped she would answer or call him back.

177. Also on 18 August 2020, Mr Folkes wrote to the Claimant and said that in light of her ongoing sickness it had been decided to put her back on furlough. He stated that whilst on furlough there would be an expectation of regular communication and he would schedule a "*quick once a week call on a Tuesday*". The Claimant responded to the effect that would be fine.

178. Mr Folkes then called the Claimant periodically, although she did not always answer. The Claimant alleges that Mr Folkes barraged her with phone calls. Mr Folkes' evidence is that he called about once a week and if he did not get the Claimant he tended to wait until the following week to call again. In our view, the likelihood is that Mr Folkes attempted a weekly call with the Claimant. However, if he did not get through we think it likely that he probably tried a couple of times before giving up until the following week.

179. On 10 September 2020, the Claimant had a grievance meeting held by Teams chaired by Mr Burch.

180. On 14 September 2020, the Claimant asked Mr Folkes when her furlough period would end. He asked if she was fit to return to work. She responded that she was suffering significantly from depression and was nowhere near any form of recovery. Mr Folkes asked to return to having regular telephone contact. The Claimant indicated that she only wanted to be contacted by email.

181. On 9 November 2020, Mr Folkes told the Claimant that all employees who had been furloughed due to long-term sickness absence had to be brought back from furlough. This reflected an organisation wide decision.

182. Mr Folkes then commenced a sickness absence review process with the first meeting to take place on 10 December 2020. The Claimant did not receive the email which was sent to her work email account, and so did not attend the meeting. When Claimant discovered the correspondence had been sent to her work email she was outraged and stated that she regarded it as deliberate bullying to aggravate her condition. She said she was having suicidal thoughts.

183. At around this time, Mr Folkes commenced a period of sickness absence for a major operation. The line management of the Claimant passed to Natasha Young.

184. The Claimant's grievance was rejected by letter dated 30 November 2020. The grievance outcome deals with a number of complaints against Mr Nandha though it rejects them.

185. On 2 December 2020, the Claimant appealed the grievance outcome. On 3 December 2020, Mr Daly emailed HR to find someone outside of CPOS to hear the Claimant's appeal. On 20 December 2020 Mr Daly emailed the Claimant, acknowledging the grievance and indicating that he would revert when a suitable manager had been identified. The Claimant responded complaining among other things that it had taken longer than 5 days (per policy) to acknowledge receipt of her appeal.

186. On 18 December 2020, Mr Daly emailed the Claimant and apologised for the delay in finding a manager to hear the appeal. He said that the only person available outside of the department would not be available until after 25 January 2021. He asked the Claimant whether she preferred to wait or alternatively whether she would like him to hear the appeal. The Claimant preferred to wait.

2021

187. On 25 January 2021, the Claimant chased Mr Daly in relation to her grievance appeal. He immediately chased Mr Phlora. Mr Phlora swiftly responded that the appeal hearing would take place on 1 February 2021, chaired by Ms Monica Cooney.

188. The appeal hearing took place on 4 February 2021, chaired by Ms Cooney.

189. On 8 January 2021, the Claimant attended a first sickness absence review meeting chaired by Ms Young. The Claimant reported ongoing depression. She referred to being suicidal. There was a discussion of reasonable adjustments. The Claimant asked for all the individuals involved in her ongoing case to leave her alone. She said that the Respondent was doing it deliberately to exacerbate her condition.

190. The Claimant was referred to OH on 21 January 2021.

191. The Claimant was seen in OH on 10 February 2021. The report stated her symptoms were consistent with severe anxiety and severe depression but with no

suicidal intent. The report advised that regular supportive contact with her manager was likely to be beneficial. The advice was that the Claimant was unfit for any work at that time and it was unclear when she would become fit. The report also noted that the Claimant was one month pregnant.

192. The Claimant's grievance appeal was dismissed on 3 March 2021 by Ms Cooney.

193. On 5 March 2021, the Claimant attended a second sickness review meeting, chaired by Ms Young. This followed an invitation to the meeting dated 26 February 2021. It is notable that the invitation is in standard terms for an invitation to a stage 2 meeting and makes no reference to the possibility of dismissal.

194. Turning to the meeting itself. This was clearly a stressful situation for the Claimant and in line with her own account that she was triggered by stressful situations, the Claimant was upset, somewhat obstructive and confrontational.

195. At the meeting there was a discussion of the OH report and returning to work. The Claimant was unable to say when she could return to work and resented being asked. She referred to continuing poor mental health and also to the fact that she was pregnant. Ms Young attempted to talk through a number possibilities but the Claimant was generally not for having a discussion at this meeting. She made clear that she would not return to her substantive role. Having referred to redeployment and discussed the possibility of reasonable adjustments, Ms Young made the Claimant aware that dismissal on ill-health grounds was a possibility. The Claimant at this point invited Ms Young to ask her whether she would be extending her sick-leave. Ms Young did that and the Claimant said that she would not. She said that now she was pregnant she would not be going back on the stress, and the Respondent had to manage her pregnancy.

196. The fact that the Claimant would be returning to work did come as a surprise to Ms Young since a recent OH report said Claimant was not fit for work of any kind. Ms Young adjourned to consider what the Claimant had said. On resumption, she said she could not let the Claimant return to work on 13 March 2020 given the current OH advice. She would speak to HR, get another OH report, discuss making adjustments, while in meantime standing the Claimant down on 'special leave'.

197. On 16 March 2021, the Claimant's GP signed her fit for work with adjustments: *"now medically stable to return to work, on reduced hours, and workplace adjustment*". A further OH report was obtained on 20 April 2021. It indicated that the Claimant was unfit for her substantive role but fit for temporary alternative duties.

198. On 20 April 2021, the Claimant notified Ms Young that she wanted to take annual leave from 4 May 2021 – 10 July 2021, parental leave from 14 July 2021 – 31 July 2021 and then maternity leave. She enclosed the necessary request forms.

199. On 29 April 2021, there was a further stage 2 sickness absence review meeting chaired by Ms Young. At this meeting it was agreed that the Claimant would take unpaid special leave between 30 April 2021 and 4 May 2021 and thereafter would take the annual, special and maternity leaves as the Claimant had requested. Ms Young raised the possibility of medical redeployment, but the Claimant indicated that she did not want to deal with that until after her maternity leave.

200. The Claimant then began the various types of leave indicated above, culminating in maternity leave. The Claimant is due to return to work on 8 August 2022.

Further findings relevant to disability status

Onset of depression

201. On the Claimant's account she began to experience significant symptoms of depression and anxiety in around November 2017.

202. The Claimant's GP records show in the entry for 13 December 2018 that the Claimant had a history of depression the "last few months". This consultation with the GP came about because, on that date, the Claimant's health visitor who was conducting a one year review on the baby, was so concerned about the Claimant's mental health she contacted the GP.

203. The OH report of 16 April 2019 records: p193

> *On discussion Patience explained that her symptoms began towards the end of her third pregnancy [which would be consistent with November 2017] and have gradually built up over time due to a combination of work and personal stresses.*

204. Doing our best to reconcile this evidence, we find that the Claimant's symptoms did begin at some level in around November 2017. They became more serious over time. The GP characterised the impairment as "depression last few months" on 13 December 2017. We find that by around September 2018 that the Claimant had the mental impairment of depression and anxiety.

205. We find that from around September 2018 onwards the depression did have an adverse effect on the Claimants day to day activities. For example:

205.1. The Claimant's ability to interact normally with her children and others deteriorated when performing routine activities be it parenting or visiting the supermarket. She had a tendency to lash out with her words towards her children and strangers. Thus there was an adverse effect on normal day to day activities such as parenting and shopping.

205.2. The Claimant's ability to carry out routine tasks, such as tidying the home and other chores, dwindled. She was able to identify the need for them to be done but lacked the motivation to do them.

205.3. The Claimant's ability to partake in ordinary social activities dwindled;

205.4. The Claimant's ability to communicate properly with her children and the children's father also dwindled.

206. We accept that the adverse effect of the impairment on the Claimant's normal day to day activities did fluctuate. The impact was severe from around September 2018 onwards and only began to abate when the Claimant's anti-depressants began to 'kick in' in around March or April 2019. However, even then she remained symptomatic and her symptoms were easily triggered by ordinary life stresses causing relapses.

207. The Claimant's depression persists to the present.

Law

Disability status

The definition of disability

208. S.6(1) EqA provides:
A person (P) has a disability if –
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and adverse long-term effect on P's ability to carry out normal day to day activities.

209. 'Substantial' is defined in s.212(1) EqA as '*more than minor or trivial'*.

210. The 'long-term' requirement is developed in para 2, Sch.1 to the EqA, which provides, so far as relevant:
(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.

211. '*Likely'*, in this context and elsewhere in the provisions defining disability, means 'could well happen', rather than 'more likely than not to happen' (***Boyle v SCA Packaging Ltd*** [2009] ICR 1056, HL).

212. Sch.1, para 5(1) EqA provides (the doctrine of deduced effects):

(3) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:
(a) measures are being taken to correct it, and
(b) but for that, it would be likely to have that effect.

(4) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.

213. The *Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2011) gives non-exhaustive examples of day to day activities:

> *'[D2] In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.'*

214. The Tribunal's focus should be on what the employee cannot do (or what they can do with difficulty) rather than on what they can do.

215. The EqA does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial. Unless a matter can be classified as within the heading 'trivial' or 'insubstantial', it must be treated as substantial (***Aderemi v London and South Eastern Railway Ltd*** [2013] ICR 591 EAT at [14-15]).

216. The Code of Practice on Employment in 2011 includes a summary in relation to the definition of disability, at paras 2.8–2.20. Paragraph 2.20 further refers the reader to App. 1 to the Code. Under the heading *'What is a "substantial" adverse effect?'*, paras 8–10 of the appendix provide:

> *'8. A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people. 9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation* […]'.

217. The *Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2011) contains the following guidance as to the interaction between the 'impairment' requirement and the issue of 'substantial adverse effects':

> *'A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases,*

there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.'

[…]

B4. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.

[…]

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.'

218. In *J v DLA Piper UK LLP* [2010] ICR 1052 EAT, Underhill P (as he was) made the following observations about deduced effects at [57]:

> '*Secondly*, there is the question of deduced effect. This was, as we have noted, the only way the case was pleaded, though it seems that the parties subsequently proceeded on the basis that "actual" adverse effects were also relied on. The Tribunal dealt with that issue by saying simply that "the Claimant did not adduce any clear or cogent evidence of this", referring to its observations about Dr Morris's evidence which we have set out at para 30 above. If, as we think, the Tribunal intended simply to discount Dr Morris's evidence because she was not a psychiatrist, that approach is wrong, for the reasons already given: we accept the contention to this effect at para 6.4 of the notice of appeal. But it may have meant only that her evidence was too brief to be "clear or cogent". If so, the point is debatable. Strictly speaking, the question that needed to be addressed was whether, on the hypothesis that the Claimant's ability to carry out normal day-to-day activities was not, as at June 2008, substantially affected, there would have been such an effect but for her treatment. Since Dr Morris did not accept that hypothesis, it is not surprising that she did not directly answer the question, saying only that without treatment the Claimant's condition would be "much worse". In view of our decision in the previous paragraph we need not decide the point, though we are inclined to think that the report can just about be read as supporting a "deduced effect" case. It is, even if so read, extremely brief, but there is nothing particularly surprising in the proposition that a person diagnosed as suffering from depression who is taking a high dose of antidepressants would suffer a serious effect on

her ability to carry out normal day-to-day activities if treatment were stopped: the proposition could of course be challenged, but in the absence of such challenge—there being none in Dr Gill's report—it is unclear what elaboration was required. Nor do we understand the relevance of the Tribunal's observation that Dr Morris's report was written in November/December 2008: it was clearly referring back to events at the material time.'

219. If there is material before the Tribunal to suggest that measures were being taken that may have altered the effects of the impairment, then it must consider whether the impairment would have had a substantial adverse effect in the absence of those measures (***Fathers v Pets at Home Ltd,*** EAT 0424/13).

220. The assessment of disability status must be made based upon the basis of evidence as to circumstances prevailing at the time of the act of discrimination: ***Richmond Adult Community College v McDougall*** [2008] IRLR 227.

Discrimination arising from disability

221. Section 15 EQA 2010 provides as follows:

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

222. In ***Pnaiser v NHS England*** [2016] IRLR 170 the EAT gave the following guidance:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

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

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, "discriminatory motivation" and the alleged discriminator must know that the "something" that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

223. In ***Dunn v Secretary of State for Justice*** *[2019] IRLR 298* at [44] Underhill LJ said this:

> *I appreciate that it would be more satisfactory if I felt able to dismiss Mr Westgate's argument definitively on the merits, since that would avoid the appellant wondering whether there might have been a different outcome if the case had been argued differently. I have been tempted to take that course because I do indeed see real difficulties with Mr Westgate's argument. In the context of direct discrimination, if a claimant cannot show a discriminatory*

motivation on the part of a relevant decision-maker he or she can only satisfy the 'because of' requirement if the treatment in question is inherently discriminatory, typically as the result of the application of a criterion which necessarily treats (say) men and women differently. In this case, if the ill-health retirement process was inherently defective in the ways found by the ET, it does not follow that it was inherently discriminatory. In truth Mr Westgate's argument appears to be 'I would not be in the situation where I was the victim of delay and incompetence if I were not disabled'; but that kind of 'but for' causation is not regarded as sufficient to constitute direct discrimination. There is an analogy with the not uncommon case where an employee who raises a grievance about (say) sex discrimination which is then, for reasons unrelated to his or her gender, mishandled: the mishandling is not discriminatory simply because the grievance concerned discrimination. Mr Westgate's answer is that s 15 cases require a different approach. But as at present advised I cannot see why the differences between s 13 and s 15 (essentially (a) the extension of protection to cases where the cause of the treatment is 'something arising from' the protected factor, and (b) the use of 'unfavourable' rather than 'less favourable') justify any different approach to the meaning of 'because of', which is common to both provisions. So I doubt whether the appellant has lost anything by Mr Westgate's argument not being advanced previously. However, this is not a straightforward area of law, and we did not hear argument on it from both sides. It is also possible that the decision of the Supreme Court in Williams may have at least a tangential impact on the analysis. In those circumstances I prefer to reject Mr Westgate's argument on the basis that it was not raised below.

224. In ***Robinson v Department for Work and Pensions [2020] IRLR 884***, Bean LJ said this:

> *I agree with these observations of Underhill LJ. Both s 13 and s 15 use the same phrase 'because of'. One requires A to have treated B less favourably than a comparator would have been treated* because of *a protected characteristic (s 13), the other to have treated him unfavourably* because of *something arising in consequence of a disability (s 15). One difference between the sections is that s 13 explicitly involves a comparison between how the claimant and other persons without the protected characteristic are treated – 'less favourable treatment' – whereas s 15 refers only to 'unfavourable treatment'. But both sections require the ET to ascertain whether the treatment (whether less favourable or unfavourable) was* because of *the protected characteristic and, as such, require a tribunal to look at the thought processes of the decision-maker(s) concerned.*
>
> *56 I also agree with the observation of Simler P in the EAT in* Dunn *that 'just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary' if a s 15 claim is to succeed. As Underhill LJ said in this court, a prima facie case under s 15(1) is not established solely by the claimant showing that she would*

not be in the situation of being the victim of delay and incompetence if she were not disabled

225. These authorities illustrate the point that the mere failure to deal properly with a complaint of disability discrimination (including a complaint of failure to make reasonable adjustments) will not necessary be because of something arising in consequence of disability. What is required is an analysis of the reason(s) for the failure.

226. As to what is unfavourable treatment, see the Equality and Human Rights Commission Code of Practice gives the following guidance: *"For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."*

227. The Code does not replace the statutory words but gives helpful guidance and an indication of the relatively low threshold sufficient to trigger the requirement for justification: ***Trustees of Swansea Assurance Scheme v Williams*** [2019] ICR 230 (per Lord Carnwath at para 27).

228. As to the requirement for knowledge of disability on the part of the employer, there need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment: ***City of York Council v Grosset*** [2018] IRLR 746, Court of Appeal.

Harassment

229. 22. Section 26 EQA 2010 provides:

(1) A *person (A) harasses another (B) if –*
(a) A engages in unwanted conduct related to a relevant 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 [for short we will refer to this as a "prohibited environment"].
…
(4) In deciding whether conduct has the purpose or 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."

230. In ***Weeks v Newham College of Further Education*** UKEAT/0630/11/ZT, Langstaff J said this at [21]:

"An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant."

231. In ***Richmond Pharmacology v Dhaliwal*** [2009] IRLR 336 (at ¶15), Underhill J (as he was) said:

15…A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard….Whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."

22…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…"

232. A finding that it is not objectively reasonable to regard the conduct as harassing is fatal to a complaint of harassment. That point may not be crystal clear on the face of s.26 Equality Act 2010 but see the *obita dicta* of Underhill LJ in ***Pemberton v Inwood*** [2018] IRLR 557 at [88] and the ratio of ***Ahmed v The Cardinal Hume Academies***, unreported EAT Appeal No. UKEAT/0196/18/RN in which Choudhury J held that ***Pemberton*** indeed correctly stated the law [39].

233. In considering whether a remark that is said to amount to harassment is conduct related to the protected characteristic, the Tribunal has to ask itself whether, objectively, the remark relates to the protected characteristic. The knowledge or perception by the person said to have made the remark of the alleged victim's protected characteristics is relevant to the question of whether the conduct relates to the protected characteristic but is not in any way conclusive. The Tribunal should look at the evidence in the round (per HHJ Richardson in ***Hartley v Foreign and Commonwealth Office Services*** UKEAT/0033/15/LA at [24-2].)

234. In considering whether the conduct is related to the protected characteristic, the Tribunal must focus on the conduct of the individuals concerned and ask whether their conduct is related to the protected characteristic (***Unite the Union v Nailard*** [2018] IRLR 730 at [80]).

235. In ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** [2020] IRLR 495 HHJ Auerbach gave further guidance:

> *[21] Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.*
>
> *[24] However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.*
>
> *[25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.*

236. The justification stage does not arise on the facts of this case (see below) so no self directions are given.

Indirect discrimination

237. Section 19 EQA provides as follows:

> *(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.

238. In a disability discrimination claim the group can properly be identified not as disabled people generally, but as disabled people with the claimant's particular disability (in this case anxiety and depression). See for example the EHRC Code of Practice on Employment which makes this point. Mr Johnston accepted this point in closing submissions.

239. The best guidance, in relation to the identification of the pool is that of Lady Hale in ***Naeem v Secretary of State for Justice*** [2017] ICR 64:

40 … In the equal pay case of *Grundy v British Airways plc* [2008] IRLR 74, para 27, Sedley LJ said that the pool chosen should be that which suitably tests the particular discrimination complained of. In relation to the indirect discrimination claim in *Allonby v Accrington and Rossendale College* [2001] ICR 1189, para 18, he observed that identifying the pool was not a matter of discretion or of fact-finding but of logic. Giving permission to appeal to the Court of Appeal in this case, he observed that "*There is no formula for identifying indirect discrimination pools, but there are some guiding principles. Amongst these is the principle that the pool should not be so drawn as to incorporate the disputed condition*."

41 Consistently with these observations, the Statutory Code of Practice (2011), prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006, at para 4.18, advises that: *"In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively."* In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of section 19(2)(b) which requires that "it"—ie the PCP in question—puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison.

240. In ***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 601, Lady Hale said this at [14]

…as Mr Allen points out on behalf of Mr Homer, the new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse (see the helpful account of Sir Bob Hepple in Equality: the New Legal Framework*, Hart 2011, pp.64–68). It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages.*

241. **In *McNeil and others v Revenue and Customs Commissioners*** [2019] EWCA Civ 1112, the court said this about particular *disadvantage:* "*In* CHEZ Razpredelenie Bulgaria v Komisia za zashtita ot diskriminatsia*, case C-83/14, [2016] 1 CMLR 14, the CJEU confirmed that the word "particular" in the phrase "particular disadvantage" was not intended to connote a disadvantage which was "serious, obvious and particularly significant" but simply to make clear that it was persons with the relevant protected characteristic who were disadvantaged: see paras. 99-100 of its judgment (p. 546). (That being so, the word would appear to be, strictly speaking, to be redundant, since that would be the effect of the statutory language even without it.)"*

242. In considering the particular disadvantage issue the tribunal is entitled to take into account the combined effect of two or more PCPs: ***Ministry of Defence v. DeBique [2010] IRLR 471.***

243. The justification stage does not arise on the facts of this case (see below) so no self directions are given.

Direct discrimination

244. Section 13 EqA provides: *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

245. Section 23 EqA provides:

(1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.
(2) The circumstances relating to a case include each person's abilities if – on a comparison for the purposes of section 13, the protected characteristic is disability…

246. In ***Nagarajan v London Regional Transport*** [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

247. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'

248. Since ***Shamoon***, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in ***Martin v Devonshire's Solicitors*** [2011] ICR 352 at [30]:

'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'

<u>*Direct disability discrimination*</u>

249. Where an employer makes inaccurate assumptions about mental illness that are not based on up to date medical evidence, but for instance upon stereotypes about mental illness, that is a matter that may infer directly discriminatory treatment: ***Aylott v Stockton on Tees*** **[**2010] IRLR 994**.**

250. In ***Owen v Amec Foster Wheeler Energy*** *Ltd* [2019] ICR 1593 the Court of Appeal gave important guidance on direct discrimination in the particular context of disability. Mr Owen had multiple health issues and was denied an overseas posting because medical concerns were raised in an occupational health assessment. Mr Owen argued that the reason the employer did not allow him to be posted overseas was the outcome of his medical assessment and that this was

indissociable from his disabilities. He argued that, regardless of any benign motive that Amec may have had, there was a necessary and inherent link between the reason Amec made the decision and his disabilities. The Court of Appeal rejected this argument – the hypothetical comparator was a person who was not disabled but who was also deemed to be a high medical risk. That person would have been treated in exactly the same way.

251. The appeal considered the concept of indissociably and the case-law around that in the context of direct discrimination. That culminated with the following conclusion:

> *78. I would also accept the submission made by Ms Sen Gupta that, unlike racial or sex discrimination, the concept of disability is not a simple binary one. It is also not the case that a person's health is always entirely irrelevant to their ability to do a job. For those reasons the concept of indissociability, which forms the foundation of much of Ms Genn's submissions, cannot readily be translated to the context of disability discrimination.*

Direct marital status

252. There is some important learning on what marital status discrimination is and upon the nature of the comparative exercise it therefore requires. In ***Hawkins v Atex Group Ltd*** [2012] IRLR 807, Per Underhill P:

> *9. The starting point must of course be the language of s.3 itself. In my view it is clear that (to use the terminology of the 2010 Act) the characteristic protected by s.3(1) is the fact of being married 1 – or, to put it the other way round, that what is proscribed is less favourable treatment on the ground that a person is married. That is what the language used says. The same is true of the section in its pre-amendment form: 'marital status' naturally means the fact of being married. The relevant comparator is thus, likewise, a person who is not married. Since in any comparison for the purpose of the section the relevant circumstances must be the same but for the protected characteristic (see s.5(3)), the appropriate comparator will usually be someone in a relationship akin to marriage but who is not actually married: I will use the old and well-understood, albeit much deprecated, phrase 'common-law spouse' rather than the modern 'partner', which does not have so specific a meaning.*
>
> *10. The paradigm case caught by s.3 is thus where a woman is dismissed – or otherwise less favourably treated – simply because she is married. Such cases may seem outlandish now, but they were very common well into the post-war era, even if they had become rarer by the time of the introduction of the 1975 Act. [3] I think it likely that it was this kind of case that Parliament principally had in mind when s.3 was first enacted.*
>
> *11. A rather less straightforward case is where the reason for the treatment in question comprises both the fact that the complainant is married and the identity of her husband – that is, where she is (say) dismissed not simply because she is married but because of who she is married to. On ordinary*

principles such a case will fall within s.3 because the fact that she is married is an essential part of the ground of the employer's action, even though the identity of her husband is an additional element. But it is important to appreciate that this will not be so in every case where a woman suffers less favourable treatment because of her relationship to her husband. It is essential that the fact that they are married is part of the ground for the employer's action. As Ms Sen Gupta succinctly put it, it is important to get the emphasis in the right place: the question is not whether the complainant suffered the treatment in question because she was married to a particular man, but whether she suffered it because she was married to that man. Some subtleties are involved here. In many, perhaps most, cases of this kind the ground for the employer's action will not be the fact that the complainant and her husband are married but simply the closeness of their relationship and the problems to which that is perceived to give rise: applying the other half of the 'two-part test' (see paragraph 7(1) above), a common-law wife would have been treated in the same way. The employer may in giving his reasons for the conduct complained of have referred to the fact that the two of them are married, or have used the language of husband and wife, but if that merely reflects the fact that in their particular case the close relationship takes the form of marriage, and he would have treated her the same if they were common-law spouses, then s.3 will not apply. Deciding whether the fact that the complainant is married – rather than simply that she is in a close relationship with the man in question – is the ground of the employer's action (in either of the ways identified in paragraph 7(2) above) will often be easy enough; but sometimes it may be more difficult. There will certainly be some cases where the reason is indeed 'marriage-specific': one example is the case of Chief Constable of Bedfordshire Constabulary v Graham [2002] IRLR 239 which I consider at paragraph 18 below.

12. Mr Burgher did not accept the analysis in the previous paragraph. He submitted that if, in a given case, the close relationship to which the employer objects takes the form of marriage there should be no need to ask anything further: the marriage is the ground of the action, irrespective of whether the complainant would have been treated the same way if she had been simply a common-law spouse. As for s.5(3), it all depends how you define the relevant circumstances: in this case, you cannot strip out the fact of marriage and yet leave in the equation the closeness of the relationship which is an incident of that marriage. That is a seductive submission, because often (though not always) to subject a spouse to a detriment because of his or her relationship to the other spouse will be unfair, and it is natural to feel that the law should provide a remedy [4]; but in my view it is wrong. Although marriage and a close personal relationship usually go together, they are conceptually separate and are not inevitable corollaries of one another. They are properly to be treated as separate factors, save in the case where the fact of marriage is indeed the criterion for the action complained of.

13. I am reinforced in that conclusion by policy considerations. It is, I believe, commonly accepted that it will sometimes be legitimate for employers to accord different treatment to employees who are parties to a close personal relationship, for essentially the kinds of reasons alluded to by Atex in the

present case – conflicts of interest and perceptions of favouritism, nepotism and the like; and such treatment may be 'less favourable'. Yet if the law were as Mr Burgher submits such treatment would be absolutely unlawful in cases where the parties in question were husband and wife, since direct discrimination is of course incapable of justification. That is not in my view a result that Parliament is likely to have intended to achieve, particularly since the identical treatment would not be unlawful (subject to any possible claim of sex discrimination or for unfair dismissal – see note 4) if the employees in question were in an equally close relationship but did not happen to be married: that seems to me an arbitrary and unacceptable anomaly. The approach which I favour, covering only cases where the employer is motivated (at least in part) by the fact of marriage as such, rather than by the closeness of a relationship which happens to take the form of marriage, seems to me essential if the law in this field is to remain principled and coherent. It leaves the section with a real, though less wide, sphere of operation: see paragraph 10 above.

253. Underhill P then considered the authorities and concluded

23. The upshot of that review is that the approach which seems to me right as a matter of principle, as set out paragraphs 9–13 above, is consistent with the weight of authority. To the extent that that involves my departing from the ratio *of* Dunn*, I do so with the less reluctance because the Appeal Tribunal was not in that case referred to* Skyrail*.*

Direct discrimination because of pregnancy/maternity

254. The EqA prohibits employers from treating an employee unfavourably (as opposed to less favourably) because of her pregnancy (s.18(2) EA 2010) or because she is exercising, is seeking to exercise or has exercised the right to maternity leave (s.18(4) EA 2010).

255. S.18 EqA provides:

18. Pregnancy and maternity discrimination: work cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has

exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

…

256. There is no comparative exercise. However, in order for a discrimination claim to succeed under s.18 EqA, the unfavourable treatment must be 'because of' the employee's pregnancy or maternity leave. In ***Interserve FM Ltd v Tuleikyte*** (2017) UKEAT 0267/16, [2017] IRLR 615 Simler P held that the correct approach to the question whether the treatment complained of was 'because of' the proscribed factor was the same in the context of s 18 as in that of s 13. This was broadly endorsed by Underhill LJ in ***Commissioner of the City of London Police v Geldart*** [2021] IRLR 74.

Victimisation

257. Section 27 EQA 2010 provides as follows:

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

258. In ***Chief Constable of the West Yorkshire Police v Khan*** [2001] IRLR 830 Lord Nicholls said *"The primary object of the victimisation provisions is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so."*

259. In ***Aziz v Trinity Street Taxis Ltd*** [1988] IRLR 204, at 29, dealing with the Race Relations Act equivalent to section 27(2)(c) EQA 2010:

> *"An act can, in our judgment, properly be said to be done 'by reference to the Act' [the Race Relations Act] if it is done by reference to the race relations legislation in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act."*

260. The putative discriminator has to have knowledge of the protected act. See, for example, ***South London Healthcare NHS Trust v Al-Rubeyi*** at UKEAT/0269/09/SM.

261. An unjustified sense of grievance cannot amount to a detriment: ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285).

Time limits

262. S.123(1)(a) EqA provides that a claim must be brought within three months, starting with the date of the act to which the complaint relates.

263. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated, and ending with the day of the ACAS certificate, does not count (s.140B(3) EqA). If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS, and ending one month after the day of the ACAS certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

264. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. In ***Hendricks v Commissioner of Police of the Metropolis*** [2003] ICR 530, the Court of Appeal held that Tribunals should not take too literal an approach: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs, in which an employee was treated in a discriminatory manner.

265. S.123(1)(b) EqA provides that the Tribunal may extend the three-month limitation period, where it considers it just and equitable to do so. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances, which may include factors such as: the reason for the delay; whether the Claimant was aware of his right to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] ICR 1194).

The burden of proof and inferences

266. The burden of proof provisions are contained in s.136(1)-(3) EqA:

(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.

267. In ***Igen Ltd & Others v Wong*** [2005] IRLR 258 the Court of Appeal gave the enduring guidance on the burden of proof. Although that was a case brought under the Sex Discrimination Act 1975, it has equal application to all strands of discrimination under the EqA:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
(2) If the claimant does not prove such facts he or she will fail.
(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.
(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

268. In ***Madarassy v Nomura Bank*** 2007 ICR 867, a case brought under the then Sex Discrimination Act 1975, Mummery LJ said:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

269. The position was summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

> *'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:*
>
> *(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):*
>
> > *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.*
> > *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"*
>
> *(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful*

discrimination – para. 58 (p. 879D). As Mummery LJ continues: "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim." He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

270. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

271. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

272. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

Discussion and conclusions

Disability status

273. The Claimant has had the impairment of depression and anxiety since around September 2018 (see our findings of fact.).

274. From September 2018 onwards, the adverse effect of the impairment on normal day to day activities was described in our findings of fact. This effect was/is obviously substantial – it goes way beyond the minor and the trivial.

275. It is true that the adverse effect has fluctuated. There was an extended period between September 2018 and around April 2019 that the adverse effect was consistently severe, however, thereafter the Claimant's medication kicked in. it is plain from her the medical evidence, including OH evidence that the anti-depressant medication (on which the Claimant remained for the long-term) had a significant beneficial effect. The Claimant's account is that the talking therapies she did likewise had a beneficial effect and we accept that. The deduced effects

are that the adverse effect on the Claimant's normal day to day activities would have continued at a severe level in the absence of these interventions.

276. The long-term criterion was, in our view, met from around January 2019 onwards. From that time onwards, based on the position prevailing at the time, it could properly be said that the impairment could well continue to have a substantial adverse effect on normal day to day activities for 12 months or more from its onset.

277. On 21 Jan 2019, the Claimant was reviewed by the GP and she was still suffering from depression. The GP recorded that this related mainly to money issues and housing (both of which are difficult problems to solve). The GP signed the Claimant off for 56 days which is a long-period of time that denoted a persistent and significant illness. If were wrong about that, an alternative date is March 2019 when an OH report said:

277.1. The Claimant reported mental health symptoms going back to 2017;
277.2. A well validated assessment on the day of the consultation suggested she had severe depression;
277.3. The Claimant was unfit for work. A follow-up in 6 weeks was advised. The duration of the Claimant's absence was unpredictable and depended on her response to treatment and capacity to cope.

278. In our view the Respondent ought reasonably to have known that the Claimant was a disabled person by not later than 1 April 2019 when it received that OH report. That OH report was gathered in part because the Claimant had notified the Respondent in very clear terms of her mental health problems in the case conference of March 2019. The Claimant described in significant detail the fact she had depression and the impact it had on a normal day.

279. Another reason why the date of deemed knowledge should be around 1 April 2019 is that the Claimant had done so much to put the Respondent on notice that she might be disabled by March 2019 if it had been acting reasonably the Respondent would have made reasonable inquiries to find out if she was disabled. This would simply have involved posing an additional question in the OH referral made in March 2019 to the effect of '*is the Claimant likely to be a disabled person within the meaning of the Equality Act 2010?'*. If that question had been posed the answer would surely have been a 'yes' (guarded of course with the usual caveat that OH advisors tend to give, namely, that it is ultimately a matter only an employment tribunal can decide).

280. If we were wrong about 1 April 2019 being the date of deemed knowledge, then by May 2019 the Claimant had had a further case conference in which she explained, among other things, that her dosage of citalopram had been doubled. That surely would put the Respondent on notice that her depression could well be long-term and otherwise meet the tests of disability.

Direct disability discrimination

Issue 7.2: Ms Young attempting to dismiss the Claimant

281. Ms Young did not attempt to dismiss the Claimant on 5 March 2021 (or at all). Rather, on 5 March 2021 Ms Young outlined some future possible consequences of the Claimant's unfitness for work (which had been indicated in the then most recent OH report). One of those possibilities was dismissal. It was not the only possibility. We accept Ms Young's evidence that she had not made any decision to dismiss the Claimant and did not attempt to dismiss her.

282. In any event, the ground of Ms Young's treatment of the Claimant was the Claimant's apparent unfitness for work and the prognosis in relation to that, as set out in the then most recent OH report. That is a distinct ground from the Claimant's disability (depression/anxiety).

283. It is true that, in the course of the meeting, the Claimant surprised Ms Young by saying she was not going to extend her sickness absence. The Claimant infers from this that because Ms Young was surprised it had been her plan to dismiss the Claimant. However, we do not agree. Ms Young was surprised because the recent OH advice had been that the Claimant was not fit to return to work. Ms Young thereafter took appropriate steps to be satisfied the Claimant was indeed fit for work (a further OH report and a meeting to discuss that as well as a Fit Note the Claimant provided indicating limited fitness to work). Ultimately, the Claimant would have returned to work but did not because instead she took unpaid leave, annual leave, parental leave and maternity leave.

<u>Indirect disability discrimination</u>

Issue 8: indirect disability discrimination in respect of Saturday working

284. The Respondent did have and did apply a PCP of "*being required to work on a Saturday*". Saturday working was a feature of, at the least, several of the shift patterns that the Respondent operated.

285. We do not accept that being required to work on a Saturday put disabled people (whether generally or alternatively specifically those with depression/anxiety) at a particular disadvantage compared to others who are not-disabled or who are disabled but do not have depression/anxiety.

286. There is, simply, no evidence of group disadvantage before us (howsoever the pool may be defined). There is evidence that the Claimant in particular had difficulty in working on a Saturday. However, it is impossible to extrapolate from that there was a group disadvantage. It is notable that the work that needed to be done on Saturdays was not any different to the work that needed to be done on other days. The reason Saturdays were difficult for the Claimant were because of the lack of available childcare. It is impossible to extrapolate from this that working Saturdays put disabled people, other than the Claimant, at a particular disadvantage.

287. It would certainly not be right or safe for us to assume or take judicial notice

that working on Saturday put disabled people (or any cohort of disabled people that went beyond just the Claimant) at a particular disadvantage compared to others who are not disabled. This claim must fail.

Discrimination arising from disability/harassment related to disability

288. The date of knowledge of disability is 1 April 2019. For this reason the complaints at paragraph 10.2 and 10.3 of the List of Issues must fail as s.15 EqA complaints. We in any event consider them on the merits.

289. The following complaints are put as both discrimination arising from disability and harassment claims. We therefore consider each complaint twice according to the statutory tests for those two causes of action.

Issue 10.2: 28 January 2019 – Khalil Sarr questioning the Claimant regarding her Flexible Working Request at a meeting to discuss her appeal against the decision not to grant her flexible working request

290. The questioning in issue here is asking the Claimant about her husband's work, in particular, his working hours on Saturdays, whether he could work at home or vary the hours.

291. Although we accept that the Claimant was very upset by these questions we do not accept that this was unfavourable treatment, low though the bar is.

292. It is, and at the time was, plain that Mr Sarr was simply trying understand the Claimant's circumstances as they related to childcare. That is part and parcel of dealing with a flexible working request when it is put on the basis of childcaring responsibility. Indeed, understanding such circumstances has the potential to lead to a resolution of the application (though it did not in this case). For instance, Mr Sarr had in mind that if there was only a small overlap between the Claimant's husband's working hours and the Claimant's then was prepared to adjust the Claimant's shifts so that there ceased to be an overlap. As it turned out the Claimant did not feel she could rely on her husband to provide the childcare whatever his working hours. That was of course a position she was entitled to take and there is no criticism of her for taking it. However, there was no way of knowing that in advance and the fact remains it was perfectly proper and objectively reasonable to ask the questions Mr Sarr did.

293. Judge Dyal and Mr Shaw also consider it material that the Claimant was the one who initially mentioned her husband in the context of explaining her need for a flexible working arrangement at the meeting. She said he worked on Saturdays. That made Mr Sarr's question about his working hours all the more routine and obviously not unfavourable. Ms Foster-Norman does not agree that this detail adds anything. However, the whole panel agree that regardless of the Claimant mentioning her husband and him working on Saturdays it was not unfavourable to inquire about what family childcare support there may be. And, upon learning that the Claimant had a husband who worked on Saturdays, asking about his hours etc.

294. We did not think that asking these questions disadvantaged the Claimant in any

way – she was free to answer as she pleased including to explain that she could not rely on her husband for childcare. There was nothing wrong with the question. It is not overly personal, it does not relate to intimidate details, establishing the childcare situation was relevant to the application.

295. The reason why Mr Sarr asked the question about the Claimant's husband was to see whether he could resolve the Claimant's flexible working request. As noted, his logic was that if there was only a modest overlap in the Claimant's hours and those of her husbands, he could adjust the timing of the Claimant's Saturday shift so there was no overlap.

296. That reason was obviously not caused by the matters said to arise from disability at paragraphs 9.1, 9.2 and 9.4 of the list of issues. As to 9.3, the Claimant herself accepts that *at this stage* of the chronology, not being able to work on Saturdays was unrelated to disability. It was simply a matter of a lack of childcare. We agree with that.

297. The treatment complained was not unfavourable and did not arise in consequence of disability.

298. The complaint also fails as an allegation of harassment. The conduct:

298.1. was unwanted;
298.2. was not related to disability - we specifically acknowledge that the 'related to test' is different to the test applied under s.15. However, the same factors identified above in relation to the reason for the unfavourable treatment also show that the treatment was not related to disability;
298.3. did not have the purpose of creating a prohibited environment or of violating the Claimant's dignity. The purpose was as above;
298.4. did not have such an effect either. Although the Claimant perceived it to create a prohibited environment/violate her dignity, having regard to all the circumstances and what is objectively reasonable, it did not. We repeat the above analysis.

Issue 10.3: 5 February 2019 – Khalil Sarr rejecting the Claimant's appeal against the decision not to grant her Flexible Working Request.

299. The appeal was rejected and this was unfavourable treatment. It was plainly disadvantageous to the Claimant.

300. We accept that the reasons why Mr Sarr rejected the appeal were the ones that he gave. Essentially that it would be detrimental to the business for the Claimant to be absent on Saturdays and because it would be uneconomic to recruit someone to work on Saturdays in her place. We found his evidence to be credible and the reasons that he gave were logical, rational and supported by the wider evidence in the case. Indeed it was plain that there was a particular difficulty with covering Saturdays to the point that a new shift pattern – the one the Claimant had been recruited to – had been created to address that difficulty.

301. The reasons for the unfavourable treatment did not arise in consequence of

disability and were clearly entirely unrelated to all of the 'somethings' at paragraph 9.1 – 9.4 of the list of issues.

302. The complaint also fails as an allegation of harassment. The conduct:

302.1. was unwanted;
302.2. was not related to disability (we specifically acknowledge that the 'related to test' is different to the test applied under s.15. However, the same factors identified above in relation to the reason for the unfavourable treatment also show that the treatment was not related to disability);
302.3. did not have the purpose of creating a prohibited environment or of violating the Claimant's dignity. The purpose was as above, in essence, to maintain business efficiency;
302.4. did not have such an effect either. Although the Claimant perceived it to create a prohibited environment/violate her dignity, having regard to all the circumstances and what is objectively reasonable, it did not:
302.4.1. the analysis above is repeated;
302.4.2. there were genuine business reasons why it was not convenient for the business to allow the Claimant's request;
302.4.3. the decision was reached following a fair process that considered and evaluated the Claimant's flexible working request.

Issue 10.4: 28 May 2019 – Anand Nandha refusing to progress the Claimant's email as a grievance.

303. The factual allegation is essentially well founded though a little summarily stated.

304. The Claimant's email of 18 May 2019 alleged a failure to make reasonable adjustments which is a species of discrimination (see s.21(2) EqA which makes that plain). The complaint, basically, was that she had been offered temporary adjustment to her duties/hours but that a reasonable adjustment would have been a permanent adjustment to her duties/hours.

305. Mr Nandha did refuse to progress the Claimant's email of 18 May 2019 (headed 'grievance') as a grievance. However, two points need to be added:

305.1. Mr Nandha left open the possibility of the grievance procedure being activated. He said "*However, if you can evidence how you have been discriminated in the process ie treating you differently to another because of your disability, then I can appoint someone to hear this as a grievance."* That was a rather narrow understanding of what a complaint of discrimination could be, essentially, limiting it to direct discrimination.
305.2. Mr Nandha did not preclude further discussion of adjustments. However, it was his view that the proper place for discussion of that was in the absence management process that was ongoing with Mr Calvey under the Attending Work Policy. Part of the very purpose of that process was to consider adjustments to facilitate a return to work.

306. We think on balance that there was unfavourable treatment here. A complaint

that the adjustment offered was not reasonable was something that could quite properly form the basis of a grievance. If treated as a grievance it would no doubt be dealt with by a different manager than the one who offered the temporary adjustment (Mr Calvey).

307. The reason for the treatment was that Mr Nandha did not think the grievance process was the correct procedure for dealing with the Claimant's complaint of 18 May 2019. Rather he thought the matter raised should be dealt with under the absence management procedure. That was simply his understanding of the correct division between the Respondent's grievance procedure and its absence management procedure. The reason for the treatment was not one of the matters at paragraphs 9.1 – 9.4 of the list of issues and was not a matter arising in consequence of disability.

308. The complaint also fails as an allegation of harassment. The conduct:

308.1. was unwanted;

308.2. was related to disability. This is a broad test and the conduct in issue was a decision about how a complaint of failure to make reasonable adjustments be dealt with. We specifically acknowledge that the 'related to test' is different to the test applied under s.15 and we so no inconsistency in conduct being related to disability for the purposes of s.26 but not because of something arising in consequence of disability for the purposes of s.15 EqA;

308.3. did not have the purpose of creating a prohibited environment or of violating the Claimant's dignity. The purpose was as above - for the Claimant's concerns to be dealt with through what Mr Nandha understood to be the correct procedure;

308.3.1. did not have such an effect either. Although the Claimant perceived it to create a prohibited environment/violate her dignity, having regard to all the circumstances and what is objectively reasonable, it did not:

308.3.1.1. We agree with the Claimant that the correct course was to treat her email of 18 May 2019 as a grievance and to follow the grievance procedure. There was a failure there and the approach Mr Nandha took is unimpressive (the failure rests with him though he was acting on HR advice).

308.3.1.2. However, the failure must be set in context because it was significantly mitigated by a number of matters.

308.3.1.3. Mr Nandha did not by his email preclude further consideration of reasonable adjustments, he simply took a view that the appropriate forum for considering it was the absence management procedure;

308.3.1.4. The absence management procedure was therefore to continue under Mr Calvey who was a caring and sensitive line manager. The relationship with him remained reasonable and workable at least at that time.

308.3.1.5. Mr Nandha left the door open for the Claimant to pursue a grievance although if the grievance were to be about failure to make reasonable adjustments (as distinct from direct discrimination) it would realistically have taken some further explanation to Mr Nandha

and HR that this was an appropriate topic for a grievance. At this time the Claimant had a trade union representative who was very capable of doing this – Ms Bosa. In fact she was unconcerned by Mr Nandha's email and preferred to open informal discussions with him to try and find a solution instead of pursuing the grievance avenue.

Issue 10.5 4 June 2019 – Anand Nandha refusing to allow the Claimant to work Tuesday to Friday on the same hours as she had previously worked.

309. It is true that Mr Nandha, together with Mr Sarr, did decided at this time that the Claimant could not be assigned a different shift pattern working Tuesdays to Fridays. However, the detail is of importance. The proposal they rejected was for a temporary change of shift pattern until the new structure came in, in a few months time. What the Claimant was offered instead was to carry out alternative duties (thus not on-street work) and to use the annual leave she had built up (which was considerable) to avoid working on Saturdays. This arrangement also was temporary until the new structure came in.

310. On balance we do accept that this was unfavourable treatment. There was an element of disadvantage to the Claimant. It meant she would be using her leave to avoid Saturdays rather than being rostered to avoid them. While this was not particularly onerous in the circumstances the bar for unfavourable treatment is low.

311. The reason for the treatment was that Mr Nandha and Mr Sarr did not want to set a precedent for removing Saturdays from people's shifts. It was known that there were others who wanted this and thus there was reluctance to create a precedent for it. The business needed people to work on Saturdays and it was a difficult day to cover already. A comparable outcome for the Claimant could be achieved without setting that precedent. I.e., the Claimant could avoid working on Saturdays until the new structure came in by using annual leave.

312. The reason for the treatment did not arise in consequence of disability. It was not any of the matters at paragraph 9.1 – 9.4. Rather, it was business considerations that were unrelated to the Claimant's disability or any matter arising in consequence of it.

313. The complaint also fails as an allegation of harassment. The conduct:

313.1. was unwanted;
313.2. did relate to disability since it related to adjustments to the Claimant's working pattern at least partly on account of depression (which was a disability and the Respondent ought to have known was a disability by that stage);
313.3. did not have the purpose of creating a prohibited environment/violating dignity – the purpose was as per the reason for the treatment above;
313.4. did not have the effect of either of those things, though the Claimant perceived it did. Although the Claimant perceived it to create a prohibited environment/violate her dignity, having regard to all the circumstances and what is objectively reasonable, it did not:

313.4.1.1. The solution offered was quite closely comparable to the solution that was rejected;
313.4.1.2. The solution offered did involve using annual leave but there is no suggestion that this was particularly onerous. The Claimant had been on sick leave for a long time and thus had a accrued a lot of leave;
313.4.1.3. There was a rational basis for declining the Claimant's request and offering a different solution.

Issue 10.6: 4 March 2020 – Deciding not to place the Claimant in the redeployment pool. The legitimate aim was to ensure proper processes were followed to ensure employees are treated fairly and consistently.

314. In this context the 'redeployment pool' means being placed on medical redeployment. It was only open to those who were medically unfit for their existing role and it attracted a genuine, as opposed to merely theoretical, risk of dismissal. There was no other 'redeployment pool'.

315. The context of this decision is that at meeting of 26 February 2020, the Claimant had indicated she wanted redeployment. However, when it was pointed out that this came with the risk of dismissal if no opportunity was found the Claimant objected because she said she was fit to return to work. Certainly, she wanted to be redeployed but she was not at that time accepting the risk of dismissal being put in the redeployment pool came with. Later in the meeting, Mr Crawford (her rep) said that the Claimant would not enter medical redeployment. He wanted her to enter voluntary redeployment. However, there was no such type of redeployment.

316. In that context on 4 March 2020, Mr Calvey told the Claimant she would not be placed in redeployment. Mr Calvey's reasons for doing this were these. Firstly, that the Claimant had stated that she was fit for work, secondly that she had not agreed to accept the risk of dismissal if placed on medical redeployment, and thirdly her representative said she would not go on medical redeployment, and fourthly there was no such concept as being placed in voluntary redeployment without risk of dismissal.

317. These reasons were not because of something arising in consequence of the Claimant's disability and in particular not because any of the matters at paragraph 9.1 – 9.4 of the list of issues.

318. The complaint also fails as an allegation of harassment. The conduct:

318.1. was not unwanted even though the Claimant thought it was. In truth she did not at this time want to be placed in redeployment because she was not prepared at that time to accept the risk of dismissal;
318.2. did relate to disability since it related to deciding whether or not to place the Claimant on redeployment by reason of her ill-health, which was a disability;
318.3. did not have the purpose of creating a prohibited environment/violating dignity. Mr Calvey did not put the Claimant on redeployment for the reasons given above. He was doing his best to try and help the Claimant;

318.4. did not have the effect of either of those things, though the Claimant perceived it did. Although the Claimant perceived it to create a prohibited environment, having regard to all the circumstances and what is objectively reasonable, it did not:

318.4.1.1. The Claimant in reality wanted something that Mr Calvey could not offer her, being placed on redeployment without being placed at risk of dismissal;

318.4.1.2. Mr Calvey did offer the Claimant something that would enable her, for a significant but temporary period of time, to avoid working on Saturdays and avoid her substantive duties;

318.4.1.3. It would have been wrong to put the Claimant on redeployment, with the consequent risk of dismissal, in the circumstances that existed at this time.

Issue 10.7: 12 March 2020 – Carlo Delgaudio refusing to allow the Claimant to work on a different floor. The legitimate aim was to ensure that proper training could be carried out to meet the needs of the business.

319. This complaint fails on the basic facts as Mr Delgaudio did not refuse to allow the Claimant to work on a different floor or have any involvement in where the Claimant sat on that day.

320. We think this allegation must in fact be a reference to Mr Ross who in his email of 12 March 2020 made clear that the Claimant would need to work on 9th Floor at times.

321. This was unfavourable treatment in the sense that the Claimant by this stage no longer wanted to sit on the 9th Floor and was significantly affected by seeing Mr Nandha in her seat (her reaction was irrational and out of all proportion but it was real not contrived).

322. The reason for Mr Ross's instruction was that the 9th floor was where the team and manager were based. It was the most convenient and logical place for her to sit. His reasons had nothing at all to do with disability or any matter arising from it.

323. The complaint also fails as an allegation of harassment. The conduct:

323.1. was unwanted because the Clamant wanted to sit elsewhere;

323.2. the conduct did not relate to disability. It is Mr Ross's conduct that is in issue and his conduct just had nothing to do with disability;

323.3. the conduct did not have the purpose of creating a prohibited environment/violating dignity. The purpose, as above, was to seat the Claimant with the rest of her team as this was convenient for the business;

323.4. did not have the effect of either of those things, though the Claimant perceived it did. Although the Claimant perceived it to create a prohibited environment/violate her dignity, having regard to all the circumstances and what is objectively reasonable, it did not:

323.4.1.1. There were good, sound, logical and unsurprising business reasons for the conduct;

323.4.1.2. The 9th floor was a busy operational floor, objectively speaking it

was not an unsafe environment;

323.4.1.3. The incident with Mr Nandha, though it had upset the Claimant, was objectively speaking wholly benign;

323.4.1.4. The nature of the dispute between the Claimant and Mr Nandha and others was not of a sort that meant it was obviously important for them to be separated in the workplace (as might be the case in instances of sexual harassment or other forms of abusive conduct). There was never any suggestion for instance that Mr Nandha had acted in an abusive or overbearing manner.

Issue 10.8: 7 April 2020 – Graham Daly refusing to progress the Claimant's grievance about Anand Nandha.

324. It is not easy to characterise exactly what Mr Daly did here and that is because there was an element of internal inconsistency in what he did. To put the point colloquially, it was a 'fudge'. On the one hand he was indeed saying that the grievance could not progress against Mr Nandha. However, on the other hand he was saying that the Claimant's grievance about the process could progress. Mr Nandha was an important decision maker in relation to that process and thus a complaint into what he had done/decided would progress.

325. We are satisfied that this did amount to unfavourable treatment. The Claimant was told that the grievance against Mr Nandha would not progress even though she was also told, in a roundabout way, that the grievance about what he had done/decided would progress. This was unfavourable and from the Claimant's point of view no doubt contributed to her sense that there was a kind of management 'stich-up' of her complaints.

326. In our view, the reason for the treatment was that if the grievance had been taken to be against Mr Nandha, it would have been necessary to appoint an independent band 5 manager to deal with it. It is plain from both Mr Daly's email correspondence at the time that Mr Daly wanted to avoid a Band 5 having to deal with this grievance. Band 5s are very senior, there are few of them and the pressures on their time are very high. It was not, in any respect, any of the matters at paragraph 9 of the List of Issues. The treatment did not arise in consequence of disability.

327. The complaint also fails as an allegation of harassment. The conduct:

327.1. was unwanted because the Clamant wanted the grievance to progress against Mr Nandha;

327.2. the conduct did not relate to disability. It is Mr Daly's conduct that is in issue and although the decision he made was about a grievance that concerned disability discrimination, that was simply a matter of background;

327.3. the conduct did not have the purpose of creating a prohibited environment/violating dignity. Mr Daly's purpose was to progress the Claimant's grievance but in a way that did not involve passing it to an independent band 5 to investigate;

327.4. Did not have the effect of either of those things, though the Claimant perceived it did. Although the Claimant perceived it to create a prohibited

environment/violate her dignity, having regard to all the circumstances and what is objectively reasonable, it did not:

327.4.1.1. In our view the preferable course would have been to simply appoint an independent band 5.

327.4.1.2. However, although the grievance did not progress with an independent band 5 it was made clear that the grievance could/would progress. This would include the complaints that the Claimant had about the process including Mr Nandha's involvement in it.

327.4.1.3. In reality, the grievance against Mr Nandha did progress albeit that it was labelled as a grievance about the process and was not dealt with by an independent band 5.

327.4.1.4. We can certainly understand the Claimant being dissatisfied with this. However, we must not cheapen the statutory words that are the tests for harassment and in our view, set in context and even cumulatively with the other matters the Claimant complains of, the thresholds of violating dignity/creating a prohibited environment are not met.

Issue 10.9: 6 May 2020 – Richie Folkes initially refusing to furlough the Claimant (later granted to commence on 18 May).

328. The basic allegation is factually correct. We agree that it was unfavourable treatment. The Claimant wanted to be furloughed and it was clearly more convenient for her to be furloughed.

329. The reason for the initial refusal was that Mr Folkes wanted the Claimant to be operational and deployable to meet operational demands. This was the start of the pandemic and the Respondent provided essential services in highly uncertain, highly changeable environment. It needed people – such as the Claimant - in operational positions to do some work so as to assist in the pandemic response. At this time, Mr Folkes did not understand childcare needs to be a basis for the Respondent to furlough members of staff. Its staff were key workers and thus in principle had more childcare options available to them than others, although it is obviously right that in some cases childcare would remain difficult or impossible. In any event this had nothing at all to do with disability or any reason arising in consequence of it.

330. The complaint also fails as an allegation of harassment. The conduct:

330.1. was unwanted because the Clamant wanted to be furloughed;

330.2. the conduct did not relate to disability. As described, it was an operational decision entirely unrelated to disability.

330.3. the conduct did not have the purpose of creating a prohibited environment/violating dignity. As described the purpose of the conduct was to make the Claimant a deployable member of staff to assist in the response to the pandemic.

330.4. did not have the effect of either of those things, though the Claimant perceived it did. Although the Claimant perceived it to create a prohibited environment/violate her dignity, having regard to all the circumstances and what is objectively reasonable, it did not:

330.4.1.1. The Claimant did have childcare difficulties;
330.4.1.2. There was an acute business need for operational staff to be deployable;
330.4.1.3. The Claimant was employed in an operational role;
330.4.1.4. It was a time of national crisis which the Respondent had an important role in responding to;
330.4.1.5. The Respondent was short-handed staff wise because many of its staff had to be furloughed, for instance because they were in the highly vulnerable category.

Issue 20.10: 18 December 2020 – Graham Daly stating a manager would be allocated for review of grievance on 25 January 2021 which the Claimant states is contrary to policy guidance [the grievance policy].

331. The issue here is the delay in dealing with the Claimant's grievance appeal. We agree that there was a significant delay (see our findings of fact) and that this was unfavourable. The Claimant, like most complainants, wanted her grievance appeal to be dealt with more swiftly and that is entirely understandable.

332. The reason for the treatment was nothing to do with disability or any matter arising from it. The reason for the treatment was that it was very hard to find an external band 5 with availability and capacity to hear the Claimant's grievance appeal. Band 5s are very senior, the country remained in a time of crisis which the Respondent had a key role in responding to, it was Christmas time and the delay was regrettable but not surprising. The treatment was not in any respect because of something arising in consequence of disability.

333. The complaint also fails as an allegation of harassment. The conduct:

333.1. was unwanted for the same reasons it was unfavourable;
333.2. the conduct did not relate to disability. As described, it was a matter of capacity and availability;.
333.3. the conduct did not have the purpose of creating a prohibited environment/violating dignity. The purpose of the conduct was simply to deal with the Claimant's grievance appeal;.
333.4. did not have the effect of either of those things, though the Claimant perceived it did. Although the Claimant perceived it to create a prohibited environment/violate her dignity, having regard to all the circumstances and what is objectively reasonable, it did not:
333.4.1.1. The timescales significantly exceeds those that the grievance policy indicates will normally be followed; however,
333.4.1.2. Band 5s are senior, busy and in demand;
333.4.1.3. There was not an external Band 5 available and with capacity prior to the one offered;
333.4.1.4. The Clamant was given the alternative of Mr Daly dealing with the appeal. It was sensible to give her this option as it meant dealing with the appeal more quickly, but it was right that it was just an option which she was free to decline.
333.4.1.5. The delay must be set in context. This remained a time of national crisis which the Respondent had an important role in responding to. It

was a very difficult crisis to responded to because the situation and the laws governing them were frequently changing.

Further disability harassment complaints

Issue 12.1: Mr Folkes constantly telephoning the Claimant despite multiple email requests

334. We accept that Mr Folkes telephoned the Claimant more frequently than she wanted him to, that the Claimant asked him not to and that this was unwanted conduct. However, we do not accept that he telephoned her 'constantly' or with unusual frequency. We find this implausible. We think the Claimant resented his calls so much she has misconstrued their frequency. We find that Mr Folkes did try to keep in touch with the Claimant by telephone but on balance we find this was in the way of weekly calls rather than 'constant' calls. We find that sometimes if he did not get through on the first attempt he would, in the ordinary way, try again a couple of times.

335. The conduct did relate to disability at least some of the time because the calls were, for parts of the chronology, during periods of disability related sick leave in order to maintain contact with the Claimant and check on the Claimant's health.

336. The calls did not have the purpose of violating the Claimant's dignity or creating a prohibited environment. Their purpose was to maintain contact with the Claimant and periodically check on how she was.

337. We do not accept that the conduct had either of those effects, albeit that the Claimant's perception is that they did:

337.1. The volume of calls was far less than the Claimant recalls. It was at a very ordinary level;
337.2. The purpose of each call was entirely legitimate: it was, as noted, to keep in touch and see how the Claimant was;
337.3. There were times when the Claimant expressed a preference not to be telephoned and for contact to be by email. However, there was a degree of mixed messaging because there were other times that she indicated she was content for contact to be by telephone.
337.4. The telephone contact was, in any event, in our view benign and objectively reasonable even though Claimant found keeping in touch by telephone to be an annoyance.

Issue 12.2: Anand Nandha offering the Claimant a part-time role then reneging on the offer

338. This issue is identical to issue 10.5. We therefore repeat our analysis.

Issue 12.3 Anand Nandha sitting in the Claimant's seat; and

339. Mr Nandha did briefly sit in the Claimant's seat. This was unwanted conduct.

340. The conduct was not related to disability in any way. Mr Nandha did not know it was the Claimant's seat and just briefly sat in it to talk to his team.

341. The conduct did not have the purpose of violating the Claimant's dignity or creating a proscribed environment. The purpose was simply to sit down in a convenient place to speak to the team.

342. The conduct did not have the effect of either of those things either albeit that the Claimant' perceives that it did:

342.1. The conduct was wholly and utterly benign. It was just briefly sitting in a seat that the Claimant had been sitting in;
342.2. There was a hotdesking arrangement so it was not as if this was known to be the Claimant's seat or that it was a seat associated with her;
342.3. Mr Nandha got out of the seat as soon as the Claimant returned and he realised it was her seat.

Issue 12.4: Ability to secure alternative employment by Anand Nandha despite him securing employment for his daughter.

343. This allegation is not very clearly phrased but we understand it to be a complaint that whereas Mr Nandha obtained alternative employment for his daughter he did not do so for the Claimant.

344. The allegation fails on it's basic facts. Mr Nandha did not obtain a job for his daughter. He had a very limited involvement in finding out the lie of the land. She then applied and secured a non-permanent labour role following an ordinary recruitment process that did not involve Mr Nandha.

345. There is no evidence that Mr Nandha could simply have procured alternative employment for the Claimant or indeed his daughter.

346. The treatment here does not have any relation to disability at all. If anything it seems that the Claimant is alleging some sort of patronage by Mr Nandha to assist his daughter. However, that has no relation whatever with disability.

Direct race discrimination

Issue 14.1: not granting her Flexible Working Request but granting the request of Employee A?

347. The Claimant made clear this is a complaint against Mr Nandha.

348. It is true that the Claimant's flexible working request was refused and that Employee A's was granted (on appeal). We think that the Claimant's circumstances and those of Employee A were materially different:

348.1. Employee A came to Mr Nandha between the initial decision on her

flexible working application and the appeal in relation to its refusal. The flexible working process was thus ongoing. At that time Employee A sent Mr Nandha an email that was very alarming and suggested she may imminently self-harm or commit suicide if she had to continue working nights. Employee A was not being supported through any other process such as attendance management process. Mr Nandha made clear that he was sympathetic to her request to change working hours. Her application was successful at the appeal stage (although Mr Nandha was not the decision maker). She was allowed to move to fixed daytime hours. She moved to one of the existing day time shift patterns.

348.2. When the Claimant's flexible working application was being dealt with in its formal stages, she was suffering from depression but there were no comparable statements raising red flags of imminent self-harm suicide at that time. Further the basis of her application was child-care rather than mental health. After the formal flexible working process had ended, she did continue to try and amend her working hours. By the time Mr Nandha became involved her case was put in part on the basis of mental health problems. By this stage, however, unlike Employee A, the Claimant's mental health was being monitored and supported under the attendance management policy. She had had and continued to have periodic OH referrals. Further, Employee A was asking to move to one of the Respondent's existing shift patterns. The Claimant was not. Further still, the proposal that was put to Mr Nandha was for the Claimant to temporarily work a bespoke shift pattern until the new structure came in. The decision made in response to that request was to ultimately to find another way of the Claimant avoiding Saturdays until the new structure came in (using leave). This was to avoid setting a precedent in relation dropping Saturdays from shift patterns that contained Saturdays. Once the new shift pattern came in, and once the Claimant's secondment had ended, the Claimant was offered a working pattern that was identical to that which was offered to employee A. The Claimant, however, did not want that working pattern when it was offered to her.

349. There were a number of material differences between the Claimant's circumstances and those of employee A's then:

349.1. The stage of the flexible working request process had reach by the time that Mr Nandha became involved;
349.2. The stage of the process at which mental health was put as the/a reason for the change of hours;
349.3. The nature of the change sought by Employee A versus the change sought by the Claimant;
349.4. The availability of temporary solutions in the Claimant's case pending the new structure (e.g. leave, alternative duties, secondment);
349.5. The Claimant, ultimately refused an offer that was the same as the one made to Employee A.

350. In our view the Claimant was not treated less favourably than Employee A, though in any event their circumstances are materially different. Most importantly, none of the treatment of the Claimant (nor indeed of Employee A) was anything whatsoever to do with race. We have already analysed what the reasons were at each stage that the Respondent dealt with/considered the Claimant's requests to

change her working hours/role. Race did not in any respect come into it. Nor did it in Employee A's case.

351. There is no direct evidence of race discrimination in respect of this or any matter nor is there, standing back and looking at the evidence as a whole, any basis to infer race discrimination in relation to this or any issue.

Issue 14.2: halting her secondment in October 2019?

352. The Claimant's secondment was not halted. Further, nothing about the arrangements for the secondment, or the time it took to get it off of the ground had anything whatsoever to do with race.

Issue 14.3. when Jason Ross allegedly shouted at her because she was a black woman?

353. Mr Ross did elevate his voice to the Claimant, but that was not because she was black, or because she was a woman, or because she was a black woman or otherwise for any reason related to race.

354. The reason Mr Ross raised his voice is because he and the Claimant were having a very difficult conversation and the Claimant was indeed shouting. The Claimant's case is effectively put on the basis that Mr Ross applied a negative stereotype about black women being loud and aggressive and for that reason mis-perceived the Claimant as shouting. We do not accept that – no stereotyping was involved and it was not a misperception. The Claimant was shouting. She was angry and she had been triggered by the events of the day and by Mr Ross's call.

Issue 14.5: Does the Respondent have a policy of preferring flexible working applications of non-black employees over black employees?

355. The Respondent does not have any such policy. There is no evidence of one. There is evidence of two flexible working applications. The Claimant's application was refused but this had nothing at all to do with race. It was refused for the reasons identified above. Employee A's application was accepted, but again this was nothing at all to do with race. It was accepted because there was an urgent mental health need and the request could be accommodated by the business without undue difficulty. In short, there is no evidence that the Respondent had a policy of the sort alleged.

Harassment related to race

Issue 19: Did the Respondent harass the Claimant on the grounds of her race by, on 18 December 2018 – Edyta Stevenson rejecting her Flexible Working Request.

356. The application was rejected and this was unwanted conduct.

357. The rejection of the application was not related to race and in fact neither the application nor the rejection of it had any connection with race whatsoever. We are satisfied that Ms Stevenson rejected the application for the business reasons that

she gave at the time, that race had no bearing on her decision and that there was otherwise no racial context surrounding the decision at all.

Pregnancy and Maternity Discrimination – s.18 Equality Act 2010

Issue 20.1 Edyta Stevenson forcing her to work longer hours when it was more than the Claimant could manage when she was pregnant in 2017?

358. The Claimant's GP advised that between 13 September and 12 October 2017 the Claimant was fit to work but only on a very limited basis. Her fitness was limited to 2 days per week, 2 hours per day.

359. To emphasise: (1) that was a medical opinion; (2) it applied for the full duration of the above period and (3) it did so without any caveat (e.g. there was no caveat to the effect that the Claimant's condition might improve or that on some days she was fit to work more hours if she felt up to it.)

360. Ms Stevenson's initial plan was to follow the GP advice until there was further medical advice from OH. For reasons that are unclear the Claimant did not attend the OH appointment on 28 September 2017. Thus during the life of the GP certificate there was no medical advice.

361. Despite the lack of any further medical advice, Ms Stevenson decided to go behind the GP's assessment and asked the Claimant to work more hours during the life of the GP certificate than the GP had said she was fit to. This was a peculiar thing to do.

362. It was all the more peculiar because the Claimant's pregnancy risk assessment specifically identified working hours as a risk. The control mechanism for that risk was to discuss the Claimant's hours with her. It is worth repeating at this point some of our findings of fact.

363. On 29 September 2017, Ms Stevenson emailed the Claimant and noted she had not attended the OH appointment. She asked the Claimant to work to the phased return plan discussed on 14 September 2017 and she reiterated the plan. That involved the Claimant increasing her working hours in the week commencing 2 October 2017 to 3 hours, 3 days per week. That instruction directly contradicted the only medical advice. Indeed it required the Claimant to work 125% more hours than the medical advice indicated she was fit for (4 hours > 9 hours).

364. Ms Stevenson asked the Claimant to liaise with Mr Abdul Shahid her new ACM to discuss how she was coping. Ms Stevenson herself was about to go on maternity leave (and did go on maternity leave on around 2 October 2017) and Mr Shahid became the Claimant's line manager during her absence. The Claimant immediately responded on 29 September 2017 that she was "*struggling as it is*" and that she wanted a slower progression back to work pending OH advice. She suggested working 2 days / 2 hours until w/c 16 October when that could grow to 2 days / 3 hours.

365. It is plain and obvious from the correspondence that the Claimant was objecting to working the hours Ms Stevenson wanted her to and reporting that even the 4 hours per week she was struggling with.

366. Ms Stevenson responded "*As I have mentioned during the return to work you are on a phased return to work and if at any point you are feeling that you are not coping with the increased hours please speak to your ACM."* This was a peculiar response since that is exactly what the Claimant had done – she had literally just reported struggling with 4 hours.

367. We have no doubt that requiring the Claimant to work more hours than her GP had said she was fit for, in circumstances in which the Claimant was reporting (we find truthfully) that she was struggling even with those, that the Claimant was unfavourably treated.

368. We do not accept the submission that the Claimant was not 'forced' to work these hours. That is an overly literal interpretation of the meaning of 'forced'. The Claimant was forced to work these hours in the sense that she objected in clear terms to doing so and her manager nonetheless stuck to her guns and required the Claimant to attempt those hours in the week commencing 2 October 2017 and then report to Mr Shahid how they were.[1]

369. We are also satisfied that pregnancy was a significant part of the reason for unfavourable the treatment. The tribunal asked Ms Stevenson why she took the approach she did. Her evidence was that she herself had been pregnant and she knew that with pregnancy you didn't know how you will feel from one day to the next so she wanted the Claimant's to try increasing the hours. I

370. What the evidence shows is that pregnancy was indeed an important part of the reason for the treatment. Ms Stevenson had a view that because the Claimant's health issue was a pregnancy related one, it was appropriate to ask her to work more hours than her GP was fit for because. That was because in Ms Stevenson's view in the case of pregnancy related illness, at least of this sort, there were day to day variations that meant the Claimant may be fit for increased hours. The treatment was therefore in significant part because of the views Ms Stevenson had specifically about pregnancy related illness. These were simply her views – they were not supported by for instance, medical evidence, and indeed were contradicted by the only medical evidence that there was.

371. In the circumstances, there is no doubt that the treatment was in significant part because of pregnancy. Pregnancy was not the only reason – but it did not need to be. It was an effective cause of the treatment. Beyond pregnancy, the reason for the treatment was that Ms Stevenson thought it desirable for an employee returning to work from sickness absence to gradually rebuild their hours. Such a desire would normally be circumscribed by medical evidence as to

1. In subsequent weeks it became a matter for Mr Shahid what hours the Claimant would work and she and he liaised about that. There is no issue on the list of issues in relation to that and we confine ourselves to what is on the list of issues.

the employee's medical fitness to rebuild her hours; it was not here, as we have said, because of Ms Stevenson's views about pregnancy related illness.

Issues 20.2 Rejecting her flexible working application dated 24 October 2018?

372. This treatment did happen and was unfavourable.

373. The decision was made within the protected period so in principle could fall under s.18 EqA. However, the reason for the treatment was nothing whatsoever to do with pregnancy or maternity leave. It was for the reasons identified above – in summary business considerations in which pregnancy and maternity leave were not in any respect factors.

Direct Discrimination marriage discrimination

Issue 21: Did Khalil Sarr ask the Claimant about her husband's work and duties in her flexible working appeal meeting on 28 January 2019?

374. Mr Sarr did ask the Claimant about her husband's work and working hours in the appeal meeting. However, this was not less favourable treatment than a relevant unmarried comparator would have received.

375. Mr Sarr was simply trying to understand what the Claimant's childcare arrangements were in the context of a request from the Claimant to alter her working hours in light of child caring responsibilities. If the Claimant had not been married but had a life-partner/common-law spouse, he would simply have replaced the word 'husband' with the word 'partner' and asked exactly the same question.

376. Further and in any event there was no detriment in being asked this question. The question did not stray into private or intimate personal issues nor was it a gratuitous question. It was a question obviously aimed at understanding the background to the Claimant's application. In context the Claimant's sense of grievance is unjustified.

Issue 22: Indirect marriage Discrimination

377. We do not accept that the Respondent has a policy or practice of "asking employees about their spouse's working pattern". It has a practice of establishing the childcare arrangements when dealing with a flexible working arrangement and that can include asking about the spouse's working pattern. However, it is artificial to identify the PCP in that way because it's practice is to equally ask about partners and anyone else that may be providing childcare, like grandparents.

378. Even if there was such a PCP, it does not put married people (howsoever the pool is defined) at a particular (or any) disadvantage. Being asked about your spouse's working pattern in a flexible working application is not disadvantageous. It is just a part an parcel of establishing the background to the application which is a very important exercise.

379. The PCP likewise did not put the Claimant at any particular disadvantage. The

question was unobjectionable, inoffensive, relevant for establishing the background and the answer might have helped provide a solution (if e.g. adjusting the Claimant's working hours so they did not overlap with her husband's would have helped – in fact it would not but there was no way of knowing that without some discussion).

Victimisation

380. It is uncontroversial that the following amounted to protected acts:

380.1. The Claimant's email to Anand Nandha of 18 May 2019;
380.2. The Claimant's letter dated 5 March 2020.

Issue 28.1 Anand Nandha ending the Claimant's secondment opportunity to the Respondent's Licencing Department as an Events Coordinator in February 2020;

381. Mr Nandha did not end this secondment and there is no evidence that he did. It was always an opportunity of finite duration and it simply came to an end in the ordinary way. There is nothing to link that with any protected act.

Issue 28.2 Preventing her from taking up another secondment opportunity as a Team Administrator in the Fleet Team in March 2020

382. The reason for this treatment was analysed at issue 10.8 above and we repeat the analysis. The treatment was not in any way because of any protected act.

Issue 28.3: Refusing to send the Claimant to Redeployment on 4 March 2020.

383. The Claimant was not put on redeployment because the only type of redeployment that existed was medical redeployment. The Claimant had said at the case conference on 26 February 2020 that she was fit for work. Her trade union representative said at that meeting that she would not enter medical redeployment. The treatment was not in any way because of any protected act.

Limitation

384. There is one complaint, issue 20.1, that is well founded on its merits. However, it has been presented very significantly outside of the primary limitation period: over two years. That is a very long time in the context of a discrimination claim in the employment tribunal.

385. There is an explanation for the delay. The Claimant's evidence is that she believed there was an ongoing course of discrimination against her that formed a continuing act. She therefore appreciated that the complaint was out of time on the face of it but considered it was not out of time on a proper analysis. We accept that this is a truthful explanation. It is not the most compelling one – it is obviously a very risky strategy to delay in presenting a complaint in reliance upon a tribunal finding that earlier events form part of continuing conduct with later

events. On the other hand, we would also accept that in a case of this kind there is a difficulty for a claimant in deciding at what point(s) to present a complaint to the tribunal rather than simply battling with the employer internally.

386. A very weighty factor is the balance of prejudice. If we refuse to extend time the Claimant will be very significantly prejudiced. She will be deprived of a remedy for a claim that we have heard on the merits and consider to be well founded.

387. On the other hand, we have considered carefully what prejudice there would be to the respondent if we extend time. There is the obvious prejudice of liability for the claim but that is not a weighty factor in and of itself. The real interest is in whether or not the Respondent has suffered any forensic prejudice – that is additional difficulty in defending the claim on account of the delay in presenting it. We do not think it has, even taking into account its point that the Claimant did not pursue this matter as part of her internal grievances.

388. The reality is that Ms Stevenson had a clear recollection of why she managed the Claimant in the way that she did. It was not her evidence that she was unable to remember. On the contrary she did remember and she did give clear evidence about what happened and why. The only exception to this is that neither she nor the Claimant could recall why the Claimant did not attend the OH appointment on 28 September 2017. However, although that detail is lost to history, on analysis, it is not a material matter. It really does not matter why the Claimant did not attend. The fact is she did not attend. There is not the slightest reason to think that the reason for her non-attendance could have a bearing on the outcome of issue 20.1 and the contrary has not been suggested. We therefore do not think that the cogency of the evidence has been adversely affected by the delay and that is very important.

389. We have been careful to limit the liability to Ms Stevenson's management of the Claimant's pregnancy related illness and not to include the period of Mr Shahid's management of the Claimant. That is faithful to the list of issues. The Respondent made powerful submissions that we must not stray beyond those issues and in the circumstances we agree. This approach also avoids any prejudice arising out of the facts that Mr Shahid was neither one of the Respondent's witnesses and nor does he work for the Respondent any longer.

390. On balance, concerned though were by the delay in presenting the claim, we reach the view that it is just and equitable to extend time. The Respondent has, we think, had a full and fair opportunity to defend the claim, the cogency of the evidence has not been adversely affected, and on its merits the claim is well founded.

_____

Employment Judge Dyal
Date 12.07.2022

APPENDIX TO JUDGMENT AND REASONS: FINAL LIST OF ISSUES

Case Number: 2301706/2020

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL

MRS PATIENCE OMONKHEGBE

Claimant

v

TRANSPORT FOR LONDON

Respondent

LIST OF ISSUES

Jurisdiction

1. Has the Claimant engaged in Early Conciliation in respect of all of her claims and if not should any of her claims be struck out? [N.b. This issue was not pursued and in any event the Claimant did engage in Early Conciliation as required]

2. Have any of the Claimant's claims for victimisation and/or discrimination been presented out of time?

3. If the any of the Claims have been presented prior to 28th December 2019 has the Claimant has been subjected to "conduct extending over a period" under

section 123(3) of the Equality Act 2010 and would it be just and equitable for the Tribunal to extend time to allow any such claim to proceed?

~~4. While preparing this list of issues, the Claimant has provided details of claims which occurred after she submitted her claim form on 27 April 2020. It is the Respondent's position that (i) the Claimant needs to amend her claim to include any of her claims which occurred after she submitted her claim form; and (ii) the Claimant has not yet made such an application. Is the Claimant allowed to proceed with these claims?~~

Disability Discrimination

5. Is the Claimant a disabled person within the meaning of the Equality Act 2010 due to her depression and anxiety?

    5.1 Does she suffer from a mental impairment?

    5.2 Does that mental impairment have a substantial effect on her day to day activities?

    5.3 At the time of the alleged acts, had this impairment lasted, or was it expected to last, more than 12 months? The Claimant states that it began in November 2017.

6. If the Claimant does have mental impairment that amounts to a disability, when did this become a disability and on what date did the Respondent have or should reasonably have had knowledge of her disability? The Claimant states that she informed the Respondent by way of her sick note in January 2019 and in her flexible working appeal meeting on 28 January 2019.

Direct Discrimination – s.13 Equality Act 2010

7. Did the Respondent directly discriminate against the Claimant or treat her less favourably on the grounds of her alleged disability by:

    ~~7.1 Edyta Stevenson rejecting her flexible working application dated 24 October 2018 ("Flexible Working Request")?~~

    7.2 Natasha Young attempting to dismiss her on 5 March 2021?

Indirect Discrimination – s.19 Equality Act 2010

8. Did the Respondent indirectly discriminate against the Claimant by rejecting her Flexible Working Request? The Claimant relies upon the PCP of being required

to work on a Saturday. The legitimate aim is that the Flexible Working Request was rejected to ensure the needs of the business are met by having sufficient staff to cover the Saturday shifts. [The Claimant confirmed on day 2 of the hearing that this PCP was only said to be relevant once Mr Nandha became involved with her request for flexible working in 2019. She was not pursuing an indirect disability discrimination complaint in respect of Ms Stevenson's initial decision nor Mr Sarr's decision on appeal. Rather the claim related to the subsequent events involving Mr Nandha]

Discrimination arising – s.15 Equality Act 2010

9. The Claimant alleges that the following arose from her alleged disability:

    9.1 not being able to work under a particular individual, namely Mr Nandha;

    9.2 not working in specifically strenuous environments;

    9.3 not being able to work full time;

    9.4 sickness absence.

10. Did the Respondent treat the Claimant unfavourably as set out below because of a matter set out in paragraph 9 above?

    ~~10.1 18 December 2018 – Edyta Stevenson rejected her Flexible Working Request;~~

    10.2 28 January 2019 – Khalil Sarr questioning the Claimant regarding her Flexible Working Request at a meeting to discuss her appeal against the decision not to grant her flexible working request. The legitimate aim is to ensure the needs of the business are fairly balanced against the request of the employee.

    10.3 5 February 2019 – Khalil Sarr rejecting the Claimant's appeal against the decision not to grant her Flexible Working Request. The legitimate aim is that the Flexible Working Request was rejected to ensure the needs of the business are met by having sufficient staff to cover the Saturday shifts.

    10.4 28 May 2019 – Anand Nandha refusing to progress the Claimant's email as a grievance. The legitimate aim was to ensure proper processes were followed to ensure employees are treated fairly and consistently.

10.5 4 June 2019 – Anand Nandha refusing to allow the Claimant to work Tuesday to Friday on the same hours as she had previously worked. The legitimate aim was to ensure proper processes were followed to ensure employees are treated fairly and consistently.

10.6 4 March 2020 – Deciding not to place the Claimant in the redeployment pool. The legitimate aim was to ensure proper processes were followed to ensure employees are treated fairly and consistently.

10.7 12 March 2020 – Carlo Delgaudio refusing to allow the Claimant to work on a different floor. The legitimate aim was to ensure that proper training could be carried out to meet the needs of the business.

10.8 26 March 2020 – Carlo Delgaudio refusing to release the Claimant for a secondment opportunity as a Team Administrator in the Fleet Team. The legitimate aim was to ensure proper processes were followed to ensure employees are treated fairly and consistently.

10.9 7 April 2020 – Graham Daly refusing to progress the Claimant's grievance about Anand Nandha. The legitimate aim was to ensure proper processes were followed ensuring employees are treated fairly and consistently.

10.10 6 May 2020 – Richie Folkes initially refusing to furlough the Claimant (later granted to commence on 18 May). The legitimate aims were to ensure proper processes were followed ensuring employees are treated fairly and consistently, and to meet the needs of the business.

10.11 18 December 2020 – Graham Daly stating a manager would be allocated for review of grievance on 25 January 2021 which the Claimant states is contrary to the grievance policy guidance. The legitimate aim was to ensure employees' complaints are dealt with properly and fairly.

11. If, which is denied, the Respondent is found to have treated the Claimant unfavourably because of something arising in consequence of the Claimant's alleged disability, was such treatment justifiable as a proportionate means of achieving a legitimate aim? [The legitimate aims are set out after each issue above.]

Harassment – s.26 Equality Act 2010

12. Did the Respondent subject the Claimant to (i) unwanted conduct; (ii) if so was the conducted related to disability (iii) if so did it have the purpose or effect of either creating a prohibited environment or violating her dignity. The Claimant relies on the conduct at 10.2 to 10.11 above, and the following acts:

    12.1 Unspecified individuals constantly telephoning the Claimant despite multiple email requests; [The Claimant confirmed in the course of the hearing that this complaint was about, and only about, Mr Folkes telephoning her.]

    12.2 Anand Nandha offering the Claimant a part-time role then reneging on the offer;

    12.3 Anand Nandha sitting in the Claimant's seat; and

    12.4 Ability to secure alternative employment by Anand Nandha despite him securing employment for his daughter.

Race Discrimination

13. The Claimant identifies as "Black African British".

Direct Discrimination – s.13 Equality Act 2010

14. Did the Respondent treat the Claimant less favourably because of her race:

    14.1 by not granting her Flexible Working Request but granting the request of Employee A?

    14.2 by halting her secondment in October 2019?

    14.3 when Jason Ross allegedly shouted at her because she was a black woman?

    14.4 Does the Respondent have a policy of preferring flexible working applications of non-black employees over black employees?

~~*Indirect Discrimination – s.19 Equality Act 2010*~~

~~15. Does the Respondent have a policy of preferencing flexible working applications of non-black employees over black employees?~~

~~16. If the Tribunal finds that the Respondent has such a PCP, did that PCP put black employees at a particular disadvantage?~~

~~17. If so, was the Claimant put at a particular disadvantage?~~

~~18. If the PCP did put the Claimant at a particular disadvantage, was such treatment a proportionate means of achieving a legitimate aim?~~

Harassment – s.26 Equality Act 2010

19. Did the Respondent harass the Claimant on the grounds of her race by, on 18 December 2018 – Edyta Stevenson rejecting her Flexible Working Request.

Pregnancy/Maternity Discrimination

Pregnancy and Maternity Discrimination – s.18 Equality Act 2010

20. Did the Respondent subject the Claimant to unfavourable treatment because of her pregnancy by:

    20.1 Edyta Stevenson forcing her to work longer hours when it was more than the Claimant could manage when she was pregnant in 2017?

    20.2 Rejecting her flexible working application dated 24 October 2018?

Marriage/Civil Partnership Discrimination

Direct Discrimination – s.13 Equality Act 2010

21. Did Khalil Sarr ask the Claimant about her husband's work and duties in her flexible working appeal meeting on 28 January 2019?

22. If so, did this amount to less favourable treatment of the Claimant on the grounds that she was married?

Indirect Discrimination – s.19 Equality Act 2010

23. Does the Respondent have a policy or practice of asking employees about their spouse's working pattern?

24. If the Tribunal finds that the Respondent has applied such a PCP, did that PCP put those people who are married at a disadvantage for securing a flexible working request?

25. If so, was the Claimant put at a particular disadvantage?

26. If the PCP did put the Claimant at a particular disadvantage, then was such treatment a proportionate means of achieving a legitimate aim? The legitimate aim is to ensure the needs of the business were fairly balanced against the request of the employee.

Victimisation – s.27 Equality Act 2010

27. Did the following amount to protected acts?

    27.1 The Claimant's email sent to Anand Nandha of 18 May 2019?

    27.2 The Claimant's letter dated 5 March 2020?

28. If so, did the Respondent treat the Claimant less favourably for having done a protected act? The Claimant relies on the following:

    28.1 Anand Nandha ending the Claimant's secondment opportunity to the Respondent's Licencing Department as an Events Coordinator in February 2020;

    28.2 Preventing her from taking up another secondment opportunity as a Team Administrator in the Fleet Team in March 2020; [in the course of the hearing the Claimant confirmed this was the same factual issue as 10.8]

    28.3 Refusing to send the Claimant to Redeployment on 4 March 2020.