EMPLOYMENT TRIBUNALS

Claimant: Miss K Johnson

Respondent: Department for Work & Pensions

Heard at: London South Croydon in public by CVP

On: 16-19 March 2021, 4 May 2021, 31 January to 4 February and 25 and 28 February 2022 (31 January, 2-4 February and the afternoon of 4 February and 25 & 28 February 2022 in chambers)

Before: Employment Judge Tsamados
With members: Ms N Murphy
Mr N Westwood

Representation

Claimant: In person
Respondent: Ms N Ling, Counsel

RESERVED JUDGMENT

The **unanimous** judgment of the Employment Tribunal is as follows:

1) The complaints of unfair dismissal and wrongful dismissal are well founded.

2) The remaining complaints of disability discrimination, harassment and victimisation are not well founded and are dismissed.

3) There will be a separate remedy hearing to deal with the successful complaints.

REASONS

The Claims

1. The Claimant was employed by the Respondent from 1 April 2009 to 16 August 2017, latterly as a Personal Adviser. She has presented two Claims to the Employment Tribunal. The first one, in case number 2302217/2017,

was received on 20 August 2017. It raised a complaint of disability discrimination. The second Claim, in case number 2501536/2017, was received on 17 November 2017. It raised complaints of unfair and wrongful dismissal. This Claim was presented two days outside the requisite time limits.

2. The Respondent submitted a Response to the first Claim on 30 October 2017 and a Response to the second Claim in January 2018. In both Responses the Respondent denies the claims in their entirety.

Background

3. There is some history to this matter and there have been a number of Preliminary Hearings.

4. The first Preliminary Hearing took place on 16 November 2017 and was conducted by then Employment Judge ("EJ") Freer. The Claimant did not attend following a refused postponement request that she made the day before on medical grounds but without providing any medical evidence in support. At that hearing, the Claimant was ordered to provide further and better particulars of her (at that stage) first Claim.

5. There were three further attempts to hold Preliminary Hearings: on 26 January 2018; 2 March 2018; and 14 May 2018. These were all postponed following requests by the Claimant.

6. A further Preliminary Hearing was scheduled for and took place on 14 May 2019. It was conducted by EJ Cheetham QC, at which he allowed the Claimant's application to extend time for her unfair dismissal complaint, consolidated the (by then) two Claims and made a number of Case Management Orders. In particular, the Claimant was ordered to provide further particulars of her Claim (having not complied with the previous Order) and the Respondent was ordered to serve an amended Response and to indicate whether it required the Claimant to provide medical evidence in support of her disability. EJ Cheetham QC set a further Preliminary Hearing to take place on 6 September 2019.

7. The Preliminary Hearing held on 6 September 2019 was also conducted by EJ Cheetham QC, at which he made a number of additional Case Management Orders, given that the Claimant had not fully complied with the previous Orders (although he stressed that this was not a criticism of the Claimant but a reflection of the difficulty for an unrepresented party in providing the information required in such a complex case). He set the Final Hearing to take place over 3 days from 14 to 16 December 2020. In particular, the Claimant was ordered to provide the Respondent with further particulars of her claim as set out in an annex to the order, and the Respondent was required to serve a further Response after receipt of the further particulars, if so advised.

8. A further Preliminary Hearing took place on 30 November 2020 conducted by EJ Ferguson, at which she postponed the hearing dates set for December 2020 and rescheduled the final hearing for 16 to 19 March 2021, to be

conducted by Cloud Video Platform ("CVP"). EJ Ferguson also identified the complaints and issues, which her record of the hearing indicates were discussed at length. She also made a number of further Case Management Orders and revised those already made in order to prepare this case for the Final Hearing.

9. A further Preliminary Hearing was scheduled to take place on 14 January 2021 but was postponed.

The Complaints and Issues

10. The Claimant brings the following complaints: unfair dismissal; direct disability discrimination; discrimination arising from disability; failure to make reasonable adjustments; harassment relating to disability; victimisation; and damages for breach of contract in respect of wrongful dismissal. The issues arising in each of these complaints are extensively set out within the record of the Preliminary Hearing held on 30 November 2020 at pages 2 to 6 of the inter partes correspondence bundle.

11. These are the complaints and issues that the parties were required to address in their evidence and submissions. It was made clear that there would be no departure from these complaints and issues unless there were exceptional reasons to do so.

Conduct of the Hearing

12. The original hearing dates were from 16 to 19 March 2021. Having considered the documentation the night before the first day of the hearing, it did appear to me that the case was not sufficiently prepared to proceed. The hearing bundle consisted of a series of separate PDF files and no index. This did not include copies of the pleadings or records of previous Preliminary Hearings. There was a separate email from the Claimant attaching an Excel spreadsheet, an impact statement and various documents. There were no witness statements.

13. The Tribunal had also received two emails from the Respondent's solicitors indicating that the case was not ready to proceed because of the Claimant's lack of adherence to the previous Case Management Orders. The solicitors were seeking a strike out/deposit order or a postponement with further case management by way of Unless Orders to secure preparation by the Claimant.

14. There was also a delay in commencing the hearing because several of the Respondent's witnesses were attempting to join the CVP from a public platform which would not allow them to connect their cameras and microphones.

15. Fortunately, on commencing the hearing it was apparent that the connectivity and document difficulties had been overcome. We were provided with a complete hearing bundle from the Respondent and a separate bundle of documents from the Claimant, although to an extent this duplicated those provided by the Respondent. In addition there were witness statements from the Respondent. Although these documents had been provided belatedly,

both parties indicated that they had had the opportunity to read them and were ready to proceed.

16. There was no witness statement from the Claimant and so we agreed to take the particulars of claim within each of her Claim Forms plus the List of Issues as her evidence in chief. Ms Ling, for the Respondent, indicated that she would take the Claimant through the List of Issues in cross examination in any event.

17. We adjourned to spend the rest of the day reading the witness statements, the documents referred to in them, those documents set out in the Respondent's reading list and those documents identified by the Claimant. Before adjourning, I explained to the Claimant the order of events and the steps in the procedure. I stressed to the Claimant that it was important that her case was put to the Respondent's witnesses, that this would usually come from her witness statement and so in the absence of one, the Respondent's proposal was a sensible one. However, I emphasised that she needed to give some thought as to what questions she should ask the Respondent's witnesses, particularly where they disagreed with what she says happened in the relevant events identified in the List of Issues.

18. We commenced hearing the Claimant's evidence on 17 March and completed it on 18 March 2021.

19. Unfortunately, it was not possible to continue on 19 March 2021 given the Claimant's overnight ill-health in respect of which she subsequently provided satisfactory medical evidence. We set a further two days in which to complete the evidence and submissions.

20. Given our limited availability, the earliest we could schedule this for was on 4 and 5 May 2021, with a further two days on 6 and 7 May 2021 for us to meet privately to reach our decision.

21. On the morning of 4 May 2021, the Tribunal received an email from the Claimant (not copied to the Respondent) advising that she was incapacitated and unable to attend the hearing. We commenced the hearing by CVP and advised Ms Ling of the Claimant's email. Ms Ling in turn advised us that one of the Respondent's witnesses was unwell and unable to give evidence for possibly 3-6 months. We were provided with satisfactory medical evidence in support of his incapacity. We were requested to keep this confidential. We requested the Claimant to attend the hearing by 12 noon to advise us of the extent of her incapacity, to advise her of the position regarding the Respondent's witness and to ascertain whether we could make use of any of the days we had set for 4-7 May 2021 to progress the case. The Claimant duly attended and we advised her of the Respondent's witness's inability to give evidence but maintained confidentiality as to the reasons why. We equally respected the Claimant's confidentiality with regard to her own incapacity and asked her to provide the Tribunal with medical evidence in support, which she duly did.

22. In liaison with the parties, the hearing was re-listed for a further two days, preceded with a re-reading day for the Tribunal and followed with two days in

chambers in which to reach a decision. Our re-reading day took place on 31 January 2022. We set two days to complete hearing the evidence and for submissions for 1 and 2 February 2022 and two days in chambers for 3 and 4 February.

23. On the morning of 1 February 2022, the Tribunal received an email from the Claimant's daughter, advising that her mother was unable to attend the hearing due to the side effects she was experiencing from new medication given to her in preparation for surgery and she had slipped down the stairs as a result of a dizzy spell, injuring her back, which had also triggered a seizure. This had not been copied to the Respondent but we decided that it was appropriate to do so.

24. We commenced the hearing by CVP just after 10 am with only the Respondent present. We advised that we had taken the email from the Claimant's daughter to be an application for a postponement and that in discussion we had determined that if we were to grant the request, the earliest dates that we could reconvene were in July 2022 as a panel of three or earlier if both parties agreed to a panel consisting of one non-legal member and I. Ms Ling stated that the Respondent intended to make a strike out application but not at present and suggested that the Tribunal make further enquiries as to whether the Claimant would be able to attend the hearing this afternoon or tomorrow. I asked if her witnesses were able to attend on the two days set aside for our chambers days and she responded yes.

25. We adjourned and I instructed my clerk to email the Claimant's daughter as follows:

"Employment Judge Tsamados has asked me to write to you as follows:

The Tribunal has taken your daughter's email received this morning as a request for the hearing to be postponed to another date. I should point out that just because a party wants a postponement does not mean they will get it.

We have to consider whether it is possible to still have a fair hearing either by postponing the case to future dates or by going ahead or if not whether to bring the case to an end.

We have to take into account the interests of both parties and balance these. In particular, that the case is about matters that happened in 2016, witnesses' memories fade, your health condition and that we have already postponed the case twice for you on medical grounds.

So the options are:

1. *We postpone the hearing today but start it on Wednesday if you are fit to attend;*
2. *We continue in your absence because we would not be able to provide further available dates until July 2022 onwards, the uncertainty that the Respondent's witnesses would all be able to attend a future hearing and the passage of time since the events in question took place; and*
3. *The Respondent's barrister has already made it clear that she will be making an application for your case to be struck out, that is brought to an end. This will be on the basis that it is no longer possible to have a fair hearing because: a) she is uncertain if all of the witnesses will be available for future hearing dates; b) given the uncertainty as to your health, the Respondent is not confident that you will be available to attend on future dates; and c) the passage of time since the events in question took place and the effect on the witnesses' memories.*

Please respond by 12 pm today. If you can attend that would be ideal. But we intend starting the hearing at 12 pm and will be considering what to do."

26. In an email in response, the Claimant's daughter stated, in essence, that her mother might be able to attend the hearing tomorrow, that she is taking

medication in readiness for a long awaited operation in 4 weeks time and that this should restore her state of health.

27. After considering the email and advising the Respondent of its contents, we advised the Respondent that we had decided to postpone the hearing until tomorrow morning in anticipation that the Claimant might be able to attend and if not, make a decision on whether to adjourn the hearing as requested or not.

28. After the hearing, I instructed my clerk to email the Claimant's daughter advising her of our decision and asked the Claimant to provide details of the date of her operation and the recovery time with evidence if available in support by 10 am tomorrow.

29. On the morning of 2 February 2022, the Respondent sent the Tribunal and the Claimant a strike out application and supporting case law that it intended to make if the Claimant did not attend the hearing or requested a further postponement. The Claimant also sent medical evidence relating to her operation in the form of a hospital letter dated 2 February 2022 and a screen shot of a text from her GP.

30. We commenced the hearing by CVP on 2 February 2022 and both parties attended. The Claimant spoke to her request for a postponement of the hearing outright. The Respondent replied and spoke to its strike out request. We discussed the practicalities of adjourning until the end of the week in the hope that the Claimant would recover sufficiently to participate or adjourning for a period of time to allow her to have her operation and to recover. We also discussed potential dates for the hearing if the postponement request were granted, possibly in July, October and November 2022. The difficulty for the Respondent with this was that certain of its witnesses could not attend on those dates and Ms McDonald in particular would not be available after May 2022 for 62 weeks (for reasons that we agreed were confidential).

31. After a short adjournment we reconvened and indicated that the Claimant's request for a postponement was refused. We gave truncated reasons in order to get on and hear the case but indicated that we would provide fuller reasons in our final Judgment. These are set out below:

    31.1 Rules 30 & 30A of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 contain general guidance as to the Tribunal's powers to consider whether to postpone or adjourn a hearing. This covers the position of the ill-health of a party and is a matter of discretion for the Tribunal, that discretion being informed by the duty to make reasonable adjustments and the right of both parties to a fair hearing. There is also Presidential Guidance on postponing hearings for medical reasons;

    31.2 In Teinaz v London Borough of Wandsworth (2002) ICR 1471, the Court of Appeal said that although postponement is a discretionary matter, some postponements must be granted, if, not to do so amounts to a denial of justice. The Tribunal is entitled to be satisfied that the inability to be present at the hearing is genuine and the onus is on the

party making the application to prove the need for the adjustment. If the Tribunal is not satisfied, it can give directions to enable any doubts to be resolved;

31.3 In Andreou v Lord Chancellor's Department [2002] IRLR 728, the Court of Appeal said that it is necessary for the Employment Tribunal to balance the fairness to the Claimant with the fairness to the Respondent and anyone else named in accusations of discrimination;

31.4 In O'Cathail v Transport for London (2013) ICR 614, the Court of Appeal said that there are two sides to a trial and the proceedings should be as fair as possible to both sides. The Employment Tribunal has to balance the adverse consequences of proceeding with the hearing in the absence of one party against the right of the other party to have a trial within a reasonable time and the public interest in the prompt and efficient adjudication of cases;

31.5 In Phelan v Richardson Rogers Ltd & Anor (2021) ICR 1164, the Employment Appeal Tribunal said that an application on medical grounds engages the right to a fair trial (under Article 6 of the European Convention on Human Rights). Proper weight must be given to the serious implications for the Claimant in refusing a postponement. These serious implications would usually outweigh the inconvenience and cost to the other party of granting the postponement, such that an Employment Tribunal properly carrying out the balancing exercise would be bound to grant the application. However, the implications for the Respondent's right to a fair trial and the wider public interest of not postponing, must also be weighed in the balance and may tip the scales the other way. The assessment of when the matter is likely to come to an effective hearing if the application is granted and what the medical evidence indicates about that will often be important considerations. Also other relevant evidence and information, including in relation to the course and conduct of the litigation hither to;

31.6 In Iqbal v Metropolitan Police Service & Anor UKEAT 0186/12, the Employment Appeal Tribunal (EAT) addressed the situation where there was no direct medical evidence as to the ill-health of the party requesting the postponement. In such a case the EAT held that it is highly material to bring into account any information there is concerning the health of the person in question;

31.7 The Claimant wants the hearing put off until July 2022 and suggests that it then proceeds with the Respondent's witnesses who can attend and those who cannot then attend can give their evidence by way of their statements alone;

31.8 The Respondent states that there is no guarantee that all of its witnesses could attend in July 2022 or other dates in October and November 2022 and that Ms McDonald may not be able to commit to dates for 62 weeks from May 2022. In addition, the Respondent states that it is getting further away in time since the events under scrutiny.

There is also the claimant's ongoing ill-health and the prejudice of not being able to call all of her witnesses;

31.9 I had suggested commencing Thursday or Friday (3 or 4 February 2022), if the Claimant felt able to participate and also suggested that she might have a friend, possibly the one who attended one of the previous preliminary hearings with her, to assist. However, the Claimant indicated that she could not state with any certainty whether she could attend and there was no guarantee that the friend would be available. In the circumstances we felt that we had to make a decision as to whether to go ahead or not on the basis of the application before us today;

31.10 Any adjustment has to be reasonable. It is not reasonable to put the hearing off until at least July 2022 when we are unclear whether all of the Respondent's witness could attend;

31.11 As to a fair hearing. The impact on the Respondent of postponing is that it could face a hearing where all of its witnesses could not necessarily attend and the hearing would take place even longer after the events in question, now running at six years. The impact on the Claimant is that the hearing continues when she is not fit to attend. This is certainly not ideal but the prejudice to the Respondent in adjourning is greater. If we continue, we can put questions to the witnesses and we can gauge their credibility. If the Claimant did feel able to participate then I could provide assistance to her in questioning the witnesses. This is far from ideal but the alternative to postpone the hearing to an unknown date in the future is even less ideal. And it is important and in everyone's interest that cases come to a final hearing within a reasonable timeframe. This case has a lot of history to it and unfortunately that reasonable timeframe has been reached;

31.12 We therefore declined to postpone the hearing and also decided it was not appropriate to consider the Respondent's strike out application.

32. I indicated that we would adjourn for lunch and recommence the hearing at 2.15 pm. I told the Claimant that if she did feel able to attend that would be ideal and I would offer appropriate assistance to her. I stressed that we had read the witness evidence and re-read our notes of her evidence, will ask questions where necessary and can test the Respondent's witnesses' credibility.

33. The Claimant then stated that her friend could attend on Friday (4 February, this being intended for our second deliberation day). I told her that we had made our decision and the difficulty with her suggestion was that there was no guarantee that she could attend and it left us with the clear possibility that we would not finish and would go part heard in any event.

34. The Claimant then said that she had not prepared anything for the hearing. I told her that this hearing was set in November 2021 (and originally set for December 2020), the case was first brought in 2017 and so I would reasonably have expected her to have prepared before now. I stressed that

it was a matter for her whether or not she attended but we would be commencing the hearing at 2.15 pm.

35. We then adjourned for lunch. At 2.15 pm we resumed the hearing. The Claimant was present in the CVP hearing room but by audio only. When I asked her to put her camera on she explained that her laptop was not working. I asked her if she was going to participate in the hearing and she replied yes. The Respondent was content to proceed with the Claimant attending by audio only.

36. We then continued to hear evidence over 2 and 3 February, with submissions on the morning of 4 February 2022. We met in chambers on the afternoon of 4 February and again on 25 and 28 February 2022, to deliberate and reach our decision.

37. I must sincerely apologise to the parties for the length of time it has taken to finalise this Judgment, which is down to my volume of work, part-time sitting schedule and latterly ill-health.

Evidence

38. We were provided with the following electronic documents by the Respondent: a joint hearing bundle consisting of 729 pages with a separate index (which we will refer to as "R1" followed by the requisite page number where necessary); an inter partes correspondence bundle consisting of 40 pages with a separate index (which we will refer to as "R2" followed by the requisite page number where necessary); the Disciplinary Procedure 17 04 05 to 17 09 22; the Disciplinary Policy 13 10 11 to date; How to: Assess the level of misconduct and decide a disciplinary penalty; a cast list; a chronology; and a reading list.

39. We were provided with the following electronic documents by the Claimant: a separate personal impact statement; a schedule of loss; and KJ Evidence Log in the form of an Excel spreadsheet with accompanying documents in a series of separate pdf files. We will refer to the accompanying documents by "C" followed by the requisite page number where necessary.

40. We heard evidence from the Claimant taking the particulars of claim of each claim form, the List of Issues and her impact statements as her evidence in chief (at R13, R23, R64 and R653 respectively) and in oral testimony. We heard evidence on behalf of the Respondent from Katrina McDonald, Edward Russell, Dean Weston and Sarah Hernandez, by way of written statements and in oral testimony.

41. At the end of the evidence, Ms Ling provided the Tribunal and the Claimant with a written closing submissions which she spoke to. The Claimant made oral closing submissions.

Findings of Fact

42. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the

hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

43. Where individuals have been referred to who did not give evidence at the hearing we have used their initials.

44. Within the agreed List of Issues the Claimant states that she has the following impairments which she relies upon for the purposes of her disability discrimination complaints: Epilepsy, Sciatica, Fibromyalgia and Dyslexia. In her personal impact statements (at R653 and the separate one she provided) she also refers to lower back and joints pain, Migraines, Anaemia and Vitamin D, Iron and Calcium deficiencies.

45. There were a number of documents within the bundle which dealt with the Claimant's health conditions. These are set out below:

    a. There is a Study Aid and Study Strategies Report prepared by Access 1st. This is for the purposes of obtaining funding for aids and adaptations in respect of her Dyslexia to undertake an LLM in Crime and Litigation at London Southbank University in 2011 (at R1 214-234). This is not a document that the Respondent was provided at the time and we are not sure whether it ever was;

    b. The report from Atos Healthcare (the Respondent's then occupational health advisers) to Dean Weston (the Claimant's countersigning/second level manager until approximately Spring 2016 onwards) dated 9 November 2012 at R1 616-618. This refers to her epilepsy, migraines, stress at work and dyslexia. The letter recommends that the Respondent review the Claimant's dyslexia report (as referred to at a. above). It also recommends a number of adjustments to her working day and workload;

    c. The report from OH Assist (the Respondent's occupational health advisers) to GP (the Claimant's line manager between Spring and Autumn 2016) dated 7 September 2016 at R1 293-296. This refers to the Claimant's epilepsy, pain in her lower back, hips and legs, sciatica, fibromyalgia, vitamin D and iron deficiency and dyslexia. The report makes a number of recommendations as to adjustments to her working day, workload and the trigger points within the sickness absence procedure;

    d. An email from Katrina McDonald (the Claimant's countersigning/second level line manager from approximately Spring 2016 onwards) to the Claimant dated 26 October 2016 at R1 312. This refers to a workplace adjustment and reasonable adjustments in respect of the Claimant's dyslexia;

e. An email from Ms McDonald to the Claimant dated 25 November 2016 at R1 326. This relates to a referral for a combined workstation/dyslexia assessment;

f. An email from JL at the Civil Service Workplace Adjustment Team ("CSWAT") to Edward Russell (Work Service Manager, the Claimant's line manager from Autumn 2016 onwards) dated 14 December 2016. This states that JL cannot progress the Claimant's workstation assessment because she has not completed consent form B;

g. An email from JL to the Claimant and Mr Russell dated 10 March 2017 at R1 386-388 stating that she has received the report from OH Assist following the specialist dyslexia assessment, setting out the equipment required and asking both to review the report carefully. The top email indicates that the email was forwarded to Ms McDonald. The report is not attached to the email and we could not find a copy of the report within the bundle;

h. An email from the Respondent's Digital Support to Ms McDonald dated 30 March 2017 at R1 706. This sets out specialist equipment required in respect of the Claimant's dyslexia and requests Ms McDonald's approval. Her evidence was that she pressed the link "approve" within the approval. On balance of probability we accept that Ms McDonald did so. We formed the view that it was unlikely she would not have done so given that the price of each item is shown as £0.

46. We also had regard to the Claimant's undated impact statement at R1 646-648. In this document the Claimant refers to her disability conditions as dyslexia, epilepsy, back pain, migraines, deficiency in vitamin D, iron and calcium, fibromyalgia and sciatica. The document indicates that she had raised concerns relating to adjustments that she required for her to effectively do her job and be comfortable at work, which had not been actioned and was causing her stress and having a negative impact on her health. The document implies that this resulted on her being advised to go on Carers Leave. The remainder of the document is not so much an impact statement as a narrative of the events arising in the claims before us and the impact of those matters on her which would be relevant for any assessment of an award for injury to feelings. Indeed the document ends with a schedule of loss setting out the monetary awards sought by the Claimant.

47. We also considered medical evidence from the Claimant's GP dated 2 July 2019 at R1 649-652. This indicates that the Claimant suffers from active conditions of chronic pain Menorrhagia, Epilepsy and Hay Fever and significant past problems of Migraine, Fibromyalgia and chronic lower back pain and in addition Sciatica, Vitamin D, Calcium and Iron deficiency.

48. Further, we had regard to an impact statement dated 29 September 2019 at R1 653-657. This document contains a number of headings of her impairments under which the Claimant does set out the impact of each on her ability to carry out day to day activities. These are in respect of epilepsy, sciatica, lower back and joint pains, fibromyalgia, migraines, dyslexia and anaemia, low iron, vitamins D and calcium. The document then goes on to

set out how the above conditions affected the Claimant on a daily basis in the context of her treatment at work by her managers as well as in her personal life. This document also ends with in effect a schedule of loss setting out the monetary awards sought.

49. In addition, we had regard to a separate personal impact statement dated 2021. Similarly to the initial impact statement that we looked at, this is a combination of a description of her various impairments and how they impact upon her in her daily and work life and also by way of a narrative of the claims that she raises against the Respondent.

50. We are conscious of the fact that EJ Ferguson clearly spent a considerable amount of time determining the List of Issues at the Preliminary Hearing held on 30 November 2020. Indeed paragraph 5 of her record of that hearing states that the List of Issues was agreed and reflects the whole of the Claimant's claim (at R2 2). Under the heading of Disability, the List of Issues only refers to Epilepsy, Sciatica, Fibromyalgia and Dyslexia (at R2 3). The Claimant did not make any application to amend the List of Issues and we stated at the outset of the hearing these represented all of the issues that the Tribunal would be determining and we would not be departing from them unless there are exceptional circumstances.

51. The Respondent accepts disability in respect of the first three impairments set out in the List of Issues. Whilst it accepts that it was aware of the Claimant's Dyslexia, it does not accept that it had knowledge that this amounted to a disability or put the Claimant at a substantial disadvantage (for the purposes of the failure to make reasonable adjustments complaint).

52. We deal with our findings and conclusions in relation to disability later on in our Judgment.

53. The Claimant was employed by the Respondent initially as a Work Coach and latterly as a Personal Adviser based at Stockwell Job Centre Plus from 1 April 2009 until her dismissal for gross misconduct on 16 August 2017.

54. We heard little about the earlier history of the Claimant's employment, what exactly her role involved beyond reference to the various adjustments that were being sought and were under consideration. The Respondent's chronology did not add anything to this. We were not even provided with a job description or a copy of her contract of employment or a statement of written particulars of her terms and conditions of employment. We were not assisted in this by the absence of a witness statement from the Claimant. The particulars of claim in her two claim forms focused on latter events in her employment giving rise to her complaints. Indeed we were left having to piece together the relevant background matters as best we could from the evidence before us.

55. The Claimant commenced a period of Carers Leave on 27 March 2014 and was due back to work on 27 March 2016. This is confirmed in a letter from Mr Weston, who was at the time the Claimant's countersigning/2nd level line manager, dated 21 February 2014 (at R1 239). This letter states that the Carers Leave break was granted to allow the Claimant to support her

daughter and grandmother. In particular, the letter contained the following paragraphs:

- *You may not take up any other employment while on leave unless the hours of work are substantially outside normal office hours and the Department cannot offer work to suit your availability. Any other employment would need to be approved by your manager.*
- *You are expected to resign if you take up outside employment that covers similar hours to your contracted hours with the Department. Failure to do so will be regarded as misconduct and could end in dismissal."*

56. In an email dated 24 March 2016 at R1 252, Mr Weston wrote to the Claimant indicating that he was happy to extend the Carers Leave to 2 October 2016 with a return date of 3 October 2016, that she could return sooner if she wished but to provide sufficient notice and that he would send a formal letter of extension.

57. By a letter dated 29 March 2016, which we assume is from Mr Weston (only the first page of the letter being contained within the bundle at R1 434), extension of the Carers Leave to 2 October 2016 was confirmed. The letter states that the extension had been granted to enable the Claimant to make the necessary arrangements to support her "Nan" and that she had indicated that she might not need the full 6 months' extension and that should she intend to return to work sooner she should give 4 weeks' notice. The letter also indicated that the Claimant's job role would be changing mid April 2016 and that further information would be sent in due course. The letter also contained the same two paragraphs as set out in paragraph 55 above.

58. In an email dated 21 April 2016, the Claimant wrote to Mr Weston stating that she would like to return to work the first week of June 2016 (at R1 267).

59. In an email dated 28 April 2016, which appears to be the response to the above email, Mr Weston stated that he was more than happy to support a return to work the week commencing 30 May 2016 and asked the Claimant to confirm her working pattern (at R1 265-266). In a further email dated 3 May 2016, Mr Weston chased the Claimant for a response to his previous email (at R1 265).

60. Ms McDonald, who took over from Mr Weston as the Claimant's countersigning/second level line manager, in or around Spring 2016, was unaware of this earlier return date.

61. In an email dated 9 May 2016, the Claimant responded to Mr Weston's email at R1 264-265). She apologised for the delay in replying stating that she had been sick. She said for health reasons she would like to return to work on half days per week from 9:30 am until 2:30 pm, with a view to increasing her hours later. She asked Mr Weston to get back to her as soon as possible.

62. Mr Weston responded by email later that same day attaching an application form for a change of hours, setting out the Claimant's expected hours and reminding her that her Carers Leave ends on 2 October 2016 (at R1 264).

63. By a further email dated 20 May 2016 at R1 270, Mr Weston chased the Claimant for a response to his email of 9 May. He does not recall if the

Claimant responded or not. However, from the evidence before us it does not appear that the Claimant returned the application form for a change of hours.

64. On 4 and 5 June 2016 the Claimant undertook paid agency work within a children's home as a residential social worker (at R1 487).

65. On 9 June 2016, a meeting was held between Ms McDonald, GP (who was the Claimant's line manager from Spring to Autumn 2016) and the Claimant. The meeting discussed what adjustments the Claimant needed on her return from Carers Leave. Ms McDonald's evidence is that at this meeting she first became aware of the Claimant's various impairments although she never received any medical evidence in support. However, she and GP, and later Mr Russell (who took over as the Claimant's line manager), felt it was necessary to provide all the support that they could. Ms McDonald also recalls that at the meeting the Claimant said that agencies were contacting her for work although she did not tell her she was working for any outside organisations.

66. In July 2016, the Claimant completed and returned a DSE CAF form (at R1 278-287). This is in effect a workstation assessment form indicating what adjustments are required to an employee's workstation and what additional equipment is required by answering a series of standard questions. In answer to several of the questions it is indicated that items had been ordered from the Office Supplies Catalogue. Ms McDonald said that from the form it appeared that various pieces of equipment were put on order.

67. We were referred to an email chain at R1 288-290 running from 25 July to 9 August 2016 between GP and the Claimant, from which it appears that the Claimant completed the form, GP had difficulties in receiving or opening it electronically and asked her to complete it again by attending the office, and the Claimant requested that she complete it on her return date because it would be very time-consuming to attend and she has care commitments.

68. On 30 August 2016, GP sent an email to the Claimant explaining that they had found a way round the difficulty of receiving her completed DSE report and were now able to read it. He explained that the next stage would be for an occupational health assessor from an organisation called Trillium to meet with her to finalise the assessment and put in place the necessary adjustments. He asked when the Claimant would be available to attend the office so that he could arrange the assessment. This email is at R1 291.

69. The Claimant responded by email that evening, asking if she would be paid to attend the office (at R1 291). GP replied the following morning stating that he could look into the issue of travel expenses but it would not be standard practice to do so in order to complete a workplace assessment (at R1 291).

70. The Claimant was referred for an occupational health assessment and the assessment was conducted by OH Assist, the Respondent's occupational health advisers, on 7 September 2016. OH Assist then sent a report of their assessment to GP in a letter of even date (at R1 293-296). We have already dealt with the contents of this report in our above findings. We note that at

the end of the report the writer does state that the Claimant has given her verbal consent to release the information to GP.

71. On 9 September 2016, GP emailed the Claimant stating that he had received her occupational health report and asked for her consent to discuss the contents with Ms McDonald and NP, who was to be the Claimant's new manager (at R1 306). It appears from the evidence before us that the Claimant did not respond to this email.

72. The Claimant was due to return to work at the end of her Carers Leave on 3 October 2016 but did not do so.

73. On 4 October 2016, Ms McDonald telephoned the Claimant regarding her return to work that day (although from the evidence we have already dealt with, the return date was 3 October). The Claimant responded that she wanted to change her hours and Ms McDonald told her that she would need to make an application for it. The evidence that we have already considered indicates that this was what the Claimant had already been told in May 2016.

74. Later that day, the Claimant sent an email to Ms McDonald in which she stated that she was unable to attend work the following day as she was unaware that tomorrow was her return date and had received no communication from the Respondent since GP's email of 9 September 2016 (at R1 305-306). Her email goes on to state the following: she was told she was unable to return to work until she received full training and she had not received any training; she has not had a discussion in regards to the occupational health referral and the outcome and how this might affect her work; she has not had any feedback on when what special equipment will be provided; she has had no communication as to the hours and days she is expected to return to; she would like to know what reasonable adjustments have been put in place for her; and she is currently signed off work by her doctor because of her seizures which have increased due to the stress from not being able to return to work as the processes taken so long and been poorly managed.

75. We were concerned about her email for a number of reasons. Firstly, that the Claimant claims to be unaware of the return date when she was told quite clearly that it was 3 October. Secondly, that she requested to vary her hours and to return in June 2016 and was asked to complete a change of hours form but we could find no evidence to indicate that she ever did. Thirdly, there had been attempts to call her into the office to undertake workplace assessment with Trillion and there is no evidence as to where this went beyond a discussion about payment for attending the office. Fourthly, she had been given the occupational health report and asked by GP, in the email to which she refers, to provide her consent to discuss it with the named individuals and we have no evidence that she responded. It is therefore surprising that the Claimant complains about the deficiencies in the procedure as taking so long and being poorly managed and that she was left in the dark and was very surprised by the telephone call that day.

76. In a further email sent a few minutes later that day, the Claimant asked Ms McDonald to send her the change of hours form that she was required to

complete and to advise her on which of the "reconditions by OHS you will be upholding" (at R1 305). We think that she probably means the recommendations rather than reconditions.

77. On 26 October 2016, the Claimant sent an email to Ms McDonald attaching a completed change of hours form (at R1 313-317). She apologised in her email for the delay stating that she has been really ill. The attached form states that prior to her going on a career break she worked 3 days a week, Wednesday to Friday and a total of 21 hours and that she wished to change her hours to work term times only, Monday to Wednesday from 9:30 am to 2.45 pm. The reasons that she gives for the requested change in her work pattern are as follows: she has split care responsibilities with her sister for her Nan; she cares for her Thursday to Sunday and her sister cares for her Monday to Wednesday; her daughter has special needs and these hours will enable her to provide her with support; she has specialist appointments which only take place on Thursdays and Fridays; this change would allow her to work without causing interruption to the working day and significantly reduce her sickness absence.

78. We would note by this stage it has taken 5 months for the Claimant to set out her request and there is no satisfactory explanation for the delay.

79. On 26 October 2016, Ms McDonald sent an email to the Claimant in which she thanked her for returning the form and stated that she will look into the matter and get back to her. Her email goes on to state that she has contacted CSWAT with regard to her DSE and reasonable adjustments request and she asked the Claimant to respond to a number of queries as to software and equipment that she required. Her email asked for a response by 31 October 2016 to minimise any delay because the running time for these matters was 6 weeks. This email is at R1 312.

80. By an email dated 1 November 2016, the Claimant responded to Ms McDonald with the requested information regarding reasonable adjustments (at R1 318).

81. We would note that at this point in the chronology of events, Ms McDonald reports her concerns that the Claimant is working elsewhere during her Carers Leave to the Respondent's internal audit/counter fraud team (at R1 413). We mention this to indicate that in our consideration of these matters we are alert to whether we can discern any change in approach by the Respondent towards the Claimant at this point given her allegations relating to the disciplinary action and dismissal.

82. Ms McDonald said in evidence that she did not believe that any of the adjustments that the Claimant set out in her email are ones that were actually suggested by OH Assist in its report at R1 293-296 and were not things that could be put in place without first going through a process. She explained that it had to go through CSWAT to establish the need for the adjustments and put them in place. We accept her evidence in this regard.

83. On 10 November 2016, the CSWAT referral form was completed by JL in discussion with the Claimant. We were referred to the form at R1 319-325.

84. On 24 November 2016, Ms McDonald sent an email to the Claimant stating that the Respondent was unable to support the working pattern that she requested and set out the reasons why. She asked the Claimant if she would like to identify other Jobcentre Plus offices that she would consider moving to and she would then ask if they could support her request. This email is at R1 328-329.

85. In response later that afternoon, the Claimant sent an email to Ms McDonald in which she stated that due to her disability she can only work at offices local to her home and that have parking and that she lives in Brixton Hill. Her email then set out a series of requests for information relating to the hours she is expected to work, arrangements for her return, what adjustments recommended by OH Assist have been accepted by the Respondent and what training will be offered and when. The email also asks Ms McDonald to confirm what reasonable adjustments under "the disability act" the Respondent had made or was willing to make to help ease her back into her role. This email is at R1 327-328.

86. In a further email sent several hours later, the Claimant asked Ms McDonald to confirm whether her request to work term time only had been rejected, for an official reply with a detailed explanation as to why, and, by way of a request under the Freedom of Information Act, how many full and part-time staff the Stockwell office currently has with a breakdown as to their working patterns but excluding any personal details. She also asked that the request is dealt with within the "time frame to avoid any more delay". This email is at R1 327.

87. In an email dated 25 November 2016, Ms McDonald wrote to the Claimant stating that CWSAT had agreed to make a referral to OH Assist for a workstation/dyslexia assessment which will assist in assessing the reasonable adjustments that can be made. She also asked the Claimant to return the necessary consent forms to allow the sharing of information and that these have been sent to her in the post. The email also indicated that the Claimant will need to attend the office in order to conduct the assessment once the referral has been processed. She asked the Claimant to return the completed forms in the self-addressed envelope by 30 November 2016 in order to progress the referral. This email is at R1 326.

88. In a response later that afternoon, the Claimant asked Ms McDonald what this assessment will entail and for a response to the questions raised in her previous two emails (at R1 326).

89. In an email dated 29 November 2016, the Claimant sent a further email to Ms McDonald asking her to reply to her previous email and stating that she has not received the consent forms (at C 2A).

90. In an email sent that afternoon, Ms McDonald wrote to the Claimant inviting her to a meeting with her new line manager, Mr Russell, to be held at 11 am at the Stockwell Job Centre on 6 December 2016, to discuss her request to change her working hours and pattern of work. The email also stated that Mr Russell would be happy to discuss the points she has raised. This email is at R1 325.

91. In response, that same afternoon, the Claimant sent an email to Ms McDonald in which she states "will I not be starting on the 5th?" and enquiring as to who will be present at the meeting (at R1 325). We were not taken to any response to this email and could not find it in the bundles. There was no direct indication in the evidence before us as to where the return date of 5 December 2016 came from although it is mentioned as a provisional start date in a later email from Ms McDonald to the Claimant dated 6 January 2017 at R1 345 in the context of an over payment of the Claimant's wages. We had previously understood it to be clear that the Claimant's return date had been 3 October 2016, that she remained absent from work with no explanation as to the position regarding her ongoing absence by either party, although she does make some reference to being signed off work by her doctor. But we were not taken to any fit notes covering this period.

92. The meeting took place on 6 December 2016 between Ms McDonald, Mr Russell and the Claimant. The Claimant was accompanied by a work colleague. We were referred to the notes of the meeting at R1 340-343.

93. The reference to a fit note at the meeting is the one which is found at R1 641. This indicates that the Claimant's doctor assessed her case on 25 November 2016 and that because of her conditions of epilepsy, fibromyalgia and sciatica she may not be fit for work taking account of the following advice. The following advice is that she may benefit with her employer's agreement to alter her hours and reference is made to her being advised by occupational health to return for 3-5 hours over 3 days a week and that currently pain and epilepsy is not well controlled so this would help. The fit note indicates that this will be the case from 25 November 2016 to 28 February 2017 and it is dated 6 December 2016.

94. We were also referred to the Claimant's completed OH Assist consent form dated 6 December 2017, although more probably than not this should state 6 December 2016. This is at R1 610-611. The incorrect year would appear on balance of probability to indicate that it was completed in the New Year and backdated. In addition we note that it is a consent form to refer the Claimant to a specialist for medical information and assessment.

95. On 14 December 2016, Mr Russell received advice from the Civil Service HR Casework team ("CSHR") in answer to a number of questions he had raised from the meeting on 6 December with the Claimant. This is at R1 334-335. In essence the advice is as follows: it is not appropriate for the Claimant to return to work on Part Time Medical Grounds ("PTMG") because she has not been absent from work through sickness or taken any sick leave; he could consider applying for new OHS advice as he could apply some short-term reasonable adjustments to support the Claimant with rehabilitation back to work; the proposed change to the working pattern working 9.30 am to 2.45 pm cannot be supported if there is clear justification and if so to look at alternative sites that could support that pattern of work. We note that the summary of advice and the advice itself does not acknowledge the Claimant's disabilities.

96. The Claimant's completed OH Assist referral consent form is at R1 336-337 and is dated 15 December 2016.

97. On 16 December 2016, Mr Russell sent an email to the Claimant chasing her for the return of the completed referral consent form sent to her by post on 25 November 2016 and indicated that he had sent a further copy in the post on 14 December and also attached an electronic copy expressing the need for her to return it by post. His email also referred to the need for a new OHS referral form, which would appear to us to relate to a separate referral for assessment. The email is at R1 338.

98. On 20 December 2016, Mr Russell sent a further email to the Claimant asking her to confirm that the consent form had arrived and confirm her dates of availability for OHS assessment. In addition he asked the Claimant to send a copy of her most recent fit note to assist with the new OHS referral. This email is at R1 338.

99. It would appear that there was a telephone conversation between Ms McDonald and the Claimant on either 5 or 6 January 2017. It is unclear from the emails on R1 345 when exactly this was.

100. On 6 January 2017, Ms McDonald sent an email to the Claimant attaching a letter dated 5 January 2017 (which is at R1 344, of which we only have the first page), the notes of the meeting held on 6 December 2017 and a working pattern form for the Claimant to complete and return by 23 January 2016 (although clearly this should be 2017).

101. The letter of 5 January 2017 confirmed the discussion at the meeting on 6 December 2016 and set out the following:

> *"I am writing to let you know my decision on your request to change your working arrangements.*
>
> *When we met on 6th December 2016, I advised you of the difficulties it would cause if I were to agree the change of hours to term times only working from Monday through to Wednesday from 9.30 to 2.45pm, the working arrangements you proposed on your application form. We discussed alternatives and you agreed that the following would be acceptable:-*
>
> *We came to a mutual agreement that you would work Monday, Tuesday and Thursday, completing 7.12 hrs per day. In addition to this we have agreed for a 3 month period commencing from 6th Feb 2017 to 5th May 2017 you would work reduced hours starting at 9am and finishing at 3pm. The normal work pattern will commence as stated above will commence on Monday 8th May 2017.*
>
> *I would like to thank you for the flexibility you have shown in working with me to agree a change of working arrangements that works for the business and your colleagues, as well as for your particular situation.*
>
> *This change will be effective from 6th February 2017 and last until 5th February 2018. We are required to meet annually to consider whether your working pattern is meeting your needs and the needs of the business and to plan ahead. .You will need to arrange the review. The first of these reviews meetings will take place on 6th November 2017 with your manager.*
>
> *I have enclosed a Working Pattern Template which you should complete and return to me, together with a signed copy of this letter, as soon as possible and by 23rd Jan 2017. You must also input your working pattern on Resource Management (RM). I have also enclosed a copy of the notes of our meeting on 6th December 2016."*

102. In an email dated 6 January 2017, at C 16, the Claimant wrote to Ms McDonald as follows:

"It was my understanding that we was agreeing permanently to change my days of work to Monday, Tuesday, and Thursday's.

However the hours was temporary based on how I got along. I would like to know my options if after the 3 months I was not fit to increase my hours as I do not want to be dismissed due to sickness if I'm unable to increase my hours."

103. On 10 January 2017, OH Assist sent a report regarding the Claimant to Mr Russell. This is at R1 347-348. In essence, the report indicates that the writer is requesting a medical report from the Claimant's GP and indicates that she was willing to provide her consent for this. In respect of the Claimant's dyslexia, the writer recommends a referral to CSWAT requesting access to an OT assessment (we assume Occupational Therapy) to help identify what support the Claimant requires and that she be provided with sight of the report to OT if requested. The report also expresses the view that dyslexia is not considered a medical condition, that the writer is unable to carry out a meaningful assessment in such cases and suggests that advice is available from several sources but would depend on the severity and nature of the condition. The report also states that severe dyslexia is likely to be classed as a disability under the Disability Discrimination Act (sic).

104. On 11 January 2017, Mr Russell sent an email to JL in which he stated that he had now received both consent forms from the Claimant who was due to have her OH interview that day because she missed the previous booking. He explained that the Respondent has rearranged the Claimant's start date as 6 February 2017. He sent a further email to JL the following day confirming that the OH referral was completed on 10 January 2017. These emails are at R1 349.

105. In an email dated 16 January 2017, Ms McDonald wrote to the Claimant chasing her for a response to her previous email of 6 January (at R1 354).

106. On 24 January 2017, Mr Russell sent an email to the Claimant apologising for the late response and explained that her work pattern will have to be reviewed after 3 months because the Respondent cannot pre-empt the Claimant situation ahead of time. With regard to the workplace adjustments he explained that this will not be possible before because the Respondent is awaiting recommendations from OH pending contact with the Claimant's GP. He further explained that the CSWAT referral had been completed and that they would contact the Claimant to arrange a date to attend the office for assessment. With regard to training he stated that the Claimant had been included in the Work Coach route way which will commence in February. His email ended that we look forward to having you back on 6 February. This email is at R1 354.

107. Later that morning, the Claimant sent an email to Mr Russell in which she stated that she thinks that it is best if she returns to work once the adjustments are made and asked him to confirm the appointment and she will attend. This is at R1 361.

108. On 26 January, an appointment for the Claimant to attend OH was booked for 31 January 2017. The Claimant did not attend this appointment. We were referred to the schedule of appointments at R1 362. In oral evidence the

Claimant was not sure why she cancelled this appointment; it could either have been a mix up or she had a seizure. In the event, OH Assist decided to progress the referral without the requested GP medical evidence.

109. On 3 February 2017, the Claimant emailed Ms McDonald and Mr Russell a copy of the email that she had sent to Mr Russell on 24 January stating that she had not received any reply (at R1 361).

110. Later in the afternoon of that day, Ms McDonald sent an email to the Claimant making it clear that at the time of writing the Respondent did not know what reasonable adjustments or equipment needed to be put in place because the Claimant had yet to have her assessment with CSWAT and the Respondent was awaiting a report from her GP. She suggested that the Claimant might need to chase this up. The email goes on to state the Respondent was expecting her to return to work on 6 February 2017 and if she failed to do so it will be treated as an absence from work and she would need to obtain a doctor's note confirming that she was unfit for work or it would be classed as an unauthorised absence. This email is at R1 360-361.

111. We would comment that it is clear to us from the evidence that neither party was communicating with each other adequately. The Respondent was expecting the Claimant to come back to work. But the Claimant was declining to do so because there was nothing in place. To which the Respondent was then saying that the reason for this is because we do not know what needs to be in place until you come back.

112. Later that afternoon, the Claimant responded to Ms McDonald's email in which she stated that she only agreed to attend the office once all equipment had been put in place, this had not been done, the CSWAT was only for her Dyslexia and not her other conditions. She further stated that she was saddened by the way the Respondent had treated her return to work because she wanted to return last April and was told she could not until everything was in place and she was given full training. We would comment that we believe this to be an unfair characterisation of what has happened given our above findings. The email ends with a request for an emergency meeting to discuss matters further. This email is at R1 360.

113. On 7 February 2017, JR sent an email to Ms McDonald arranging the Dyslexia assessment and chasing the workstation assessment ("WSA") (at R1 365). Her email contained a forwarded copy of an email from R Bespoke Services dated 26 January, which confirmed that the Claimant had been booked in for a Dyslexia WSA on 14 February 2017 (at R1 365-366).

114. It appears that a meeting was arranged with the Claimant and Ms McDonald for 8 February 2017. However, the Claimant emailed Ms McDonald that morning asking for it to be rearranged following the death of her cousin (at R1 367). Ms McDonald responded the following day rearranging the meeting for 16 February 2017 (at R1 367).

115. Also on 9 February 2017, JR emailed Mr Russell advising him that whilst the Claimant had agreed to the Dyslexia assessment, she had not agreed for the WSA to be booked (at R1 368). She included an email from OH Assist which

indicates that they were unable to book the appointment because the Claimant advised that she had no expected return to work date, that the case had been put on hold to accommodate her original expected return to work date of 6 February and that they were unable to hold the case open for longer than 2 weeks. So if they did not have a response by 13 February they would have to close the case and for the assessment to be re-referred once the Claimant had returned to work (at R1 368-369). We would note that strictly speaking what the Claimant has told OH Assist is correct because 6 February has come and gone and she has not returned to work. However, it does add to the delay.

116. We appreciate that this was a very difficult position and we believe that Mr Russell sums it up succinctly in the following paragraph from his witness statement (at paragraph 32):

"This left us in a position where Krystal (the Claimant) would not agree to come into work until the adjustments that she wanted were put in place, where she was also refusing to undergo the CSWAT workstation assessment to be able to put those adjustments in place. We were left in an impossible position."

117. On 14 February 2017, Mr Russell sent an email to the Claimant in which he asked her to explain why she could not attend the meeting that had been scheduled for 16 February (at R1 372). The email also states that he provided the Claimant with a copy of the letter and an email sent on 9 February 2017 advising her of this meeting. In evidence, Mr Russell said that he believes that the Claimant attended the office on 14 February for her Dyslexia assessment, that he met with her and handed her the letter to attend the meeting to discuss her absence. He also stated that he could not see that the Respondent had a copy of that letter anymore.

118. On 15 February 2017, the Claimant sent an email to Mr Russell timed at 9.55 pm (at R1 373):

"Dear Edward

I did not receive the email from Katrina you are referring too.

I did notify Katrina that I am grieving due to the lost of a family member.

I attended my the assessment yesterday even though I was sick and had a massive migraine, however I did not want to prolong my return so I still attended. I was then issue with a letter stating my absence was being treated as unauthorised leave asking me to attend a meeting in Thursday.

1.Please see sick notes below which you and Katrina have previously been given. Please ref to date as they are still in date.

2. Please refer to previous email stating why I have not returned to work. I have not signed any agreement or agreed to a return work date. As I stated I was still sick and without the reasonable adjustments being in place I would not be able to start as this would make my conditions worse.

3. I feel bullied into returning to work, and discrimination against.

4. I need to seek further legal advice now I have been given this letter.

5. Please send me guidance you are referring to in the letter along with the guidance and policy for career leave, returning back to work, sickness, reasonable adjustment, and any regarding disabled employees.

6. My Dislexica assessment was completed on 14.02.17 which is after the provisional start date, [ly OHS is still outstanding.

My reasonable adjustment has not been agreed.
My assessment for hardware has not been completed.
I was advised previously by you, Katrina and previous managers that I could not start previously as you wanted to make sure adjustments were in place. However they still are not. Nothing has changed from when I wanted to start in April 2016 till now in regards to training, and the reasonable adjustments. At a minimum since last year the minimum reasonable adjustments should have been agreed and a timeline in place as to when they will be available so a clear and sure start date can be firmed up. To date nothing has been done and it is now going on 10 months. The only assessment I have had has taken place after my return date for just my dyslexia.

Previously I had done the job without any support or reasonable adjustment or special equipment which hindered my condition and made it worse. Therefore I have been advised by management, legal professionals, medical expert and disability advisors not to return to work until things are in place or been agreed.

I can only stress that we have not agreed on a return to work date therefore I am totally confuse to why I am being issued this letter. A provisional date was agreed if all things was in place. To date I have not even had my assessment for any special equipment. No one has contacted me in regards to this. The only contact I have had was with OHS which is still outstanding and in regards to my Dislexica assessments which did not take in to consideration my other conditions, which I previously raised with both yourself and Katrina.

Please provide evidence of agreement of a start date."

119. In evidence, the Claimant stated that she never received the Dyslexia assessment and at a later point that she could not remember if she had received it.

120. We are again alert to the difficult position that the Respondent was in and again we refer to Mr Russell's witness statement (at paragraphs 36 and 37) on receiving the above email, which we believe sums this up succinctly:

"36. My reaction to this was a feeling of being a bit stuck. I did not know how we could move this forward without her agreeing to a date. I could not help Krystal and put further adjustments in place without the assessment. I am not qualified to make that assessment. That was the purpose of the CSWAT referral.

37. I know that Krystal now says she felt bullied into returning to work. I think that this is false and unfair. Krystal had been off due to a career break. When she was due to return she asked for adjustments. Everything that could be put in place without a further assessment had been put in place for her return. Everything else we needed her to be in the office for, to undertake a CSWAT assessment."

121. However, we were unclear what adjustments the Respondent had put in place at this stage.

122. On 7 March 2017, Mr Russell spoke to JL with regard to the various attempts that had been made to book the Claimant's WSA and in the end the referral was withdrawn. This was subsequently confirmed by an email forwarded by JL to Mr Russell from OH at R1 368-369.

123. On 10 March 2017, JL received a copy of the Claimant's Dyslexia report. She sent an email to Mr Russell on that date stating that she had received the report, she would send it to the Claimant separately because it contains medical information but her email provided a summary of the recommended equipment. Mr Russell said in evidence that he did not think that the Respondent ever received a copy of the report although he did not know whether the Respondent normally would.

124. Mr Russell emailed Ms McDonald on 17 March 2017 asking for a discussion to determine if he should proceed with ordering the equipment (at R1 386). In his evidence he said that the Respondent ordered a specialist PC and Dragon software for the Claimant which he believes ultimately sat in the office for 2 years as nobody else could use it.

125. On 25 March 2017, Ms McDonald sought advice from CSHR because the situation with the Claimant was not progressing. We were referred to R1 390-391. The advice recommended that Ms McDonald attempt to contact the Claimant again. We again note that there is no specific reference to the Claimant's disability. However, we did wonder whether this would have made any difference. But it could have done if the referral at indicated what the Claimant wanted, what she been assessed as requiring and what the Respondent had put in place.

126. On 3 April 2017, Mr Russell sent a letter to the Claimant as to her absence being unauthorised and required her to attend an investigatory meeting on 12 April 2017 at R1 399.

127. On 12 April 2017, the Claimant sent an email to Mr Russell, Ms McDonald and her union representative, AM, providing her consent to discuss her case with her union representative. Her email stated that it was a very stressful time for her and that she was unable to cope with the additional work related stress. Her email further stated that both Mr Russell and Ms McDonald had failed to contact her or reply to her previous emails and so she was unable to continue with communication without a representative. She asked that her representative be copied into any further correspondence and that any telephone conversations should be conducted by conference call including her representative, This email is at R1 400. It was not clear from her email what emails she alleged had not been responded to. We deal with this further below.

128. Mr Russell spoke to AM by telephone that same day explaining to him what equipment the Respondent already had and what they had tried to do by making appropriate referrals. His evidence is that AM acknowledged this. He further states in evidence that he knew that at some stage down the line the Claimant was going to make a grievance and he had to go to a meeting explaining that the Respondent had tried to put the adjustments in place and the same trade union representative was there. He remembered thinking that if the Claimant had just come into get the assessment done it would have been sorted out a long time before that. His further evidence is that he really did not know what more Claimant wanted the Respondent to do.

129. On 20 April 2017, Mr Russell sought further advice from CSHR as to how to progress the situation with the Claimant. This is at R1 401-402. In essence he explained in the summary of his query that the Claimant had not returned to work on 6 February 2017 following a career break and only provided fit notes to cover her until 20 February 2017. Attempts had been made to refer her to OHS and CSWAT but these had proved unsuccessful. We note that he goes onto state that the Claimant would not share her Dyslexia assessment report with the Respondent. However as far as we could ascertain, she was never asked to.

130. The gist of the advice given was that Mr Russell needed to contact the Claimant to find out whether or not she was fit to return to work. If she was unfit she needed to be providing fit notes. If she was fit she should be coming into the office and should be given meaningful work to undertake pending receipt of the OHS and WSA reports and identification of adjustments. If the Claimant does not come into work, then she is on unauthorised leave and disciplinary action could be taken.

131. On 17 May 2017, Mr Russell sent a letter to the Claimant which is at R1 541-542. In this letter he set out a chronology of events and explained what the Respondent had done and requested that she return to work the week commencing 29 May 2017. We note that this letter does not really follow the HR advice set out above. The Claimant did not respond to the letter.

132. In evidence, Mr Russell said that from memory all of the adjustments that the Claimant had before she went on Carers Leave were still in place and had been locked in a separate room. He stated that this included her specialist chair marked with her name on the back of it and he believed it also included a footrest, specialist mouse and keyboard, although the Respondent had a number of these available in the office anyway and they could easily have been put on order.

133. With regard to the various adjustments which the Claimant has identified we make the following findings:

    Lighting

    a. The Stockwell office contained what was described as standard office lighting throughout. Ms McDonald gave evidence that the Respondent installed a purple light for one particular employee to help with her conditions. She further stated that the Respondent would have adjusted the Claimant's lighting in the same manner had she engaged in the workplace adjustment process.

    b. Mr Russell said in evidence that his recollection was that the Claimant's desk had already had a light above it taken out before she went on Carers Leave and that this meant nobody could sit at the desk next to hers. Mr Weston said in evidence that prior to the Claimant's Carers Leave, a number of adjustments had been previously put in place for her including the removal of the light above her desk. Of course this presupposes that a) it had not been subsequently put back and b) that the Claimant would have returned to sit at that same desk.

    c. We also note that within the CAF form dated 12 July 2016, at the bottom of R1 280, it does state "no" to the question of whether the lighting is suitable and that the user was advised of ongoing issues on site, that it was being resolved/monitored separately, that the user was advised on adjustability of lighting (where possible). Further, in the DSE dated July 2016, in answer to the same question, that the light above "the ladies" head has already been removed for a previous staff member (at R1 308).

Communal printers

d. In oral evidence Ms McDonald stated that the requirement to use printers had substantially reduced since the Claimant had been on her Carers Leave because the office had become more paperless. She added that she was not sure it was a requirement to use a printer. But in any event the Respondent had already agreed to move the Claimant to a desk near a printer in the back office and she believed this was first agreed when the Claimant undertook the DSE in July 2016.

Breaks

e. Within the CSWAT at R1 322 the question was posed, do you take regular breaks working away from your VDU? The answer was "believe when she returns back to work that regular breaks can be discussed with management".

f. Ms McDonald accepted that there was guidance on breaks which she believed said something similar to staff being allowed to take one or two five-minute breaks and a lunch break depending on the hours that they worked. However, her further evidence was that this was never rigid and it was always to be applied flexibly in accordance with the employee circumstances. She said for example that the 15 minute breaks could be split into more regular breaks if this was needed or helpful. If individuals had particular need for more frequent longer breaks then the Respondent incorporated this if necessary.

g. Ms McDonald discussed the breaks with the Claimant at their meeting on 6 December at R1 342. She stated that the breaks that the Claimant would receive would be discussed with Mr Russell and CSWAT to ensure that she received the break periods that CSWAT considered she required based on her needs.

Caseload

h. In evidence Ms McDonald stated that it was never the case that the Claimant was to be given the same caseload as all other employees. She explained that caseload is allocated on the basis of hours worked. Further, that the Respondent would make individual adjustments if necessary (as at paragraph 68. sub-paragraph 4.2 of her witness statement). At the meeting on 6 December at R1 342, Ms McDonald said that she told the Claimant that she would not have a caseload on day one and that it would gradually be phased in. In addition, Ms McDonald also agreed with the Claimant that she would attend training to be re-skilled in her role on return, given the period of time she had been away.

E-training

i. In evidence Ms McDonald said that there was no requirement that all employees had to complete e-training within the same amount of time. The Respondent would have given anybody the amount of time that they

actually needed to complete training, including taking them off-line from casework if necessary.

j. In the notes of the meeting held on 6 December at R1 342 in discussion about the Claimant's diary, Ms McDonald states that she would not get a diary straightaway, not at least for a month, on the basis that Ms McDonald thought that the Claimant would need that time to complete any relevant e-training.

Screen sizes

k. Ms McDonald's evidence was that by the time of the Claimant's intended return from her Carers Leave, the Respondent's computer screen sizes were already larger than they were before she went away.

134. Ms McDonald said in her evidence that she was unaware whether any of the adjustments that the Claimant refers to would have disadvantaged her. She stated that the difficulty for the Respondent was that it was attempting to get her into the workplace to undertake a CSWAT assessment in order to fully understand what would disadvantage her. However, the Claimant failed to engage with this and did not return to the workplace. She felt that their hands were tied and the Claimant's position was contradictory. On the one hand, she said she would not return until the adjustments were in place. On the other hand, she said she would not undertake the necessary assessments to put adjustments in place until she had returned.

135. Despite this, Ms McDonald further said in evidence that the Respondent purchased a number of items for the Claimant, including Dragon software although they needed to purchase a separate modem in order for it to be able to host the dyslexia software. This was notwithstanding the fact that the Respondent had never seen the Claimant's dyslexia report.

136. With regard to a standing desk, Ms McDonald stated that this would require a CSWAT assessment which the Claimant would not go through.

137. Part of the Claimant's complaint of harassment is that from December 2016 onwards, Mr Russell and Ms McDonald failed to correspond with her and her union about the adjustments she required.

138. The Respondent's submissions at paragraph 32 are helpful in this regard. This puts the matter in context. From 6 February 2016, the Claimant was expected to return to work, Ms McDonald having reached a decision on 5 January 2016 as to the terms on which she would return and having set a date for the return on 6 January 2016 (at R1 344). The Claimant refused to return to work until the adjustments were made, notwithstanding the difficulties that the Respondent had in putting them in place without being clear what they were and without the Claimant physically being in the office to make an assessment. The Claimant was also refusing to attend formal meetings with her managers as requested. The Claimant in effect was only prepared to engage with her managers on her terms and in turn her we accept that her managers were entitled to engage with her in a formal appropriate manner rather than having to engage on the Claimant's terms.

139. The Claimant has not been specific about which correspondence she alleges was not responded to. The Respondent's submissions set out an analysis of the various emails sent at the time and we accept this (at paragraph 33):

    a. Email from the Claimant to Ms McDonald dated 6 December 2016 (at R1 330): this did not invite or require a response; but Ms McDonald responded on 5 January 2017 (at R1 344);
    b. Email from the Claimant to Ms McDonald dated 6 January (at R1 355): this was responded to on behalf of Ms McDonald who had been in and out of the office for the past few weeks by Mr Russell on 24 January (at R1 354);
    c. Email from the Claimant to Ms McDonald dated 24 January 2017 (at R1 361): it is not apparent that a response was required, particularly since Mr Russell had told the Claimant that CSWAT would be in touch with her (in the email at R1 354), but it was replied to by Ms McDonald on 3 February (at R1 360);
    d. Email from Ms McDonald to the Claimant dated 3 February (at R1 360): in response to this email a meeting was set up for 8 February 2017 (emails at R1 367 reference);
    e. Email from the Claimant to Mr Russell dated15 February (at R1 373): it was not appropriate for the managers to engage with an email in which the Claimant refused to comply with a reasonable management request, said that she was going to seek legal advice, asserted that she had not agreed to a start date/working pattern when it was for the Respondent to determine this, and complained that adjustments were not in place. Moreover, by this time Mr Russell and Ms McDonald had been informed by CSWAT that the Claimant was not cooperating with the reports necessary to put adjustments in place (at R1 365 and 368 and also R1 378 on 20 February);
    f. Email from AM, the Claimant's union representative to Mr Russell, cc'ed to Ms McDonald dated 29 March (at R1 392): the Respondent had not been authorised to communicate with him (until the Claimant's email to Ms McDonald dated 12 April 2017 (at R1400) in response to which Mr Russell spoke to AM.

140. The Claimant has provided information as to her various complaints within a Scott Schedule to which the Respondent has provided its response (at R1 46-62). We were not taken to this document and neither party referred to it in evidence or submissions. It was something that, then, EJ Freer ordered at the Preliminary Hearing held on 16 November 2017, although he simply described it as additional information. The Scott Schedule is in a tabular form in which the Claimant was required to set out further particulars of unclearly pleaded allegations. From the document it is apparent that the Claimant misunderstood what she was being asked to do. At the final Preliminary Hearing, EJ Ferguson made it clear that the List of Issues she had spent much time determining with the parties, set out the whole of the claim (at R1 64 paragraphs (4) and (5)). For these reasons we did not believe it appropriate to consider the contents of that document.

141. We now move on to consider the events relating to the Claimant's dismissal which at a certain stage in the chronology takes over from the events

regarding her return to work, the latter of which does appear to fall into abeyance and indeed is superceded by.

142. We were provided with copies of the following documents in relation to the disciplinary investigation and proceedings that culminated in the Claimant's dismissal:

    a) Discipline Policy last updated 9 October 2020 (at R1 152-176)
    b) How to: Assess the level of misconduct and decide a disciplinary penalty (a separate document)
    c) Disciplinary Procedure 170405 to 170922 (a separate document)
    d) Disciplinary Policy 131011 to date (a separate document)
    e) Standard of Behaviour Policy last updated 27 May 2020 (at R1 86-111)
    f) Standards of Behaviour Policy undated at R1 177-194)
    g) Considering, applying for and managing Career Breaks undated (at R1 195-197)
    h) Special Leave Procedures undated (at R1 198-213)

143. We were also referred to the investigation report and appendices at R1 403-535. This sets out extensively the chronology of events, the extent of the investigation undertaken and the findings reached. It also contains a list of appendices at R1 410-411. The report and the appendices very much speak for themselves. However, as far as we could ascertain we did not have all of the appendices within the bundle. The following appendices are missing: 5-10, 15, 17-21, 30-32. We drew this to the attention of the parties during the hearing.

144. The chronology of events relevant to this matter are set out below, taken from the investigation report and elsewhere where indicated.

145. In 2009, on commencement of employment, the Claimant told the Respondent that she had a weekend job with Harvey Nicholls.

146. On 12 April 2011, within the OH report from ATOS the Claimant states that management are aware of her job with Harvey Nicholls

147. On 6 June 2011, the Claimant states in a meeting with her manager that she has stopped working Saturdays.

148. On 11 August 2011, in a meeting with the same manager, the Claimant states that she still has a part-time job but was on sick leave.

149. From February 2012 onwards, the Claimant was employed as a Hate Crime Champion Volunteer with the London Borough of Lambeth (taken from the Claimant's LinkedIn profile at R1 416).

150. From September to December 2012, the Claimant was a Family Support Worker Volunteer with Home-Start (taken from the Claimant's LinkedIn profile at R1 416). However, that organisation states that the Claimant was a volunteer from August to December 2012 and attended training courses during 2012-2015 (at R1 445).

151. On 12 & 18 July 2013, the Claimant requested copies of her sick notes for Harvey Nicholls.

152. From January to October 2014, the Claimant was employed by the London Probation Trust as a Court Bail Information Officer (her LinkedIn profile at R1 416). At R1 480 that organisation (the London Community Rehabilitation Company or "LCRC") states that her employment was from 21 January to 31 May 2014.

153. From 21 January to 30 September 2014, the Claimant was employed by the National Offender Management Service ("NOMS") (R1 482). We note that this is the same organisation as the London Probation Trust or LCRC.

154. On 21 February 2014, Mr Weston sent the letter we have referred to above to the Claimant regarding her Carers Leave (at R1 239-240).

155. On 27 March 2014, the Claimant commenced her Carers Leave.

156. From January to October 2015, the Claimant was employed as a Student Social Worker with the London Borough of Lambeth (at R1 416).

157. On the following dates in 2015, 6, 7-9, 17, 20-23 July and 5, 12, 19, 26 September, the Claimant worked for The Challenge (at R1 484-485)

158. On 29 March 2016, Mr Weston sent the letter we have referred to above to the Claimant regarding the extension of her Carers Leave to 2 October 2016 (at R1 434).

159. On 4-5 June 2016, the Claimant was employed as a Residential Social Worker through the agency Social Care 4U (at R1 487).

160. On 2 October 2016, the Claimant's Carers Leave ended (although as we have already established, the Claimant never returned to work).

161. In November 2016, Ms McDonald looked at the Claimant's LinkedIn profile (at R1 416-419 – the print out being dated 1 November 2016). We accept that the Claimant's working elsewhere came to light as a result of an electronic invitation sent to Ms McDonald to look at her LinkedIn page.

162. On 1 November 2016, Ms McDonald completed a Staff Investigations Referral Form in which she reports what she finds in the LinkedIn profile to the Respondent's internal audit/counter fraud team (R1 413-414). The form itself is undated, but Investigation Report states that it was received on 1 November (R1 404).

163. The LinkedIn profile indicates that the Claimant had worked for various organisations (as set out above) during the period of her employment with the Respondent and during her Carers Leave. The Respondent's general position is that the Claimant did not inform her managers of her other work and did not have permission to undertake such work. The Claimant's general position is that she did tell her managers and had permission.

164. On 1 November 2016, the investigation commenced.

165. On 3 November 2016, an email was received from Home-Start to AS (the investigating officer) confirming the Claimant's work as a volunteer and on what dates (R1 445-446). This appears to have been sent as a result of an initial telephone conversation with AS.

166. On 16 November 2016, the Respondent printed out or received the Claimant's HMRC PAYE records for 2014-15 and 2015-16 indicating various employers that she has worked for during those periods (at R1 461-479).

167. On 29 November 2016, Social Care 4U wrote to AS confirming that the Claimant registered with their agency from February 2015 onwards and only worked for them for two days on 4 and 5 June 2016 (at R1 487).

168. On 1 December 2016, LCRC wrote to AS confirming the Claimant's employment and details as detailed above (at R1 480).

169. On 2 December 2016, the London Borough of Lambeth emailed AS confirming that the Claimant only worked for them in a voluntary/work experience capacity.

170. On 7 December 2016, AS sought and received advice from CSHR as to the employment undertaken by the Claimant during her Carers Leave (at R1 437-440).

171. On 13 December 2016, The Challenge emailed AS confirming the Claimant's employment and details as set out above (at R1 484-485).

172. On 4 January 2017, NOMS wrote to AS confirming the Claimant's employment and details as set out above (at R1 482).

173. On 10 February 2017, Mr Weston provided an investigation statement to AS (at R1 370-371).

174. On 3 March 2017, the Claimant took part in an investigatory interview with AS (the typed notes of which are at R1 492-500 and the handwritten notes of which are at R1 501-506 and 511-514).

175. On 9 March 2017, Mr Weston gave a second investigation statement (at R1 523-524). This was in response to the information provided by the Claimant in her interview on 3 March.

176. On 21 March 2017, Ms McDonald gave an investigation statement (at R1 509-510).

177. On 11-12 April 2017, AS sought and received advice from CSHR as to the Claimant attending Home-Start training whilst off sick (at R1 449-452)

178. On 12 April 2017, the investigation was concluded. The investigation report is dated 25 April 2017 and along with the appendices is at R1 403-535.

179. On 27 April 2017, AS sent the report to MB (CSOM) for consideration of disciplinary action (at R1 536-540)

180. On 8 June 2017, the Respondent wrote to the Claimant requiring her to attend a disciplinary decision meeting (at R1 543-545).

181. On 13 June 2017, The Challenge sent an email to the Claimant confirming shorter dates of employment with other organisations than at those previously notified to the Respondent at B484-485 (B546).

182. On 20 June 2017, Home-Start sent two letters to the Claimant as to non-receipt of travel expenses, attendance at training and a scheduled meeting between Mr Weston and CP (of Home-Start) (B547).

183. On 27 June 2017, TN interviewed the Claimant (the transcript of which is at B549-564).

184. On 18 July 2017, CSHR emailed TN with advice as to the disciplinary outcome and this email contains a reference to the previous manager's evidence being "unreliable" (B572-573).

185. On 20 July 2017, TN wrote to Mr Weston asking to interview him as a witness regarding the Claimant's claim that he was aware she worked for London Probation and The Challenge (B574-575).

186. On 31 July 2017, TN conducted a telephone interview with Mr Weston (the record of which is at B576-578).

187. On 8 August 2017, CSHR sent an email containing follow up advice to TN, TN having decided to dismiss the Claimant (at B579-580).

188. On 15 August 2017, TN wrote to the Claimant notifying her of her dismissal without notice or payment in lieu with effect from 16 August 2017 (at B581-585). The dismissal focused on the Claimant's employment with NOMS/LCRC and The Challenge as being undertaken during normal office hours and without having informed her line manager or being given approval to work.

189. TN found that there was no evidence that the Claimant had informed her line manager of this work either on commencement of her new work pattern of 3 days a week on 3 February 2014, which had been granted on grounds of health, disabilities and medical advice, or being given Carers Leave from 27 March 2014 onwards which had been granted in order for her to support her daughter and grand mother. Further, she did not accept that he line manager was already aware of her work with NOMS/LCRC before she went on Carers Leave and there was no evidence in support of this.

190. TN's decision was as follows:

> *"Having carefully considered all of the facts of the case and on the balance of probability I believe the case to have been proven. The investigation concluded that you were working without permission for another employer whilst on Carers Leave.*

I have decided the level is Gross Misconduct."

191. On 16 August, TN completed the document entitled "The required Disciplinary Policy – Decision Maker's Template" (at B586-590).

192. On 29 August 2017, the Claimant appealed against the decision to dismiss her (at B591-595).

193. Ms Sarah Hernandez, the Respondent's London and Essex Group Partnership Manager, was appointed appeal manager. On 6 October 2017, she wrote to the Claimant inviting her to attend an appeal meeting initially set for 2 October but rearranged for 16 October (at B598).

194. The appeal meeting took place on 16 October 2017. The notes of the meeting are at B599-605.

195. On 9 November 2017, Ms Hernandez wrote to the Claimant advising her that her appeal was unsuccessful and that the decision to dismiss her was upheld (at B608-609).

196. We also note that there is an OH consent form signed by the Claimant and dated 6 December 2017 at B610-611. We were not sure why this had been provided at that date. It is dated after her dismissal and appeal outcome.

Relevant Law

197. Section 13 Equality Act 2010:

"(1) 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."

198. Section 15 Equality Act 2010:

"(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."

199. Section 19 Equality Act 2010:

"(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…"

200. Section 20 Equality Act 2010:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format…"

201. Section 21 Equality Act 2010:

"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

202. Section 26 of the Equality Act 2010:

"(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

203. Section 27 Equality Act 2010:

"(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.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith…"

204. Section 98(4) Employment Rights Act 1996

'(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.'

Conclusions

Burden of Proof

205. Under section 136 Equality Act 2010, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination toprove 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.

206. The Employment Tribunal can take into account the Respondents' explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

207. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondents' explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

208. We have considered the evidence that was put before us and have reached findings of fact as indicated above having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts where we felt it appropriate to do so.

Time Limits

209. Section 123 Equality Act 2010 governs time limits:

"(1) [Subject to sections 140A and 140B,] proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable…

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

210. An act of discrimination which *"extends over a period"* shall be treated as done at the end of that period under section 123(3) Equality Act 2010. In some situations, discrimination continues over a period of time, sometimes

up to the date of leaving employment. If so the time limit in which to present a Claim Form to the Employment Tribunal runs from the end of that period. The common, although technically inaccurate, name for this is 'continuing discrimination'.

211. In Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96, the Court of Appeal held that a worker need not be restricted to proving a discriminatory policy, rule, regime or practice, if s/he could show that a sequence of individual incidents were evidence of a *"continuing discriminatory state of affairs"*.

212. An Employment Tribunal may allow a claim outside the time limit if it is just and equitable to do so. This is a wider and therefore more commonly granted discretion than for unfair dismissal claims. This is a process of weighing up the reasons for and against extending time and setting out the rationale. Case law has suggested that a Tribunal ought to consider the checklist under section 33 of The Limitation Act 1980, suitably modified for tribunal cases.

213. The factors to take into account (as modified) are these:

a. the length of, and reasons for, the worker's delay;
b. the extent to which the strength of the evidence of either party might be affected by the delay;
c. the employer's conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;
d. the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case;
e. the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker's legal adviser should not be held against the worker and appears to be a valid excuse.

214. The Tribunal should consider whether the employer is prejudiced by the lateness, ie whether the employer was already aware of the allegation and so not caught by surprise, and whether any harm is done to the employer or to the chances of a fair hearing by the element of lateness.

215. Where the delay is because the worker first tried to resolve the matter through use of an internal grievance procedure, this is just one factor for the Tribunal to take into account (Apelogun-Gabriels v Lambeth LBC and another [2002] IRLR 116, CA).

216. If the delay was because the worker tried to pursue the matter in correspondence before rushing to Tribunal, this should also be considered (Osaje v Camden LBC UKEAT/317/96.

217. Where a claim is outside the time limit because a material fact emerges much later a tribunal should consider whether it was reasonable of the worker not to realise s/he had a prima facie case until this happened (Clarke v Hampshire Electro-Plating Co Ltd [1991] IRLR 490, EAT).

218. The Claimant first Claim was received by the Employment Tribunal on 20 August 2019 following a period of ACAS Early Conciliation which started and ended on 17 November 2017. This would mean that the earliest an incident of discrimination could be in time was on 18 August 2017.

219. We heard no evidence or submissions as to time limits and to be fair this did not form part of the List of Issues although it is a matter that goes to jurisdiction and was a live issue with regard to the second Claim of unfair dismissal.

Disability

220. We considered whether the Claimant was disabled for the purposes of section 6 of the Equality Act 2010 ("EQA").

221. In view of our above findings we conclude that the Claimant was disabled at all relevant times by virtue of Epilepsy, Sciatica, Fibromyalgia and Dyslexia. Further, we find that the Respondent had knowledge of the Claimant's Dyslexia at all relevant times.

222. Whilst the List of Issues, which had been extensively discussed and was agreed, was limited to these impairments, there seems no doubt that the Claimant also had the impairment of Migraine. Whilst we also accept that she suffered from lower back and joint pains, these are more correctly symptoms of her Fibromyalgia.

Direct disability discrimination

223. The complaint of direct disability discrimination is set out at paragraph (6) (v)-(vii) of the issues (at R2 3).

224. Under section 13 EQA, it is unlawful to treat a worker less favourably because of a protected characteristic, in this case disability, by reference to an actual or hypothetical comparator in the same or similar circumstances.

225. The Claimant's case is that she was treated less favourably by the Respondent in pursuing disciplinary proceedings against her and by dismissing her. She relies on hypothetical comparators. That would be a non-disabled person who was treated more favourably in circumstances not materially different to her own.

226. The earliest date on which this allegation could have arisen was 1 November 2016 when Ms McDonald viewed the Claimant's LinkedIn page and it is arguable that it continued until the time of the presentation of the first Claim and of course thereafter until her dismissal.

227. However, the primary facts do not support this allegation. Ms McDonald received an invitation to the Claimant's LinkedIn page, she viewed it, reported what she found and thereafter the matter was out of her hands. The evidence does not support the Claimant's assertion that both Ms McDonald and Mr Weston knew that she was working. The investigation, decision and appeal into this matter was in the hands of other people.

228. We therefore find that the complaint of direct disability discrimination is unfounded and it is dismissed.

Discrimination arising from disability

229. The complaint of discrimination arising from disability is set out at paragraph (6) (viii)-(xii) of the issues (at R2 3-4).

230. This arises under section 15 EQA. A complaint of discrimination arising from a disability is essentially where a Claimant is alleging that she has been treated unfavourably as a result of something arising from her disability. It is a defence to such a complaint if the employer can prove the unfavourable treatment was a proportionate means of achieving a legitimate aim.

231. We accept that the "things" set out at paragraph (6) (viii) a. and b. arose in consequence of the Claimant's disability. Namely: a. her need for reasonable adjustments in order to return to work from carers leave; and b. her inability to return to work in 2016. With regard to the latter, her inability to return to work arose from the need for at least some of the adjustments to be put in place first. At least, the physical arrangements to her workstation, as to the chair, the lighting, the footrest, the mouse, as well as a lighter workload and regular breaks.

232. Turning then to paragraph (6) (ix) and the alleged unfavourable treatment.

233. The first of these at sub-paragraph a. is pursuing disciplinary proceedings against her. We assume that this is alleged to have been either from the start of the investigation on 1 November 2016 or from the date of the letter requesting that she attend the disciplinary hearing, namely 8 June 2017. This is because whilst there were at least two attempts to call the Claimant into an investigation meeting regarding her unauthorised absence, this did not go any further.

234. For the sake of argument we accept that these matters which out of time are capable of amounting to continuing discrimination.

235. The second of these at sub-paragraph b. is that the Respondent dismissed the Claimant. The dismissal took effect on 16 August 2017. Arguably this is covered by the extension of time granted in respect of the second Claim of unfair dismissal which was granted on the narrower test of reasonable practicability under ERA.

236. In respect of both we accept that this is unfavourable treatment from the Claimant's perspective. However, in the circumstances we conclude that it was not unreasonable for the Respondent to take the view/action that it did.

237. Turning then to paragraph (6) (x), did the Respondent treat the Claimant unfavourably in any of those ways because of any of those things. In view of our findings, we conclude that whilst we can well understand why the Claimant believed this to be so, we could not find any evidence to link the unfavourable treatment to the things arising from her disability.

238. In the circumstances, we did not need to consider paragraph (6) (xi) or (xii) – proportionate means of achieving a legitimate aim and knowledge. In any event we were not provided with any submissions as to (xi) and we have indicated our conclusion to knowledge of Dyslexia above.

239. We therefore find this complaint unfounded and it is dismissed.

Reasonable Adjustments

240. The Claimant's complaint is set out at paragraph (6) (xiii) to (xx) of the List of Issues.

241. Under sections 20 and 21 of the Equality Act 2010, there is a duty upon employers to make reasonable adjustments. Failure to do so constitutes unlawful discrimination. Where an employer applies a provision, criterion or practice ("PCP") which puts a disabled person at a substantial disadvantage compared with people who are not disabled, the employer must take such steps as are reasonable to avoid the disadvantage. The purpose of the adjustment is to address the disadvantage. In addition, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage compared with people who are not disabled, the employer must then take such steps as are reasonable to provide the auxiliary aid.

242. The adjustment has to be reasonable. In considering whether an employer has met the duty to make reasonable adjustments, the Tribunal must apply an objective test. Although we should look closely at the employer's explanation, we must reach our own decision on what steps were reasonable and what was objectively justified. Relevant factors can include the extent to which the adjustment would prevent the disadvantage, the practicality of the employer making the adjustment, the employer's financial and other resources, and the cost and disruption entailed.

243. There is no duty to make reasonable adjustments if the employer does not know and cannot reasonably be expected to know that the worker has a disability and does not know or cannot reasonably be expected to know that the worker is likely to be placed at a substantial disadvantage as a result.

227. On the evidence that we heard, the adjustments should have been made by 3 October 2016.

228. Of course, this places the complaint out of time and under section 123 (1) (b) EQA a failure to do something is to be treated as occurring when the person in question decided on it. Further in Matuszowicz v Kingston upon Hull City Council [2009] EWCA Civ 22, the Court of Appeal held that where there has been a failure to make reasonable adjustments, the time limit would run from the end of the period during which the employer might reasonably have been expected to make the adjustment. Doing the best we can we this would at the latest be the date on which the Claimant was due to return to work. That was on 3 October 2016. Even were we to run this from the extended return dates of 5 December 2016 and then 6 February 2017, these dates would still not place the presentation of the complaint as in time.

229. This means that the Tribunal has no jurisdiction to deal with this complaint.

230. Lest we are wrong we felt it prudent to set out our findings and conclusions in full.

244. With regard to sub-paragraph (xiii), did the Respondent not know and could it not reasonably have been expected to know that the Claimant was a disabled person. We have indicated above that the Respondent accepted that the Claimant was a disabled person on all four bases and whilst it denied knowledge of Dyslexia, we concluded that the Respondent did have knowledge. We also found that Claimant to be disabled by reason of Migraines.

245. With regard to Dyslexia, our findings as to knowledge are as follows:

    a. On a casual basis Mr Weston was aware in conversations with the Claimant that she was Dyslexic;
    b. From 9 November 2012 ATOS report at R1 616;
    c. From 7 September 2016 OH Assist Report at R1 293 and whilst specially stated that the Claimant needed more time to complete her work;
    d. Whilst the Claimant had a Dyslexia Report from 2011 (prepared by her University) and this is in the bundle, we do not know if this was provided to the DWP during the time of her employment:
    e. Whilst the Claimant had undergone a Dyslexia Assessment during her employment, this was not provided to the Respondent. All that they were aware of were the recommendations as to the resultant hardware/software requirements.

246. On balance of probability, we form the view that the Respondent either knew or ought to have known that the Claimant had Dyslexia at the relevant times and that it would impact upon her in the ways she identifies in this claim.

247. The Claimant relies on the following PCPs identified at paragraph (6) (xiv) of the List of Issues:

    a. Having bright lighting throughout the office;
    b. All staff in the Claimant's role must use communal printers;
    c. Only allowing 1 or 2 15-min breaks and a lunch break;
    d. Giving the same caseload to all employees in the Claimant's role;
    e. Giving the same time to all employees in the Claimant's role to complete e-training?

248. The Respondent admits the PCPs in general terms but does not admit that they were applied to the Claimant given that she was not at work at any of the times complained of.

249. At paragraph (6) (xv) of the List of Issues, the question is posed did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in the ways set out in a series of sub-paragraphs.

250. The Respondent does not accept substantial disadvantage.

251. We have set out the substantial disadvantage alleged and our conclusions below (by reference to the sub-paragraph lettering within (6) (xv):

    a. Bright lighting triggers Migraines (a symptom of the Claimant's epilepsy). We accept substantial disadvantage and refer to the ATOS report dated 9 November 2012 as self-reported by Claimant at R1 616;
    b. The Claimant is sometimes not able to move around as much due to her Sciatica and Epilepsy and she needs to use the printer more than 25 times a day which involves walking back and forth to the communal printer. We accept that her mobility would be restricted at times but we also accept that the Respondent's evidence that there was a reduced need to use the printer by the expected date of her return and that she was offered a desk nearer to a printer;
    c. Due to all of the conditions relied upon the Claimant would get tired and low in mood without additional breaks, and could not take her medication when needed. We are unable to accept substantial disadvantage on this point because beyond the pleading we heard no evidence on this;
    d. The Claimant could not complete the work in the time allowed due to her Dyslexia. We accept substantial disadvantage although we also accept that the Respondent had agreed it would give the Claimant a reduced case load to start with on her return to work;
    e. The Claimant could not complete the training in the time allowed due to her dyslexia? We do not accept substantial disadvantage. We accept the Respondent's evidence that there was no requirement to complete e-training within an allotted period of time.

252. Turning to paragraph (6) (xvi), if so, did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be place at any such advantage? Dealing with the letter sub-paragraphs in (xv) as follows:

    a. Yes;
    b. Yes, based on the requirements prior to the Claimant's carers leave (ie 3 years before) but not so much at the point of her intended return;
    c. No evidence was presented;
    d. Yes;
    e. No.

253. Turning to paragraph (6) (xvii) of the List of Issues, if so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant; however it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows (our findings corresponding to the sub-paragraphs from (xv) as set out above and bearing in mind that the Claimant was not actually back at work):

    a. Dimming the lighting above the Claimant's desk. We find that this had dealt with or could be dealt on her return to work;
    b. Providing a printer for the Claimant next to her desk. We find that there was by the time of the Claimant intended return to work a limited need to

print documents and in any even the Respondent indicated that it would move her to a desk near a printer;

c. Allowing the Claimant to take additional breaks as recommended by Occupational Health. We find that it was recommended and Respondent said there was always flexibility as to the taking of breaks;
d. Reducing the Claimant's workload. It was agreed that the Claimant would have no case load to start with and then a reduced for a period of time (but it should have been subject to review);
e. Allowing the Claimant additional time for e-training? This was not required.

231. Turning then to paragraph (6) (xviii), if so, would it have been reasonable for the Respondent to have taken those steps at any relevant time? The only sub-paragraph that we found lacking was d. We do find that the Respondent could have given the Claimant a clearer indication as to her workload and the period over which it would have been reviewed.

232. Turn then to the complaint relating to the provision of auxiliary aids at paragraph (6) (xix) of the List of Issues, would the Claimant, but for the provision of the following auxiliary aid, be put at a substantial disadvantage in comparison with persons who are not disabled, in that:

	Auxiliary aid	Disadvantage without it
a	Software to assist those with dyslexia	Needed to read and write Unable to carry out job properly.
b	Larger screen	Difficulties in absorbing information due to dyslexia
c	Special chair	Discomfort, exacerbation of pain, unable to work well, increased frequency of seizures, affected mood, knock-on effect on attendance
d	Adjustable height desk	Ditto
e	Special mouse and keyboard	Ditto
f	Foot rest	Ditto

233. Our conclusions in respect of each are set out below:

a. The Respondent had bought the computer required to run the software and the Dragon software but the Claimant had not returned to work for the Respondent to implement these aids;
b. By the time of the Claimant expected return the Respondent was using larger screens;
c. The Claimant had a specialist chair prior to her carers leave and this had been stored away;
d. We heard no evidence as to why the Claimant needed an adjustable height desk. However, we understand it was so that she could chose to work standing up or sitting down as required by her impairments;

e. This had been provided prior to her carers leave and had been stored away;
f. This had been provided prior to her carers leave and had been stored away.

234. Turning then to paragraph (6) (xx), if so, did the Respondent take such steps as it was reasonable to have to take to provide the auxiliary aid? The answer is yes in terms of a., c. and e. but the general difficulty for the Respondent was that it was prevented from providing these aids by the Claimant not returning to work.

235. In conclusion, the complaint of failure to make reasonable adjustments is unfounded safe in respect of the PCP at paragraph (6) (xiv) d. Giving the same caseload to all employees in the Claimant's role. The substantial disadvantage being that the Claimant could not complete the work in the time allowed due to her Dyslexia. The Respondent knew or ought reasonably to have been expected to know that the Claimant was likely to be placed at any such disadvantage. Whilst the Respondent agreed that the Claimant would have no caseload to start with and then a reduced caseload for a period of time, it would have been reasonable for the Respondent a clear indication as to her reduced workload and the period over which it would have been reviewed.

236. This was particularly important as the indication we have from the period prior to her carers leave was that she had struggle to cope with her workload. The Respondent could reasonably have given her more reassurance about the workload adjustments it had in mind so as to allay her apprehension in not being able to cope.

237. However, as we have said above, we have no jurisdiction to deal with this complaint given that it was presented out of time. It is therefore dismissed.

<u>Harassment relating to disability</u>

238. Harassment is defined under section 26 of the Equality Act 2010. A person "A" harasses another "B", if "A" engages in unwanted conduct related to a protected characteristic, which has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the unwanted conduct has such purpose or effect, the Tribunal must consider the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

239. We took into account that where conduct complained of does not have that purpose, i.e. where it is unintentional in that sense, it is not necessarily unlawful just because the worker feels his dignity is violated etc. We also took into account, as required, the other circumstances of the case and whether it is reasonable for the conduct to have that effect as well as the perception of the worker bringing the complaint. The starting point is whether the worker did in fact feel that his dignity was violated or that there was an adverse environment as defined in the section and that it is only unlawful if it was

reasonable for the worker to have that feeling or perception. But not forgetting that nevertheless the very fact that the worker genuinely had that feeling should be kept firmly in mind (Richmond Pharmacology v Dhaliwal [2009] ICR 724).

240. We were also guided by ECHR Employment Statutory Code of Practice at paragraph 7.18:

"In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

241. The Claimant's complaint is set out at paragraph (6) (xxi) of the List of Issues. The conduct that the Respondent is alleged to have engaged in is as follows:

a. Katrina McDonald emailing the Claimant threatening that if she did not return to work in December 2016, she would be subject to disciplinary action. The Claimant was ordered to identify the dates of the emails that she alleged contained these threats. She did so in an email sent to the Employment Tribunal on 14 December 2020 (at R1 75) as being 3 February 2017 (email at R1 360) and 23 March 2017 (email at R1 393);
b. Katrina McDonald accessing the Claimant's LinkedIn profile to search for a reason to dismiss her. The Claimant was ordered to confirm that date of this alleged conduct. She subsequently confirmed the date as November 2016;
c. From December 2016 onwards, Edward Russell and Katrina McDonald failing to correspond with the Claimant and her union about the adjustments she required.

242. The first of these at a. is clearly a one of act and is out of time. For the same reason so is b. For reasons set out below it was not possible to gauge the extent of the period of time that the Claimant alleges the Respondent failed to correspond with her and her union.

243. Lest we are wrong we again felt it prudent to go on and set out our findings.

244. At paragraph (6) (xxiii) of the List of Issues, the question was posed, if so, was the conduct unwanted. We concluded that in respect of a. and b. the answer is yes.

245. Paragraph (6) (xxiv) then asks, if so, did the conduct relate to the protected characteristic of disability. We concluded as follows: a. broadly speaking yes; b. no; c. broadly speaking yes.

246. Turning then to (6) (xxiv), did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

247. We concluded that none of conduct relied upon had the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

248. In respect of the effect, with regard to a. we find the answer to be no. Taking into account the wider circumstances of the Claimant not returning to work at the end of her Carers Leave and the Respondent's attempts to get her back to work, we conclude that it is not reasonable to perceive these matters having the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. With regard to b. given our above findings the answer is no looking at the wider circumstances of the case and whether it is reasonable for the conduct to have that effect. With regard to c., the answer is again no given that the Claimant did not really expand upon what level of delay or failure is acceptable and when it becomes unacceptable.

249. We therefore find the complaint of harassment to be unfounded even were it presented in time, which we have found it was not.

Victimisation

250. It is unlawful to victimise a worker because she has done a "protected act". In other words, a worker must not be punished because she has complained about discrimination in one or other of the ways identified under section 27 EQA.

251. The Claimant sets out the protected act that she relies upon a paragraph (6) (xxv) of the List of Issues, the date of which she subsequently confirmed. This is the grievance submitted before her dismissal complaining about the adjustments not being put in place and harassment by Mr Russell and Ms McDonald. The grievance was submitted on 5 June 2017 and is at R1 720.

252. The next question at (6) (xxvi) is did the Respondent dismiss the Claimant because she did a protected act? From our findings we note that the investigation report was finalised on 25 April 2017 and was sent to the CSOM on 27 April 2017. It was only on 8 June 2017 that the Claimant was invited to attend a disciplinary decision meeting with TN. Whilst we could see that this might look suspicious to the Claimant there was nothing to suggest that it was anything more than a temporal coincidence.

253. The reasons for the Claimant's dismissal could have been: the Respondent's incompetence and its failure to identify that this was not a matter that amounted to gross misconduct or a dismissible offence (as we identify when considering the unfair dismissal and wrongful dismissal complaints); victimisation more broadly speaking in the non-legal sense of the word; or the Claimant's lack of co-operation in returning to work. However, there is

nothing to indicate that her dismissal was as a result her submitting her grievance.

254. Again the difficulty for the Claimant is also that the Claim has been presented out of time and there is nothing to suggest that it is conduct continuing over a period of time to provide us with jurisdiction to deal with it. But again, lest we are wrong, we have set out our findings and conclusions.

255. As a result we find the complaint to be unfounded.

Unfair dismissal

256. Section 98 of the Employment Rights Act 1996 (ERA) sets out how an Employment Tribunal should decide whether a dismissal is unfair. There are two basic stages. Firstly, the employer must show what was the reason, or if more than one, the principal reason, for the dismissal. The reason must be one of the four potentially fair reasons set out in section 98(2) or some other substantial reason of a kind such as to justify dismissal. Secondly, the Employment Tribunal must then decide in accordance with section 98(4) whether it was fair to dismiss the employee for that reason.

257. We first considered whether the Respondent had shown a potentially fair reason for the Claimant's dismissal within section 98(1) and (2) ERA 1996. The Respondent asserts that the Claimant was dismissed for a reason relating to her conduct. We find that the Respondent has shown that the potentially fair reason is to do with conduct. This is quite clearly established from the evidence and documentation.

258. We then turned to consider whether this was a sufficient reason for the Claimant's dismissal within section 98(4) ERA 1996. This involves an examination of both the way in which the Respondent dismissed the Claimant (the process followed) and the reason for the dismissal (the substance).

259. From the evidence and documentation we find that in terms of the procedure followed the dismissal was unfair. We had regard to the Respondent's own disciplinary procedure and also to the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015).

260. We then turned to consider whether the reason for the dismissal was substantive fair or unfair. We had regard to the test contained within BHS v Burchell [1979} IRLR 379, EAT relating to conduct dismissals. This requires us to consider the following:

    a. Whether the employer believed that the employee was guilty of misconduct;

    b. Whether the employer had in mind reasonable grounds upon which to sustain that belief; and

    c. At the stage at which the employer formed that belief on those grounds, whether s/he had carried out as much investigation into the matter as was reasonable in the circumstances.

261. When assessing whether the Burchell test has been met, the Tribunal must ask itself whether what occurred fell within the 'band of reasonable responses' of a reasonable employer. This has been held to apply in a conduct case to both the decision to dismiss and to the procedure by which the decision was reached. (Sainsbury's Supermarkets v Hitt [2003] IRLR 23, CA).

262. In addition, we reminded ourselves that we must be careful not to substitute our own decision for that of the employer when applying the test of reasonableness.

263. From the evidence and documentation we draw the following conclusions.

264. We accept that the Claimant working elsewhere came to light as a result of an electronic invitation sent to Ms McDonald to look at her LinkedIn page. We could find nothing untoward in Ms McDonald viewing the Claimant's LinkedIn account and having seen the various references to her working elsewhere during her employment with the Respondent and reporting the matter to the Respondent. Having been made aware of the situation, we find nothing untoward in the Respondent then taking action to investigate. In any event there is no evidence to indicate that the decision to investigate and to then take disciplinary action was in Ms McDonald's hands.

265. As the investigation report and appendices indicate, the investigation process was detailed and thorough. It clearly was as much investigation into the matter as was reasonable in the circumstances.

266. We note that the CSHR summary of query at R1 572 notes that the formal investigation found that there was a case to answer of gross misconduct for an employee who had worked for at least one other employer whilst on Carers Leave. In the summary of discussion, CSHR provide advice that this indicates that this conclusion is supported by way of analogy to the way in which an employee working for another employer whilst on sick leave would have been treated:

> *"I did clarify the employee's transgression with the example under gross misconduct of working for another employer whilst on sick leave and can advise that this case is gross misconduct in essentially the same vein. The basis for this is when they took carer's leave, this was on the understanding they had some caring responsibilities. If they then used this period for other purposes in a way which would conflict with their DWP working pattern, they would be considered as not having such caring responsibilities and therefore available to undertake their DWP duties. The conflict is when they were working for another employer without permission and those periods had conflicted with the DWP job."*

267. Whilst we of course remember that we are considering the Respondent's actions within the test of reasonableness, there are two difficulties with this conclusion. Firstly, it is of course possible to work during Carers Leave provided permission is first sought. This is not obviously the case with working during sick leave. Secondly, the disciplinary procedures and policies we were provided with do not contain any warning that working/not obtaining prior permission to work during Carers Leave could amount to gross misconduct. Whilst we were told that there was a document entitled "How to Access the Level of the Misconduct and Decide ad Disciplinary Penalty" providing guidance as to gross misconduct, the evidence from Ms Hernandez

as to who she applied it to the Claimant's case was, frankly, lacking. Thirdly, the Carers Leave letters sent to the Claimant at the time did not contain any warning that working/not obtaining prior permission to work during Carers Leave could amount to gross misconduct. Fourthly, the document entitled "Considering, applying for and managing Career Breaks" does not contain any a warning that working during or failing to obtain approval to do so could amount to gross misconduct.

268. We therefore conclude that it was not reasonable of the Respondent to conclude that the Claimant's actions amounted to gross misconduct although we accept that it was reasonable of the Respondent to have concluded that she had been working during her Carers Leave without having obtained permissions.

269. Looking at what the Claimant was found to have done wrong. The Claimant was dismissed for working for NOMS/LCRC and The Challenge. The other allegations of working elsewhere were not upheld or pursued.

270. The Claimant only needed permission to commence new employment before going on Carers Leave and she says she had told the Respondent at the time.

271. So what this comes down to is work that the Claimant did for NOMS/LCRC between 21 January to 30 September 2014 and for The Challenge. The work that the Claimant did for NOMS/LCRC was during DWP hours but commenced before she went on Carers Leave. The work that she did for The Challenge was in September 2015 and was at weekends and so it reduces even further down to cover the hours that the Claimant worked in July 2015, which were weekdays and the majority of them were during her DWP hours.

272. So even if the Respondent did not accept that the Claimant told Mr Weston about this work and we accept that this was a reasonable conclusion to reach from the investigation undertaken, we pose the question, was it reasonable to dismiss her for gross misconduct in these circumstances taking into account the limited period of working?

273. This has to be viewed against the following. The whole point of Carers Leave is to retain skills and staff. The Claimant's length of service. The Claimant had not been well in any event. However, her position is not analogous to sick leave as CSHR advised. Whilst we acknowledge that there is some degree of breach of trust given that the Claimant was granted the leave to care for her daughter and her grandmother, is that sufficient to dismiss? Moreover, did the Respondent dismiss the Claimant for breach of trust? Paragraph 10.3 of the Respondent's Grounds of Resistance (at R1 44) states that:

"The Claimant was dismissed for gross misconduct for conduct which demonstrated that she had breached the Respondent's policies resulting in a breakdown of the relationship of trust between the Respondent and the Claimant".

274. However, this is not supported by the evidence that we heard and in particular the letter of dismissal. TN, the decision maker, was not called by the Respondent to give evidence. The dismissal letter simply refers to the

Claimant working without permission whilst on Carers Leave and that she has decided that the level is "Gross Misconduct" (at R1 584). Ms Hernandez's evidence was not that forthcoming as to why she upheld the finding of gross misconduct. Indeed, her evidence indicated that she did not really follow the guidance at R1 172 as to the need to stand back from the detail to ensure that the decision (to dismiss) is proportionate and reasonable.

275. We were referred to the document entitled "How to: Assess the level of misconduct and decide a disciplinary penalty. We note paragraph 20 which states:

"The examples in the Penalties for Misconduct table are intended to help managers decide how best to deal with a case. It should be noted that the examples listed are neither exhaustive nor mutually exclusive and should be used as guidelines. If the case is borderline, managers should give the lesser penalty."

276. We specifically note the last sentence which states that if the case is borderline, managers should give the lesser penalty.

277. We also considered the table "Penalties for Misconduct" at the heading "Gross Misconduct" starting at page 8 of the document. We could not determine how the Respondent reasonably arrived at a conclusion that the Claimant was guilty of misconduct. We appreciate that these are examples but we have no rationale for arriving at the conclusion of gross misconduct beyond the analogous CSHR advice relating to someone on sick leave. As we have said TN did not give evidence and Ms Hernandez's evidence did not shed any light on this.

278. Indeed that is the closest example, at page 10 "working without permission for another employer while on sick leave". As we have indicated we do not find it reasonable to treat this as analogous. The Claimant was on Carers Leave and could work whilst caring, provided permission was obtained and she was not being paid.

279. If anything we felt it reasonable for the Claimant's offence to fall within the definition of "Minor Misconduct" at page 4 of the document, defined as:

"An isolated example of misconduct which falls short of the standards expected. First offence and minor in nature."

280. The Claimant did not tell the Respondent she was working whilst on Carers Leave but there was no financial consequence as a result. And indeed, the Respondent wanted the Claimant back to work on the one hand but extended her Carers Leave on the other.

281. There is no suggestion by the Respondent in evidence that the Claimant was dishonest or was deceiving them because she was working when she said she was caring or even that she was acting in breach of trust.

282. On this basis, we find that the decision to dismiss the Claimant was unreasonable. Whilst the investigation was reasonable, the conclusions reached were not and so the Respondent could not have reached a genuine belief of guilt of matters amounting to a dismissible offence.

283. This applies to both the decision to dismiss and to the decision to uphold the dismissal on appeal.

284. We also find that in the circumstances dismissal fell outside the range of reasonable responses.

285. We therefore conclude that the Claimant was unfairly dismissed.

286. Dealing with two specific matters which were of concern to the Claimant.

287. The Claimant raised concerns both during the disciplinary procedure and at our hearing as to what she viewed as a disparity of evidence or shifting of ground between the three statements that Mr Weston had provided during the process. In essence, she believed that his evidence shifted on the second and third occasions that he was asked to provide statements having been made privy to what she had subsequently stated in her investigatory interview and in correspondence. On consideration of the various statements, we can see that Mr Weston was simply approached to give his view in the light of further information from the Claimant and that this is not a shifting of ground as the Claimant views it. Whilst the Respondent does not appear to acknowledge this matter during the disciplinary process we do not believe it renders the process or the dismissal unreasonable. Indeed on an objective basis, for the purposes of the other complaints, we also conclude that there was nothing in the Claimant's allegations as to Mr Weston's evidence.

288. In addition, the Claimant also placed some significance on information as to her outside interests and activities that she disclosed as part of an application for employment with the Home Office in July 2012 (at R1 664-667). She relies in particular on a reference to her developing an interest in social services, legal, prison and probation industry demonstrated by external self research out of work and within her studies as evidence that she was working elsewhere and Mr Weston knew about her voluntary work with the London Borough of Lambeth and had lied about not knowing. TN dealt with this at R1 584 of the letter of dismissal as follows:

> *"I have had regard to this and accept the DWP knew of your interests in supporting vulnerable people, however the application form dated 05/07/2012 was completed 18 months before you commenced employment with National Offender Management Service (NOMS), also known as London Community Rehabilitation Centre on 21/01/2014 and 3 years before starting with Challenge Network LTD on 06/07/2015 therefore cannot be deemed as disclosure of employment with these two organisations."*

289. We do not find the Respondent's position and conclusions in this regard to be unreasonable and on an objective basis, for the purposes of the other complaints we reach the same conclusions.

<u>Wrongful dismissal (damages for breach of contract)</u>

290. This complaint arises under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. It is essentially a complaint of wrongful dismissal.

291. In order to justify summary dismissal there has to be a repudiatory breach of contract. In order to amount to a repudiatory breach, an employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract of employment – Laws v London Chronicle (Indicator Newspapers) Ltd (1959) I WLR 698, CA. The employer faced with such a breach can either affirm the contract and treat it as continuing or accept the repudiation, which results in immediate, ie summary, dismissal.

292. The degree of misconduct necessary in order for an employee's behaviour to amount to a repudiatory breach of contract is a question of fact for a court or tribunal to decide.

293. In Briscoe v Lubrizol Ltd [2002] IRLR 607, the Court of Appeal approved the test set out in Neary & Anor v Dean of Westminster [1999] IRLR 288, ECJ (Special Commissioner), in which it was found that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in this employment".

294. We recognise that there are no hard and fast rules and that many factors may be relevant, for example, the nature of the employment and the employee's past conduct and whether within the terms of the employee's contract of employment certain acts have been identified as warranting summary dismissal.

295. We also recognise that certain acts such as dishonesty, serious negligence and wilfully disobeying lawful instructions can justify summary dismissal at common law.

296. In London Central Bus Company Ltd v Nana-Addai & Nana-Addai v London Central Bus Company Ltd 29th September 2011 UKEAT/0204/11 & UKEAT/0205/11, the Employment Appeal Tribunal took the opportunity spell out the differences in the two tests of unfair dismissal and wrongful dismissal. Unfair dismissal is a right created by statutory. Cases such as Burchell have made it clear that in an unfair dismissal case, it was for a Tribunal to identify what was the reason for the dismissal and to decide whether or not the employer's decision to dismiss was based on a reasonable conclusion after making such enquiries and investigation as was appropriate and then to ask if the dismissal fell within the band of reasonable responses. Wrongful dismissal is a contractual right. The question is, has the employee committed a fundamental breach of his/her contract of employment so radical in its nature that it justified summary dismissal without compensation for notice? Thus, in a case of wrongful dismissal it is for the tribunal itself to decide what happened and not the employer's perception of what happened.

297. I was of the view initially, that this complaint had not been pleaded. However, it was raised in the Claimant's Claim Form at R1 23. Given that the unfair dismissal complaint was found to be in time by EJ Cheetham QC, then this complaint must also be in time given that it is based on the same discretion on which to allow a late claim and the same dates for presentation.

298. Given our above findings and viewed objectively we do not accept that the Claimant committed a fundamental breach of her contract of employment so radical in its nature that it justified summary dismissal without compensation for notice? We conclude that the Claimant was dismissed in circumstances in which she was entitled to notice of dismissal and that she is entitled to damages in respect of the failure to provide her with such notice.

Further disposal

299. The matter will be listed for a remedy hearing for one day and will address those matters set out at paragraph (6) (xxvii) of the List of Issues. This will be listed on the first available date 10 weeks after the date that this Judgment is sent to the parties. The parties are to notify the Tribunal if a remedy hearing is required within 5 weeks of the date on which this Judgment is sent to the parties. At that point, the Tribunal will make case management orders as to the provision of witness statement evidence dealing with remedy and an up to date Schedule of Loss and a Counter Schedule of Loss.

Employment Judge Tsamados
Date: 25 July 2022