EMPLOYMENT TRIBUNALS

Claimant: Mrs J Lewis

Respondent: Secretary of State for Work and Pensions

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at Southampton **On:** 17 to 19 October 2022

Before: Employment Judge Gray **Members:** Mrs M Metcalf
Mr L Wakeman

Appearances
For the Claimant: In person
For the Respondent: Ms J Williams (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

- **The complaints of direct disability discrimination (Equality Act 2010 section 13), for failure in the duty to make reasonable adjustments (Equality Act 2010 sections 20 & 21), and for unauthorised deductions from wage (Employment Rights Act 1996 section 13) / breach of contract, all fail and are dismissed.**

REASONS

1. This hearing was to determine matters of liability in this claim.

2. For reference at this hearing, we were provided with an agreed bundle consisting of 719 pages. The Claimant then requested that a further 48 pages be added to the bundle which were copies of the Respondent's stress at work policy and procedures that applied at the time of the matters complained about. These in the end were not referred to by the parties in their oral evidence.

3. In addition, we were given an agreed cast list and we were also presented with a witness statement bundle consisting of the Claimant's witness statement and six witnesses called on behalf of the Respondent:

   3.1 Erica Thompson ("ET")
   3.2 Duncan Wardle ("DW")
   3.3 Amanda Buttle ("AB")
   3.4 Shane Frost ("SF")
   3.5 Tim Stroud ("TS")
   3.6 Dawn Kane ("DK")

4. It was agreed that the timings at the final hearing would be used as follows:

Day 1 (AM)	Tribunal reading and preliminary matters
Day 1 (PM) to Day 3 (PM)	Claimant's evidence Respondent's evidence Closing submissions
Day 4	Tribunal deliberations
Day 5	Judgment
	Dealing with case management to then determine compensation or other remedies, if appropriate

5. In the end evidence concluded at the end of day two. This was in the main because two of the Respondent's six witnesses (AB and DK) were unable to attend this hearing and we were invited to read their statements only. It was noted that these witnesses would be given less weight than those witnesses who attended.

6. Submissions were made on day three. Both parties requested written reasons, so it was determined proportionate to reserve our decision.

Background to the claim

7. By a claim form presented on 4 July 2019 the Claimant brought the following complaints:

   (a) Discrimination on the grounds of disability.

   (b) Breach of contract (the Claimant has confirmed this is not in respect of notice).

   (c) Unlawful deductions from wages.

8. The dates of the ACAS early conciliation certificate are 21 May 2019 until 12 June 2019. An act occurring on or after the 22 February 2019 will be in time.

9. This claim has been through a number of case management preliminary hearings.

10. It was at a case management hearing on the 4 October 2021 that the issues to be determined at this final hearing were confirmed.

11. Prior to that there was a preliminary hearing which took place on the 5 May 2021 and 21 June 2021, which resulted in a reserved judgment dated 22 June 2021

which was sent to the parties on the 30 June 2021 confirming:

- **The Claimant's complaint of direct discrimination about the appeal outcome fails and is dismissed.**
- **It is just and equitable to extend time in respect of the Claimant's direct discrimination complaints relating to matters on and before 21 February 2019.**
- **The Claimant's application to amend to add 11 complaints of harassment from the period 24 May 2017 to 7 December 2017 is refused.**
- **All other matters remain to be determined and will require appropriate case management.**

The Issues as to liability

12. The issues as to liability are as follows:

Disability

1. It is accepted that the Claimant, by reason of the impairment of mixed anxiety and depression, with features of PTSD, is currently a disabled person as defined in section 6 of the Equality Act 2010. The Tribunal will decide:

    a. From when the Claimant met that definition? The Respondent accepts the Claimant was a disabled person from the 23 May 2018 (based on an Occupational Health report) but the Claimant asserts she was a disabled person from the 23 May 2017. ***[At the commencement of this hearing the Respondent confirmed that it accepts the Claimant satisfied the definition from December 2017]***.

    b. Did the Respondent have knowledge (constructive or actual) of the Claimant's disability before the 23 May 2018? ***[At the commencement of this hearing the Respondent confirmed that it accepts that it had constructive knowledge of the Claimant's disability from December 2017]***.

Failure to Make Reasonable Adjustments

Limitation

2. Was the Claimant's failure to make reasonable adjustments complaint made within the time limit in section 123 of the Equality Act 2010?

a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the alleged failure to make reasonable adjustments?

b. If not, is it just and equitable in all the circumstances to extend time?

Notes:

3. The Claimant avers that she requested a reasonable adjustment, of a Stress Risk Assessment in August 2017.

4. The Claimant did not initiate ACAS Early Conciliation (EC) until 21 May 2019, with the EC process ending on 12 June 2019.

5. The Claimant did not present her claim until 4 July 2019. ***[Claims on or after 22 February 2019 would be in time]***.

Substantive Issues

6. Did the Respondent apply the following provision, criterion or practice (PCP):

   a. Not adopting the recommendations of Occupational Health (namely, a Stress Risk Assessment and regular meetings).

7. Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that Occupational Health recommended that the Claimant should have a Stress Risk Assessment and regular meetings to manage her disability related health issues at work, and by not doing so, as alleged by the Claimant, her health could not improve and she was unable to return to work?

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

9. What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

   a. Implementing a Stress Risk Assessment and regular meetings to manage her disability related health issues at work.

10. Was it reasonable for the Respondent to take those steps and when? The Claimant says that she last expressly requested the adjustment in August 2017. The Respondent says it did carry out the adjustments in September 2017, with regular meetings taking place with the Claimant from November 2017 onwards.

11. Did the Respondent fail to take those steps? As above, the Respondent says it did carry out the adjustments in September 2017, with regular meetings taking place with the Claimant from November 2017 onwards.

Direct Disability Discrimination

12. Did the Respondent do the following things:

    a. Refuse to classify the Claimant's absence following an alleged verbal assault on the 1 June 2017 by a work colleague as "Assault - Work Related" absence at various points from August 2018 until the Grievance outcome (February 2019). Note that a Preliminary Hearing on 5 May 2021 and 21 June 2021 has already determined that the Grievance Appeal outcome was not less favourable treatment because of disability.

13. Was that less favourable treatment? The Tribunal will have to decide:

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

14. If so, was it because of disability?

Notes

15. The Respondent asserts that there was no such entitlement for the Claimant's absence to be classified in this way as the Respondent's procedure/policy only applies to an assault by a customer and not a work colleague, so its refusal to classify it in that way was not an act of direct discrimination.

Breach of Contract / Unlawful Deduction from Wages

16. Did the Respondent make unauthorised deductions from the Claimant's wages and if so, how much was deducted?

17. The Claimant asserts that her absence following an alleged verbal assault on the 1 June 2017 by a work colleague should have been classified as "Assault - Work Related" absence resulting in full pay being properly payable to her. The Claimant claims that any short fall in her full pay is therefore an unauthorised deduction from wage.

18. Did this claim arise or was it outstanding when the Claimant's employment ended?

19. Was the Respondent not paying the Claimant full pay while she was on sick absence a breach of contract?

The facts

13. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

14. The Claimant commenced her employment with the Respondent on 4 January 1983 and undertook early ill health retirement on 26 June 2019.

15. The issues in this case focus on a time period of May 2017 to February 2019.

16. Based on the evidence we have been presented on this matter it is clear that what happened in that period of time does not appear to be in dispute between the parties. During the Claimant's oral evidence and her cross examination of the Respondent's witnesses it was clear that the Claimant considered what they had done for her to be helpful, and she appreciated it. Instead, the focus of dispute is whether it was reasonable for the Respondent to do more (the Reasonable Adjustment complaint) and the interpretation of the provisions relating to, and the application of, an employment benefit.

17. The date the Claimant was a disabled person and the Respondent had constructive knowledge of disability and the substantial disadvantage is also in dispute.

18. The Claimant says in her witness evidence that she was disabled before 23 May 2018 and the Respondent would have had knowledge of it.

19. The Respondent acknowledges (as confirmed when confirming the agreed issues at the start of this hearing) the Claimant was a disabled person and it had constructive knowledge from December 2017.

20. It is not in dispute that the Claimant is a disabled person by reason of the impairment of mixed anxiety and depression, with features of PTSD.

21. The Claimant says in her witness statement that as the result of a breakdown of her marriage she suffered stress, anxiety and depression continuously between February 2005 and January 2007 and she was given special paid leave from the 7 to 11 February 2005, four periods of sickness absence and a 12-week phased return during this period.

22. There is a summary of the Claimant's absence record at pages 326 and 327 of the agreed bundle. Reasons of stress are referred to for absences from 21 February to 25 February 2005, 10 October 2005 to 16 October 2005 and 17 October 2005 to 21 October 2005, then 11 September 2006 to 21 January 2007. In 2008 there is also reference to disability related leave on the 29 January 2008 and 25 February 2008.

23. There is then no apparent sickness issue that could be disability related until anxiety and depression is recorded from 11 August 2017 to 29 October 2017 and then 16 January 2018 to 26 June 2019.

24. There is a reference to absence on the 26 January 2017 for reason of … "Nervous System – migraine/headaches", which the Claimant refers to in her witness statement and asserts that she believes at that point her then line manager (Phil), as it was the Claimant's first day of sickness absence in more than 5 years, should have been alerted that it was possible that a more serious problem existed. This may be the Claimant's belief, but it is not a reasonable conclusion to assert in our view. The Claimant herself in her meeting with Phil at that time says she could not face work on that day. That, alongside there being no absence in over 5 years prior to that does not suggest a more serious problem. What follows it is then a day of compassionate leave on the 23 February 2017. It is not until the 11 August 2017 that sickness absence for anxiety and depression begins.

25. We also note that the GP notes (at page 359) do not suggest an issue in 2017 being linked to stress until 6 June 2017.

26. The Claimant explains in her statement that it was during May 2017 when she had a 1:1 with Phil that she explained how unwell the problems with her team were making her and she says she asked for an Occupational Health ("OH") referral and a stress reduction plan.

27. We are referred to some text messages at that time (pages 98 to 101) that show concerns being raised about the work issues, and that the Claimant was looking for a complete change, but they do not say that she is seeking an OH referral or a stress reduction plan.

28. It is not in dispute that there is a verbal assault of the Claimant by a work colleague on the 1 June 2017.

29. By text message dated 5 June 2017 to her then line manager the Claimant says she has decided to raise it as a formal complaint, and that she cannot work there until the situation improves.

30. There then follows a constructive dialogue between the Claimant and ET. It is agreed that the Claimant can work from home for two weeks.

31. The Claimant then returned to the workplace around the 19 June 2017.

32. There is then an OH referral on the 21 June 2017. ET confirmed in cross examination that her and the Claimant agreed to ask DW to do the referral and ET recalled the reason for that being the way the Claimant felt about Phil at the time. ET could not recall the Claimant raising that she was not confident that Phil would do it.

33. The OH referral is submitted by DW after discussion with the Claimant.

34. The OH report dated 22 June 2017 (at pages 334 to 335) says that the Claimant is fit for full work duties, that management should address the work issues, advised that a stress work assessment be carried out, if feasible she be allowed to work from home over a period of 6 weeks, and that her level of stress be monitored in a one to one meeting at regular intervals to ensure her condition is improving.

35. During the course of this hearing at the conclusion of the Claimant's oral evidence, it was confirmed by the Claimant that she agreed that the date from which she could assert that the Respondent had the requisite knowledge for the reasonable adjustment complaint is the 22 June 2017. Before that date the PCP the Claimant relies upon did not exist.

36. OH confirms that based on their interpretation, the Claimant's stress/anxiety bullying and harassment condition is unlikely to be considered a disability because it has not lasted longer than 12 months and is not having a significant impact on her ability to undertake normal daily activities. There is no challenge by the Claimant at that time to this conclusion by OH (ibid).

37. DW was asked in oral evidence what he did after receipt of the report. He confirmed he had a conversation with the Claimant, and she confirmed that she wanted to take matters to her line manager herself. DW confirmed that he left the Claimant to do so.

38. The Claimant confirmed in cross examination that at that time she wanted to stay and rebuild the relationship with her line manager and work on the recommendations in the report.

39. In her witness statement (page 2) the Claimant describes how she met with her line manager in late June 2017 at a 1:1 meeting. She says she was visibly distressed stating to him that things were so bad that at that point she felt the only solution was to leave. She says he made no comment about this. The Claimant says she also raised the OH report and brought to his attention the recommendations. The Claimant says he did not comment on this.

40. We would note here that we have not been presented any evidence from this line manager about this matter (or any of the other matters where he is referenced as doing or not doing something). There are no contemporaneous documents presented to us by the Claimant relating to such a meeting. The Claimant did not raise any formal grievance about the conduct of her then line manager. Evidentially therefore, in the context of the complaint the Claimant makes, we need to consider the evidence we have been presented around this and importantly what happened after it.

41. The Claimant has annual leave from mid July 2017 returning on the 8 August 2017. There is a 1:1 with her line manager and the Claimant says she raised her concerns about the fact that the recommendations from the OH outcome report had still not been implemented.

42. The Claimant then commences sickness absence from the 11 August 2017.

43. On the 11 September 2017 there is then a meeting with the Claimant, her union representative and ET (see pages 104 to 107). It is set up to complete the stress risk assessment and stress reduction plan. ET explained in her evidence that there had been confusion between the Claimant's line manager and DW as to who was taking the matter forward (them each thinking the other was doing it). It was chased by the Claimant's union representative in early September 2017 and ET checked to confirm the position.

44. The Claimant agreed in cross examination that at the meeting on the 11 September 2017 she had discussed all the issues that caused difficulty and there were five areas causing it, but two were thought to be the most important at that time. The two were a lack of personal confidence and for her to not have line management responsibilities. To address that, it was suggested for the Claimant to work in a role without line management and they discussed that the Claimant could take on a short-term role without such responsibilities. The Claimant confirmed that she thought these agreed steps would solve matters. She agreed that it was intended to assist, but that in itself it did not resolve it. The Claimant confirmed that the help ET gave her was very valuable. The Claimant confirmed that she had no criticism of what was done up to that point.

45. We have noted that a number of serious allegations are raised by the Claimant about her team as are recorded in the note from the meeting on the 11 September 2017 (see page 105). Reference is made to potential flexi abuse, inappropriate use of private cars on official business and poor record keeping of expense receipts.

46. It was put to SF during his oral evidence whether those type of serious issues were investigated. He confirmed formally no that there was no formal grievance or investigation conducted. He confirmed that there was nothing to say that the things alleged hadn't taken place and he had an open conversation with the team about the issues.

47. We appreciate that these matters are 5 years ago, however considering some of the allegations made e.g., potential flexi abuse and inappropriate use of private cars on official business, it is surprising that no formal action was taken. This though was how the matters were dealt with at that time and it is not part of the stress reduction recommendations agreed that they should be formally investigated.

48. The Claimant has AB appointed to assist her. The Claimant confirms in her witness statement (page 3) that AB had been appointed as her independent line manager. The Claimant also confirms that she met with AB on the 16 October 2017 and 1 November 2017 (see page 4 of her statement). The Claimant confirmed in cross examination that at the meeting on the 16 October 2017 she discussed her situation with AB. This was during the Claimant's sick leave period and it was on the 1 November 2017 that the Claimant returned to work, the Claimant confirming in cross examination that at that time she was well enough to come back and try work.

49. In the cross examination of SF, the Claimant suggested there should have been a formal absence review meeting around the 11 October 2017 (relying upon paragraph 48 of the Attendance Management Procedure (see page 549)), however, this is not something that the Claimant submits evidence on. It is also not clear what benefit this would have given the Claimant in view of the meeting with AB on the 16 October 2017 and then the Claimant's agreed return to work on the 1 November 2017 along with a welcome back meeting.

50. The notes of the Claimant's welcome back meeting with AB on the 1 November 2017 are at pages 110 to 113. It records that the Claimant has been off sick in this last period (9 August 2017 to 31 October 2017) due to stress and anxiety which is work related. It notes that the absence is not to do with an accident/assault (see page 110).

51. At page 112 it notes that the Claimant would like her line manager to consider a DETP (Disabled Employee Trigger Point), which gives a disabled employee an increase to the number of days of sickness absence before the sickness absence management process is triggered and that the Claimant continues to do telephone counselling through Employee Assist ("EA"). EA also recommended that the Claimant complete an AR1 (accident reporting form) for Psychological Injury, and that the Claimant had decided to wait until she spoke to her line manager before pursuing it. It then notes the Claimant's phased return pattern over the next 6 weeks. The Claimant confirmed in cross examination that she had a plan which she set out to AB, having spoken to ET, as part of what the Claimant wanted to do.

52. The Claimant agreed these notes accurately reflected what was discussed.

53. As to the role of SF, he takes over ET's role on the 2 October 2017. SF describes how he met with the Claimant around this time (see paragraph 8 of his statement) but he cannot remember the date. The Claimant confirmed in cross examination that she couldn't either and although she was sure they did meet she cannot remember what was discussed. The Claimant acknowledged that she had a number of meetings with SF, and although she couldn't remember all the details, she agreed she was aware she could contact SF at any time, but not that he was her line manager.

54. In cross examination SF confirmed that on the 2 October 2017 he took over the line management responsibility for the Claimant, although on the system it showed Phil as line management, but by the way he corresponded he was assuming line management. When asked if he said that to the Claimant, he confirmed that he could not remember if he did or didn't.

55. We note from this that, as is understandable, it is difficult for the witnesses to recall the exact date and content of conversations that happened 5 years ago.

56. The Claimant refers in her witness statement (page 4) to meeting with SF in early November 2017 and that he made an OH referral. There is then a further OH report dated 7 November 2017 (pages 336 to 337). It confirms that the Claimant is medically fit for work and is benefiting from the return to work plan and support

in place, and that she would also benefit from working from home when possible. It also notes that a stress reduction plan is in place and that she is on a project where she can avoid managing staff (page 336). The Claimant in her cross examination of SF sought to assert that the plan was not updated, but SF did not agree this, saying it may not have been updated in writing, but it was being progressed. We agree with this.

57. OH holds the view at that time that the Claimant does not satisfy the definition of disability (see page 337) because as at that time her symptoms (although having a significant impact on her ability to carry out daily activities including work at that time) have not yet lasted for longer than 12 months. There is no challenge by the Claimant at that time to this conclusion by OH.

58. During oral evidence we were taken to an email dated 6 December 2017 (page 117) that addresses the Claimant being able to change her work location and that she has now done so. It was also acknowledged by the Claimant that SF had suggested to her that she could sit in a different location to her team, but she had chosen not to until then. The Claimant confirmed that she had wanted to persevere where she was.

59. Both the Claimant and SF recalled a telephone discussion between them on the 14 December 2017 (see page 5 of the Claimant's witness statement and paragraph 19 of SF's statement).

60. The Claimant recalled in cross examination about this conversation that she was so upset, sobbing, and SF was really kind. The Claimant suggested she wanted more from it, but what the "more" was, is not articulated at this time. What was requested was agreed and happened, for example that her annual leave start at that time.

61. The Claimant returns to work on the 2 January 2018 and meets with SF on the 4 January 2018. There are notes from this meeting made by SF (see pages 119 to 120). The Claimant agreed with SF's record.

62. They note that … "On Janet's return to work we made an OHS referral which took place. Although this did not class Janet's condition to be classed as a disability, we have discussed between us that this has impacted her for the last 12 months and is likely to continue to do so and therefore I believe that this would be classed as a disability. This led to us discussing the introduction of a DETP for Janet which we discussed and we both agreed that we would put in place a DETP of 4 days which would be reviewed every 6 months as a minimum.". In cross examination SF clarified that his reference to the last 12 months, was within the last 12 months, i.e., from June 2017.

63. The Claimant agreed that they took opportunity to review all actions taken and also recorded agreement re phased work, and it had been left open to review and amend further, if it was felt the increase in hours towards the end was too much. The Claimant agreed that she had changed her non-working day from Friday to Monday and she felt that was beneficial.

64. The Claimant confirmed about SF that she has never denied that SF showed her kindness, he did give her metaphorical warmness, what he did was good, but what she says she really needed was Phil not to be her line manager.

65. About the line manager issue, the Claimant said that SF didn't conduct her formal return to work meetings, but she agreed that SF did agree for the things she asked for. SF asserted he was acting as the Claimant's line manager, albeit it was not updated on the system, and that AB was undertaking the attendance/return to work type meetings (for example on the 16 October and 1 November). We accept what SF says on this matter.

66. It was considered on the 4 January 2018 that the Claimant needed a different line manager full time, and it was agreed that TS would take up that role (see page 120). The Claimant had also confirmed that continuing to pursue mediation with Phil would not have the same impact at that point, although she wanted to still pursue some conversation with Phil when his personal situation had improved (see page 120).

67. The Claimant asserted in cross examination that what she needed was a support worker to work with her, somebody who would work with her or have a cup tea or a piece of cake, a work buddy. Also, that a referral could have been made to the CSAWT team, the civil service adjustment and works team, so they could talk to her about mental health and conduct an in-depth assessment with a view to creating a document to work with, like a passport. The Claimant acknowledged that she had not identified these as things she needed, but she says that she was ill and didn't know what she was doing.

68. During the cross examination of SF, he confirmed when asked about what he thought about the Claimant coming back into a hostile situation when based in the same office, that they had spoken about it, and that the Claimant was keen to go back into that environment following his meeting with the team. He said there was nothing that flagged to him that more needed to be done at that time. Further, that he had listened to the Claimant's requests and had actioned those and the Claimant didn't express any concerns about those. He confirmed that the Claimant didn't raise with him or request to raise a formal grievance and that she seemed content that what she had asked for had been concluded. This, based on the evidence we have been presented, appears a reasonable position for SF to take.

69. About the then agreed appointment of TS to the role of full-time line manager, the Claimant confirmed in cross examination that she has no complaint about the care TS gave her. She stated that it was wonderful, he was kind, he never failed to do the things he said he would do.

70. The Claimant is then signed off work from the 16 January 2018 to the end of her employment on the 26 June 2018 for ill health retirement.

71. The Claimant stated about TS that he was brilliant, he was fabulous, the thing TS got stuck with is the classification. This relates to retrospectively re-defining the Claimant's sickness absence as "Assault – work related". This relates to the

Claimant's complaint of direct disability discrimination and her complaint for unauthorised deductions / breach of contract.

72. As the Claimant sets out in her witness statement (page 8) it is during August 2018 that she identified from the DWP Sick Leave Procedures for Managers that she could be entitled to a period of extended paid sick leave as she had suffered an injury as a result of an assault at work.

73. It is for the Claimant to prove (on the balance of probability) facts from which the Tribunal could conclude that the Respondent had committed an unlawful act of discrimination. The alleged act is that the Respondent refused to classify the Claimant's absence following an alleged verbal assault on the 1 June 2017 by a work colleague as "Assault - work related" absence at various points from August 2018 until the Grievance outcome (February 2019).

74. The person responsible for this is TS. The evidence that the Claimant relies upon to support it was explored in the cross examination of her. The Claimant maintained during cross examination that she could think of no other reason for the decision TS made, that was her belief and that she would be putting the matter to TS in cross examination of him. The Claimant, despite being reminded of this, did not put the specific allegation to TS.

75. It is clear from the evidence that we have been presented that there are different views about the fairness of the availability of the "assault at work" sick pay benefit, and what was expressed at various points as to why it did not apply to the Claimant. However, it is clear that the answer has always been no. In short, the Claimant did not satisfy all the ingredients for her absence to be classified as "Assault – work related" and without that classification applying to her sick leave she did not have an entitlement to benefit from full pay while off sick.

76. As TS acknowledged in cross examination, the advice given was it was a no, it was always a no and he followed that advice.

77. The relevant part of the Sick Leave Procedures for Managers / DWP Intranet is at page 567 of the bundle.

78. Clause 6.37 says … "6.37 An assault is defined as an act of aggression which can be either physical or verbal. To be regarded as an assault on duty the assault must be clearly connected with their work for the Department, whether or not the employee was on duty at the time. Guidance can be found on the Health and Safety Managing Incidents site.".

79. Clause 6.38 refers to the need for managers (amongst other things) to ensure the incident is recorded and an accident report completed, where the employee has not done so.

80. Clause 6.39 confirms that a service request to Employee Services should subsequently be completed to amend the sickness record appropriately.

81. Clause 6.40 … as "long as the absence is recorded on SOP as "Assault – work related" the employee will receive full pay…"

82. It is not in dispute that when the link in clause 6.37 is clicked on it takes you to a document titled … "Unacceptable Customer/Claimant Behaviour guidance" which is at pages 574 to 628 of the bundle.

83. We were also referred to the Civil Service Management Code (pages 633 to 642). In particular page 636 which at paragraph 2 notes: … "… Where departments and agencies are given direction to determine terms and conditions, the Code sets out the rules and principles which must be adhered to in the exercise of those discretions. It does not of itself set out terms and conditions of service.". Also, paragraph 4 … "This delegation… does not remove the obligation on departments and agencies to submit to the Cabinet Office proposals or arrangements which are contentious, or raise questions of propriety.".

84. Further, page 640 … "9.6 Absence due to injury, Disease or Assault at Work", and also page 641 paragraphs 9.6.5 and 9.6.6, which confirm where an absence is due to an assault, and no claim for damages is made staff must … received full pay …".

85. The interaction of these provisions is addressed by the DWP in correspondence to the Claimant as can be seen at pages 706 and 718 of the bundle. Both confirm that the Code relates to physical assault, not verbal and that the DWP interpretation goes further by giving cover for verbal assaults, but the assaults need to be linked to conduct by a customer/DWP claimant. We understand that to reflect the front-line contact DWP employees can have with customers and DWP claimants in what may be stressful circumstances. It is understood to be part of the management of a potential Health and Safety risk while carrying out their roles. We accept the rationale presented to us in the statement of DK at paragraphs 22 to 26. Although DK did not attend to be cross examined about her statement, we have not been presented with evidence to say that the rationale she presents is not that held by the Respondent.

86. The Claimant in her evidence relies in the main on an email from David Harrison (a HR case worker) which is part of an email trail at pages 246 to 254. We have considered carefully what he says. In short, he is expressing an opinion on what might be a rationale for interpreting the clause in a broader way, i.e., to allow for the "Assault – at work" classification to be applied to all assaults. DK presents her rationale in response (see page 247) which is consistent with what she states in her statement. The Health and Safety rationale is also referred to by Colin Herring Head of Employee Policy Advice Team as can be seen as extracted into an email at pages 314 to 316.

87. TS explains in paragraphs 21 to 42 of his witness statement why he did what he did about the assault at work classification. He was also cross examined about his actions. From that it is clear that TS is seeking advice on the matter, includes the Claimant in that process and adheres to the advice he is given. He did not believe he could change the Claimant's sickness classification without authorisation to do so. He was advised the Claimant did not qualify to be classified as sick due to

"Assault – work related". We accept the reason given by TS. He has conducted his enquires in an open manner and as he confirmed in cross examination, he would not have acted differently for anyone else. As already noted, the Claimant did not want to put to TS that he had done what he did because of her disability.

88. As to the unauthorised deductions / breach of contract claim it is for the Claimant to prove on the balance of probability that full sick pay was properly payable to her under a contractual provision. Even if we find as a matter of fact that the full sick pay benefit was a contractual benefit (noting from the written submissions of Respondent's Counsel that … "it appears clear from Dawn Kane's witness statement (paragraphs 17 & 18) that the clauses within the procedure were incorporated to give effect to the instructions set out in the civil service management code (CSMC) which relate to an assault at work (see paragraph 9.6.5, page 640). The CSMC does not of itself set out the terms and conditions of service of individual civil servants, it provides a framework of instructions to departments by which they set terms and conditions of employees through delegation (see 636)."), it is still necessary for the Claimant to show her entitlement to it. That requires the Claimant to be classified as being sick for reason of "Assault – at work").

89. To be given that classification a number of ingredients must be met, including the completion of an accident report (as already noted, the Claimant herself, as of 1 November 2017 (page 110) did not state the absence was due to assault and she wanted to hold off on completing an accident report). The Claimant therefore seeks a reclassification of her absence retrospectively in August 2018. Further, the assault has to be because of a customer or DWP claimant. Although not expressly stated in clause 6.37, the link to the relevant policy is there, and as TS confirmed in cross examination, that link is there by intent. It fits the health and safety rationale the Respondent has presented evidence about. We accept that our analysis of this matter has benefited from being able to see the full and final explanation on the clauses' interpretation, that followed a variety of different explanations by the Respondent. It is therefore understandable why the Claimant has sought to challenge the matter.

90. In respect of the factual matters concerning the time limit jurisdictional issues in respect of the reasonable adjustments complaint the Claimant addresses these at page 6 of her witness statement. In short, the Claimant relies upon the same explanation that she did in respect of the direct discrimination complaint, where it was found to be just and equitable to extend time. This includes her wanting to resolve matters internally through the grievance process and becoming aware of time limits when she contacted ACAS. Also, the state of her health at that time. We note though that these are matters specific to the direct discrimination complaint, as it was that which was the subject matter of the grievance, not the complaint about reasonable adjustments.

The Law

Disability

91. As set out in ***section 6 and schedule 1 of the Equality Act 2010*** a person P has a disability if she has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months or is likely to last the rest of the life of the person.

92. It is not in dispute in this claim that the Claimant is a disabled person. There is a dispute as to from when, with the Claimant asserting from some point in 2005/2007 and that the Respondent had all the requisite knowledge for the complaints made by the 22 June 2017. The Respondent asserts it would all be from December 2017. This has an impact on the reasonable adjustment complaint, but not the direct disability discrimination complaint which relates to a period August 2018 to February 2019.

Direct discrimination

93. This complaint is alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleges direct discrimination.

94. The protected characteristic relied upon is disability as set out in section 4 and 6 of the EqA. It is not in dispute that the Claimant was a disabled person at times material to this complaint.

95. For a claim for direct discrimination, under section 13(1) of the EqA 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.

96. As we are reminded by Respondent's Counsel, direct discrimination claims require a comparison as between the treatment of different individuals i.e., individuals who do not share the protected characteristic in issue. In doing so there must be no material difference between the circumstances relating to each individual (section 23 EqA). The Tribunal therefore must compare 'like with like'.

97. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

98. As summarised in the written submissions of Respondent's Counsel … "In respect of the burden of proof, there is a two-stage process for analysing the complaint.

At the first stage, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. In **Madarassy v Nomura International plc [2007] IRLR 246** 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it which in turn constitutes a prima facie case. At the second stage, if the Claimant is able to raise a prima facie case of discrimination following an assessment of all the evidence, the burden shifts to the Respondent to show the reasons for the alleged discriminatory treatment and to satisfy the tribunal that the protected characteristic played no part in those reasons. In other words, only at the second stage does the Respondent bear any burden (see **Efobi v Royal Mail Group Ltd (2021) ICR 1263** which confirmed that the reverse burden of proof remains good law under the EQA 2010).".

99. Considering ***Madarassy***, Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination".

100. The burden of proof does not shift to the Respondent simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the Respondent had committed an unlawful act of discrimination (***Madarassy***). "Could conclude" must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

Reasonable adjustments

101. Sections 20 and 21 of the EqA state:

(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.

……..

21 Failure to comply with duty

(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.

102. ***Paragraph 20(1) of Schedule 8 to the EqA*** provides that a person is not subject to the duty to make reasonable adjustments if he or she does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace, or a failure to provide an auxiliary aid — ***paragraph 20(1)(b)***.

103. The Tribunal must identify:

103.1 The provision, criterion or practice applied by or on behalf of the Respondent;

103.2 the Identity of any non-disabled comparators (if appropriate): and

103.3 the nature and extent of the substantial disadvantage suffered by the Claimant.

(Environment Agency v Rowan 2008 ICR 218)

104. The identification of the applicable PCP is the crucial first step that the Claimant is required to take. If the PCP relates to a procedure, it must apply to others than the Claimant. Otherwise, there can be no comparative disadvantage. Only once the Employment Tribunal has gone through the steps in ***Rowan*** will it be in a position to assess whether any adjustment is reasonable in the circumstances of the case, applying the criteria in the EHRC Code of Practice on Employment (2011).

105. The test of reasonableness imports an objective standard, Maurice Kay LJ in ***Smith v Churchills Stairlifts plc [2006] IRLR 41*** at paragraph 45.

106. In **HM Prison Service v Johnson 2007 IRLR 951**, it was made clear that it is insufficient for a Claimant to simply point to substantial disadvantage caused by a PCP and then place the onus on the employer to think of what possible adjustments could be put in place to ameliorate the disadvantage.

107. In **Project Management Institute v Latif 2007 IRLR 579**, Mr Justice Elias (as he then was) stated as follows:

"In our opinion, the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly

be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not".

108. We accept as submitted by Respondent's Counsel that the Claimant is not under a duty to show how the employer had failed to comply with a reasonable adjustment, but the law requires her to raise the issue, in broad terms at least, as to whether a specific adjustment should have been made. If a Claimant is successful in doing so the burden then shifts to the Respondent to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

109. Further, as submitted … "17. In respect of the reasonableness of the adjustments proposed, an employer is not required to take disproportionate measures and the focus must be on the practical result of the measure/s that can be taken. In considering what is reasonable the tribunal must do so objectively (see **Smith v Churchills Stairlifts Plc 2006 ICR 524**). There will be a range of factors relevant to this question although the tribunal are not bound to take account of specific factors in every case. The factors listed in the EHRC Employment Code are always of assistance (see paragraph 6.23 of the Code). It should be remembered that in some cases there are simply no reasonable adjustments that can be made which will alleviate the disadvantage identified, that the duty concentrates on outcome not process and that consultation per se is about process and does not constitute an adjustment (see **Owen v Amec Foster Wheeler Energy Ltd (2019 ICR 1593**).".

Time limits

110. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three 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. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

111. We note the principals from the cases of ***British Coal v Keeble [1997] IRLR 336 EAT***; ***Robertson v Bexley Community Service [2003] IRLR 434 CA***; and ***London Borough of Southwark v Afolabi [2003] IRLR 220 CA***;

112. We note the factors from section 33 of the Limitation Act 1980 which are referred to in the ***Keeble*** decision:

    112.1 The length of and the reasons for the delay.

112.2 The extent to which the cogency of the evidence is likely to be affected by the delay.
112.3 The extent to which the parties co-operated with any request for information.
112.4 The promptness with which the claimant acted once he knew the facts giving rise to the cause of action.
112.5 The steps taken by the claimant to obtain appropriate professional advice.

113. We note that the Court of Appeal in the ***Afolabi*** decision confirmed that, while the checklist in section 33 of the Limitation Act provides a useful guide for tribunals, it need not be adhered to slavishly. The checklist in section 33 should not be elevated into a legal requirement but should be used as a guide. The Court suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time and they are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

114. It is also clear from the comments of Auld LJ in ***Robertson*** that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard … "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule".

115. Section 123(3)(a) of the EqA 2010 provides for conduct that extends over a period to be treated as being done at the end of that period.

116. Section 123(3)(b) of the EqA 2010, failure to do something, is to be treated as occurring when the person in question decided upon it. Where there is no evidence to the contrary, s.123(4) of the EqA 2010 provides a default means by which the date of the 'decision' can be identified, either when there is an inconsistent act or alternatively the expiry of the period in which the employer might reasonably have been expected to do it.

117. The identification of the period in which the employer might reasonably have been expected to comply with its duty to make reasonable adjustments (if established) should be taken from the point of view of the Claimant, having regard to facts known or which ought reasonably to have been known by the Claimant at the relevant time. see, ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*** at paragraph 14. As we are reminded by Respondent's Counsel in **Abertawe** it was found that the duty to make adjustments arises as soon as the employer is able to take steps which it is reasonable for it to take to avoid the disadvantage. In determining when that may be, the tribunal should have regard to the facts as they may reasonably have appeared to the Claimant, including what the Claimant was told by her employer.

Breach of contract / deduction from wage

118. The Claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.

119. The Claimant also claims in respect of deductions from wages which she alleges were not authorised and were therefore unlawful deductions from her wages contrary to section 13 of the Employment Rights Act 1996.

120. Section 13 states:

Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not

operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

121. We are reminded by Respondent's Counsel that … "In order to determine whether there has been an unlawful deduction of wages and/or breach of the Claimant's contract of employment, it is necessary to consider the express and/or implied terms of her contract of employment. In construing the written terms of a contract (alleged express terms are relied upon by the Claimant in this case), regard must be had to the intentions of the parties by reference to what the reasonable person would have understood them to be having regard to all the background knowledge available to them as to the meaning of the language used in the contract (**see Campbell v British Airways Plc 2018 WL 06172527** and **Anderson v London Fire and Emergency Planning Authority, 2013 WL 618056**).".

The Decision

122. Considering first the question of disability and knowledge of it.

123. It is accepted that the Claimant, by reason of the impairment of mixed anxiety and depression, with features of PTSD, is currently a disabled person as defined in section 6 of the Equality Act 2010.

124. What we need to determine is from when the Claimant met that definition.

125. As was confirmed at the start of this hearing the Respondent accepts the Claimant was a disabled person for that reason from some point in December 2017.

126. The Claimant asserts in her witness statement that she was a disabled person for that reason for some time in 2005 to 2007. This is different to what is stated in the agreed list of issues where the Claimant confirmed it was from the 23 May 2017.

127. We can see from the evidence presented by the Claimant that she has health issues associated with anxiety, stress and depression from 2005. However, we have not been presented with evidence that what happened in 2017 was a recurrence of what happened before. However, even if we give the Claimant the benefit of doubt on this and agree with her that she meets the definition from some point in 2005 to 2007 the key issue in this claim is the Respondent's knowledge about the matter.

128. The Claimant asserts that the Respondent had all the requisite knowledge for the complaints made by the 22 June 2017. The Respondent asserts it would all be from December 2017.

129. This therefore only has an impact on the reasonable adjustment complaint, as the direct disability discrimination complaint relates to a period of August 2018 to February 2019.

130. There has been no evidence presented to us to suggest the Respondent is made aware of a potential linkage between what the Claimant suffered in 2005 to 2007 and then in 2017 onwards.

131. So, what did the Respondent know by 22 June 2017?

132. The Claimant is not absent from work for any sickness related reason for a period of more than 5 years before her absence on the 26 January 2017 for reason of … "Nervous System – migraine/headaches". The Claimant asserts that she believes at that point her then line manager, as it was her first day of sickness absence in more than 5 years, should have been alerted that it was possible that a more serious problem existed. This may be the Claimant's belief, but it is not a reasonable conclusion to assert in our view. The Claimant herself in her meeting with her line manager at that time says she could not face work on that day. That, alongside there being no absence in over 5 years prior to that does not suggest a more serious problem. What follows it is then a day of compassionate leave on the 23 February 2017. It is not until the 11 August 2017 that sickness absence for anxiety and depression begins.

133. We also note that the GP notes (at page 359) do not suggest an issue in 2017 being linked to stress until 6 June 2017.

134. The Claimant explains in her statement that it was during May 2017 when she had a 1:1 with Phil that she explained how unwell the problems with her team were making her feel and she says she asked for an OH referral and a stress reduction plan.

135. We are referred to some text messages at that time (pages 98 to 101) that show concerns being raised about the work issues, and that the Claimant was looking for a complete change, but they do not say that she is seeking an OH referral or a stress reduction plan. Further, the Claimant remains at work at this time.

136. It is not in dispute that there is a verbal assault of the Claimant by a work colleague on the 1 June 2017. There then follows a constructive dialogue between the Claimant and ET. It is agreed that the Claimant can work from home for two weeks.

137. The Claimant then returned to the workplace around the 19 June 2017.

138. There is then an OH referral on the 21 June 2017.

139. The OH report dated 22 June 2017 (at pages 334 to 335) says that the Claimant is fit for full work duties, that management should address the work issues,

advised that a stress work assessment be carried out, if feasible she be allowed to work from home over a period of 6 weeks, and that her level of stress be monitored in a 1:1 meeting at regular intervals to ensure her condition is improving.

140. OH confirms that based on their interpretation, the Claimant's stress/anxiety bullying and harassment condition is unlikely to be considered a disability because it has not lasted longer than 12 months and is not having a significant impact on her ability to undertake normal daily activities. There is no challenge by the Claimant at that time to this conclusion by OH.

141. We do not find based on these findings that the Respondent had all the requisite knowledge of disability relevant to the reasonable adjustment complaint by the 22 June 2017.

142. So, by when did the Respondent have such knowledge?

143. After receipt of the OH report DW has a conversation with the Claimant, and she confirmed that she wanted to take matters to her line manager herself. DW confirmed that he left the Claimant to do so.

144. We accept that the Claimant raised the OH report and its recommendations with her then line manager in late June 2017. The Claimant then has annual leave from mid July 2017 returning on the 8 August 2017. There is then a 1:1 with her line manager and the Claimant says she raised her concerns about the fact that the recommendations from the OH outcome report had still not been implemented.

145. The Claimant then commences sickness absence from the 11 August 2017 which is recorded as being for reason of anxiety and depression.

146. On the 11 September 2017 there is then a meeting with the Claimant, her union representative and ET (see pages 104 to 107). It is set up to complete the stress risk assessment and stress reduction plan. ET explained in her evidence that there had been confusion between the Claimant's line manager and DW as to who was taking the matter forward (them each thinking the other was doing it). It was chased by the Claimant's union representative in early September 2017 and ET checked to confirm the position.

147. The Claimant agreed in cross examination that at the meeting on the 11 September 2017 she had discussed all the issues that caused difficulty and there were five areas causing it, but two were thought to be the most important at that time. The Claimant confirmed that she had no criticism of what was done up to that point.

148. There are then a number of meetings between the Claimant and the Respondent, at the beginning of October 2017 with SF, then on the 16 October with AB and then on the 1 November 2017 with AB when the Claimant returns back to work on an agreed phased return.

149. The Claimant refers in her witness statement (page 4) to meeting with SF in early November 2017 and that he made an OH referral. There is then a further OH report dated 7 November 2017 (pages 336 to 337). It confirms that the Claimant is medically fit for work and is benefiting from the return to work plan and support in place, and that she would also benefit from working from home when possible. It also notes that a stress reduction plan is in place and is on a project where she can avoid managing staff (page 336).

150. OH holds the view at that time that the Claimant does not satisfy the definition of disability (see page 337) because as at that time her symptoms (although having a significant impact on her ability to carry out daily activities including work at that time) have not yet lasted for longer than 12 months. There is no challenge by the Claimant at that time to this conclusion by OH.

151. There is then the telephone conversation between the Claimant and SF on the 14 December 2017.

152. We accept the evidence of SF on this matter. The Claimant had returned to work on the 1 November 2017 with a positive trajectory: however, by December 2017 it was clear that was faltering. We find that the Respondent had knowledge (constructive or actual) of the Claimant's disability by 14 December 2017.

153. Having confirmed our findings as to disability and knowledge of it we now move to consider the alleged PCP, has that and the alleged substantial disadvantage that arises from it, when compared to non-disabled comparators, been proven on the balance of probability?

154. The alleged PCP is the Respondent … "Not adopting the recommendations of Occupational Health (namely, a Stress Risk Assessment and regular meetings).".

155. The alleged substantial disadvantage is, when compared to someone without the Claimant's disability that … "Occupational Health recommended that the Claimant should have a Stress Risk Assessment and regular meetings to manage her disability related health issues at work, and by not doing so, as alleged by the Claimant, her health could not improve and she was unable to return to work.".

156. The asserted disadvantage links to the stress reduction assessment/plan and regular meetings not happening.

157. There is a period from the 22 June 2017 to the 11 September 2017 before the stress reduction plan and then regular meetings started to happen.

158. This would suggest that knowledge of any asserted substantial disadvantage would predate the Respondent having constructive or actual knowledge of the disability.

159. The reasonable adjustment complaint is also reliant on us finding that the asserted PCP exists. The Respondent denies it had such a PCP, having taken the steps set out in the OH report. As Respondent's Counsel asserts in her written submissions (paragraph 19) … "There is absolutely no evidence that the

Respondent had a practice in place of not following OH advice and/or a provision to that effect. In fact, the evidence points very clearly the other way. Even if it failed to follow OH advice through inadvertence or incompetence on this occasion, that does not constitute having a practice of doing so which is what the law requires.". As also put in her oral submissions that there is no written evidence of such a provision and at best all we have is a one-off situation where there are OH recommendations not potentially followed straight away.

160. Did the Respondent apply the PCP of not adopting the recommendations of Occupational Health (namely, a Stress Risk Assessment and regular meetings)?

161. We do not find that the alleged PCP of the Respondent has been proven on the balance of probability to exist. The Respondent did conduct a stress risk assessment and hold regular meetings with the Claimant. There is a delay between the OH report on the 22 June 2017 and the meeting on the 11 September 2017, but it was done. The Claimant does not assert that the Respondent had a PCP of delaying the adoption of the recommendations of Occupational Health (namely, a Stress Risk Assessment and regular meetings).

162. As the alleged PCP does not exist, we cannot find that the alleged substantial disadvantage has been proven on the balance of probability, because you cannot have one without the other. The Claimant has alleged that she was at a substantial disadvantage compared to someone without her disability, in that Occupational Health recommended that the Claimant should have a Stress Risk Assessment and regular meetings to manage her disability related health issues at work, and by not doing so, as alleged by the Claimant, her health could not improve and she was unable to return to work. The Claimant did return to work on a phased return on the 1 November 2017.

163. The Claimant asserts that it would have been reasonable for the Respondent to implement a stress risk assessment and have regular meetings to manage her disability related health issues at work. We find that the Respondent did do this. We also find that it went further than that, setting up support contact from AB and SF, changing the Claimant's job role so as to remove her line management responsibilities, allowing her to change work location, setting up an agreed phased return, moving the Claimant's non-working day, allowing for working from home, assigning TS as her permanent line manager and introducing a DETP.

164. We also acknowledge here that as submitted by Respondent's Counsel a stress risk assessment and regular meetings on their own could be viewed as process not outcome (as per **Owen**). What we have noted as being done by the Respondent were the outcomes of that process.

165. For all these reasons we do not find that the Respondent has failed in the duty to make reasonable adjustments. This complaint therefore fails and is dismissed.

166. With this finding we do not need to go on and consider the limitation issues. We would observe though that the Claimant's failure to make a reasonable adjustments complaint was not made within the time limit in section 123 of the Equality Act 2010. The potential limitation to contact ACAS would appear to have

been in mid- December 2017, based on if there was a failure it was rectified by the 11 September 2017, so that the claim was not made to the Tribunal within three months (plus early conciliation extension) of the alleged failure to make reasonable adjustments.

167. As to whether it is it just and equitable in all the circumstances to extend time, the Claimant has relied upon the same reasons why she did not submit the complaint of direct discrimination before she did (see page 6 of the Claimant's witness statement). This does not expressly explain matters for the reasonable adjustment complaint. However, even if we give the Claimant the benefit of the doubt on that, the Respondent has articulated significant prejudice (as set out in paragraph 18 of the Respondent's Counsel's written submissions and articulated in her oral submissions). We have noted that all of the witnesses could not recall exact dates and details of meetings and conversations. This does give the Respondent difficulty in answering this claim definitively with full facts at the forefront of their mind. This is further compounded by the Claimant not raising a grievance about this matter at the time, despite union support and having gone through the grievance process for the sick pay matter. Also, based on the Claimant's evidence to this Tribunal, what more she is asserting the Respondent could have done, is not something she ever articulated to the Respondent before now. From that we can see that the Respondent would have significant prejudice in defending those matters.

168. So, to consider the complaint of direct discrimination. The Claimant alleges that the Respondent refused to classify the Claimant's absence following an alleged verbal assault on the 1 June 2017 by a work colleague as "Assault - work related" absence at various points from August 2018 until the Grievance outcome (February 2019). This is what happened, the Respondent did refuse to classify the Claimant's absence in this way.

169. Was that less favourable treatment? We have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated. The Claimant says she was treated worse than a hypothetical comparator.

170. With regard to the complaint for direct discrimination the Claimant needs to prove some evidential basis upon which it could be said that this hypothetical comparator would not have suffered the same allegedly less favourable treatment as the Claimant.

171. We have not been presented evidence to prove on the balance of probability that a hypothetical comparator would have been treated more favourably.

172. We accept the evidence of the Respondent (in particular TS) that the decision was because it was understood there was no such entitlement for the Claimant's absence to be classified in this way as the Respondent's procedure/policy only applied to an assault by a customer/DWP claimant and not a work colleague.

173. About this complaint we find that no facts have been established upon which we could conclude (in the absence of an adequate explanation from the Respondent), that an act of discrimination has occurred. In these circumstances the Claimant's complaint of direct discrimination, fails and is dismissed.

174. So, to consider whether the Respondent made unauthorised deductions from the Claimant's wages and / or acted in breach of contract by not paying her full pay while off sick.

175. The Claimant asserts that her absence following an alleged verbal assault on the 1 June 2017 by a work colleague should have been classified as "Assault - work related" absence resulting in full pay being properly payable to her. The Claimant claims that any short fall in her full pay is therefore an unauthorised deduction from wage or a breach of contract complaint that was outstanding when the Claimant's employment ended (her being off sick to the termination of her employment for ill health reasons).

176. We are reminded by Respondent's Counsel that … "In order to determine whether there has been an unlawful deduction of wages and/or breach of the Claimant's contract of employment, it is necessary to consider the express and/or implied terms of her contract of employment. In construing the written terms of a contract (alleged express terms are relied upon by the Claimant in this case), regard must be had to the intentions of the parties by reference to what the reasonable person would have understood them to be having regard to all the background knowledge available to them as to the meaning of the language used in the contract.".

177. We accept that there is a contractual right to benefit from full pay when absence is classed as "Assault - work related". That classification though is necessary for full pay to then be properly payable to the Claimant.

178. We accept that there are a number of ingredients required to satisfy that classification, such as the assault being by a customer or DWP claimant. We accept the Respondent's evidence as to the rational for those so being what the reasonable person would have understood them to be having regard to all the background knowledge available to them as to the meaning of the language used in the clauses.

179. The Claimant did not satisfy them all, and only satisfied some of them much later after the accident report was completed. The Claimant did not though suffer a verbal assault by a customer or DWP claimant.

180. For these reasons the Claimant has not proven that full pay was properly payable to her, nor that there was a breach of contract. For those reasons this complaint also fails and is dismissed.

181. We accept that our analysis of this matter has benefited from being able to see the full and final explanation on the clauses' interpretation that followed a variety of different explanations by the Respondent. It is therefore understandable why the Claimant has sought to challenge the matter.

182. The unanimous judgment of the tribunal is therefore that the complaints of direct disability discrimination, for failure in the duty to make reasonable adjustments, and for unauthorised deductions from wage / breach of contract, all fail and are dismissed.

183. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 12; the findings of fact made in relation to those issues are at paragraphs 13 to 90; a concise identification of the relevant law is at paragraphs 91 to 121; how that law has been applied to those findings in order to decide the issues is at paragraphs 122 to 182.

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Employment Judge Gray
Date 24 October 2022

JUDGMENT SENT TO THE PARTIES ON
26 October 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE