EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms Ema Holt **v** **London Borough of Haringey**

Heard at: Norwich by CVP

On: 8 to 12, 15 to 19 and 22 to 26 August 2022, in chambers 10 & 11 October 2022

Before: Employment Judge Warren

Members: Mr D Sutton
Mr I Murphy

Appearances

For the Claimant: In person

For the Respondent: Mr C Crow, counsel

RESERVED JUDGMENT

1. The Claimant's claims of unfair dismissal, disability discrimination, that the respondent has failed to comply with its obligations in relation to a request for flexible working and of breach of contract, all fail and are dismissed

REASONS

Background

1. By two claims issued on 24 January 2020 and 25 July 2020, Ms Holt brings claims of unfair dismissal, wrongful dismissal and disability discrimination arising out of her employment with the respondent as a Human Resources Advisor between 24 October 2016 and 4 March 2020. Early conciliation on the first claim was 26 November to 26 December 2019. Early conciliation on the second claim was between 27 May and 27 June 2020.

2. The case has been the subject of three preliminary hearings: before Employment Judge R Lewis on 19 January 2021, Employment Judge Manley on 18 May 2021 and Employment Judge Welsh on 4 April 2022.

3. Employment Judge Manley was responsible for listing this hearing. In her hearing summary, she set out what was at the time, an agreed list of issues. There was further work on the list of issues by the parties subsequent to that hearing, for the agreed list of issues appearing in the bundle, (see below) differs from that set out by EJ Manley.

4. Employment Judge Welch set out a hearing timetable which, taking into account reasonable adjustments for Ms Holt in the process, anticipated closing submissions and start of tribunal deliberations on day 12. As events have unfolded, we heard submissions on day 13, which took all day. We correctly anticipated not being in a position to give a full judgment on day 15, which is why we adjourned to give a reserved decision. The volume of material to consider has meant that we needed 2 more days for our deliberations.

5. At the preliminary hearing before Employment Judge Welch, Ms Holt withdrew claims for holiday pay and unlawful deduction form wages. EJ Welch accordingly gave judgment dismissing those claims on withdrawal.

6. EJ Welch set out adjustments for this final hearing to accommodate Ms Holt's disabilities and made arrangements for Ms Holt to be able to seek assistance from the Intermediaries Service. She recorded that the list of issues had been amended by agreement between the parties, the amendments arising at the instigation of Ms Holt following disclosure. The agreed list of issues was attached to EJ Welsh's hearing summary.

The conduct of this hearing

7. The tribunal had the benefit of a report from Communicort Limited, accredited intermediaries commissioned by the tribunal administration to assist us in ensuring the effective participation of Ms Holt in this hearing. Recommendations were made on the basis of which it was not anticipated Ms Holt would need to be accompanied by an intermediary. Having regard to Communicort's recommendations and in discussion with Ms Holt as to her wishes, we agreed upon the following:

    7.1 As had already been canvassed at the preliminary hearings, the tribunal start time would be 11am each day and we would finish at 4. As it happens, the parties, including Ms Holt, contrary to our expectations, turned up at 10am on the first day of the hearing, day 2, (day 1 had been spent reading in). Ms Holt was content to start at 10am and work a full day on day 1. Thereafter we began at 11am every day.

    7.2 We would break every 50 minutes for 10 minutes and for 1 hour for lunch every day, We adhered to that arrangement throughout the hearing. Ms Holt was clear that she could request a break at any time

and occasionally did, including for half a day on day 9, (18 August 2022) when we started at 2pm.

7.3 Ms Holt had the use of a calendar and an agreed chronology.

7.4 In cross examination, Mr Crow took care to carefully introduce each new topic and avoided lengthy questions or questions with multiple parts. When occasionally he lapsed, he corrected himself.

7.5 One concern which Ms Holt had was that she might lose her voice. As a contingency, she had a microphone and amplifier which she intended to place in front of her laptop microphone. I suggested she consider a headset similar to that which I was using, consisting of headphones and an attached microphone. We discussed that if she lost her voice, we would break overnight to given her voice a chance to recover.

7.6 Ms Holt did indeed lose her voice, over the first weekend, so that we encountered the problem on the morning of day 6, (15 August 2022). Using the amplifier in front of the microphone barely made any difference and we could hardly hear her. All agreed that we would not be able to proceed. On Ms Holt's initiative, a solution was found. She dialled into the CVP hearing room using a mobile phone and by holding the phone close, we were able to hear her sufficiently that everybody agreed it was possible to continue. Overnight, Ms Holt purchased and had delivered a headset with headphones and attached microphone, which she was able to use from day 7 onwards and we were able to hear her perfectly well.

7.7 Finally, I should record that I allowed a good deal of latitude to Ms Holt when she conducting her cross examination of the respondent's witnesses. She conducted herself very well during the course of the hearing, she knew her way around the bundle and had the relevant page numbers immediately to hand. Her questions were well put and succinct. The latitude which I allowed her was that many of the questions were not obviously directly pertinent to the issues, but I restrained my interruptions, having regard to the fact that she is a litigant in person and the potential impact of her fibromyalgia and ME in what is a highly stressful environment.

The Evidence

8. We had a witness statement from Ms Holt. She did not call any other witnesses.

9. For the respondents, we had witness statements from and heard evidence from:

9.1 Ms Daksha Desai, Head of Human Resources.

9.2 Ms Beverley Tarka, Director Adults, Health and Communities, dismissing officer.

9.3 Ms Zina Etheridge, Acting Chief Executive Officer at the time.

9.4 Ms Zena Brabazon, A councillor of the respondent and Chair of the appeal panel.

9.5 Mr Richard Grice, Director for Customers, Transformation and Resources.

9.6 Miss Annessa Salmon, HR Manager.

9.7 Ms Karen Gooday, Head of Employment, Reward and Transformation, (Not employed by the respondent at the relevant time).

10. We heard from one further witness, Mrs Beena Mohabeer, Ms Holt's line manager for some of the relevant time. Mrs Mohabeer was a reluctant witness; she was required to attend the tribunal pursuant to a witness order which had been made in separate applications from both parties. In correspondence direct with the tribunal to the exclusion of the parties, Mrs Mohabeer made application to be excused from attending to give evidence on grounds she asked us to keep confidential. We refused her application. Over the second weekend, 20/21 August 2022, the respondent's solicitors met with Mrs Mohabeer and prepared a witness statement. This was sent to everybody on the Sunday evening and we heard evidence from Mrs Mohabeer on the afternoon of Monday 22 August 2022.

11. We were provided with a properly paginated and indexed bundle of documents, both in paper and PDF format, running to page 1190. This case was very well prepared by the respondent's solicitors so I hesitate to criticise, but it would have been helpful if the bundle in PDF format had been provided with optical character recognition, in accordance with the President's directions.

12. During the course of the hearing the following documents were added by agreement:

12.1 Page 573(A) and (B), two missing pages from the grievance report by Mr Blanchard, of April 2020.

12.2 Page 1054(A), a page missing from the minutes of the appeal hearing.

12.3 Page 1191 and 362(A) , being copies of flexi record sheets.

12.4 Pages 1192 to 1201, being transcripts of three telephone calls and copies of two emails relating to the arrangements for delivery of the dismissal appeal outcome.

12.5 Pages 1203 to 1206, email correspondence in relation to Ms Holt attending a course on GDPR.

12.6 Page 1202, transcript regarding Ms Holt's HRBP application.

13. On day 12, (23 August 2022) Ms Holt sought the tribunal's permission to introduce two further extracts from transcripts of an interview of Mrs Mohabeer during the grievance investigation. Mrs Mohabeer had finished giving her evidence the previous day. Ms Holt wanted to refer to the transcripts in order to cast doubt on Mrs Mohabeer's credibility on two topics; whether she knew that Ms Holt was the co-ordinator of Procurement, which took a lot out of her and whether she had received and read links to documents giving information about fibromyalgia and ME.

14. By way of background, the bundle contained agreed excerpts from transcripts of recordings of investigations for Ms Holt's grievance and disciplinary as well as of the grievance, disciplinary and appeal hearings. Agreed excerpts were included because full transcripts represented a huge amounts of documentation. As Ms Holt said, she had not requested these pages from the grievance interview of Mrs Mohabeer be included because she had not realised Mrs Mohabeer would deny in cross examination that she knew Ms Holt was responsible for procurement or that she had read the documents relating to her disabilities. Ms Holt's request was opposed by the respondent. We refused the request for the following reasons:

14.1 We had regard to the overriding objective and the need to balance the relative prejudice to each of the parties.

14.2 Mrs Mohabeer was a reluctant witness for health reasons and if we allowed documents in she would have to be recalled to be cross examined about them.

14.3 Reviewing our notes of Mrs Mohabeer's evidence, on both issues she was very tentative and made clear her uncertainty as to her recollection. Whilst on the one hand, she had acknowledged she had received and read the attachments about Ms Holt's disabilities, she also said that she had not received or read them, she was uncertain and said she could not recall.

15. In our judgment, the excerpts from the transcript provided insufficient doubt as to Mrs Mohabeer's credibility as to render it proportionate to recall her.

16. As for Ms Holt's point that Mrs Mohabeer had remarked in the transcript that her role as Co-ordinator of Procurement took a lot out of her, that was not a new point, she could have asked for this page to have been included in the bundle in the first place and put it to Mrs Mohabeer during cross examination.

17. The key point was that Ms Holt had sent an email to her manager, Ms Giovanna Azzopardi and her future manager Mrs Mohabeer in April 2019,

with attachments giving information about symptoms of fibromyalgia and ME.

18. At the start of the hearing, I confirmed to Ms Holt that she ought not make reference to without prejudice discussions about settlement and such references in her witness statement and the bundle would be disregarded.

The Issues

19. The tribunal was provided with an agreed list of issues, which is set out below by way of cutting and pasting in. I have tidied up the formatting.

Time Limits

1. With respect to the first claim, C contacted ACAS on 26 November 2019. Therefore, any complaint relating to an act or omission (or conduct extending over a period ending)before 27 August 2019 is prima facia out of time.

2. With respect to the second claim, C contacted ACAS on 27 May 2020. Therefore, any complaint relating to an act or omission (or conduct extending over a period ending) before 28 February 2020 is prima facie out of time.

3. In respect of each claim, was the claim presented within the relevant time limits? If not, has C presented her complaint within such other period as the tribunal thinks just and equitable?

Unfair Dismissal

C was dismissed on 5 March 2020.

4. What was the (principal) reason for C's dismissal? Can R show that it was conduct or some other substantial reason… ("SOSR") – both potentially fair reasons in accordance with Section 98(1) and (2) of the Employment Rights Act 1996 ("ERA").

5. If conduct or SOSR was the principal reason for dismissal, was the dismissal fair or unfair in accordance with Section 98(4) ERA?

6. If conduct was the principal reason:

   a. was there a reasonable investigation (within the band of reasonable responses)? C says that there was not.

   b. was the belief in misconduct based upon reasonable grounds?

   c. did R follow a fair process?

   d. was dismissal within the band of reasonable responses? C says that it was not.

7. C relies in particular on the failure to join the grievance and disciplinary processes together; the failure to (again) postpone the disciplinary hearing; and the failure to give C access to a usable computer, connected to the internet, with a large screen, in a private space, in advance of the disciplinary hearing, R withholding evidence from C (namely the grievance email sent to the Claimant's Hotmail account on 3 October 2019, the IT investigation dated between 4 October and 11 November 2019 and the instant messaging conversations between the claimant, Tenneil Francis, Carys McDermott, Vanessa Silva,

and the claimant in October 2019, the emails between Daksha Desai and Eubert Malcolm regarding the report to the data protection team).

8. If the dismissal was unfair, should any adjustment be made to a basic or compensatory award to reflect:

a. any failure to mitigate;

b. the chance, if any, that C would have been fairly dismissed if a fair procedure had been followed;

c. C's blameworthy conduct; and/or

d. any unreasonable failure to comply with the Acas Code of Practice on R's part?

Disability Discrimination

9. It is accepted by R that C was disabled at all material times by reason of her fibromyalgia and chronic fatigue syndrome.

Direct Discrimination

10. Was C, because of her disability, treated less favourably than someone in materially the same circumstances, but not sharing her disability, would have been treated, by:

a. Zina Etheridge not responding to C's request of 3 October 2019 (within the cover letter to the grievance) for an Environmental Stress Audit?

11. C relies on a hypothetical and actual comparator – a bilateral amputee (Malcolm) who was employed in Children's Services, Social Work Team B, who complained to the Chief Executive in 2019 about the lack of personal evacuation plans.

Discrimination Arising From Disability

12. Did R treat C unfavourably by:

a. not investigating the alleged decline in C's performance; and/or

b. dismissing C?

13. If so, was this because of:

a. C's absence; and/or

b. her sending a "grievance email to Hotmail" on 3 October 2019?

14. If so, were those matters that arose in consequence of C's disabilities?

15. If so, did R know (or could it reasonably have been expected to know) that C had the relevant disabilities?

16. If so, was the treatment a proportionate means of achieving one or more of the following (alleged) legitimate aims:

a. consistent and fair application and enforcement of contracts and policies;

b. effective management of the workforce;

c. complying with legal requirements, such as GDPR;

d. complying with contractual requirements, such as confidentiality;

e. upholding professional standards;

f. protecting R's reputation;

g. maintaining the confidence of staff who look to HR for guidance and support; and/or

h. protecting the independence of the disciplinary chair to decide appropriate sanctions on a case by case basis?

Indirect Discrimination

17. Did R apply the following PCP to C and those who do not share her disabilities:

relying on staff to request, unprompted, any reasonable adjustment they may require, during the recruitment process?

18. If so, did those PCPs put those with C's disabilities at a substantial disadvantage in comparison with those without them? C says that those with her disabilities need more time to prepare for interviews, because of fatigue.

19. If so, did the PCPs put C at that disadvantage? She had less time to prepare for the interview than others. She did not know she did not need to cancel her leave and could have had more time to prepare as interviews were scheduled across two weeks.

20. If so, were the PCPs a proportionate means of achieving a legitimate aim? R relies on paragraph 16(a)-(h), above.

Reasonable Adjustments

21. Was there PCPs of:

a. HR Advisors' casework being allocated to an advisor based on their "patch" of business units and/or at management discretion?;

b. HR Advice team members present at work, to provide necessary cover for any team member(s) absent?

22. C avers that the PCP put her to the following disadvantages in comparison with those not sharing her disabilities because she was unable to carry out a full workload

23. At all material times, did R know or ought it reasonably have been expected to know that C had the relevant disabilities and was placed at the substantial disadvantage relied upon?

24. If so, did R fail to take such steps as were reasonable to take to avoid the alleged disadvantage? C avers that R should have:

a. carried out a stress risk assessment from May 2019 onwards;

b. reduce caseload, extending deadlines or reducing other duties;

c. considered extra staffing requirements; and/or

d. redeployed C on a temporary basis.

Harassment

25. Did R's employees or authorised agents engage in unwanted conduct related to C's disabilities by:

a. Daksha Desai and Anessa Salmon failing to advance the conduct issue concerning C's "Rome wasn't built in a day" comment from 12 August 2019 onwards.

b. Beena Mohabeer, on 3 September 2019, telling C she did not have a diagnosis when C raised her ME/CFS and FM disabilities;

c. Anessa Salmon, at a meeting on 9 September 2019:

i. saying that C would need to attend the full day in person to understand what was required of her from her role; questioning C's disability;

ii. questioning C's disability; and/or

iii. blaming C for decisions made by others before her employment and while she was absent

d. Anessa Salmon, at the away day of 11 September 2019 telling C, "you think you can't sack someone who's disabled; well, you can";

e. Anessa Salmon, on 23 September 2019, asking C to cease her phased return and attend work for her full hours from the next day, contrary to GP fit notes;

f. Daksha Desai, on 26 September 2019, sending HR staff an email expressing happiness that there were to be no fixed desks for "DDA" reasons in the new office;

g. Beena Mohabeer, in September 2019, asking C to provide evidence of management approval of her flexible working agreement when C asked for an update on her flexible working application;

h. Anessa Salmon, on 28 October 2019, when C asked for an update on her flexible working application, repeatedly asking C for evidence of management approval of her flexible working agreement, referencing it would be reviewed and could be revoked;

i. Anessa Salmon, on 29 October 2019 password protecting the case plan without advising C, preventing C from using it;

26. Did the unwanted conduct have the proscribed purpose or proscribed effect set out in Section 26(1)(b) EqA, bearing in mind Section 26(4) EqA?

Victimisation

27. Did C's submission of her grievance of 3 October 2019 amount to her doing a protected act?

28. Did R's employees or authorised agents subject C to a detriment because she had done a protected act, by:

a. failing to investigate her grievance in line with its own policy, by breaching her confidentiality, unreasonably delaying her grievance, breaching the ACAS code, withholding evidence and/or not giving her a right of appeal;

b. refusing C's request for the grievance and disciplinary processes to be joined or heard together;

c. R withholding evidence from C, (namely the grievance email sent to the Claimant's Hotmail account on 3 October 2019, the IT investigation dated between 4 October and 11 November 2019 and the instant messaging conversations between the claimant, Tenneil Francis, Carys McDermott, Vanessa Silva, and the claimant in October 2019 and the claimant in October 2019, the emails between Dacsha Desai and Eubert Malcolm regarding the report to the data protection team);

d. summarily dismissing C;

e. unnecessarily delaying C's appeal in breach of the Acas Code and its own policies; and/or

f. dismissing C's appeal.

Failure to Respond to a Flexible Working Request

29. C relies on a Flexible Working Request she submitted on 16 July 2019.

30. Is C entitled to bring a claim under Section 80H ERA?

31. Did she make a valid request under Section 80F ERA?

32. If so, did R respond to the request?

33. If not, what remedy, if any, should be granted under Section 80I ERA?

Notice Pay

34. Did C fundamentally breach the contract of employment by committing gross misconduct?

35. To how much notice was C entitled?

The Law

Disability Discrimination

20. Disability is a protected characteristic pursuant to s.4 of the Equality Act 2010, (EQA).

21. Section 39(2)(c) and (d) proscribes discrimination by an employer by either dismissing an employee or subjecting her to any other detriment.

22. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285: the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

23. Section 39(5) imposes a duty on an employer to make reasonable adjustments.

Burden of Proof

24. In respect of the burden of proof, s.136 reads as follows:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred;
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

25. The Court of Appeal gave guidance on how to apply the equivalent provision of s.136 under the previous discrimination legislation, in the case of Igen Ltd v Wong and Others [2005] IRLR 258. There, the Court of Appeal set out a series of guidance steps, that guidance may still be relied upon, see Underhill LJ at paragraph 14 in Greater Manchester Police v Bailey [2017] EWCA Civ 425. We have carefully observed those steps in this case. A Tribunal may however, consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is

a *prima facie* case; there is a difference between factual evidence and explanation, see Madarassy v Nomura International plc [2007] IRLR 246 CA

Indirect Discrimination

26. Indirect discrimination is defined at s.19 as follows:

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

27. The effect of s.136, is that it is for the claimant to show *prima facie* the existence of a provision, criterion or practice, (PCP) and that such PCP placed the claimant's group sharing her protected characteristic at a disadvantage as compared to another group that does not share her protected characteristic and that the PCP was applied to the claimant which resulted in her being subjected to that disadvantage. These are primary facts which the tribunal has to find before the burden of proof shifts to the respondent, see Project Management Institute v Latif [2007] IRLR 579 and Bethnal Green and Shoreditch Education Trust v Jeanne Dippenaar UKEAT/0064/15/JOJ.

Reasonable Adjustments

28. Section 20 defines the duty to make reasonable adjustments. It comprises three possible requirements, the first and third of which might apply in this case set out at subsections (3) as follows:-

> "(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"

29. Section 21 provides that a failure to comply with such requirements is a failure to make a reasonable adjustment, which amounts to discrimination.

30. There are five steps to establishing a failure to make reasonable adjustments (as identified in the pre-Equality Act 2010 cases of Environment Agency v Rowan [2008] IRLR 20 and HM Prison Service v Johnson [2007] IRLR 951). The Tribunal must identify:

30.1 The relevant provision criterion or practice applied by or on behalf of the employer;

30.2 The identity of non-disabled comparators, (where appropriate);

30.3 The nature and extent of the substantial disadvantage suffered by the disabled employee;

30.4 The steps the employer is said to have failed to take, and

30.5 Whether it was reasonable to take that step.

31. It is important for the claimant to identify the PCP relied upon and for the Tribunal to makes its decision on the PCP advanced by the claimant, see Secretary of State for Justice v Prospere UKEAT/0412/14.

32. In relation to reasonable adjustments, the burden of proof was explained by Elias J in Project Management Institute v Latif UKEAT/0028/07CEA at [54]: the Claimant must establish that a duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Once that is established, the burden is reversed to the Respondent to show that the proposed adjustment is not reasonable. The same approach would apply in relation to the provision of auxiliary aids.

Harassment

33. Harassment is defined at s.26:

> "(1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are—
>
> … disability;
>
> …

34. We will refer to that henceforth as the proscribed environment. There are three factors to take into account:

34.1 The perception of the Claimant;

34.2 The other circumstances of the case, and

34.3 Whether it is reasonable for the conduct to have that effect.

35. The conduct complained of that is said to give rise to the proscribed environment must be related to the protected characteristic. That means the Tribunal must look at the context in which the conduct occurred. It also means that general bullying and harassment, in the colloquial sense, is not protected by the Equality Act; protection from such behaviour only arises if it is related in some way to the protected characteristic. See Warby v Wunda Group Plc UKEAT/0434/11/CEA

36. HHJ Richardson observed in Hartley v Foreign and Commonwealth Office Services UKEAT/0033/15/LA at paragraph 23:

> "The question posed by section 26(1) is whether A's conduct related to the protected characteristic. This is a broad test, requiring an evaluation by the Employment Tribunal of the evidence in the round — recognising, of course, that witnesses will not readily volunteer that a remark was related to a protected characteristic. In some cases the burden of proof provisions may be important,... The Equality Code says (paragraph 7.9):
>
> '7.9. Unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic.' …"

37. The motivation and thought processes of those accused of harassment may be relevant to the question of whether their conduct amounted to harassment, see Unite the Union v Nailard [2018] IRLR 730 at paragraphs 108 -109.

38. Sir Patrick Elias in Grant v Her Majesty's Land Registry [2011] EWCA Civ 769 said of the words, "intimidating, hostile, degrading, humiliating or offensive" that Employment Tribunals, "*should not cheapen"* the significance of those words, they are an important control to prevent trivial acts causing minor upsets being caught up in the concept of harassment.

Direct Discrimination

39. Direct discrimination is defined at s.13 as follows:

> (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…
>
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

40. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the Claimant, but not having her protected characteristic, or it may be a hypothetical comparator, constructed

by the Tribunal for the purpose of the comparison exercise. The employee must show that she has been treated less favourably than that real or hypothetical comparator.

41. In a case of direct disability discrimination, the comparator would be a person in the same circumstances as the claimant, but who is not disabled as defined in the Equality Act 2010, see London Borough of Lewisham v Malcolm [2008] UKHL 43.

42. How does one determine whether any particular less favourable treatment was, "because of" a protected characteristic? There is no difference in meaning between the term, "because of" in section 13 and "on the grounds of", under the pre-Equality Act legislation, (see Onu v Akwiwu and Taiwo v Olaigbe [2014] IRLR 448 at paragraph 40).

43. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572. Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic? - (see paragraphs 13 and 17).

44. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence".

45. The treatment of non-identical comparators in similar situations can assist in constructing a picture of how a hypothetical comparator would have been treated: Chief Constable of West Yorkshire v Vento (No. 1) (EAT/52/00) (8 June 2000) at [7].

46. The application of section 136 and the burden of proof is straightforward, as set out above.

Disability Related Discrimination

47. Disability Related discrimination is defined at s.15 as follows:

> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

48. Determining whether treatment is unfavourable does not require any element of comparison, as is required in deciding whether treatment is less favourable for the purposes of direct discrimination. There is a relatively low threshold of disadvantage for treatment to be regarded as unfavourable. It entails perhaps placing a hurdle in front of someone, creating a particular

difficulty or disadvantaging a person, see Williams v Trustees of Swansea University Pension and Assurance Scheme [2019] UKSC.

49. The difference between Direct Discrimination on the grounds of disability and Disability Related Discrimination is often neatly explained in these terms: direct discrimination is by reason of the fact of the disability, whereas disability related discrimination is because of the effect of the disability.

50. As for the difference between making a reasonable adjustment and disability related discrimination, in General Dynamics v Carranza UKEAT 0107/14/1010 HHJ Richardson explained that reasonable adjustments is about preventing disadvantage, disability related discrimination is about making allowances for that persons disability.

51. There are 2 separate causative steps: firstly, the disability has the consequence of causing something and secondly, the treatment complained of as unfavourable must be because of that particular something, (Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN).

52. There is no requirement that the employer was aware that the disability caused the particular something, City of York Council v Grosset [2018] EWCA Civ 1105 although, as the Court of Appeal observed in that case, if the employer knows of the disability, it would be, "*wise to look into the matter more carefully before taking the unfavourable treatment".*

53. Simler P, (as she then was) reviewed the authorities and gave helpful guidance on the correct approach to s15 in Pnaiser v NHS England [2016] IRLR 170 which may be summarised as follows:

    53.1 The tribunal should first identify whether the claimant was treated unfavourably and if so, by whom.

    53.2 Secondly, the tribunal should determine what caused the treatment, focussing on the reason in the mind of the alleged discriminator, possibly requiring consideration of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive is irrelevant.

    53.3 Thirdly, the tribunal must then determine whether the reason for the unfavourable treatment was the, "something arising" in consequence of the claimant's disability. There could be a range of causal links. The question of causation is an objective test and does not entail consideration of the thought processes of the alleged discriminator.

54. As to the burden of proof, the claimant will have to show:

    54.1 That she was disabled at the relevant time;

    54.2 That she had been subjected to unfavourable treatment;

54.3 A link between the unfavourable treatment and the, "something", and

54.4 Evidence from which the tribunal could properly conclude that the, "something" was an effective cause of the unfavourable treatment.

55. It the claimant proves facts from which the tribunal could conclude that there was section 15 discrimination in this way, the burden of proof shifts to the respondent to prove a non-discriminatory explanation, or justification.

Victimisation

56. Section 27 defines victimisation as follows:

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

57. The meaning of, "detriment" is explained above.

58. Whether a particular act amounts to victimisation should be judged primarily from the perspective of the alleged victim, whether or not they suffered a "detriment". However, an alleged victim cannot establish detriment merely by showing that she had suffered mental distress, she has to show that such was objectively reasonable in all the circumstances; see St Helens Metropolitan Borough Council v Derbyshire [2007] IRLR 540 HL.

59. To be an act of victimisation, the act complained of must be, "because of" the protected act or the employer's belief. What that means is discussed above in the context of direct discrimination.

60. The application of section 136 and the burden of proof is straightforward, as set out above.

Time

61. Section 123 of the EQA requires that claims of discrimination must normally be made within 3 months of the act complained of, or such further period as

the Tribunal considers just and equitable. Where an act continues over a period of time, time runs from the end of that period, from the last act.

Unfair Dismissal

62. Section 94 of the Employment Rights Act 1996, (ERA) contains the right not to be unfairly dismissed. Section 98 at subsections (1) and (2) set out five potentially fair reasons for dismissal, one of which at subsection (2)(b) is the conduct of the employee and the fifth of which, if the reason is not one of those listed at s98(2), is, *"some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held"*, (s98(1)(b)).

63. If such a reason is established, the Tribunal must go on to apply the test in Section 98(4):

> "Where the employer has fulfilled the requirement of subsection (1) the determination of the question whether the dismissal was 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."

64. This will entail the Tribunal asking itself whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt.

65. We have guidance from the appeal courts on how to apply that test where the grounds for dismissal relied upon by the employer is misconduct. The first is the test set out in the case of British Home Stores v Burchell [1980] ICR 303. The Tribunal must be satisfied that the employer holds a genuine belief, based upon reasonable grounds and reached after a reasonable investigation. It is for the employer to show the genuine belief, the burden of proof in respect of the reasonable grounds and the investigation is neutral.

66. If the employer is able to satisfy that test, the Employment Tribunal must go on to apply the test set out in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. The function of the Tribunal is to determine whether in the particular circumstances a decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If a dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

67. In this case, the Respondents say that Ms Holt was guilty of gross misconduct justifying dismissal without warning. The test for gross misconduct, or repudiation, is 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 its employment, see Neary v Dean of Westminster Special Commissions [1999] IRLR 288.

68. "Some other substantial reason" is a, "catch all provision", recognising that the list at s98(2) cannot capture every situation in which a decision to dismiss is potentially fair. From the very wording, of s98(1)(b) it is self-evident that the reason must be:

    68.1 Not the same reason as one of the other potentially fair reasons, although it may contain elements of the other reasons;

    68.2 "Substantial", which means that it must not be frivolous or trivial, and

    68.3 A reason that potentially justified dismissing an employee holding the position the claimant held.

69. The band of reasonable responses test also applies to the question of whether or not the employer's investigation into the alleged misconduct was reasonable in all the circumstances. See Sainsbury v Hitt [2003] IRLR 23.

70. The investigation should be into what the employee wishes to say in mitigation as well as in defence or explanation of the alleged misconduct.

71. Mitigation must be actively considered by the decision maker.

72. We should look at the overall fairness of the process together with the reason for dismissal. It might well be that despite some procedural imperfections, the employer acted reasonably in treating the misconduct as sufficient reason for dismissal.

73. In this case, the Claimant argues that she was treated inconsistently with others. Insofar as that argument relates to a claim of unfair dismissal in the context of Section 98(4), the ACAS Code of Practice on Discipline and Grievance Procedures (2015) provides at paragraph 4 that dealing with issues fairly includes acting consistently. By the same token, the ACAS guide explains that does not necessarily mean that similar offences will always call for the same disciplinary action, one has to look at the context of the particular circumstances. This is reflected in the relevant case law and in particular, the cases of Hadjioannou v Coral Casinos Limited [1981] IRLR 352 and Paul v East Surrey District Health Authority [1995] IRLR 305 in the Court of Appeal. These cases enjoin Tribunals to scrutinise arguments of disparity with particular care, because ultimately it is a question of whether, in the particular case, the decision to dismiss was a reasonable response. An employer in fairness ought to consider whether it has dealt with similar cases differently in the past and equally take into account the particular circumstances of the instant incident and any particular mitigation. Action or inaction in the past may lead employees to believe that certain categories of conduct would be overlooked or at least not dealt with by the sanction of

dismissal. Sometimes inconsistency may point to a suggestion that the reason for dismissal contended for by the employer is not the genuine reason and sometimes, if the circumstances of the two cases compared could truly be said to be parallel, it may not be a reasonable decision to dismiss one employee, when one has not dismissed the other.

Flexible Working

74. Section 80F of the ERA provides:

> (1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if—
>
> (a) the change relates to—
>
> (i) the hours he is required to work,
>
> (ii) the times when he is required to work,
>
> (iii) where, as between his home and a place of business of his employer, he is required to work, or
>
> (iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations. . .
>
> [(b) . . .].
>
> (2) An application under this section must—
>
> (a) state that it is such an application,
>
> (b) specify the change applied for and the date on which it is proposed the change should become effective, [and]
>
> (c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with. . .
>
> (d) . . ..

75. Section 80G provides that an employer has an obligation to deal with such an application in a reasonable manner.

76. Section 80H gives the employee enforcement rights in the employment tribunal, (within 3 months of the, "relevant date").

<u>The Claimant's Credibility</u>

77. We had reason to have concerns about the claimant's credibility in her evidence to the tribunal. Some examples of this are:

77.1 She said in cross examination that she had not been asked on 20 September 2019 to provide a list of duties that she could not undertake. She was taken to an email of that date, (page 363) where she clearly was. Her answer was that she had not been working on 20 September. This is an example of Ms Holt's tendency to be pedantic and difficult to the point that she becomes misleading.

77.2 In evidence when she was questioned about an email that she had received from a lawyer of the respondent giving her instructions to send an employee about an appeal hearing, she sought to answer the criticism of her lack of action by suggesting that the letter at page 286 suggested the action she was being asked to take should be no later than five clear days before the date of the hearing, (that is the employee's appeal hearing). That was plainly not the meaning of that piece of correspondence. The letter the claimant had been asked to send was to inform the employee that he had to provide certain information within five clear days of his hearing. This was an example of Ms Holt's willingness to give evidence off the cuff without regard as to whether it was accurate or truthful.

77.3 When being cross examined on the point where Miss Salmon had asked her whether she was recording, she said that she had become cross with Miss Salmon when she asked her that, but later in her evidence denied having got cross with Miss Salmon.

77.4 In her witness statement at paragraph 90, Ms Holt said that on 12 September 2019 Mrs Mohabeer had telephoned her when she was at home ill, (having rejected her working from home request) implicitly criticising her in that context for calling her. When taken to her log at page 681, she had to concede that she in fact called Mrs Mohabeer.

77.5 At paragraph 194 of her witness statement, Ms Holt alleged that Ms Tarka had, "refused" to make a decision about the outcome of her disciplinary hearing until she, (Ms Holt) had returned from her holiday. We were taken to an email that she had received from her trade union representative on 18 February, (page 535) which appeared to confirm that Ms Tarka was offering, if she reached a decision during Ms Holt's holiday, to allow the period within which an appeal must be submitted, to run from 5 Mach when she was due to return. In cross examination Ms Holt acknowledged that paragraph 194 of her witness statement was wrong, that Ms Tarka had not refused to make a decision, but she then alleged that Ms Tarka had refused to tell her until she returned from holiday. This unexpected evidence prompted the respondent to later introduce, (with the agreement of Ms Holt) further evidence, including transcripts of conversations between Ms Tarka and Ms Holt's union representative and email correspondence. From this new evidence, it was clear Ms Tarka was neither refusing to make a decision nor refusing to give her decision, but was in fact bending over backwards to assist Ms Holt in the timing that her decision was delivered to her, in order to

preserve her position on the time required within which an appeal would have to be submitted.

77.6 When being questioned about the above mentioned additional evidence, Ms Holt initially complained that she had not been told that her telephone conversations were being recorded. She was taken to points at the beginning of each transcript from which one can clearly see that she was told. She knew very well that she was.

77.7 When looking at an email dated 1 December 2020 which referred to an Occupational Health appointment on 8 December, (page 629) Ms Holt reposted that appointment had not taken place. Mr Crow then had to take her to page 637, a copy of the Occupational Health report, which records that the appointment did take place.

77.8 In her witness statement at paragraph 63, Ms Holt says the respondent did not take up her offer to apologise to GG. It was abundantly clear on the written evidence that the respondent had affirmed it wished her to apologise.

77.9 During the disciplinary process, Ms Holt told Mr Malcolm and Ms Tarka that she had undertaken GDPR training. In the appeal hearing she said that she had not undertaken the training referred to. In cross examination of Mrs Brabazon, Ms Holt questioned her on the basis that she had not undertaken the training. In cross examination, on being referred to additional documents submitted in evidence with the agreement of Ms Holt, she confirmed that she had in indeed attended the GDPR training referred to.

77.10 In cross examination, Ms Holt acknowledged that she had been aware that the HRBP post she applied for would have involved her working with Ms Gaffney prior to submitting her application. When taken to page 565 where the grievance investigator, Mr Blanchard, in his grievance report wrote that Ms Holt had said she would not have applied for the post had she known it would have involved working for Ms Gaffney, Ms Holt's immediate response was to say that Mr Blanchard had misquoted her. She then had to be taken to the transcript of the recording of her meeting with Mr Blanchard at page 1202, box 555, which shows that she did indeed tell Mr Blanchard that she would not have applied for the post had she known it involved working for Ms Gaffney.

77.11 Ms Holt raised in cross examination for the first time an allegation that working from home had been removed from her in Septemebr 2019. This was an allegation that was not supported by documentary evidence, in particular by the rota at page 364, and disputed by the respondent's witnesses. It was not a credible allegation to raise for the first time in cross examination.

78. Whilst strictly speaking not evidence under oath, Ms Holt put a number of apparently spurious and unfounded allegations to witnesses during cross examination. For example:

    78.1 She suggested to Mrs Brabazon there had been a failure to ask her about reasonable adjustments for the appeal hearing. That was simply not true as will be demonstrated in the findings of fact below.

    78.2 She suggested to Ms Tarka that she had not been given advance warning that an issue at the disciplinary hearing would be whether GDPR principles had been breached. That was plainly not true in light of the content of Mr Malcolm's investigation report that was served with the invitation to the disciplinary hearing.

    78.3 She criticised Ms Desai for failing to consider her feelings when disclosing emails between herself and Ms Assapardi. As will be referred to below, those emails were not intended for her, they were disclosed to her in response to her own very specific Subject Access Request.

    78.4 She suggested to Mr Grice that her permission ought to have been sought before her grievance was referred to the HR Advisor assisting the grievance investigator, Mr Blanchard. An absurd suggestion.

79. It is right to say that Mr Crow's characterisation of the claimant as sometimes appearing to play games and appearing to take entirely unmeritorious pedantic points that take matters no further forward, both in her dealings with the respondent and with the tribunal, appear to be justified.

Findings of Fact

80. Ms Holt has fibromyalgia and myalic encephalomyelitis, (ME). The respondent accepts that she was a disabled person in accordance with the EQA at all material times.

81. Between February 2006 and September 2012, Ms Holt was employed by the respondent, initially for two years in HR Payroll and then on the HR Advice Team for four years. She re-joined the respondent as an HR Advisor on 24 October 2016. The HR Advisor job description applicable to Ms Holt includes the following at paragraph 22 under the heading of Main Duties and Responsibilities, (page 820):

> "Understanding, knowledge and ability to follow guidelines that ensures compliance to health and safety at work, data protection and other statutory requirements."

82. We set out below excerpts from various polices of the respondent to which we have been referred during the course of the hearing of this case and which may have a bearing on its outcome.

83. Internal Recruitment policy at 5.1:

"Candidates must let the Hiring Manager and all the Recruitment Team know if they have any special needs, which they need to be met at interview, for example, sign language interpreter and assistance to allow ease of access for wheelchairs."

84. And at 5.2:

"The council encourages applications from disabled applicants."

85. The Stress Management Policy includes, at paragraph 4:

"The most common signs of stress include:-

- Change in behaviour pattern;
  …
- Poor concentration;
  …
- Excessive mood changes or out of character behaviour…"

86. At paragraph 6:

"All managers and head teachers are responsible for carrying out risk assessments on all the activities that they are responsible for, these assessments MUST include an assessment of stress in the workplace.

…

Risk assessments should be reviewed at least annually and if there is a significant change, either to work patterns or if someone has time off for stress related illness.

As part of the Stress Management assessment Programme the Corporate Health and Safety Team can be called upon to carry out work related stress risk assessments for staff in a particular service/ schools/group/section and provide a complete analysis which details any particular stressors within that group and also provide any follow up assistance required by the service or school…

When an employee has been away from work for a long period they may feel isolated and out of touch with current events. Bringing the employee back into work for a short period prior to their official return date can help alleviate any concerns. Attendance at a staff meeting or an informal meeting with colleges could be considered. Once the employee has returned to work the manager must monitor the employees progress.

87. The Code of Conduct, (the copy in the bundle is dated June 2019, Ms Holt says it did not apply at the time but accepts that its provisions were standard and the quoted references have always applied) provides at 3.32:

"While working with us, you may have access to and be entrusted with large quantities of information. This may include, amongst other things, details of our affairs,… and employees. Much of this information will be sensitive and confidential.

For the duration that we need the information, please ensure that it is not destroyed, removed or wilfully damaged; and that it is stored in accordance with the General Data Protection Regulations (GDPR)."

88. The Code of Conduct also includes the following under the heading, "Misconduct":

> "The aim of our Code is to ensure that you are demonstrating our values to an acceptable standard. Any serious, blatant or repeated breaches of it could be viewed as gross misconduct…
>
> In line with our values there are some acts that could be described as gross misconduct, for example:
>
> - Removing, deliberately damaging or misusing council property.
> - Using the internet, email, social media, electronic software and information systems inappropriately."

89. The ICT Summary Acceptable Usage Policy and Personal Commitments Statement includes:

> "The council recognises that individuals may need to use ICT facilities for limited personal use during the working day. Individuals should exercise discretion, ensure usage is proportionate and does not detract from them carrying out their work responsibilities, is not detrimental to Haringey Council in any way, does not breach any term and condition of employment and does not place the individual or Haringey Council in breach of statutory of other legal obligations…
>
> The following conditions apply to all users regardless of the council ICT systems being used. **Users must not**:
>
> 1. Perform any action using ICT systems which would make the council liable to censure of fines by the Information Commissioner's Office (ICO) under the General Data Protection Regulations (2018) (GDPR – 2018) or the Data Protection Act (2018) (DPA – 2018)
>
> …
>
> 2. Perform any action using ICT systems which could bring the council into disrepute.
>
> …
>
> 12. Forward any Haringey Council email to personal email accounts (for example a personal Hotmail account) or save Haringey Council documents or information on any ICT system not managed by the council.(forwarding of a letter to you from HR, your "My Conversation", or similar information about your employment by the council is permitted."

90. The detailed IT Acceptable Use Policy includes:

> "Users are prohibited from using Haringey Council's email facilities:
>
> 1. To inappropriately email council information outside of the council's secure network.
>
> 2. eg to your personal email account to access the document on a personal device.

3. To transmit confidential or "OFFICIAL-SENSITIVE" information to authorised external recipients, without applying appropriate protection. "

91. The Disciplinary Policy states:

"3.13 An employee who is called to a disciplinary hearing will be given full written notification of the allegations to enable him or her to prepare a response.

…

3.21 Additional information requested by the employee/representative will be provided where it is relevant and reasonable to do so.

…

6.11 Gross misconduct is misconduct of such a nature that the authority is justified in no longer tolerating the continued presence at work of the employee concerned. If the council is satisfied that gross misconduct has taken place the result will normally be summary dismissal. Whilst any serios breach of conduct will be considered to be gross misconduct, the following are given as examples:

- Unauthorised removal or misuse of council property.
- Inappropriate use of the internet, email, the council's electronic software, information communication systems or computer misuse.
  …
- Misuse of the council's property or name.
  …
- Any action that could bring the council into disrepute.

6.12 Sanctions short of dismissal for gross misconduct could be appropriate:

- Where the employee is considered to be blameworthy of a serious offence but there are mitigating circumstances to justify disciplinary action, short of dismissal.

- Where the employee previously had an excellent work record, the offence was out of character and was committed at a time when the employee was experiencing severe emotional/domestic problems.

- Where an employee admits the offence at the outset of the investigation process and the nature of the offence is taken into account and where the above examples also apply

Simplified procedure

1. This simplified procedure will be used where an investigation or fact finding interview has taken place and there is a case to answer and the likely sanction will be a verbal or written warning, or final written warning and both sides agree a short hearing is appropriate. If the likely sanction will be dismissal for gross misconduct, but due to mitigating circumstances management have decided not to seek dismissal, both sides can agree that a short hearing would be more appropriate. Paragraph 6.12 gives details of some circumstances where a sanction for gross misconduct short of dismissal may be appropriate.

This could mean that an appropriate level of manager details the case to the employee and, having heard his or her response decides on the sanction. The approach would usually suit the initial stages of dealing with wilful poor performance of work or relatively minor breaches of conduct.

2. Where a simplified approach is not deemed appropriate a more formal approach will be taken to hearing as set out below.

…

9.5 To lodge an appeal, the Disciplinary Procedure Appeal Form (attached to Appendix 1) must be completed in full and sent to the head of HR within 10 working days of the date of the letter confirming the decision of the disciplinary hearing. An appeal may be lodged outside of this timeframe only if there are exceptional reasons for the delay. The final decision about whether or not to accept the appeal in such circumstances will rest with the head of HR."

92. The respondent's Management Guidance for Disciplinary Procedure contains guidance in relation to what to do about grievances as follows:

"2.2 Grievances

If a grievance discloses a breach of the Code of Conduct then it should be dealt with as a disciplinary matter. The grievance may be suspended depending the outcome of the disciplinary hearing.

In exceptional circumstances, ie: where allegations of bullying or harassment have been made, the disciplinary process may be temporarily suspended pending a prompt investigation."

93. The Grievance Policy provides at paragraph 3.2, (page 218):

"Formal grievances should always be dealt with in a reasonable timeframe and in any event within 28 calendar days unless a revised deadline has been agreed by the parties.

Grievances will be dealt with sensitively and with due respect for the individuals involved. Any information communicated during the course of the investigation or as part of a grievance must be treated as confidential.

(In respect of the role of the line manager)

If the line manager accepts the grievance they should arrange a meeting with the individual, and their representative if applicable, to discuss the grievance and possible resolution, normally within 10 working days of the receipt of the form."

And at paragraph 3.7:

"If the grievance has not been resolved to the employee's satisfaction, the employee has the right to appeal the outcome. This is the final stage of the grievance procedure."

94. The Grievance Policy Practice notes, section 7, (page 223) provides:

> "An individual, or group of individuals, may commence the formal step of the process by completing the Grievance Submission Form shown in Appendix A. The completed form should be sent to the individuals line manager (of their manager if the line manager is the subject of the grievance) and a copy sent to Human Resources."

95. Although the respondent objected to the claimant referring to its Dignity At Work Policy on bullying because it is a January 2020 policy, the passage Ms Holt referred to read as follows:

> "It is important to remember that if an individual feels the behaviour is offensive to them it could be bullying or harassment – even if it was not intended to cause offence."

96. That is a statement everybody involved in employee relations would recognise.

97. Every time a person logs into the respondent's IT system they encounter a notice entitled, "LEGAL NOTICE CAPTION TO ALL USERS" which goes on to warn that the computer system is the property of the respondent, for authorised use only, in the event of unauthorised use, disciplinary action would be taken, that a serious breach of the Council's policies will normally result in dismissal, that IT systems access is subject to monitoring, users should have no expectation of privacy, users must be familiar with and comply with the council's IT Acceptable Use Policy and that by continuing, the user consents to those terms and conditions of use. There is then a button for the user to click, "OK" before proceeding.

98. During Ms Holt's first period of employment with the respondent, they obtained two Occupational Health reports,. The first was dated 6 July 2006 which states that she has chronic fatigue syndrome/ME. The report describes constant tiredness with reduced energy and that with exacerbations of her condition, she can experience reduced concentration, although that was said not to be a constant feature. The second report is dated 27 November 2006 and makes recommendations of reasonable adjustments in the context of disability, to include flexible working hours, a workstation assessment and support attending medical appointments. The advisor stated that when Ms Holt was experiencing significant exacerbation of her condition, it was unlikely that she would be able to adhere to strict deadlines or manage a high workload.

99. Ms Holt was diagnosed with fibromyalgia in 2007, (page 349) and with chronic fatigue syndrome in 2011, (page 348).

100. When Ms Holt returned to the respondent's employment on 24 October 2016 she had declared her disability, indicating the need for adjustments which specifically were: to be allowed to take annual leave at short notice, the use of flexi time and the ability to work from home where possible, in line with the employer's business needs, (page 192).

101. The respondent obtained a further Occupational Health report dated 6 April 2018, (page 210). Oddly, this states that Ms Holt has no specific diagnosis.

All the more odd as the report states in its final paragraph, that it had been dictated in the presence of Ms Holt. The following points are of note from the report:

101.1 She is said to exhibit symptoms of persistent tiredness and unrefreshing sleep.

101.2 She perceived a mismatch between the demands of her work and the time available to complete it, which had led to increasing stress levels which further exacerbated her physical symptoms.

101.3 There was said to be no obvious issues with memory, focus or ability to concentrate.

101.4 She was said to be fit to continue work full time but that she would benefit from adjustments.

101.5 The advisor strongly recommended a stress risk assessment.

101.6 It was said that her workload may be impacting on her health. Although she is quoted as acknowledging that her work demand goes through peaks and troughs such that during peak times, the increased demands placed upon her impacted on her health.

102. The report does not recommend specific adjustments, it just states that Ms Holt may benefit from some being put in place. It seems to be assumed that changes would be implemented after the stress risk assessment.

103. A stress risk assessment was subsequently carried out and Ms Holt made a flexible working request, which was granted. Neither were evidenced in writing before us. Ms Holt's hours were reduced from 36 to 33 per week and she was permitted to work from home on Thursdays.

104. In February 2019 a peer review, followed by a detailed review by an external appointee in April 2019, revealed that the Human Resources Advisor team was perceived as not providing a satisfactory service. As a consequence, a Task and Finish Project was set up to be undertaken by Miss Salmon, to be appointed as Interim HR Manager.

105. In March 2019, Ms Holt's then colleague Mrs Mohabeer was appointed Team Leader.

106. As at April 2019, the top down management structure applicable to Ms Holt was that at the very top stood the Chief Executive Ms Etheridge. The applicable Director, (Director for Customers, Transformation & Resources) was Mr Grice. The Acting Head of HR was Ms Desai. Beneath Ms Desai was Head of HR Operations, Ms Morgan. Ms Holt's line Manager, (HR Direct Services Manager) was Ms Assapardi and her Team Leader was Mrs Mohabeer.

107. Ms Holt's team of HR advisors consisted of, in addition to herself, Ayse Isikstan, Karys McDermott, Tenniel Francis as well as Team Leader, Mrs Mohabeer. A team of five.

108. Over the following months the following changes to staffing took place:

    108.1 Ms Isikstan went on long term sick from 25 June 2019 and moved to another team on her return in September 2019;

    108.2 In early August 2019, a new HR Advisor was appointed, Ms Samantha Liverpool;

    108.3 On 7 August 2019, Miss Salmon joined as Interim HR Manager;

    108.4 On 12 August 2019, Ms Assapardi went on extended leave;

    108.5 Mrs Mohabeer was on long term sick leave and planned leave from 21 September 2019 to February 2020.

109. This was a team that was under pressure in terms of level of work and head count. The pressure was greater during the summer period, when people were taking annual leave and those remaining had to cover for them.

110. Cases were allocated to individual HR advisors initially as a starting point, on the basis of their, "patch". In other words, each HR advisor was notionally allocated a particular area of the business in respect of which they were responsible for providing HR advice to the managers within that area. The people responsible for deciding who would be allocated what were Ms Assapardi, (later Miss Salmon) along with Mrs Mohabeer. A person's, "patch" was however only a starting point; consideration was also given to the individual advisor's available capacity at the time, the amount of work that would be involved in the particular case, the complexity of the case, the experience and skills needed and the abilities of the individual, the individual's preferences, opportunities for development, ensuring individuals had a variety of cases, trying to avoid conflicting deadlines and spreading out the riskier cases across the team. The allocation of cases was regularly discussed by the team at regular meetings and was subject to change in changing circumstances.

111. Although we were referred to a case log, it was clear to us that was not a reliable indicator, either of the number of cases of each individual advisor had nor of their actual workload. Some cases had been allocated to an individual at the outset and that individual often remained on the system as the allocated caseworker, whereas in actual fact, work on the case had been passed to somebody else. One case might involve a huge amount of work, but another case might involve very little work.

112. There was an arrangement in place that by way of a rota, each member of the team was allowed to work form home on a set day each week. The rota, (Agile Working Rota) recorded who was working from home each particular day and who was providing duty cover. Duty entailed dealing with

queries and calls coming in for the team, dealing with urgent issues, forwarding queries to the named advisor or providing cover if that person was absent for some reason. We accept the evidence of Mrs Mohabeer that there was no requirement to work in the office if one was on duty.

113. On 24 April 2019, Ms Holt sent an email to Mrs Mohabeer and Ms Giovanna giving links to advice from the NHS and other organisations about fibromyalgia and ME. Her email explains that she was providing this information following recent discussions regarding absence/return to work. Mrs Mohabeer's evidence was that she did not give the information a great deal of attention as at the time as Ms Giovanna was Ms Holt's manager. The information included:-

    113.1 An explanation that symptoms of fibromyalgia can get better or worse, depending upon stress levels.

    113.2 Fibromyalgia can cause muscle spasm and extreme tiredness.

    113.3 That a symptom of fibromyalgia can be cognitive problems including "fibro-fog", trouble remembering and learning new things, problems with attention and concentration.

    113.4 Fibromyalgia can lead to depression.

    113.5 That it is common for people with ME/CFS to also have problems concentrating or difficulty focussing on more than one thing at a time, problems remembering things that had recently happened and being slow to speak or react, sometimes described as, "brain fog".

    113.6 People with ME are unlikely to be able to work to the usual pattern of high energy expenditure during the week and resting at weekends.

    113.7 Work related stress can exacerbate the symptoms of ME.

    113.8 A phased return to work for someone with ME, a longer period over which errors are increased may be an ineffective adjustment, building up work at home and phasing in workload can be helpful.

114. It is of course right to say that these are general descriptions of typical symptoms and not evidence of any particular symptom suffered by Ms Holt, nor that she suffered such symptoms at any particular time.

115. Following some absences from work, the respondent obtained a further Occupational Health report dated 30 April 2019, which is at page 249. This referred to two recent sickness absences due to fatigue. It is stated that Ms Holt had not been diagnosed with a specific medical condition, but continued to express ongoing symptoms of tiredness and fatigue. It suggests that adjustments and modifications to her role should be considered only if there is a diagnosis, rather than on a speculative basis. However, this appears to be in the context of potential symptoms of ADHD. The advisor confirms that Ms Holt is likely to be considered disabled and that reasonable adjustments, (in apparent contradiction of the forgoing)

should be considered. The advisor suggests that the stress risk assessment previously recommended should be updated, "*The evidence from the stress risk assessment, her work can be further adjusted to prevent levels of stress which may give rise to irritable towards customers and/or intermittent mood swings*" [sic]. Once again, we note that the penultimate paragraph refers to the report having been dictated in the presence of Ms Holt, which is odd given that the letter states she has no diagnosis.

116. On 21 June 2019, Ms Holt sent Ms Assapardi a risk assessment form which she had completed in respect of those sections appropriate to her, which included identifying the problem as being excessively busy periods as well as many other issues. This was never completed by Ms Holt's managers; it appears to have fallen between the gaps amidst Ms Assapardi's departure, Miss Salmon's appointment and Mrs Mohabeer's departure, which is remiss of the respondent and for which it can be rightly criticised.

117. The team working from home was stopped on a temporary basis over the summer of 2019 because it was busy with absences due to leave or sickness. Quite why not working from home made a difference is not clear.

118. On 20 June 2019, Ms Holt began a series of interactions with an employee of the respondent who we will refer to as GG, in relation to his wishing to secure an amendment to an Occupational Health report about him. As we shall see, GG later complained about Ms Holt. This in due course becomes one of two so called, "conduct" issues which Ms Holt says the respondent should have progressed whilst she was absent form work due to ill health.

119. The second such, "conduct" issue is that relating to an individual we shall call NC. The issue is recorded in email correspondence which begins with an email of 27 June 2019 at page 286. One of the respondent's lawyers wrote to Ms Desai and Ms Holt, directing that they inform NC he should confirm who he would have accompanying him at a pending hearing and if he intended to call any witnesses, the names of those witnesses. Such information was to be provided no later than five clear days before the date of the hearing. Pausing there for a moment, we have already mentioned that during cross examination in respect of the criticism of Ms Holt for failing to deal with this letter, she suggested that the words, "No later than five clear days before the date of the hearing" meant that she did not have to act on the instruction until five days before the hearing and we have noted, that is very obviously not the meaning of the letter. The lawyer chased progress on 2 July . Ms Holt replied to say the respondent has a standard template letter which advises employees of their right to be accompanied and that she was unable to set a date, (presumably for the relevant hearing) because management had not collated their documents and NC was on leave. The lawyer replied to say that informing NC of his right to be accompanied is not the same as asking him to confirm who is accompanying him and who he is calling as a witness. The lawyer wrote directly to Ms Desai to ask that she ensure that everything was done properly.

120. Ms Desai and Ms Holt had a conversation about this over the telephone on 3 July 2019. Ms Desai's version of the conversation is that Ms Holt was

rude to her, answering her phone, "what do you want" and being cross because the call was made after she had finished work. Ms Desai says the purpose of the call was to encourage Ms Holt to work collaboratively with colleagues. Ms Holt's account as recorded in her log, (see below) was that Ms Desai had instructed her to call the lawyer immediately and that she declined to do so as it was the end of the day and she had an appointment to go to, but that she would call the next day.

121. On 25 June 2019, Ms Ayse Isikstan began her period of absence until September 2019.

122. On 15 July 2019 by way of an email to all potentially interested parties, notice was given of a vacancy for an HRBP role for an initial period of three months. An explanation of what the role entailed, included a job profile, was provided.

123. On 16 July 2019, Ms Holt emailed a flexible working request to Mrs Mohabeer and Miss Salmon. The application is on a standard form the respondent provides. The respondent criticises Ms Holt and says that this is not a valid flexible working request because it does not contain a date from which it is proposed the flexible arrangements should apply. We note that the form does not appear to call for such a date to be provided. The point of the application is to formalise the switching of her working from home day from a Thursday to a Wednesday, so as to help her manage fatigue by better breaking up the week in terms of travelling. Mrs Mohabeer agreed with Ms Holt to change the rota so that henceforth, she would work at home on Wednesdays rather than Thursdays, but she said that a flexible working request itself would have to be agreed by management. Mrs Mohabeer's evidence is that this was a matter for Ms Assapardi, not her.

124. The rota was changed so that Ms Holt would in the future work from home on Wednesdays, rather than Thursdays.

125. On 23 July 2019, Ms Desai wrote to Ms Assapardi to express her concerns about Ms Holt, *"Specifically the lack of pace and poor judgment she illustrates when speaking with customers and HR colleagues".* She said that this was based on several complaints she had received and gave two specifics which were:

    125.1 In relation to GG, when he asked about progress on his OH report she had replied, *"Rome was not built in a day".* She wrote about this in strong terms, *"The lack of sensitivity in dealing with this person could have had deeper ramifications and it is unacceptable for a HR professional to talk to anyone when handling a wellbeing matter in this manner".*

    125.2 She had been slow to set up an appeal date for NC. She said that a lawyer had called her asking her to intervene as Ms Holt was being unhelpful.

As we shall see below but it is worth noting at this point, pursuant to a subject access request, Ms Holt subsequently had sight of this email, on 15 Septemebr 2019.

126. On 29 July 2019, the deadline for expressing interest in the HRBP role expired at 5pm. Ms Desai sent an email to Ms Holt because she knew she was interested in the role and reminded her the deadline had expired. The next day, 30 July, Ms Holt submitted her expression of interest. Notwithstanding that she had missed the deadline, the respondent agreed to include her in the interview process and HR Business Partner, Ms Gaffney, spoke to her on the telephone to discuss the interview process and when the interviews would be held. Ms Holt was told that her interview would be at 11 o clock on 2 August, confirmed in an email from Ms Gaffney on 30 July. A total of five people were interviewed, two were interviewed on 2 August and three were interviewed on 9 August. Those who were interviewed on the 9th were interviewed on that day because they were not available on the 2nd. Mrs Mohabeer was one of those interviewed on the 9th. She had been on leave and had not seen the expression of interest invitation until she returned from leave on 7 August. She was offered an interview on the 9th. She asked Ms Gaffney if the interview could be delayed and Ms Gaffney declined her request.

127. On 6 August 2019, a colleague died suddenly whilst at work, which upset everybody.

128. Also on 6 August, Ms Holt withdrew her application for the HRBP position. Her email doing so at page 301 said, *"in light of Friday's interview, I would like to withdraw my application…"*. Ms Holt gave a number of explanations to different people as to why she withdrew her application, including: that she never wanted the role, she only made the application to annoy Ms Gaffney; that she had not realised it involved working with Ms Gaffney, (which seemed to us improbable) and that once she realised that it did, she withdrew; that she had only applied for the role to be difficult, that she had found Ms Gafney to be rude and that Ms Gafney hated her. Having heard Ms Holt's evidence, our finding is that Ms Holt applied for the role to be difficult.

129. Ms Holt's complaint about the HRBP role as set out in the list of issues, is that there was an expectation that if she wanted adjustments to the interview process, it was up to her to ask for them.

130. Also on 6 August, Miss Salmon joined the respondent via an agency to work as interim HR Manager and to undertake the Task and Finish project. Also at about this time, Ms Liverpool started working for the respondent.

131. With Ms Assapardi scheduled to go on long-term leave from 12 August 2019, there was an email exchange between her and Ms Desai with regard to Ms Holt on 8 and 9 August 2019, (309-310). On 8 August Ms Desai wrote that before she leaves, Ms Assapardi should confirm whether she had met with Ms Holt to discuss the matters previously raised and whether Ms Holt had sent an apology to GG. Prompted by that, Ms Assapardi met Ms

Holt on 9 August. Subsequent to the meeting, she wrote to Ms Desai to say that Ms Holt was concerned that her side of events on the GG matter were not being heard or asked for and that she wished to write a statement about the events, which would give a different version. She reported Ms Holt felt that she was being picked on and that she felt like resigning.

132. In respect of the meeting between Ms Assapardi and Ms Holt on 9 August, Ms Holt says she was told to write a letter of apology without being asked her side of the story. She subsequently set out her version of events in an email of 9 August 2019, (page 304 / 305).

133. On 12 August 2019, when Ms Assapardi had begun her long period of absence, Ms Holt wrote to Ms Desai direct, attaching her above mentioned version of events regarding GG and asking to meet with her as soon as possible, *"as it has caused me significant anxiety over the weekend".*

134. Ms Desai set up a meeting with Ms Holt for 3pm on 13 August 2019. However, after doing so she had a conversation with Miss Salmon and because as she says, due to staff shortages and the fact that she was so busy, she asked Miss Salmon to see her instead. Ms Desai therefore cancelled the 3 o clock meeting. Ms Holt did not know why the meeting had been cancelled. That it was cancelled upset her. She left work, went to her doctor and obtained a fit note signing her off work as not fit to work due to stress. The fit note is dated 14 August 2019, copied at page 330. The condition is stated to be, "Stress related condition" and she is certified unfit for seven days.

135. Ms Holt telephoned in on the morning of 14 August 2019 to say that she was unwell and would be providing a fit note. In response, Mrs Mohabeer wrote to her by an email which included the following:-

> "It is important that you take the necessary time you require to recuperate and to focus on that. Therefore I would urge to refrain from dealing with work matters whilst off sick and until such time you inform us of a potential return to work date."

Mrs Mohabeer also said that any urgent matters requiring attention should be forwarded to her or Miss Salmon. We note that presupposes Ms Desai would be logging into the system to check her emails

136. Ms Holt wrote on 15 August 2019 to Mrs Mohabeer explaining that a significant contributor to her stress was the complaint regarding GG and the suggestion that she must apologise. She complained that despite having provided a full account of her interactions and despite the fact that GG had now signed a settlement agreement, she had still not received a response. She complains that she has repeatedly pointed out the stress that this was causing her and she would have thought she would have had a response by now. She speaks of an increasing number of instances where she has been criticised unfairly and undermined, talked over or not been allowed to express her view. She says that while she is happy to refrain from work

whilst off sick, she would appreciate a date or time at which she will be able to discuss the GG matter.

137. Mrs Mohabeer replied on 16 August 2019 to say that the matters raised would be discussed on her return to work. Ms Holt replied to that the same day, to say that was a disappointing response. Mrs Mohabeer replied to say the matters raised would be discussed on her return to work but in the meantime, they would look into them and revert back to her with an update the next week.

138. The last email in this particular chain on 16 August at 15.59 from Ms Holt to Mrs Mohabeer, copied to Miss Salmon, stated that she had left the office the previous Friday after being told she must apologise to GG for dismissively saying, *"Rome wasn't built in a day*" and a suggestion had been made that, "*anything could have happened",* given that he was an individual who had previously stated he was considering taking his own life. She complains that she sent a full account to Ms Assapardi and to Ms Desai, but had received no reply. She spoke of panic attacks and anxiety all weekend. She complained about Ms Desai setting up a meeting for the Tuesday which was then cancelled. She wrote*, "I cannot attend work whilst I am this stressed about receiving a response from Daksha as I have been breaking down"*.

139. Also on 16 August (timed at 12:16) Ms Holt chased Mrs Mohabeer and Miss Salmon for a copy of her completed risk assessment.

140. On 21 August 2019, Ms Holt was certified not fit to work for a further three weeks because of, "stress related problem", (page 342). The certificate would take her to 6 September 2019.

141. During this period, as can be see, notwithstanding that she was away from work ill, Ms Holt was logging in to the respondent's IT system and sending messages to Mrs Mohabeer and Miss Salmon. She was not told to desist and was not told that she should not be doing so.

142. On 21 August 2019, Ms Holt sent Mrs Mohabeer an email attaching her latest fit note. She wrote that her GP advised that she ask for an update on the allegations against her and that her employer could and should take steps to resolve the situation by communicating with her rather than indicating that it was awaiting her return to work, which is not helping the situation and is causing her further stress. Mrs Mohabeer replied, "*As you are aware matters that you refer to can only be properly addressed on your return to work"*. Ms Holt replies to that by saying that she is not so aware and asks for an explanation of the respondent's stance being contrary to the medical advice that she has received.

143. On 23 August 2019, Ms Holt telephoned Ms Desai to discuss the GG matter. It was a placatory conversation. Ms Desai gave Ms Holt assurances, for which she was grateful. Ms Holt followed up the conversation with an email of thanks and to say that she felt much better. Unfortunately, this email was not in the bundle. Ms Desai reassured Ms Holt that she had not suggested, (as appears to have been suggested to Ms

Holt by Ms Assapardi) that GG might take his own life or that Ms Holt's comments might cause him to self-harm. Put to her in cross examination, Ms Holt did not dispute the quotations from her missing email in the grievance report at page 589, *"Thank you for speaking to me earlier, I feel so relieved. It has been so helpful to me*" and, *"I feel that a massive weight has been lifted from me"*.

144. On 2 September 2019, one week before Ms Holt's current fit note expired, she went to her doctor and obtained a new fit note which confirmed, at her request, that she may be fit to work provided the respondent put in place recommended adjustments, specifically a phased return to work, amended duties, *"up to four weeks, and then recommend Occupational Health review".*

145. At 15:13 on 2 September 2019, Ms Holt emailed Mrs Mohabeer and Miss Salmon to attach her sick note and asking them to call between 4 and 5 o'clock to discuss what time she will be back the next day and the time of her return to work meeting. Miss Salmon replied to say that it was good to hear she was fit to return to work, that Mrs Mohabeer was not working that day and so she was not able to give a time for the return to work meeting, but suggests that she attend work and Mrs Mohabeer will arrange a convenient time for their meeting. Ms Holt replied to ask that Mrs Mohabeer call her in the morning between 9 and 10 o clock. Miss Salmon responded, *"I understand you have been signed off fit to return to work tomorrow therefore I would expect you to come to work and Beena will make arrangements to meet you*". Ms Holt wrote in response to point out the fit note referred to a phased return to work on reduced hours, which was why she wished to discuss in advance. She invited that contact be made with her between 9 and 10 the next day.

146. On 3 September 2019 at 9:52 Miss Salmon wrote to Ms Holt:

> "As an HR Advisor, you will know that the fit note are only suggestions which the employer must consider before any agreement, taking into account the exigences of the service; workload and resources etc.
>
> Amended (you claim it means reduced hours) hours and duties have not been discussed with your line manager nor agreed by the authority. As you should also know, a phased return if agreed, has to be once again agreed by your line manager depending on you illness and whether the service can accommodate, flexibility will always be exercised where appropriate.
>
> Therefore, I would once again urge you to attend work today in line with your fit note in order for you to have your return to work meeting with your line manager and to discuss your fit note etc."

147. At 11:07 Ms Holt emailed Miss Salmon and Mrs Mohabeer to say that she was at work. She appears to have expected to meet Mrs Mohabeer at 11 o'clock in the meeting room and comments that she was not there.

148. Mrs Mohabeer and Ms Holt did eventually meet on 3 September 2019. This was their first formal meeting since Mrs Mohabeer had taken over as her

line manager. Mrs Mohabeer pointed out that the recent Occupational Health report that she had seen, (that at 30 April 2019) referred to Ms Holt as not having had a diagnosis. She also pointed out that the fit note referred to stress and low mood, not to ME/CFS or fibromyalgia. Ms Holt mentioned these conditions to her during the return to work meeting and Mrs Mohabeer responded that she had not been aware Ms Holt had been formally diagnosed. We accept that she did not challenge Ms Holt and dispute whether she had a diagnosis, but merely pointed out that she was not aware of the diagnosis. Mrs Mohabeer suggested a two week phased return to work, to be kept under review. At that point, Ms Holt did not have a case load as it had been distributed to others, mostly to Ms Liverpool. She arranged a meeting with Ms Holt and Ms Liverpool to agree on a redistribution of her caseload as appropriate.

149. During this meeting, Ms Holt asked Mrs Mohabeer for an update on her flexible working request. Mrs Mohabeer did not know anything about it. She therefore asked Ms Holt for documentation so that she could chase it up.

150. Ms Holt agreed in evidence that subsequent to this meeting, she worked more hours each week than she had agreed with Mrs Mohabeer. In cross examination, on looking at the relevant documentation, she agreed that in fact taking into account the hours that she worked, the sick pay that she claimed during the time that she was not working and the flexi time that she had claimed, she overclaimed. Her evidence was that she had not realised this until it was pointed out to her by Mr Crow in cross examination.

151. On 4 September 2019, the HR Advisor Team, including Ms Holt, were invited by Miss Salmon to attend an awayday on 11 September between 9.30 and 5pm to review case work. Miss Salmon described the purpose of the day as to, "*find solutions and closure for outstanding cases and identify timelines for when actions needed to be taken*".

152. Miss Salmon and Ms Holt met on 9 September 2019. There are conflicting accounts of what was said in that meeting. Ms Holt's account is in her log at page 680 and very briefly, in her witness statement. Miss Salmon's account is in her witness statement. Three allegations arise out of this meeting which appear in the list of issues. Our findings are:

    152.1 Miss Salmon probably did say to Ms Holt that she should attend the awayday for the full day in person;

    152.2 We do not accept that Miss Salmon, "questioned" Ms Holt's disability. We accept that at this point in fact, whilst Miss Salmon knew that Ms Holt had been absent from work, the reasons given in the fit notes provided were stress related and she had not appraised herself with the content of the Occupational Health reports.

    152.3 Ms Holt has mischaracterised the conversation with Miss Salmon when she described Miss Salmon as blaming her for the decisions made by others before her employment and whilst she was absent.

> They discussed Ms Holt's cases and problems with them, some of which doubtless were as a consequence of actions by others, either before she inherited those cases or in respect of decisions made whilst she was off sick. She was not blamed for those decisions nor were the decisions of others attributed to her by Miss Salmon.

153. A team meeting took place on 10 September 2019. The minutes are at page 344. There is a note that additional resources had been requested to deal with the backlog of case work and a note:

> "Working from home is still removed due to the requirement of team in the business whether this will be reviewed is up for discussion, relevant team members require OH referral for reasonable adjustments to be considered".

154. The awayday took place on 11 September 2019. Accounts of this meeting vary. There are no minutes. The claimant's log contains a lengthy note at page 681. She gives a brief account in her witness statement at paragraphs 86 to 88. There are a number of accounts in the transcripts of the interviews with various people in connection with the grievance. There is one specific allegation arising out of the awayday, which is that Miss Salmon said to Ms Holt, *"You think you cant sack someone whose disabled; well you can".* Miss Salmon's account, in relation to the specific allegation, is at paragraph 89 of her witness statement. We note that in Ms Holt's own note at page 361, this is recorded as a comment made to the whole team. We find that the context was a discussion about a failure generally, by the respondent, to adequately manage employee relations issues in situations where the employee in question was disabled. It was not in any way directed at Ms Holt, nor could it reasonably have been interpreted as such.

155. We noted the account of Ms Francis in the grievance investigation in respect of the awayday, in particular that Ms Holt and Miss Salmon clashed and Ms Holt raised her voice. This description of their relationship accords with the impression we gained on reviewing the evidence and having regard to their demeanour with each other during Ms Holt's cross examination of Miss Salmon.

156. On 12 September 2019, Mrs Mohabeer referred Ms Holt to Occupational Health.

157. Also on 12 September, Ms Holt emailed Mrs Mohabeer to say that she was not well and would therefore work from home. We do not appear to have that email. We do however have Mrs Mohabeer's reply at page 346, *"We did not agree WFH. If you are having a flare up of fibromyalgia and difficulty with mobility and pain today will be regarded as a sick day. Hope you feel better soon"*. Mrs Mohabeer explained in her witness statement at paragraph 19, that she did not want a situation where sickness absence was being masked by working from home and that she was concerned about Ms Holt's health.

158. On 13 September 2019 Ms Holt obtained a further fit note, which referred to a history of fibromyalgia, work stress and low mood. It stated that she may

be fit to work taking account of a phased return to work, altered hours and amended duties. The GP had typed in capital letters:

> "Needs to discuss with manager about amended duties/phased return/work from home etc. It is not the role of the GP to make definitive recommendations, these are suggestions, these need to be discussed with manager and please consider an Occupational Health review".

159. Also on 13 September, Mrs Mohabeer emailed the Advisors Team with an updated Case Plan. This was an Excel spreadsheet listing everybody's cases and recording actions and progress. Historically, there had been a problem because anyone could make amendments to it at any time and in places it was therefore incoherent. Mrs Mohabeer told the team that a new version had been saved in the shared drive and that going forward, any new updates should be highlighted in red.

160. On 15 September 2019, Ms Holt received documents that she had requested in a Subject Access Request, those documents we have flagged above. She was upset by what she read.

161. On 17 September 2019, Mrs Mohabeer and Ms Holt met. There is a handwritten note of the meeting by Ms Holt at page 360 and an email from Mrs Mohabeer to Miss Salmon/Desai reporting on the meeting at page 361. Mrs Mohabeer recorded in her email:

> "EH has been advise that prolonged phased does not suit needs of service and agreed to review this on weekly basis. EH has had a three week phased return so far form w/c 02.09.19 to w/c 16.09.19.
>
> Ema mentioned the requirement for adjusted duties and I have asked her to provide a list of duties she cannot undertake in order to discuss this matter further.
>
> …
>
> Upon receipt of OH report EH is due for a first formal meeting under the Sickness Monitoring Policy and she is aware of this. …
>
> Flexible working request
>
> There is a historical agreement for by Debi and Giovanna for EH to work from home 1 day per week as a reasonable adjustment. This was initially a Thursday changed to Wednesdays. EH has submitted a formal flexible working request to change WFH day from Thursday to Wednesday.
>
> I suggest this is reviewed in light of the impending OH advice."

162. The duty rota for week commencing 23 September 2019 shows Ms Holt was scheduled to work form home on the Wednesday, (page 364).

163. On 20 September 2019, Mrs Mohabeer emailed Ms Holt. She invited her to speak to Miss Salmon on 23 September to discuss her working hours. She reminded Ms Holt, having regard to the doctor's recommendation of adjusted duties, that she was waiting to hear from her with a summary of

the duties that she was unable to undertake. She was asked to provide that to Miss Salmon. Ms Holt never provided a list of duties that she was unable to undertake.

164. Mrs Mohabeer began a period of absence from work commencing 23 September 2019 and did not return until February 2020.

165. Miss Salmon and Ms Holt met for a phased return review meeting on 23 September 2019. There are minutes of this meeting at page 365. There are handwritten notes by Ms Holt at page 367. The allegation relating to this meeting from the list of issues is that Miss Salmon asked Ms Holt to cease her phased return to work and attend work for full hours the next day which, she says, was contrary to her GP's advice. Our finding is that Miss Salmon was pressurising Ms Holt to work full hours and to end working from home. Ms Holt probably did, as Miss Salmon alleges, agree to work full hours, but in the context of that pressure. However, also, in the context that Ms Holt was already doing more hours during the phased return to work thus far than had originally been agreed.

166. The next day, 24 September 2019, Ms Holt began a period of absence which lasted until 10 October 2019. We note what Ms Holt said about this in the disciplinary hearing at page 902, "*I would like to state that at this time I was not fully incapacitated, I was fit to undertake some work, however because my adjustments could not be accommodated, I was absent".* That corroborates our conclusion about the basis upon which Ms Holt agreed to work her full contractual hours on 23 September, but also about her state of mind at the time of impending events, (she was fit to undertake some work).

167. Ms Holt emailed Miss Salmon on 24 September 2019 in order to make reference and record the events the previous day:

> "You confirmed that it is not possible to accommodate any adjustments and that I had already had two phased returns since you have started at Haringey and that you require me to return to my normal contractual hours effective from 24 September (today).
>
> You have also recently given me additional tasks… this is despite my caseload being the highest in the team, and me being the only part-time worker in the team..
>
> As you have stated that it is not possible to accommodate any adjustments I will therefore be absent from today, due to fibromyalgia, work related stress and low mood, as detailed on the medical certificate."

168. On 26 Septemebr 2019, Ms Desai sent an email to the team, (and other teams) about a pending move of office location. In respect of proposed hot desking she wrote:

> "I am not aware of any DDA requirements which would warrant a fixed desk, which means every desk can be used by anyone – a full desk sharing environment 😊."

169. That was preceded by a bullet point naming two, “Move Champions” stating that any questions about the move, including specialist requirements, should be directed to them. This email is identified in the list of issues as an act of harassment on the part of Ms Desai. We accept Ms Desai’s evidence that her statement was true, she was not aware of any DDA requirements warranting a fixed desk for anyone.

170. The respondent received a further Occupational Health report dated 3 October 2019. Points of note are:

    170.1 Ms Holt had said that a significant contributor to her stress was a complaint from an employee.

    170.2 She was said to be fit for work, but likely to benefit from adjustments.

    170.3 She was reported to feel treated unfairly and unsupported regarding the recent complaint.

    170.4 A stress risk assessment was recommended.

    170.5 The ability to work from home one day a week and when her symptoms flare up was recommended.

    170.6 She is quoted as saying that she used to have a fixed desk but this had been removed. Reinstatement to fix desk with a larger screen was recommended.

    170.7 It was said that a successful return to work was likely to be dependent on resolving perceived work issues and an early resolution was recommended.

    170.8 Ms Holt was said to be fit to attend management meetings.

171. Also on 3 October, Ms Holt submitted her grievance. She emailed it to the Chief Executive, Ms Etheridge. In her covering email she asked Ms Etheridge to consider commissioning an environmental stress audit for the HR Team. Her grievance consisted of, (attached to her email to Ms Etheridge) a proforma completed form, a log of events she had prepared, the emails between Ms Desai and Ms Assapardi of 23 July, 8 and 9 August 2019 and an email from Ms Desai of 27 Septemebr 2019.

172. In her grievance, Ms Holt:

    172.1 Complained of reasonable adjustments previously in place having been removed.

    172.2 Complained about bullying and harassment by Mrs Mohabeer, Miss Salmon, Ms Desai and Ms Gaffney.

    172.3 Asked for the reasonable adjustments to be reinstated, for her complaints of bullying and harassment to be investigated, that she be

provided with a copy of the complaint about her and for an environmental stress audit to be carried out of the HR Team.

172.4 Complained that Ms Gaffney's conduct toward her in the interview for the HRBP post had been unprofessional and that the role advertised was not the role offered and that she was given less time to prepare.

172.5 Described Miss Salmon as unprofessional, rude, belittling, undermining, shouting and of creating an unpleasant working environment for the Advice Team. She was said to have told advisors that they didn't know what they were doing, that legal advice was wrong and the respondent's policies were rubbish.

172.6 Complained that the respondent had ignored Occupational Health advice to update her stress risk assessment.

172.7 Complained that Ms Desai had withdrawn her regular one day per week working from home, without consultation or notice.

172.8 Complained that Ms Desai instructed her to apologise to GG without asking for her side of events, had cancelled a meeting on 13 August which caused her to go home, had suggested that Ms Holt had caused a risk of harm or death to GG and had unfairly made allegations about her lack of pace.

172.9 Complained that Mrs Mohabeer and Miss Salmon had not implemented the reasonable adjustment of a phased return to work, she had been pressured to work for longer than she felt able, she had been told that she did not have a diagnosis and that she has been continuously told that her flexible working arrangements would be reviewed.

172.10 Complained that her fixed desk had been removed.

173. Two minutes after submitting her grievance to Ms Etheridge, Ms Holt emailed to her personal Hotmail account her grievance form and other documents. Amongst these other documents, were her log of events and information relating to GG. That included cut and pasted excerpts from his Occupational Health Report and correspondence in relation to that report.

174. Ms Holt says that she deleted the email to herself shortly after sending it, she also said in evidence she did not realise that the information contained therein was confidential until it was later pointed out to her by Mr Malcolm.

175. In an instant messaging exchange with a colleague Ms McDermott, Ms Holt said that she was full of cold on 3 October and would not, "make it in". The context was making arrangement for colleagues to clear her locker.

176. Ms Etheridge acknowledged the grievance and explained that she had appointed Mr Grice to deal with it. The respondent's position is that Mr Grice was appointed because Ms Holt had referred to him in her grievance as someone who would support her. That is not strictly correct. Although

his name appears in a list of named individuals within a box headed, ”Please list the name of colleagues who will support your case”, after a list of four such colleagues Ms Holt then referred to, “Other witnesses to matters” and gave 12 further names, of which Mr Grice was one. She therefore appears to have referred to him as a potential witness, not as someone who would support her case.

177. On 11 October 2019, somebody called Peter Douglas requested Ms Holt’s email account be copied for investigation by Internal Audit. What prompted this and at whose instigation, is not clear to us.

178. Ms Holt’s GP provided a further fit note certifying her as unfit to work due to viral illness fatigue and stress from 11 to 18 October 2019.

179. Mr Grice confirmed by email that he was reviewing the grievance on 14 October 2019.

180. On or about 22 October 2019, Ms Holt made changes to the casework log, she said as such to Ms McDermott in instant messaging discussions that day, (page 446).

181. On 24 October 2019, it had come to Miss Salmon’s attention via Ms McDermott, that changes to the casework log were being made, but not in red. She set in motion an investigation into when the casework log was accessed and how many times, (page 1174).

182. On 25 October 2019, Ms Holt’s GP provided a further fit note referring to stress related problem, viral illness and stating that she may be fit to work commenting, *“Patient to go back to work on 28.10.2019 phased return to work – as advised by Occupational Health Team – Report. Please follow recommendations from Occupational Health”.* The certificate is to 8 November 2019.

183. Ms Holt attended a return to work meeting with Miss Salmon on 28 October 2019. Miss Salmon’s note of that meeting is at page 388. The minutes open with, *“Informed Ema that as it comes to my attention that she maybe recording meetings with colleagues. Could she confirm that she is not recording, and if so gave her the opportunity to turn off any recording. Ema confirms she was not recording”.*

184. The Occupational Health report was discussed. It was agreed that Ms Holt would have a fixed desk. She said she was happy with the large computer screen in place.

185. The flexible working request was discussed. Ms Holt confirmed she did not hold any paperwork showing the 2018 request had been agreed, save that it had been reflected in payroll. Miss Salmon said that she would ask the Transactional Manager for a copy of the paperwork.

186. Miss Salmon informed Ms Holt that all her cases had been reallocated to the team and Ms Holt said she would be comfortable with 10 cases.

187. Ms Holt said that she would create a phased return to work timetable and it was agreed that time not at work during the phased return would be taken as sick leave.

188. The following is recorded in relation to changes to the casework log:

> "Ema informed me that she had gone into the case log and changed the values on the back page without informing anyone and changed my details on the dropdown on the front page. She said the figures at the back were wrong and she had repaired the breaks. She claimed that colleagues did not know how to use it and had changed it because broken and giving wrong information. She had made the changes just for October. Informed Ema that I would get back to her on this as I was not expecting her to change a team log that the advisors had been working to and given that she had been absent for five weeks on this occasion."

189. Upon her return to work, Ms Holt was able to choose a desk which became her designated desk.

190. Ms Holt emailed Miss Salmon copies of her two flexible working requests, explaining that of May 2018 had been processed by payroll but she had never received a contract amendment and in respect of the July 2019 request, Mrs Mohabeer had amended her rota but she had otherwise received no further response.

191. On 29 October 2019, a lock was put on the casework plan so that it could only be accessed by one person with a password. The whole team was informed of this and that therefore future changes to the case plan had to be made through that one authorised person.

192. On 31 October 2019, Mr Grice wrote to Ms Holt to explain that he was looking for an external independent investigator to investigate her grievance.

193. Ms Holt and Miss Salmon had a meeting on 5 November 2019. Ms Holt made a very long and detailed note about this meeting, which begins in the bundle at page 406. In her witness statement, Ms Holt complains that Miss Salmon demanded to know where her flexible working approval was, why she had not yet had a First Formal Sickness Meeting and was annoyed that she had passed a message to Ms Liverpool. She said that she excused herself and told colleagues that she was going home for personal reasons. According to Ms Holt's note, Miss Salmon appears to have been criticising Ms Holt for doing some work, (speaking to an employee) on a case which was not her case, (it had been reallocated to Ms Liverpool) and there came a point where Ms Holt said that she needed a break. She had agreed with Miss Salmon to resume the meeting later in the day, but in the meantime had packed her desk and locker and told her colleagues to say that she had to leave work immediately and go home due to a personal matter. There are no allegations in the list of issues arising out of this meeting.

194. That evening, Ms Holt sent an email to Miss Salmon, copied to Mr Grice, saying that she had left work early, *"because of your ongoing obtuse and unprofessional behaviour towards me".* Miss Salmon replied, (7 November)

to say that she had been told that Ms Holt had left work due to a family emergency. She said that matters would be discussed on her return to work.

195. We can see from the email at page 391 that Ms Desai had been made aware of what had happened and she gave instructions to Miss Salmon to make it clear to Ms Holt on her return to work, that leaving work without informing management was not acceptable. Later that day, Miss Salmon wrote to Ms Desai:

> "I understand that Ema is/has been online this morning. I would advise that she is written to ask her to desist from going online whilst off sick especially given that her workload was cited as a main reason for her going off sick with stress."

196. Mr Grice had been informed that Ms Holt had been accessing casework plan and making changes to it whilst she was absent from work due to ill health. He considered this to be serious and worthy of disciplinary investigation. He appointment an Assistant Director, Mr Eubert Malcolm, to investigate, to be assisted by HRBP Mr Tamattris. As Ms Holt was accused of accessing the respondent's IT systems inappropriately, he considered suspension an appropriate measure. The concern was that she would access the IT system during the investigation.

197. Mr Grice wrote to Ms Holt on 11 November 2019 to inform her that she was suspended pending investigation into potential gross misconduct, "Allegations have been made regarding your use of the council's IT system during your sickness absence." Unfortunately, the wrong address was used for Ms Holt and the letter was not delivered.

198. Ms Holt wrote to Mr Grice on 14 November 2019 attaching a supplement to her log of further events which had occurred since submission of her grievance. Mr Grice suspected from this that Ms Holt had not received the suspension letter, he therefore emailed her on 19 November attaching a further copy of the same. He also emailed Ms Holt separately to explain that it had taken time to identify an independent investigator but he had now been able to do so and that he would be writing to her again about that shortly.

199. Ms Holt emailed Mr Grice on 20 November 2019 to complain, amongst other things, that it was irregular to suspend somebody without stating the specific allegations and without specifying the policy alleged to have been breached, or the timeframe. He replied on 22 November to say that it was not a requirement to set out a specific allegation, but reiterated that it was in respect of a disciplinary investigation into her use of the respondent's IT system during her sickness absence.

200. During Mr Malcolm's investigation, it is not entirely clear when, it came to light that Ms Holt had copied documents to herself and her personal email in respect of her grievance.

201. On 22 November, Mr Tamattris sent draft questions to Mr Malcolm in respect of his pending interview of Ms Holt.

202. Ms Holt was interviewed by Ms Malcolm on 26 November 2019, the notes start at page 770. She admitted that she had possibly emailed confidential or sensitive data to her personal email account, (page 771 and 775). She confirmed that she was familiar with Data Protection and GDPR rules, (page 782).

203. Also on 26 November 2019, Ms Holt commenced early conciliation through Acas.

204. On 8 December 2019, Mr T Blanchard was appointed to investigate Ms Holt's grievance. He was from outside the organisation, although he had previously conducted one other investigation for the respondent. During our hearing, Ms Holt alleged that previous investigation was into Ms Desai; not an allegation she had previously made. Ms Desai and Mr Grice denied that was the case.

205. Ms Holt was informed of Mr Blanchard's appointment on 12 December 2019. She was invited to meet with him on 19 December 2019.

206. On 17 December 2019, Ms Desai reported to the respondent's Information Governance Officer a data breach in respect of Ms Holt emailing to herself and to her union, information relating to an employee's Occupational Health Assessment, that Ms Holt had been interviewed and had confirmed that she had done so.

207. On 26 December 2019, the ACAS early conciliation period came to an end.

208. On 14 January 2020, Mr Malcolm produced a report in relation to his disciplinary investigation, which begins at page 670. Mr Malcolm made the following findings:

> "Two logs containing commercially sensitive information, including employee names, reference to formal hearings, settlement agreements and potential employment tribunal claims against the council…
>
> An entry on 09/09/19 where the employee's line manager advised her 'not to log in whilst sick and not to forward emails'.
>
> Highly sensitive, confidential and personal information relating to an employee's medical condition. This also contained the outcome of their psychological assessment and disclosure of personal discussions between an employee and the O/H doctor."

209. Mr Malcom reported Ms Holt's acknowledgement that she had sent the email with the attachments which she described as an error of judgment, not the right thing to do. She had said she was disappointed in herself, but at the time she was having a breakdown. She had pointed out that she was signed off with stress. She had confirmed her awareness of ITU policies, the Code of Conduct, Data Protection and GDPR rules. Ms Holt had said that the error of judgment was in very extreme circumstances when she was suffering from stress, exacerbated by her disabilities and bullying and

harassment in relation to her disabilities. Mr Malcolm concluded that it was reasonable to conclude that Ms Holt's actions were a serious concern constituting a serious breach of the councils policies and data protection obligations. He recommended the matter should proceed to a disciplinary hearing.

210. Ms Holt was invited to attend a disciplinary hearing on 30 January 2020 by way of letter dated 14 January 2020. The allegation which she faced was stated to be, *"The use of the council's IT system during your sickness absence"*. Whilst that may appear to be somewhat vague, the letter of 14 January included a copy of Mr Malcolm's investigation report summarised above and transcripts of interviews, (all of which were recorded).

211. Within the bundle there are many pages of transcripts of interviews in relation to the grievance and disciplinary investigations, the disciplinary hearing, the disciplinary appeal and the grievance hearing. Everything was recorded and transcripts produced. Excerpts from interviews have been included by agreement between the parties, not the full transcripts. As we made clear to the parties, we have not read everything. What we have read is what we have been taken to during evidence. We will not recite everything that we were taken to in this decision. We have taken into account everything that we were taken to in reaching our decision, both in our findings of fact and in our conclusions.

212. Ms Holt did not immediately receive the letter of 14 January 2020 and its enclosures, as she was away from home in connection with her terminally ill grandfather. The respondent planned to reschedule the disciplinary hearing for 10 February, but Ms Holt's trade union representative was not available for that date. Ultimately, it took place on 17 February 2020, see below.

213. On 22 January 2020, Ms Holt was provided with access to the respondent's IT system at the respondent's premises in order to look for evidence in connection with her grievance. She took the opportunity also to look for evidence in relation to the disciplinary hearing.

214. Ms Holt issued the first of these proceedings on 24 January 2020.

215. By email dated 24 January 2020, Ms Holt requested print outs of various documents. In so far as they existed, they were provided on 8 and 14 February 2020.

216. On 29 January 2020, Ms Holt collected hard copies of the bundle of documents for the disciplinary hearing. She requested access to her email account to retrieve evidence for her disciplinary hearing.

217. By email dated 31 January 2020, Ms Holt requested of Mr Grice that the disciplinary and grievance processes be joined. She submitted that they were, "intrinsically and substantially related". By email dated 11 February 2020, Mr Grice refused that request, stating that he did not believe they were related, (page 513).

218. Email correspondence between Ms Holt and Mr Grice appears at page 945/6. Ms Holt had chased for access to the IT system, Mr Grice said he had previously asked her to stipulate what material she was looking to access, Ms Holt denied having received any previous communication, (and in cross examination of Mr Grice, accused him of lying when he said he had spoken to her on the telephone). We accept he had spoken to her.

219. Ms Holt requested, "As a reasonable adjustment" access to a computer and a large screen. She explained that she only had use of a tablet and telephone at home, from which it was difficult to do a lot of reading/writing because of the small screen size and she would like a large screen to help her write up her notes and questions for the hearing. We note that the respondent had provided all documents in hard copy, Ms Holt had access to the internet at home and had previously connected her laptop to her television.

220. Later on 13 February, Ms Holt requested a postponement, reciting that she would not be able to submit her evidence by the deadline of 4pm because the respondent had not responded to her request for access to emails and had not provided her with transcripts from the grievance investigation.

221. On 14 January 2020, (page 520) Ms Holt reiterated her request for a computer and large screen as a reasonable adjustment, referring Mr Grice to her Occupational Health report of Septemebr 2019. Mr Grice replied refusing her request, stating that he had reviewed the OH report which did not mention she had any difficulty with writing or note taking. Ms Holt replied with a screenshot of the September 2019 OH report which referred to vision fatigue and the need for a large screen. The report stated, *"Due to her conditions she also reported fatigue ability of her vision and she benefits from having a large screen"*.

222. On 16 February 2020, Ms Holt emailed her union representative to say, *"I no longer want to request a deferment as I have done all the work but we can discuss".*

223. The disciplinary hearing therefore proceeded on 17 February 2020. The transcript begins at page 854. The hearing was chaired by Ms Tarka, Director Adults, Health and Communities. She was the sole decision maker. Ms Tarka's evidence that Ms Holt gave a very clear account of herself with no apparent brain fog is corroborated by a reading of the transcript. Ms Holt was represented by a trade union representative, Mr Rehahn.

224. Ms Holt confirmed that she had forwarded her grievance with the attachments to herself. She said that she had then deleted it, (page 900). She said that she was disappointed in herself and that it was not something she would ever do again. She apologised for her error of judgment, (page 901). She said she had a number of matters she wished to raise but did not want them to detract from the fact that she accepted responsibility for her error (page 901). Those matters were:

224.1 She was off sick because her managers would not accommodate her phased return to work, (this is where she expressly stated that she was not fully incapacitated, she was fit to undertake some work and was absent because her adjustments could not be accommodated).

224.2 Although Mr Malcolm had accused her of sending an email to an iCloud address as well as her Hotmail address, when she had accessed her emails on 22 January, she searched for an email to her iCloud address and was not able to find one.

224.3 She had been refused further access to her emails after 22 January. The respondent had not shown that logging in whilst sick was gross misconduct or even a disciplinary matter. She suggested that forwarding an email to her personal email was reasonable limited personal use.

224.4 Data is not property and she had not therefore misused council property, (page 907 box 33).

224.5 There had historically been data breaches similar to hers which had not been treated as gross misconduct, (page 908).

224.6 Her breach was not a serious one.

224.7 That unfounded accusations had been made against her on two separate cases which had caused work related stress at the time that she had forwarded the email to herself. Without that stress she said, she would have been more clear thinking and would not have made that mistake.

225. Ms Holt reiterated at the conclusion of her submission in defence, that she'd had a lapse of judgment for which she apologised; she was disappointed in herself, she had made a wrong choice and she would never do it again.

226. In answering questions from Ms Tarka, Ms Holt acknowledged that she understood the serious significance of sending personal information relating to others, to her personal email and the breach of GDPR principles.

227. Ms Holt had challenged Mr Malcolm, who gave his presentation to Ms Tarka at the outset of the disciplinary hearing, in relation to the absence of copies of the emails either to the Hotmail account or the iCloud account of Ms Holt. He acknowledged in hindsight that perhaps they should have been provided. He acknowledged that he could not say how many emails had been sent. He pointed out in response, that Ms Holt had acknowledged in interview that she had sent the emails. Nevertheless, she pressed him for evidence.

228. Ms Holt further challenged Mr Malcom:

228.1 For making a mistake by failing to correctly identify whether Mrs Mohabeer or Miss Salmon was his line manager.

228.2 Over which documents had been attached to which emails.

228.3 Over which council policy had been breached.

228.4 As to whether or not he had written the questions for interviews himself.

228.5 That he had not given documents to Ms Holt to look at before asking her questions.

228.6 As to whether or not the respondent had reported the matter to the Information Commissioner within the required timeframes.

228.7 As to whether it could genuinely be said her actions could bring the respondent into disrepute.

229. The disciplinary hearing began at 10:42 and ended at 17:03, (with several breaks during the course of the day).

230. Ms Holt was due to be on annual leave from 19 February to 4 March 2020. Arrangements were therefore made for the outcome of the disciplinary hearing to be delivered to her upon her return from annual leave on 4 March 2020. In the meantime, Ms Tarka made enquiries of HR, (Ms Parma) about how data breaches had been handled in the past and was reassured that each case had to be taken on its merits and there was no need to be concerned about inconsistency.

231. The outcome letter is at page 850. Ms Holt was dismissed. Ms Tarka wrote:

> "Based on the evidence presented, I have come to the conclusion, on the balance of probabilities, you deliberately misused your position and access to support your own interests and in doing so wilfully disregarded all associated policies. The actions you took in forwarding the sensitive/confidential information are incompatible with your role of HR Advisor with the council. It is on this basis and given these circumstances that I have concluded that the allegation has been substantiated, and furthermore that an act of gross professional misconduct has occurred resulting in irretrievable breakdown of trust and confidence that is implied by your employment contract".

232. Ms Holt submitted an appeal on 17 March 2020. The document is at page 934. Her grounds of appeal were:

232.1 As to the basis upon which the allegation was found proven: In this regard, she said the hearing bundle had not contained the relevant email. That similar cases had been dealt with informally. She said it was unclear what the allegation was. That it was unreasonable to conclude she had deliberately misused her position. That it was unreasonable to conclude her actions were gross misconduct in the context of what she described as numerous data breaches to which she said she had been subjected to, during the process.

232.2 Against the level of sanction imposed: She argued that having regard to her ten years' service, her severe emotional distress at the time, the outstanding Occupational Health recommendation for a stress risk assessment, that she had been off work with stress and had submitted a grievance for failure to make reasonable adjustments, bullying and harassment and her diagnosed condition was known to be exacerbated by stress, the sanction of dismissal was too severe.

232.3 The process followed was incorrect: In particular, she said natural justice had not been followed, she had not been clearly told why she was suspended, she was still unclear of the actual allegations, she was prevented from accessing evidence thereby presenting it in time and she was prevented from questioning management. She complained she had been refused access to information, subject access requests had not been processed in time, Mr Grice had refused to combine the grievance and disciplinary hearing, Mr Grice had delayed responses. She argued the respondent should have adopted its simplified procedure. She complained that the respondent did not call witnesses.

233. The country went into lockdown on 23 March 2020; the respondent's casework, including progress on Ms Holt's appeal, was suspended. That was explained in an acknowledgment of receipt on 23 March.

234. On 3 April 2020, someone in the respondent's payroll department, called Ms Papasavva, provided information to Mr Blanchard (investigating the grievance) about Ms Holt's flexible working request. She confirmed that the 16 July 2019 flexible working request had been addressed to Mrs Mohabeer, copied to Ms Assapardi and that there was nothing else on file. She confirmed that a lot of working from home arrangements were not formalised.

235. On 8 April 2020, Mrs Mohabeer responded to an email from Ms Holt requesting transcripts of her disciplinary hearing, explaining that until such time as government guidance in relation to covid was revised, the respondent would not be corresponding in relation to the appeal.

236. On 20 April 2020, Mr Blanchard provided his report on his investigation into Ms Holt's grievance. The report begins at page 558. The report runs to 56 pages. As well as reviewing all relevant documentation, Mr Blanchard had conducted 14 face to face interviews, 2 telephone interviews and 7 email interviews. All face to face interviews were recorded and transcribed. The investigating report is notably thorough. It sets out key findings on all allegations. Mr Blanchard analysed information he had received from interviewees in the context of the allegations. He contrasted what had been said to him by Ms Holt with what had been said to him by others. He set out reasoned conclusions in respect of each allegation. In summary, his conclusions were:

236.1 There had been a breach of policy in failing to provide a formal response within the proscribed period of the flexible working request, which was an administrative error.

236.2 He found that, "*There was no evidence to support the underpinning theme of the grievance that the actions taken by those against whom the allegations were made were motivated by bullying and harassment*". Of course, it is not necessary for there to be intention, a motive, to bully or harass for conduct towards an individual to meet the definition of harassment in the Equality Act 2010. Nonetheless, it is clear that Mr Blanchard found that Ms Holt had not been bullied or harassed and many of the actions complained of were motivated by a desire to see Ms Holt return to good health.

236.3 Mr Blanchard recognised that some things could have been done differently. For example, there should have been fewer unexpected changes of managers, proper handovers should have been undertaken to ensure Ms Holt's disability was known. There should have been some flexibility in holding discussions with Ms Holt before she returned to work to reduce her anxieties. There could have been a clearer handover between Ms Desai and Miss Salmon over who was picking up the issues raised by Ms Holt. The stress risk assessment should have been done more quickly.

236.4 On the other hand, Mr Blanchard recognised that Ms Holt's extensive absences meant that, *"momentum and continuity was lost*".

236.5 He was unable to identify what reasonable adjustments had been withdrawn.

236.6 In respect of the environmental stress audit proposed, he reported that interviewees felt that they were in a better position than they had been previously and he was unclear what an environmental stress audit would achieve.

237. The second period of early conciliation through ACAS was between 24 and 27 May 2020.

238. Although by this stage Ms Holt was no longer working for the respondent, we were referred to a fit note in the bundle at page 614 which certified Ms Holt as not fit to work due to fatigue and a hoarse voice, covering the period 25 May to 24 June 2020.

239. Ms Holt was informed of the grievance outcome by a letter dated 19 June 2020 which is at page 615. The outcome letter did not provide for any right of appeal.

240. In June 2020 the respondent lifted its suspension of case work. It had a significant backlog to work its way through.

241. On 25 July 2020 Ms Holt issued the second set of proceedings.

242. By letter dated 28 August 2020, Ms Holt was invited to attend an appeal hearing on 18 September 2020. Ms Holt replied to say that she would not be well enough to attend and she would need reasonable adjustments to be considered before she could do so. She was asked to confirm what adjustments she would need. She replied that she would need time to speak with her union representative and prepare her paperwork. She would not be able to attend in the morning as she was generally unable to function before 12pm. She had at that point lost her voice and when that had previously happened, she had lost it for two months. She said that she would need the hearing to be spread across three or four days. She asked the respondent why there was a hurry. The respondent replied inviting Ms Holt to let them know when she was well enough to proceed and what adjustments she would like at that time.

243. On 13 November 2020, Ms Holt wrote to the respondent to confirm that she was now well enough to continue with the appeal process. She said that she would need the hearing to start after 1pm, that it would need to be split across two days with one hour session followed by a one hour break.

244. On 17 November 2020, the respondent set in motion the necessary steps to obtain Occupational Health advice in relation to the appeal hearing. Ms Holt entered into correspondence with the respondent to suggest that they could obtain the information they wanted from her GP rather than from Occupational Health.

245. An Occupational Health assessment took place by video on 8 December 2020 and a report starting at page 637 was produced on 9 December 2020. The report recommended:

    245.1 The hearing should not start before 1pm.

    245.2 It should last for no more than two hours in total each day.

    245.3 There should be a break of one hour between the two hours of the daily meeting.

    245.4 That Ms Holt was keen for the hearing to go ahead without her having representation she would prefer to represent herself.

    245.5 That the respondent ought to liaise directly with Ms Holt in respect of any other possible further adjustments.

246. The respondent then set about identifying councillors available to sit on the appeal panel and wrote on 26 January 2021 inviting Ms Holt to attend an appeal hearing over five days during the week Wednesday 10 March to Tuesday 16 March. Each afternoon, the hearing was to last from 2pm to 3pm and 4pm to 5pm.

247. The appeal hearing took place as planned between 10 and 16 March. The transcript appears beginning at page 1020. The appeal panel consisted of

three councillors of whom Mrs Brabazon was the Chair. Ms Holt was accompanied by her trade union representative, Mr Rehahn.

248. Ms Holt complains that she was not asked what adjustments she would like in the hearing. The transcript records the following from Ms Brabazon:

> "Obviously, if anyone requires and adjournment while the hearing is going on, please ask. I am obviously mindful of many of the issues that are concerning anybody's heath. So you really only have to ask. Ema, are there any questions you have about the practical arrangements?"

Ms Holt replies not.

249. Ms Tarka gave evidence to the appeal panel. Ms Holt was invited to ask her questions. She and her representative protested about this, complaining that as this was a review not a rehearing, they had not prepared questions for Ms Tarka. The appeal panel made arrangements so that Ms Holt and her representative would have plenty of time to prepare questions if they wished to do so. In the end, Ms Holt and her representative declined to ask question of Ms Tarka.

250. During the course of the hearing Ms Holt argued that:

250.1 She was under severe emotional stress.

250.2 She had admitted her error immediately.

250.3 She complied with the investigation and had been honest throughout.

250.4 The individuals concerned with the data breach and the ICO had not been informed within the timeframes prescribed and therefore, the respondent did not see the breach as high risk or serious.

250.5 The integrity of the investigator, Mr Malcolm, was questionable, (page 1071)

250.6 She had not undertaken the GDPR Essentials course, (page 1072) and that this was an error by Mr Malcolm.

250.7 The disciplinary hearing bundle had not been put together in accordance with the guidance, (page 1073).

250.8 The forgoing amounted to a breach of natural justice.

250.9 She had not been provided with a response to a Subject Access Request for the grievance transcript she wished to present to the appeal panel and Mr Grice had not complied with her request for the transcript to be provided.

250.10 A Subject Access Request had revealed new evidence that no email to an iCloud account by Ms Holt had been found.

250.11 The individual that had conducted the IT audit had not attended the disciplinary hearing.

250.12 She had not had adequate time to prepare for the disciplinary hearing because she could not access evidence and was confused about the allegations she faced.

251. Ms Holt was asked questions by Ms Tarka during the appeal:

251.1 She refused to answer with a yes or no whether she considered that the transfer of confidential employee information by an HR Advisor constituted gross misconduct, she said it could not be answered with a simple yes or no.

251.2 She agreed that the email that she had sent to herself contained confidential information about employees. She did not accept that was a serious breach when compared with similar cases. She denied, (page 1117) having taken a course on GDPR. She did acknowledged that she had a general understanding of data protection and GDR. At page 1118 answering questions from Ms Brabazon, she gave as an example of other breaches being treated less seriously, a member of staff forwarding the names and addresses of tenants for use in her business selling satellite packages, (page 1118-9)

251.3 Asked what, if the disciplinary officer had decided that there should be an outcome short of dismissal, should the sanction have been her response was that the disciplinary officer would not have been able to arrive at a reasonable sanction due to the lack of natural justice in the investigation and report. She argued that the disciplinary officer did not have the necessary information to draw a conclusion on sanction that would be fair.

252. After the appeal hearing, the appeal panel permitted Ms Holt to submit some further evidence; reference to the information usually supplied to a person suspended which she said had been omitted, specifically in relation to the section of the policy which was alleged to have been breached. Also, to make the point that the version of the Code of Conduct included in the bundle was a later version, with which she was not familiar, (October 2019), (see page 1140).

253. The outcome to the appeal was provided by letter dated 25 March 2021 which begins at page 1141 of the bundle. The decision of the appeal panel was to uphold the decision to dismiss. The panel found that Ms Tarka's finding that Ms Holt had committed gross misconduct and her decision that she should be summarily dismissed, was fair and appropriate. Essentially, the appeal panel focussed on the fact that Ms Holt had admitted at all stages, having sent personal information relating to an employee to her personal email address, that it was wrong of her to do so and that she knew she should not have done so.

254. The appeal panel noted some procedural failings. They accepted that the allegations set out in the invitation to the disciplinary hearing could have been clearer, although the accompanying investigation report provided that clarity. They acknowledged that the email to Ms Holt's personal account had not been included in the bundle, but they emphasised that omission was not fatal, because Ms Holt had admitted sending such an email.

255. The appeal panel felt that the sanction of summary dismissal was appropriate, bearing in mind that Ms Holt was an HR Advisor. They did not accept her explanation that what she had done was an error and they took the view that her actions were deliberate. They did not consider that her length of service or her medical condition, were sufficient to impact on the sanction.

256. The panel acknowledged that the Data Protection Policy and IT Data Breach Security Form could have been included in the investigation report. That was not felt to have created an unfairness, as Ms Holt had admitted sending the email and knowing that she should not have done so. It was acknowledged that she had not been permitted to question the HR Advisor to Ms Malcolm. The panel felt that was appropriate; Mr Malcolm was at the disciplinary hearing to answer to his investigation and recommendations. The appeal panel did not accept that Ms Holt had not been permitted to submit new evidence at the disciplinary hearing. They commented that Subject Access Requests are a different process to the disciplinary process. Mr Grice was found to have kept in regular correspondence with Ms Holt. The simplified disciplinary procedure was not appropriate. The appeal panel felt that Ms Holt had all necessary documentation for the disciplinary hearing. They also felt no criticism could be made over the decision of Ms Tarka not to call witnesses other than Mr Malcolm.

Conclusions

257. We approach our conclusions by reference to the agreed list of issues, but we consider the discrimination allegations first.

Direct disability discrimination

258. Ms Holt complains at 10. a. of Ms Etheridge not responding to the request in her grievance that an Environment Stress Audit be carried out. That would be in relation to her team. She relies on in the alternative, a Mr Dalby or a hypothetical comparator.

259. Mr Dalby was a bilateral amputee who could not return to work until a Personal Evacuation Plan, (PEP) had been undertaken. He had issues getting it undertaken, he therefore raised it with Ms Etheridge.

260. Mr Dalby is not an actual comparator because his circumstances were different. The similarity is that they both raised concerns with Ms Etheridge. She dealt with both in the same way, in that she ensured the matters raised were passed on. In the case of Mr Dalby, by ensuring that the manager responsible for health and safety was aware. In the case of Ms Holt, by

appointing a suitable person to consider her grievance, of which the request for an environmental risk audit was part.

261. A hypothetical comparator would be a person who had raised a grievance, including a request for an environmental risk assessment of her team, who was not disabled. We find that such a person would have been dealt with in the same way. There is no evidence from which we could properly conclude that the reason Ms Etheridge did not respond to the request for an environmental risk audit in Ms Holt's grievance was because of Ms Holt's disability. Having heard evidence from Ms Etheridge, we are satisfied that Ms Holt's disability was not a motive for, played no part in, consciously or unconsciously, her action or inaction.

Section 15: Discrimination Arising from Disability

262. There are two allegations of unfavourable treatment relied upon: not investigating Ms Holt's alleged decline in performance and dismissing her.

263. Ms Holt confirmed in her closing submissions that her reference to her alleged decline in performance is a reference to the respondent's failure to investigate the GG matter whilst she was off ill. The GG matter in fact related to conduct, not performance. It was the NC matter which related to performance.

264. In correspondence between 15 August and 21 August 2019, Ms Holt pressed the respondent to deal with the GG matter, (NC does not appear to be mentioned) because worrying about it was causing her to be ill and her doctor was advising her that she needed a resolution. However, Ms Desai spoke to her on 23 August 2019 and reassured her, such that in Ms Holt's words, she felt, "so relieved". In light of that, we conclude that there was no unfavourable treatment in this respect.

265. Dismissal was of course, unfavourable.

266. Ms Holt was dismissed, not because of her absence, (issue 13.c.) but because of the email she had sent herself containing confidential information. Was that in consequence of her disability? Ms Holt says that it was, because of her ill health at the time, brain fog and confusion, caused she says, by her fibromyalgia and ME; she says that she made an error of judgment she would not otherwise have made. We have no direct evidence on which we could make such a finding. Having regard to her email correspondence at the time, her note taking, and the transcript of her meeting with Mr Malcom on 26 November, we are satisfied that Ms Holt was not suffering from brain fog or confusion on 3 October 2019, or indeed subsequently. We do not accept her evidence to the contrary.

267. We therefore conclude that forwarding confidential information to herself on 3 October 2019 was not, "something arising in consequence of her dismissal". Her complaint of discrimination arsing from dismissal therefore fails.

Indirect Disability Discrimination

268. From paragraph 5.1 of the Internal Recruitment Policy quoted above, (paragraph 83) it seems that the respondent does indeed have a PCP of requiring staff applicants to request unprompted, any reasonable adjustments they may need during a recruitment process, which is unwise.

269. Such a practice would be applied to people who are and who are not disabled. It places people who are disabled at a disadvantage as they are more likely to need an adjustment to the process if they are to have a fair opportunity without disadvantage.

270. However, we find that Ms Holt was herself not and would not have been placed at such a disadvantage, (as required by section 19 (2) (c)) because:

    270.1 The pleaded case seems to be that she needed more time, (page 44 para 89) but she gives no evidence about this in her witness statement and we are not satisfied on the evidence, that she did need more time.

    270.2 As an experienced HR Advisor she knew very well that if she needed a reasonable adjustment, she would need to ask for it, and

    270.3 In fact, she only applied for the post to be difficult.

271. The complaint of indirect discrimination therefore fails.

Reasonable Adjustments

272. The PCP on work allocation is as set out at paragraph 110 above, it was not simply based on the individuals, "patch" and management discretion.

273. The PCP regarding presence at work as opposed to home working is as set out at paragraphs 112 and 117.

274. In so far as there was a requirement for staff in the team to attend work during the summer and forgo their working from home days, that requirement was not applied to Ms Holt.

275. Ms Holt was not placed at the contended for disadvantage of not being able to carry out her full work load, by reason of either the allocation of casework or the requirement for team members to attend work during periods of staff absence.

276. The complaint of failure to make reasonable adjustments fails.

Harassment

277. When we use the expression, "could not reasonably have given rise to the proscribed environment" or similar, we mean that having regard to the perception of Ms Holt, the other circumstances of the case and whether it is reasonable for the conduct to have that effect, the matter at hand could not

give rise to the environment proscribed at section 26(1) of the EQA. In each instance, we have considered whether there is evidence from which we could conclude that the proscribed atmosphere has been created by the alleged act. We consider each allegation of unwanted conduct as set out in the list of issues in turn:

277.1 a. It is true to say that Ms Desai and Ms Salmon did not advance their consideration of the complaint about Ms Holt that she had said to GG that, *"Rome was not built in a day*". However, this did not create the proscribed environment; Ms Desai reassured Ms Holt about the matter on 23 August 2019, after which she was relieved. Furthermore, it did not relate to her disability.

277.2 b. We have found that, (paragraph 148) Mrs Mohabeer did not, "tell" Ms Holt that she did not have a diagnosis; she observed that the most recent OH reports, (said to have been dictated in her presence) said that she did not have a diagnosis. Mrs Mohabeer did not challenge Ms Holt about this, merely pointed out that she was not aware of a diagnosis. Whilst related to disability, this could not reasonably have given rise to the proscribed environment.

277.3 c. i. As set out at paragraph 152, Miss Salmon probably did say to Ms Holt that she should attend for all of the Away Day. Ms Holt did not want to do so because she was on her phased return to work. It is therefore related to her disability, but in our judgment it does not reasonably give rise to the proscribed environment.

277.4 c. ii. We have found, at paragraph 152.2, that Miss Salmon did not question Ms Holt's disability.

277.5 c. iii. We have found, at paragraph 152.3, that Miss Salmon did not blame Ms Holt for the decisions of others.

277.6 d. We have found, at paragraph 154, that Miss Salmon made a general comment to the whole team to the effect that there was a misapprehension that a disabled person could not be dismissed. It was not directed at Ms Holt, it was not related to her disability, it could not reasonably be said to have given rise to the proscribed environment.

277.7 e. As we found at paragraph 165, Ms Holt was pressurised into ceasing her phased return to work and resume her contractual hours. However, she agreed to this in the context of her already working more hours than the phased return to work required and in that context it was not an unreasonable request to have made of her, one to which she agreed. This did not give rise to the proscribed atmosphere.

277.8 f. Ms Desai did send an email expressing happiness that there were no fixed desks for, "DDA" reasons, (see paragraphs 168 and 169). Given that Ms Desai had made it clear that she was, "not aware" of

any DDA requirements, (as it happens, genuinely so) and that names were given of people to whom anyone could go with any specialists requirements, this could not reasonably be said to have created the proscribed environment.

277.9 g. Mrs Mohabeer did ask Ms Holt for a copy of any management approval of her earlier flexible working request. Mrs Mohabeer was new to management of Ms Holt and had not seen such an approval. It was not unreasonable to ask Ms Holt for a copy of it. It was not a challenge to Ms Holt seeking to suggest such approval had not been given. It could not reasonably be regarded as giving rise to the proscribed atmosphere.

277.10 h. Much in the same way that it was not unreasonable for Mrs Mohabeer to ask about paperwork for the 2018 request, so it was not unreasonable of Miss Salmon to also ask her and to indicate that she would make further enquiries. She did not suggest that it could be reviewed and revoked. It could not reasonably have given rise to the proscribed environment.

277.11 i. Miss Salmon did arrange for the Case Plan to be password protected. It applied to everyone, not just Ms Holt. It was a sensible and reasonable measure to take to resolve a genuine problem and had nothing to do with Ms Holt's disability. It could not reasonably be said to have created the proscribed atmosphere.

278. None of the allegations of harassment are upheld. We have stood back and asked ourselves whether it could be said that all, or any combination of the foregoing, could together, reasonably be said to have created the proscribed atmosphere for Ms Holt. We have concluded not.

Victimisation

279. Ms Holt's grievance of 3 October 2019 complained of disability discrimination and therefore amounted to a Protected Act. That is not disputed.

280. We consider each allegation of detriment because of the Protected Act in the order they appear in the list of issues. In each instance, we have considered whether there is evidence from which we could conclude that the matter complained of, (if upheld as a detriment) was because of the Protected Act so as to shift the burden of proof to the respondent. When we say that something was not because Ms Holt had complained of discrimination, we mean that it was not because her having done a Protected Act as defined at section 27 of the EQA.

28 a Grievance Investigation

281. Ms Holt in her closing submissions, says that Mr Grice did not meet with her within 20 days, he did not investigate within 28 days, did not agree an extension with her and did not give her a right of appeal.

282. It is true to say that the respondent did not comply with the timescales set out in its own policy; employers rarely do. It may well be that things should have been done more quickly. Appointing an external investigator delayed things a little. It took Mr Blanchard from 8 December to 20 April 2020 to produce his report. Christmas would have got in the way. His report is 50 pages long. We explain at para 236 just how thorough it was. A report like that is not produced in a short period of time. The reason for the delay was the appointment of an external investigator and the time taken to undertake the investigation, not that Ms Holt had complained of discrimination. It was a thorough investigation, the allegation that the respondent failed to investigate the grievance is not upheld.

283. Mr Grice's failure to meet with Ms Holt within 20 days, did not investigate within 28 days and did not agree an extension with her, was because he had appointed an external investigator, not because she had complained about discrimination.

284. Our understanding of Ms Holt's complaint of breach of confidentiality is in respect of the sending papers relating to her grievance to Mr Blanchard unredacted and/or his seeking advice from HR. Both are absurd. Neither actions were because Ms Holt had complained of discrimination, they were because Mr Blanchard, the external investigator appointed at her request, needed all the relevant papers and needed advice.

285. Ms Holt did not put any particular breach of the ACAS code to any witness. We consider potential breaches of the ACAS code separately as they arise.

286. We are not aware of and Ms Holt did not identify, any suggestion of the respondent withholding evidence in relation to the grievance. We believe her complaints in this regard are to do with the disciplinary hearing, see below.

287. The respondent did not give Ms Holt a right of appeal against her grievance outcome. The explanation given is that by the time of the grievance outcome, she was no longer an employee and no longer entitled to appeal. That is not in accordance with usual or good industrial relations practice. It is a dangerous practice for an employer to adopt, especially where it is facing allegations of discrimination in the grievance. The tribunal has never come across such a practice. The grievance policy, (page 219) refers to "employees", but does not say that the right is lost with termination of employment. The ACAS code at paragraphs 41 to 45 refers to a right of appeal. That too refers to employees, but does not provide that the right is lost if employment were terminated. It would be extraordinary were that so. That said, this is an allegation of victimisation. The question is, what was the reason for the respondent not providing a right of appeal? That the respondent adopted such a policy is not enough to shift the burden of proof to the respondent, but even if it was, we find that Mr Grice believed that because Ms Holt's employment had been terminated, it was appropriate and in accordance with policy not to provide her with a right of appeal. It was not because Ms Holt had complained of discrimination.

28 b Refusal to hear grievance and disciplinary together

288. We can not find reference in the policies to potentially joining grievances and disciplinary matters. It is referred to in the ACAS code, paragraph 46:

> "…Where the grievance and disciplinary cases are related it may be appropriate to deal both issues concurrently. "

289. Mr Grice declined Ms Holt's request. He did not think they were related. He considered the very point contemplated by the ACAS code. Ms Holt said that they were related, but did not set out for him for why. We find that Mr Grice refused to join the two because he did not think that they were related, not because Ms Holt had complained of discrimination.

28 c Withholding evidence

290. In the context of the disciplinary proceedings, Ms Holt complains of the respondent withholding evidence.

291. In relation to the documents referred to in the email of 24 January 2020, in so far as they existed, they were provided, (paragraph 215).

292. The respondent did not provide a copy of the email that Ms Holt had sent herself on 3 October 2019. It ought to have done. However Ms Holt acknowledged that she had sent the email and she acknowledged sending to herself the documents attached to it. There was therefore no detriment. Further, it was an oversight and not because she had complained about discrimination.

293. The respondent did not provide Ms Holt with documents relating to the IT investigation. There was no need to do so, as Ms Holt admitted sending the email of 3 October to herself. There was no detriment and the reason was the absence of need, not that Ms Holt had complained of discrimination.

294. Ms Holt complains that instant messaging exchanges between her and some of her colleagues in October 2019 were withheld. They were not relevant to the issues. Ms Holt said in evidence that they would have jogged her memory that she had a cold on 3 October. We do not see that would have made any difference. They were not relied on in the disciplinary decision making. They were in any event accessible to her when she accessed the respondent's IT system on 22 January 2020, (paragraph 213). There is no detriment and the reason they were not provided is not that she had complained of discrimination.

295. Lastly in accordance with the agreed list of issues, Ms Holt complains about not being provided with copies of emails between Ms Desai and Mr Malcolm regarding the report to the data protection team. These were not relied on in the disciplinary decision making. They would not have assisted Ms Holt. There was no detriment. The reason these were not provided is that they were not relevant, not because Ms Holt had complained about discrimination.

28 d Summary dismissal

296. Having heard evidence from Ms Tarka and having regard to the evidence before her, we are satisfied that the reason she dismissed Ms Holt was because she believed her to have been guilty of gross misconduct. That Ms Holt had complained about discrimination played no part whatsoever, in her decision making, consciously or subconsciously.

28 e Delay in appeal

297. Reviewing the chronology: the appeal was submitted on 17 March 2020, the country went into lock down on 23 March, the respondent suspended all case work, Mrs Mohabeer explained the situation on 8 April, the respondent lifted the suspension of casework in June, on 28 August Ms Holt was invited to attend an appeal hearing on 18 September, she said she was not well enough and asked, "What's the hurry?", on 13 November Ms Holt reported that she was well enough, on 17 November the respondent made a referral to Occupational Health for advice on adjustments, the advice was provided on 9 December, the respondent identified councillors available to sit and on 26 January 2021 invited Ms Holt to attend the appeal hearing on 10 to 16 March 2021, when it took place.

298. We find that the reasons for the delay are the usual practical issues in finding a panel, coordinating diaries, issues with Ms Holt's own health and the extraordinary difficulties presented by the pandemic and lock down. There was delay, the reason for it was not that Ms Holt had complained of discrimination.

28 f *Not upholding appeal*

299. Having heard evidence from Ms Brabazon and having regard to the evidence before the appeal panel, we are satisfied that the decision not to uphold the appeal was because they found that the decision to dismiss had been fair and appropriate and not because Ms Hold had complained about discrimination.

Summary re discrimination

300. For these reasons, the claimant's complaints of disability discrimination fail and are dismissed.

Failure to respond to a Flexible Working Request

301. Section 80F(2)(b) of the ERA requires that a valid and enforceable flexible working request must include the date on which it is proposed that the change comes into effect and Ms Holt's request did not contain that information. She is not therefore able to rely on section 80G and her complaint in this regard must fail.

302. It is ironic that she used the respondent's bespoke form for her request, which makes no provision for such a date to be provided. This probably

means that every request for flexible working that the respondent has ever received on its own form is unenforceable. An obvious flaw in its processes.

Unfair Dismissal

303. We are satisfied that the reason for dismissal was that Ms Tarka genuinely believed that Ms Holt was guilty of emailing confidential information to herself and the principle reason for dismissal was therefore, Ms Holt's conduct.

304. Was such belief based upon reasonable grounds after conducting a reasonable investigation?

305. The investigation does not have to perfect. Mr Malcom's report ran to 8 pages of narrative, with relevant documents annexed. He had interviewed Ms Holt and Miss Salmon. Ms Holt had admitted sending the email with the confidential information attached. He investigated Ms Holt's mitigation, which was that she had work related stress caused by unfair treatment. It was in our judgment, a reasonable investigation.

306. Were there reasonable grounds for believing that she was guilty of the misconduct? Yes, because she admitted it.

307. Did the respondent follow a fair procedure? On the face it, plainly in our view, yes. But we considered the points raised by Ms Holt at paragraph 7 of the list of issues:

    307.1 Mr Malcolm and Ms Tarka considered that which would have been relevant from the grievance, on Ms Holt's case, which is that she was overworked and stressed by events that had happened. Ms Tarka concluded that did not provide an explanation nor mitigation, for Ms Holt's actions. Not joining the grievance and disciplinary processes did not render the dismissal unfair.

    307.2 Ms Holt complains that the respondent refused to postpone the disciplinary hearing. It did postpone the hearing originally scheduled for 30 January 2020, and again to 10 February and then again to 17 February as her representative was not available. She requested a third postponement the day before the hearing was scheduled to take place, that was refused, but in any event, she changed her mind and said she was ready. There was no unfairness.

    307.3 Ms Holt complains of the respondent's failure to accede to her request for access to a computer, internet connection and large screen in a private space. The respondents submissions about having provided everything in hard copy, that she had a large screen in the form of her television, (to which she could have connected her ipad) and access to the internet at home, (a private space) are well made. However, the key point is that Ms Holt was ready for the disciplinary hearing, she was able to conduct herself

without apparent difficulty, with the assistance of her union representative. No unfairness arises.

307.4 Ms Holt finally complains of the respondent withholding evidence. She makes the same complaint in the context of her claim of victimisation. We dealt with that at paragraphs 290 to 294 above. For the same reasons, either there was no such withholding of evidence, or where evidence was not provided, it had no relevance to the decision to dismiss.

308. Was the decision to dismiss within the range of reasonable responses?

309. We remind ourselves that it is not for us to substitute our views for those of the respondent. It is not a question of whether or not we would have dismissed Ms Holt. Nor is it a question of whether a reasonable employer would have decided not to dismiss her. It is a question of whether the decision to dismiss was within the range of decisions a reasonable employer might reasonably have made.

310. Of significance to the respondent and relevant to our assessment of whether the decision fell within the range of reasonable responses is:

310.1 Ms Holt was an experienced HR advisor. She knew very well from her work and from her training that she should not email such confidential information to herself and the potentially serious consequences to herself and the respondent of her doing so.

310.2 As an HR advisor, she would frequently be involved in matters that were confidential and handling information that was sensitive and subject to GDPR. She was in a position of trust.

310.3 Ms Holt did not help herself with her approach to the disciplinary and appeal hearings, which seemed like diversionary tactics. Whilst she said in the disciplinary and appeal hearings that she accepted that she had done wrong and did not want what she had to say thereafter to detract from her acknowledgement of guilt, she proceeded to embark on such a detailed, extensive, forensic critique of the investigation and the surrounding circumstances, that she gave precisely that impression. Ms Tarka was entitled to conclude that Ms Holt felt that her actions were justified and that her focus appeared to be on criticising others rather than taking personal responsibility for her own actions.

310.4 Ms Tarka acknowledged and took into account the mitigation relied upon by Ms Holt. In particular, as Ms Tarka put it, Ms Holt's distress which she attributed to her grievance and workplace concerns.

310.5 Ms Tarka concluded that Ms Holt's actions in sending the confidential information to herself was, "deliberate". That is a conclusion that she was entitled to reach on the evidence before her.

310.6 Ms Tarka considered and rejected, any sanction less than summary dismissal. She took the view that Ms Holt's conduct amounted to gross misconduct; trust and confidence in her had been destroyed.

311. Whilst not appearing in the list of issues, Ms Holt also argued that there was inconsistency in the sanction that she received as compared to others. That is no defence to her wrong doing; it does not justify her actions in sending confidential information to herself. She was not arguing that the respondent knew of others who had done precisely as she had done, without imposing any sanction at all. It is potentially relevant on the issue of level of sanction. Ms Tarka took advice and was advised, (correctly) that whether something amounted to gross misconduct will depend on the specific circumstances of each case and was reassured that she need not be concerned about inconsistency. If Ms Holt wished to successfully argue inconsistency, having regard to the cases of Hadjioannou and Paul, we would have had to have been provided in evidence with details of the other cases in questions, so that we could have made a detailed comparison. We had no such evidence.

312. We find that the decision to dismiss was within the range or reasonable responses and the claim of unfair dismissal for these reasons, fails.

Notice Pay

313. Ms Holt was dismissed for gross misconduct. She did commit an act of gross misconduct. She was in fundamental breach of contract. She is not therefore entitled to notice pay.

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Employment Judge M Warren

Date: 12 October 2022

Sent to the parties on: 25 October 2022

For the Tribunal Office