EMPLOYMENT TRIBUNALS

Claimant: Miss V Hayles

Respondent: The Home Office

Heard at: Midlands West (by CVP on 3 October 2022 only)

On: 26, 27, 28, 29, 30 September and 3 October 2022

Before: Employment Judge Faulkner
Mrs D Hill
Ms L Clark

Representation: **Claimant** - in person
Respondent - Mr J Feeny (Counsel)

JUDGMENT

1. The Claimant was at the relevant times, and the Respondent knew that she was, a disabled person within the meaning of section 6 of the Equality Act 2010 ("the Act").

2. The Respondent did not discriminate against the Claimant by treating her unfavourably because of the sickness absence that arose in consequence of her disability in any of the following respects, because in each case the unfavourable treatment was a proportionate means of achieving a legitimate aim:

2.1. On 11 February 2019, indicating that she could be dismissed in a letter inviting her to a meeting to discuss her continuous sickness absence.

2.2. On 22 July 2019, informing her that the Respondent would hold a meeting with her concerning her attendance record and that she may be given a warning.

2.3. On 10 October 2019, giving her a first written warning regarding her attendance record.

3. The Respondent did not fail to comply with the duty to make reasonable adjustments in relation to the application of its Attendance Management Procedure. Not issuing the letter of 11 February 2019 and not giving the Claimant the warning of 10 October 2019 were not reasonable adjustments and the Claimant

has not shown that she was put at the substantial disadvantage in comparison with persons who are not disabled of attending work when she may not have felt otherwise able to do so.

4. The Respondent did not fail to comply with the duty to make reasonable adjustments in relation to the requirement for the Claimant to attend work. The Claimant has not shown that she was put at the substantial disadvantage in comparison with persons who are not disabled of attendance at work being stressful and anxiety-inducing. In any event, from 1 March 2019 the Respondent took the steps of providing her with a buddy and with the managerial support recommended in occupational health reports.

5. The Respondent did not discriminate against the Claimant because of her race:

5.1. In January 2018, at a meeting held to discuss operational issues.

5.2. On 10 October 2019, by sending her an email regarding duty rotas.

6. The Claimant did protected acts in conversations with the Respondent on 11 October 2019, 5 November 2019 and 10 December 2019.

7. The Respondent did not victimise the Claimant, because it did not subject her to the detriment of declining her request for a change in line manager on 11 May 2021 because she did the protected acts or any of them.

8. On 10 December 2019, in informing the Respondent that she believed managers were failing to adhere to equality legislation in their recruitment practices, the Claimant made a protected disclosure.

9. The Respondent did not subject the Claimant to the detriment of declining her request for a change in line manager on 11 May 2021 on the ground that she had made a protected disclosure.

10. Accordingly, all of the above complaints fail and are dismissed.

11. The Claimant's remaining complaints of victimisation and protected disclosure detriment were struck out on the ground that they had no reasonable prospect of success.

REASONS

1. Judgment in this case was signed and sent to the parties on 4 October 2022, oral judgment and reasons having been given at the conclusion of the Hearing. The Reasons below are provided in response to a request from the Claimant dated 17 October 2022.

Complaints

2. After ACAS Early Conciliation from 20 to 23 December 2019, the Claimant presented a Claim Form on 12 January 2020. She complained of discrimination

arising from disability, failure to make reasonable adjustments, direct race discrimination, victimisation and protected disclosure detriment.

Issues

3. The parties agreed (at a time when the Claimant was legally represented) a List of Issues in the form set out in the Appendix to these Reasons. It was amended during the course of the Hearing as follows, using the numbering in the Appendix:

3.1. The Respondent conceded issue 2 (knowledge of disability) during closing submissions, subject of course to the Tribunal's conclusions on disability itself.

3.2. The Respondent also accepted that if the Tribunal found that the Claimant was a disabled person at the relevant times, her absences from work arose in consequence of disability (issue 4).

3.3. The Respondent conceded that, if she was found to be a disabled person, the Claimant was put at the substantial disadvantage set out at issue 8(i).

3.4. As to issue 13(b), the Claimant relied on Stephanie Swann as her comparator in respect of the alleged detriment at issue 14(i) and on John Astley and Rebecca Ebourne in respect of that at issue 14(ii).

3.5. It was agreed that issue 15 should properly be stated as "If the Claimant was less favourably treated than her comparator(s), was this because of race?".

3.6. The Respondent accepted that the Claimant did the protected acts set out at issue 17.

3.7. By the time we reached closing submissions, the only issue contested by the Respondent in relation to the alleged protected disclosures set out at issue 23 was whether the Claimant believed and reasonably believed that they were made in the public interest (issue 25).

3.8. Following the Respondent's successful strike-out application described below, the only detriment for the Tribunal to consider, both in relation to victimisation and protected disclosure detriment, was that set out at issues 18(viii) and 24(xvi).

4. The Respondent also confirmed that it did not seek to argue that it did not know and could not have been reasonably expected to know that the Claimant had been put to the substantial disadvantages relied upon for the complaints of failure to make reasonable adjustments.

Preliminary matters

5. There were a number of preliminary matters which the Tribunal had to deal with on the first day of the Final Hearing, extending into the second day once we had carried out our agreed reading. These matters and how they were resolved are summarised below.

Applications in relation to witnesses

6. Stuart Lomax was, as will appear below, a key witness for the Respondent. In the usual way, he was present at the start of the Hearing, intending to hear the Claimant's evidence. The Claimant was somewhat taken aback by this, and applied – though it must be said not with particular force, once the Tribunal explained the usual arrangements for a public hearing – for him to be excluded from the Tribunal hearing room until he was called to give evidence. The Claimant accepted that there was no prejudice to her occasioned by him remaining in the room and confirmed that she would not be thrown off course if he did. By contrast, there would plainly have been prejudice to the Respondent if the Claimant was present for the whole of the Hearing but its main witness was not, including in relation to gaining a full appreciation of the evidence and providing instructions to Mr Feeny accordingly. We saw no reason to depart from normal practice and the application was therefore refused.

7. On the second day, a senior officer with the Respondent, Richard Johnson, attended simply to observe. The Claimant, who it must be remembered continues in the Respondent's employment, stated that she felt intimidated and uncomfortable. After some discussion, it was agreed that Mr Johnson would not remain in attendance.

8. By consent, Stuart McPherson gave evidence remotely, via the Cloud Video Platform.

9. The Respondent sought to rely on a witness statement for Matthew Foster in relation to the single factual matter dealt with at issues 18(viii) and 24(xvi), namely his refusal to agree to a change in the Claimant's line manager. Witness statements had been exchanged on 25 May 2022, but Mr Foster's was not provided to the Claimant until 6 September 2022. When advising on the compilation of the Respondent's evidence, its solicitors had not appreciated the need to call Mr Foster because they had relied on an earlier list of issues and the complaints in relation to which he was a relevant witness were added to the list later. The statement was 4 pages and 18 paragraphs long, the relevant issue was dealt with in the Claimant's statement and the Respondent did not seek to rely on any additional documents to support the statement. Mr Feeny informed us that the relevant emails on the issue, already in the bundle, ran to around 20 pages.

10. The Claimant opposed the application. She had not read the statement. She said she would need three or four hours to consider it and to prepare any questions she may wish to ask of Mr Foster were his statement to be admitted. In granting the Respondent's application (without having reviewed the statement), we noted the following:

10.1. The omission of the statement from the exchange process was entirely the Respondent's fault, which was a factor against granting the application.

10.2. The Claimant was a litigant-in-person, but the statement apparently dealt with a discrete single issue, the Claimant had already applied her mind to it and dealt with it in her statement and there were only a small number of relevant documents for her to consider in relation to it.

10.3. Although not ideal to do so once the Hearing had begun, because of the need for Tribunal reading-in time the Claimant had more than sufficient time to fully consider the statement and prepare to question Mr Foster.

10.4. Seeing the statement would assist the Tribunal in deciding the issue, any prejudice to the Claimant could be overcome as just outlined and there would be clear prejudice to the Respondent in not being able to defend the complaints on the merits of Mr Foster's evidence, when the failure to exchange it arose from a genuine oversight.

Documents

11. In resisting the application to admit Mr Foster's statement, the Claimant made an application for disclosure of emails or other written communications between Mr Foster and a member of the Respondent's HR team, Molly Henstock, in or around May 2021 in relation to the refusal to change the Claimant's line manager. That application was granted by consent, and in consequence the Respondent provided a small number of documents.

12. There were subsequent discussions about whether a further Order for specific disclosure should be made in relation to the same or similar subject matter. It was agreed that the Claimant should first review email exchanges between Mr Foster and another member of the Respondent's HR Team, a Mr Huffer. Her having done so, she informed us at the start of the afternoon on day 2, just before we began hearing evidence, that she was happy to proceed and did not renew any disclosure application.

Adjournment application

13. On 12 August 2022, the Claimant submitted a further Claim to the Tribunal, the Response to which had been presented in the week prior to this Hearing. On 7 September 2022, the Claimant emailed the Tribunal applying for that Claim and this to be heard together. That application had not been considered prior to this Hearing. The Claimant confirmed that it was maintained and, when I explained that the inevitable consequence of granting it would be the adjournment of this Hearing (given the Respondent at least was wholly unprepared to deal with the substance of the new Claim), probably for around a year, the Claimant confirmed that she was also therefore applying for an adjournment.

14. We appreciated the Claimant's wish to only have to engage with one Tribunal hearing, with all the challenges the process brings particularly for a litigant-in-person. A single hearing can reduce cost, the time invested by witnesses and avoid duplication of evidence. We also appreciated that there was something to be said for the consistency a single tribunal would be likely to be able to ensure in reaching conclusions on both cases together. We were mindful of the point that the overall impression a tribunal gains of an employer and of how an employee has been treated by that employer over a period of time can sometimes be a relevant factor in determining complaints of discrimination. The application was nevertheless refused on the following grounds:

14.1. There was no crossover between the Claims in terms of who is alleged to have discriminated against the Claimant.

14.2. There is also no crossover in terms of the alleged acts of discrimination; they rest on entirely different facts.

14.3. The principal form of discrimination at the heart of the second case – harassment – does not feature in this one.

14.4. There is therefore little, if any, duplication that would be avoided by hearing the Claims together.

15. Accordingly, any prejudice to the Claimant as a result of having to refer in the hearing of the second Claim to matters arising in relation to this, can be overcome by:

15.1. Her being permitted to give evidence about matters from this case – within reason of course and to the extent that they represent relevant background.

15.2. The fact that the Reasons for our judgment (which it was open to either party to request) would be available to the tribunal hearing the second Claim.

15.3. It could not be guaranteed, but if the parties wished it, we could request that the same panel be convened to hear that Claim also.

16. Further, any prejudice to the Claimant, which we regarded as minor, was significantly outweighed by the forensic prejudice which would be caused by a significant delay in this Claim being heard (fading of witness memories was already of concern given the delays in getting the Claim to this point), and by the further costs which the Respondent, and therefore the tax payer, would inevitably incur, for example by having to pay a further brief fee to Mr Feeny in a year's time.

17. Further still, there are other cases and other parties to think about as well. Listing a case for a year's time to include the six days set aside for this Claim would deprive other parties of days on which their claims might be heard.

Strike out application

18. Another application we were asked to consider on day 1 was the Respondent's application to strike out the victimisation and protected disclosure detriment complaints set out at paragraphs 18 and 24 of the List of Issues, other than those at paragraphs 18(viii) and 27(xvi) of that List. In short, the basis of the application was that the remaining alleged detriments in both cases took place before any of the alleged protected acts or protected disclosures which were said to have led to the detriments.

19. The Claimant was given time to consider her position and having done so, she maintained her opposition to the application. She accepted that the complaints were "logically out of sync", but maintained that they were relevant to her Claim and to the evidence the Tribunal should consider. She also submitted that the Respondent should have made the application sooner, and that she felt she was prejudiced by it being made so late because she was unable to take legal advice about it.

20. The case law is clear that tribunals should be very careful about striking out discrimination (and, for that matter, protected disclosure) complaints; they should only be struck out, without hearing all of the evidence, in the clearest of cases, the usual example being where they are inexplicably inconsistent with contemporaneous documents. That said, having heard the parties and considered the matter, we decided to strike out the complaints, for the following reasons:

20.1. We were satisfied that the List of Issues properly reflected what was set out in the Particulars of Claim. Paragraphs 24 to 26 of those Particulars expressly state that the alleged protected disclosures were in October and November 2019, whilst paragraph 26 very much indicates that the issues around Mr Lomax raising questions about the Claimant's meeting in London came earlier; it was now known that this was in September 2019. As to victimisation, paragraphs 27 and 28 of the Particulars did not of themselves suggest that the detriments took place before the protected acts, but it was clear from the List of Issues that all but one of them did.

20.2. Employment Judge Harding had previously refused a number of amendment applications by the Claimant (see page 89 of the hearing bundle at paragraph 1.2).

20.3. The application was made late, and the Claimant was not therefore able to take advice on it. Rule 37 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 requires a party to be given a reasonable opportunity to make representations when faced with such an application. We were satisfied that the time she was given to consider her position, following which she was able to inform us that she recognised the difficulty she faced, was reasonable, given the very obvious logical difficulty of saying that she was subjected to detriments because of protected acts or disclosures that came after the detriments themselves.

20.4. The List of Issues had been prepared when the Claimant had the assistance of counsel. It was difficult to see how taking further legal advice would have made the slightest difference, especially given that the Claimant made clear in her submissions that she would not have changed the dates of the alleged protected acts/disclosures or the alleged detriments.

21. For these reasons, we struck out the Claimant's complaints of victimisation at paragraphs 18(i) to (vii) of the List of Issues and the complaints of protected disclosure detriment at paragraphs 27(ix) to (xv), in all cases on the basis that they had no reasonable prospect of success.

Hearing

22. The parties had agreed an extensive bundle of documents, supplemented as described above. Witness statements were prepared for, and oral evidence heard from, the Claimant and, for the Respondent, Mr S McPherson (Director General for Strategy, Policy & Programmes at the UK Health Security Agency, previously Director General for Crime, Police and Fire for the Respondent), Mr K Bower (Assistant Director at Clandestine Threat Command), Mr S Lomax (Chief Immigration Officer and the Claimant's line manager from around June 2017) and Mr M Foster (Mr Lomax's line manager from 2021).

23. We read the witness statements before hearing evidence. As to documents, we made clear that in the usual way we would only read the documents we were taken to by the parties, not least to provide any chance of the case being completed in the allotted time. We read all of the documents referred to in the witness statements, and of course those we were taken to in oral evidence, except that we made clear that we had not read, and did not think it necessary to read the following, which the parties expressed themselves to be content with:

23.1. The Claimant's historic grievances, complaints and internal appeals, though of course we read what the Claimant said about them in her statement (see VH15).

23.2. Most of the documents referred to in Mr Lomax's statement regarding his handling of the Claimant's sickness absence (SL6 to SL28, SL30 and SL31).

23.3. Documents regarding the Claimant's meeting in London or the performance issues raised with her by Mr Lomax, given the outcome of the strike-out application.

23.4. Other documents plainly not relevant to the issues, such as those relating to the Claimant's back problem.

24. Document references in these Reasons are of course references to the agreed Hearing bundle. Alpha-numeric references relate to witness statements, so that for example VH5 is paragraph 5 of the Claimant's statement and SL12 is paragraph 12 of Mr Lomax's statement.

Facts

25. We made our findings of fact based on the evidence we considered as summarised above, and where there was a dispute between the parties, on the balance of probabilities.

26. The Claimant has been employed by the Respondent since 11 September 2001 as an Immigration Officer ("IO") engaged in enforcement duties, for example visiting premises where it is thought that illegal immigrants might be working. She is based at the Respondent's West Midlands office in Solihull. She describes her race as Black.

27. Currently, the only Black employees in Solihull at operational grades are the Claimant and Ms N Hill. Previously, two male employees at those grades were also Black (the Claimant described them as of "mixed heritage"), but both left for promotions in 2018 and 2019 respectively. There were about sixty employees in total in the Solihull office in 2018, reducing to around forty in 2019. A Black employee subsequently joined the Marriage Team (which deals with forced marriage and related issues); we were not told whether he remains employed. Of seventy-five employees currently based in Solihull, twenty-four are of BAME background (this is the term deployed by the Respondent in its evidence); 67% of successful applicants in last recruitment drive were of that background.

Disability

28. The Claimant's case was that she was a disabled person by reason of work-related stress and anxiety from April 2018, and that this was precipitated by a discussion with Mr Bower on 23 January 2018 (see below). In VH4 she said that she has had anxiety since 2017 and refers to page 649, a report dated 8 March 2019 in connection with her application for extended sick benefit (again, see below). The report indicates that anxiety occasioned a five-day absence in 2017 and refers to "anxiety and depression". Depression was not an impairment the Claimant relied on for the purposes of this case.

29. The Claimant was absent from work from 5 March 2018 to 28 February 2019. Initially she was off work for an eye operation. In her impact statement at pages 21 and 22, she said that on 9 April 2018 (which appears to be when she was due to return to work after the operation), she did not have the energy or motivation to get ready for work by getting out of bed, showering and dressing. She told us in oral evidence that this was the case "probably daily", for a few months thereafter. During the course of her absence, she was able to meet Mr Lomax in a city centre coffee shop for discussions about her absence, but the Respondent accepts that she was not motivated to attend work.

30. The Claimant says that she avoided opening letters from work during this period and that whilst she was usually strong and able to bounce back from setbacks, she was unable to do so at this point. She says she was also tearful. In terms of how the alleged work-related stress and anxiety affected normal day to day activities, she described to us the following for the months of April to July 2018, before she started cognitive behavioural therapy ("CBT"):

30.1. She had previously been able to carry out household chores all in one go at the weekend, but instead had to do them in small stages because she felt overwhelmed. She gave the example of washing up and said she could not focus even on the smallest task.

30.2. She could no longer do her gardening. Her family did it for her when they saw how she presented.

30.3. She no longer cooked for herself and also skipped some meals. Family members shopped for her and brought meals to her which she heated up, enough for every day. This began to improve once she started CBT and counselling (see below), but the help with meals continued – though to a lesser extent – even on her return to work in March 2019. She did not lose any weight.

30.4. Her sister had to wash her hair, about once a month, whereas the Claimant had previously done this herself. She could manage her hair without it being washed more regularly.

30.5. She had trouble sleeping – the Respondent did not challenge that.

30.6. She reduced her socialising. The Respondent did not dispute that either.

30.7. She spent reduced time in the gym, because she felt overwhelmed by it and when she was there, she did not chat to other people. She stopped going altogether for a few weeks but was encouraged to go by her therapist/counsellor;

those few weeks must be the period April to July 2018, given that she did not see the counsellor or therapist until August.

We return in our analysis below to our assessment of the Claimant's impact statement and oral evidence as summarised above.

31. All treatment and professional medical intervention was directed by the Claimant's GP. She was not referred to a psychiatrist. She began CBT in August 2018 and continued beyond the period we were concerned with, which ended in October 2019. She had counselling from early 2019, which also continuing beyond October of that year. She did not take any anti-depressant medication at any time as she did not want to manage her health in that way. Her family and friends did not suggest she needed it nor that she should get specialist psychiatric help.

32. There was a selection of GP records in the bundle. We were not taken to all of them during oral evidence, but we considered it important to review them in their entirety as part of our inquisitorial approach to the issue of disability. We therefore summarise those records in chronological order.

33. The note from 9 March 2018, just after the Claimant's absence started (page 629), referred to her feeling bullied at work, though it noted that the Claimant was happy away from work. She accepts she had no mental health issues away from work at this point. She was offered counselling but declined it. The GP said that there was no current sign of clinical depression and concluded that the Claimant was "currently off work and well".

34. The note on 3 April 2018 (page 629) describes her as having low mood regarding anxiety related to work, panic about having to work with a particular colleague and being worried that she is being criticised. It referred to the Claimant being unable to sleep. The GP recorded, "Copes well in all other aspects of life. Work anxiety seeping into daily life as often does not want to get out of bed". They went on to say that her concentration was poor but said her appetite was good. The Claimant told us that she would not have made that comment about her appetite to the GP. We did not accept that evidence; it is far more likely that the GP noted it because the Claimant said it. The GP also noted that the Claimant wanted to consider counselling and so gave her details for Birmingham Healthy Minds ("BHM"). She was to be reviewed in 4 weeks and seek advice if there was a further decline in mood or anxiety or if she was not coping.

35. On 3 May 2018 (again, page 629) it was said that the Claimant's anxiety was work-induced, that she was awaiting counselling and was not fit for work.

36. The note on 4 June 2018 (page 628) again mentioned the Claimant's anxiety, that she was still awaiting counselling and that she was not fit for work for that reason.

37. The note on 2 July 2018 (page 628) recorded that she was not fit for work because of anxiety.

38. On 31 July 2018 (page 628) the GP noted the Claimant's ongoing work-related anxiety and stress; that disclosure of her sick note by one colleague to

another had made her feel worse; that she was due to have counselling but this had been postponed to 15 August; that she had requested a sick note; and that there were no other issues. She was described as having good eye contact, smiling and being a little on edge.

39. On 31 August 2018 (page 628) it was said that the Claimant had started at BHM, though she had only had an initial session, and was not fit for work because of work-induced anxiety.

40. There is a note on 1 October 2018 (page 628) which recorded again that the Claimant was not fit for work because of anxiety.

41. On 20 November 2018 (page 627), the GP recorded that CBT had not been effective and so the Claimant had now been referred for counselling; it described her feeling of dread when she thought about work, regarding harassment and bullying and said that she was not fit for work because of anxiety.

42. Finally, on 28 January 2019 it was noted that the Claimant was due to return to work but had been given the same manager as her point of contact which would need to be resolved; again, the GP said that she was not fit for work because of work-induced anxiety.

43. It can be seen that the GP notes largely record work-related, rather than day-to-day difficulties for the Claimant. The Claimant's evidence on this point was that she did not believe she needed to refer to matters outside of work when in consultations with the GP and that her GP did not ask her about them.

44. The Respondent obtained a number of occupational health ("OH") reports regarding the Claimant.

45. That at pages 475 to 477 was sent to Mr Lomax on 23 August 2018. It referred briefly to the background grievances brought by the Claimant and said that as she had worked with the manager who she had grieved against in November 2017, she had anxiety symptoms, which she described as lack of sleeping, lack of interest in things she used to do and a sinking feeling and butterfly sensation in her stomach. It was reported that the Claimant exhibited moderately severe anxiety and low mood symptoms, but projected that she would return to work in two to four weeks, recommending a phased return and regular meetings with her line manager. The report stated that the Claimant was likely to be covered by the Equality Act 2010 ("the Act") due to previous back issues. No further review was arranged at that point.

46. A further report was produced on 4 January 2019 (pages 609 to 611) which said that "day to day" the Claimant could not sleep, her appetite was poor, she tended to avoid socialising and could not concentrate to read a book or watch TV. It said her memory would lapse and that she needed to write things down such as a shopping list. The Claimant did not accept in evidence that this comment suggested she was doing her own shopping, contrary to her impact statement. We were content with her evidence on this point; the comment could have related just as much to her writing down a list for a friend or family member as writing one for herself. Perhaps unsurprisingly, the report writer was not able to comment on the veracity of the Claimant's summary of her employment circumstances but mentioned them as "these perceptions appear to be driving

her stress-related illness and continued absence". They therefore stated that if operationally feasible, the Claimant would prefer a different manager. The report described her as "functionally capable of returning to work … [but it was] important any work issues causing stress [were] discussed and, if possible, resolved". The report concluded, "On balance, it is likely that Ms Hayles' case would be covered by the disability legislation. I understand that she has been feeling stressed and anxious for more than a year and is currently receiving psychological support". No further review was arranged.

47. The Claimant says that after returning to work on 1 March 2019, getting out to work was like starting school every day, in that she wanted someone with her. She says she struggled, not knowing the environment she would meet at work, for example if her work would be scrutinised. Over time, her ability to do household chores got better, though she still struggled to go to the gym, going only once or twice a week compared to the previous five times a week, and sometimes going weeks without going at all. She did not accept invitations to go out socialising, whereas before she would go to the cinema, theatre, concerts, meals or night clubs. She said her family ceased cooking and gardening for her a few months after her she returned to work, though she often bought ready meals rather than cooking for herself. She continued to have trouble sleeping.

48. Whilst there was no medical evidence before us on what the position would have been without counselling and CBT, the Claimant says it helped her deal with situations by taking them step by step; she says none of the improvements upon her return to work described in the preceding paragraph would have happened without those interventions. We will return to the Claimant's evidence on this point and on the impact of the alleged impairments after her return to work in our analysis below.

49. The Claimant remained in work from 1 March 2019, albeit on a phased return to 24 June 2019, after which she resumed normal duties. A September 2019 OH report said that she was fit for work without any adjustments, though it did refer to low mood "for the past two weeks but she is managing".

Knowledge of disability

50. Given the Respondent's concession during submissions, there was no need for us to make findings on the question of knowledge of disability. We simply record that Mr Lomax told us that he understood the Claimant would be covered by the Act if her work-related stress and anxiety lasted for 12 months. He took it after the OH report in January 2019 that she was most likely covered by the Act though he was not entirely sure. His view did not change following receipt of the further OH report on 19 September 2019 (pages 799 to 800, briefly referred to above), even though that did not mention disability.

Background

51. The Claimant has brought a number of grievances and complaints to the Respondent's attention in recent years. As already indicated, we made clear to the parties that we would not read them, though we did read the Claimant's account of them in her statement. It is not necessary for us to detail them, and so we simply summarise them in very brief terms:

51.1. She brought a grievance in January 2016 about an appraisal outcome, a comment that people were nervous to approach her (which she took as racial stereotyping), racist comments and Black History Month posters being defaced which management did not immediately condemn.

51.2. She brought another formal grievance in May 2016, alleging a concerted effort to suppress the earlier grievance. This was not upheld.

51.3. She made a complaint on 8 July 2016 alleging inherent discrimination in a performance development review ("PDR") process.

51.4. She sent an email to the Respondent on 12 October 2016 regarding reasonable adjustments for her back problems.

51.5. In January 2017, she brought a grievance alleging bullying and harassment by a senior colleague. Eventually this was partially upheld and her appeal against the outcome was also upheld.

51.6. On 15 March 2017, she emailed the Respondent about her bullying and harassment complaints being dismissed.

51.7. She brought another grievance in June 2017 again alleging discrimination, this time about signing in for duty to the office manager and what she alleged was differential treatment regarding that process.

January 2018

52. In January 2018, Mr Bower became responsible for the Solihull office. His brief was to improve performance there, as it was on the verge of not being able to send officers on visits because of various compliance challenges. He identified that one of the key issues to be addressed was a lack of communication in the office and also told us there was a lack of manager confidence in dealing with things quickly.

53. In January 2018, the Claimant was Officer in Charge ("OIC") for a particular visit, which meant that she had to plan and oversee the operation. It was assigned last- minute, no risk assessment was done and the team was an officer short. During the course of the visit, one of the team's vehicles had its tyres slashed and a group of people gathered by its van. As can be seen from page 1471 and following, the Claimant subsequently submitted a near-miss form. Mr Lomax sent her an email on 15 January 2018 (page 401) telling her that she had shown great leadership in getting the subjects of the visit out of a volatile area. Mr Lomax explained to us that his comments related to the assurance (that is, compliance) aspects of the operation, which he had attended himself in an observational capacity.

54. A few days before his email to the Claimant, on 12 January 2018 (page 409), Mr Lomax sent a brief email to a number of people about the operation, including the Claimant. Mr Bower was copied in. On 15 January 2018, Mr Bower replied (to Mr Lomax only), "Great work on the van – please pass on my thanks to the team for a job well done".

55. Mr Bower subsequently heard comments from officers that the Claimant did not feel the visit had gone as well as others thought it had, and that she was concerned it had not been safe. His account is that this worried him and so he wanted to speak with her as OIC. Mr Bower was also conscious that the visit had been into a very difficult area operationally and was concerned to ensure that the Respondent got its approach right in relation to that area. We accepted that those were his reasons for wanting to meet with the Claimant, being consistent with his priorities for the office and his overall responsibilities. In KB3 he refers to the Claimant not preparing a written debrief. He told us, and we accepted, that he had looked for one on the Respondent's system, for assurance purposes, and not found one; the near miss form submitted by the Claimant was filed on a separate system.

56. On 23 January 2018 (page 1485) Mr Lomax sent the Claimant's near miss report to Mr Bower, Mr Bower thinks because they had discussed it. That would seem to fit with his evidence that he had looked for a written debrief following the comments he had picked up about the visit. On the same date, he called the Claimant into his office.

57. The Claimant describes the meeting as a professional telling off. She says Mr Bower told her she should have refused to conduct the visit, but did not say to her that either Assistant Director (AD) Scarr, who authorised the visit, or the Tasking Officer, had done anything wrong in ordering the Claimant to go on the visit. Mr Bower explained to us that the Tasking Officer does not set up a visit, but simply records it, and told us that AD Scarr would have been happy with the visit because the Claimant is an experienced and competent officer. We accepted his account of these different roles in the operation.

58. Mr Bower says he told the Claimant that she should have done a written debrief and that she could have spoken up if she was unhappy about manning levels for the operation. The Claimant says neither of these things was said. It is agreed however that Mr Bower asked the Claimant to provide a written debrief after their meeting. We concluded therefore that he did raise this with the Claimant. As shown at page 406, the Claimant prepared it on 24 January 2018, the day after the meeting. In doing so, she raised concerns about the allocation of the task and of staff to the task. It seems likely to us therefore that this point too was discussed at the meeting. At KB6 Mr Bower says that the Claimant told him she had been put in an unsafe environment as there had not been enough staff; he asked whether she had raised this on the day and she said she had not. He told us he did not tell her she should have refused to do the visit, saying that this is not his approach; rather he says he told her she was entitled to escalate the matter or refuse to go. On balance we preferred his account on this point, in other words that it is more likely he said she could have raised the issue, as that seemed to us more consistent with his general approach.

59. As part of his enquiries (KB9), Mr Bower also asked for debriefs from Mr Lomax and another colleague. He also spoke to the rest of the team (KB7); none raised any particular issues of concern.

60. On 12 February 2018 (page 416) Mr Bower wrote to the wider team, mentioning two near misses, one being that described above and other an unrelated incident. He did not identify the Claimant or identify the visits. His email set out lessons he thought could be learned and actions he wanted taken

by IOs generally, including speaking out if they were uncertain about staffing levels for any visit. That reference in his email supports his evidence as to his discussion with the Claimant on this point and reinforces our conclusion at paragraph 58 above. He also said in the email he had decided to refresh critical incident training for IOs. Mr Bower accepts that there were in the end multiple debriefs about the January visit, but says it was crucial that the Respondent be able to make a strategic decision about the area in question. In a report at pages 410 to 412, Mr Lomax said that staff had indicated they thought a second de-brief was not required. Mr Bower told us he could understand that perception but highlights that this is the nature of operational assurance nationally and underlined again that this was a particularly sensitive geographical area for such visits.

61. The Claimant claims that what Mr Bower said to her on 23 January 2018 was an act of direct race discrimination, specifically that he made the comments because she is Black. She told us that if she had been White, Mr Bower would not have acted in this way; she says he gave her no credit for what she had achieved on the visit, namely that she had helped to detain illegal immigrants. For his part, Mr Bower accepts that the result of the visit had been very good and that the Claimant had also got the team together on returning to the office for a discussion about it. He told us it is his normal approach to start any such discussions with staff by highlighting the positives. We think it more likely he did so, given his email to Mr Lomax of 15 January asking that thanks be passed to the team.

62. Mr Bower carried out reviews of many visits during his time in Solihull, to look at standards of work, some of which involved White employees. We accepted that evidence, not least because it is borne out by the email of 12 February 2018 referred to above, in which two separate visits were mentioned.

63. The Claimant compares how Mr Bower treated her to how he treated IO Stephanie Swann when she and the Claimant had a conversation on 30 September 2019 whilst IO Swann was on a visit and called the office to get some information. As can be seen at page 842, the Claimant raised the incident in an email to Mr Bower, referring to IO Swann's "abrupt tone" and saying that a colleague, Ravi Spolia, confirmed to IO Swann that the information the Claimant had given her was correct. The Claimant says, "This to me unanimously amounts to unconscious bias. I find it most troubling, disturbing, undermining and demeaning".

64. Mr Bower spoke with both officers. According to KB10, IO Swann was under stress during the visit and needed the Claimant to provide information, which she felt the Claimant did not do. Mr Bower accepts that IO Swann did not handle the conversation well, because she was abrupt with the Claimant. We note for completeness that there is no suggestion that IO Swann used any race-based language.

65. Mr Bower replied to the Claimant's email (page 843), saying that he had spoken with IO Swann to "inform her of how she had made you feel as I wish to address this properly". He told us that the Claimant's perceptions were important and that what she had raised needed to be dealt with straightaway. Things quickly returned to normal between the Claimant and IO Swann. Mr Bower spoke with Mr Spolia, who had accompanied the Claimant to a discussion with

Mr Bower. Mr Spolia is a race champion; he was content with how the matter had been dealt with.

66. The Claimant emailed Mr Bower after the meeting (pages 886-7), saying that he had defended IO Swann's actions, but that no-one had defended her after the January 2018 incident referred to above or when Mr Lomax took her through the Respondent's Attendance Management Procedure ("AMP") as we will describe below. The Claimant alleged that this was discrimination. On 21 October 2019 he replied to the Claimant (page 885) saying that it was highly likely IO Swann spoke to her in an assertive way due to her being in a potentially volatile situation. He noted in the email that both the Claimant and IO Swann had agreed to his suggestion that they meet and discuss what had happened, saying that if this did not resolve the matter, the Claimant could come back to him. The Claimant accepts that this email gave a correct account of what took place.

67. Mr Bower denies race discrimination and says that the two situations were different. The Claimant says that they were comparable because IO Swann was emotionally upset but was defended by Mr Bower, whereas no-one defended her when she was upset either in January 2018 or during the AMP process.

Sickness absence

68. We had regard to the AMP, which is at pages 1345 and following. The Claimant was initially managed under the section headed, "Continuous sickness absence" (page 1360), which is defined as 14 consecutive calendar days. Page 1361, paragraph 79, says that the employee and their line manager will meet at an informal review to keep in touch and explore the support needed for a return to work and that they will also meet at a Formal Attendance Review Meeting ("FARM") to explore the support needed and to consider whether the employee is likely to return to work in a reasonable timeframe. The AMP says, "A decision on whether the business can continue to support the level of absence … may also be taken".

69. At pages 1362-3 it is said that a FARM should take place when the absence reaches 28 continuous days, unless a return to work is imminent. Further FARMs should be held at least every 3 months and also following an informal review if a manager considers they cannot continue supporting an absence. If a return to work is not likely within a reasonable timescale and/or the absence cannot be supported, the manager should consider ill-health retirement or whether dismissal is appropriate. The Claimant accepts that it is mandatory to hold the aforementioned FARMs under the AMP.

70. At pages 1221 and following there is another version of the AMP, which was updated in June 2019. At page 1233, there is a section on "Managing Attendance". It states that the threshold for taking action is six days or three periods of absence in twelve months.

71. It is not necessary for us to set out the full history of the Claimant's sickness absence, though the many interactions between her and Mr Lomax in this period are described at length in his statement. The main points to note are as follows.

72. On 13 April 2018, the Claimant met with Mr Lomax for what the Respondent says was the first FARM – that would fit with the AMP as summarised above.

The meeting was convened by a letter from Mr Lomax dated 3 April 2018 (page 490). It did not say it was convening a formal meeting, but it did offer the Claimant the right to be accompanied. According to SL6, Mr Lomax attempted at this meeting to offer the Claimant information about the Respondent's Employee Assistance Programme ("EAP") and support for stress at work, which she declined.

73. There was a further meeting in June 2018, convened to see how the Respondent could support a return to work. The Claimant and Mr Lomax spoke about the possibility of her taking another role, and Mr Lomax offered her an OH assessment, but at that stage she did not want it. She said she had had enough of working at the Solihull office, due to bullying and harassment, and did not want to return.

74. On 11 July 2018, the Claimant informed Mr Lomax that she wished to return to work but be placed on special leave because she believed her absence had been caused by bullying, harassment and discrimination by her managers. Mr Lomax replied a few days later to say that special leave was only available in limited circumstances, but that AD Scarr was willing to discuss the Claimant's concerns.

75. In a letter dated 3 August 2018, evidently in response to enquiries from the Claimant, Mr Lomax confirmed that an OH referral was booked and also attached a return-to-work plan – pages 524-7.

76. On 13 August 2018, Mr Lomax met with the Claimant again to discuss arrangements for her return to work; he also completed a stress risk assessment. Following the meeting, he asked the Claimant to provide him with copies of her previous OH reports and expressed his willingness to act upon them – page 466.

77. On 22 August 2018 (page 543) the Claimant applied for "sick leave excusal", which in summary permits the continuation of sick pay in certain circumstances. Jumping forwards in the chronology temporarily, at page 649 there is a report from a medical practitioner as part of that process dated 8 March 2019 which recommended that she be given the benefit. In June 2019 (page 698), she was informed that AD Scarr had determined she should get Injury Benefit payments to cover part of her absence, that is from 3 May to 9 September 2018. Mr Lomax agrees that this was a recognition by the Respondent that the Claimant had experienced work-related stress. AD Scarr felt that Mr Lomax's letter of 9 September 2018 (see below) resolved the workplace concerns the Claimant had raised. The maximum benefit was 6 months – see page 1234, paragraph 59.

78. An OH report dated 23 August 2018 (pages 475-477) referred to the Claimant's stress at work and her long-standing back condition, saying that the latter was probably covered by the Act. It recommended a phased return to work and regular meetings with her line manager on that return.

79. On 9 September 2018 (page 481), Mr Lomax wrote to the Claimant addressing concerns raised in the stress risk assessment, such as the process of allocating tasks. He sought to reassure the Claimant that teams were becoming more diverse as new staff were being recruited. The Claimant says she did not receive this letter. It was not necessary for us to reach a conclusion as to whether it was sent or not.

80. Another FARM took place on 27 September 2018. A subsequent OH report on 9 October 2018 said that the Claimant did not feel comfortable working with the subject of one of her grievances and that she was having counselling. It was expected that she could return to work in 2 to 4 weeks on a phased return and noted that she felt positive about discussing that return as Mr Bower had implemented changes as a result of her letters.

81. At a further meeting on 28 November 2018 (pages 604-8), Mr Lomax agreed to an eight-week phased return to work as he agreed with the Claimant that the four weeks suggested by OH was too short.

82. In a further OH report dated 4 January 2019 (pages 609-611), it was said that the Claimant remained off work because of stress and work-related anxiety and that she felt she would be under a lot of scrutiny on her return and was anxious about meeting with Mr Lomax. It nevertheless recommended a twelve-week phased return and regular meetings with her line manager. These recommendations, also mentioned in the August 2018 report, are what the Claimant says the Respondent should have done and failed to do as a reasonable adjustment (issue 11(ii)). As already noted, the report concluded that the Claimant was medically capable of full duties, stating, "On balance, it is likely that Ms Hayles's case would be covered by the disability legislation. I understand that she has been feeling stressed and anxious for more than a year and is currently receiving psychological support".

83. On 21 January 2019, Mr Lomax wrote to the Claimant with some questions arising from the OH report. He explained that on her return the Claimant would have ongoing discussions with him and that a mentor would be provided once she returned to operational work.

84. On 23 January 2019, Mr Lomax met the Claimant to discuss the OH recommendations (page 616 and following). The Claimant said she had not been supported by previous managers and raised the January 2018 discussion with Mr Bower detailed above. Mr Lomax said that she did not have to meet with Mr Bower or AD Scarr on her return to work, made clear he was happy to be her manager and assured her that they would meet on a weekly basis once she returned. Page 618 records that they agreed to meet weekly and that they also agreed a twelve-week phased return.

85. It was thus anticipated that the Claimant would return to work at the end of January 2019, but in fact she subsequently submitted a further sicknote. On 29 January 2019 therefore, Mr Lomax met with AD Scarr who said she would no longer support the Claimant's absences as she had been absent for 11 months and accordingly Mr Lomax should start the attendance management process. HR agreed, Mr Lomax says (SL40), "as the medical evidence indicated that the Claimant should have been able to return to work but was refusing to do so". Mr Lomax says that on 4 February 2019, he sent the letter at page 415 which said it included a copy of the AMP (the letter is misdated 2018). The Claimant says she does not recall receiving the letter. Again, it is not necessary for us to reach a conclusion on this point.

86. It was Mr Lomax's decision as to whether and how to implement OH recommendations. He had previously recommended a buddy arrangement for

staff returning from long-term leave, as he himself had been off sick for six months in 2016 and not had one on his return to work.

87. On 11 February 2019 (pages 635-6), another AD sent the Claimant a letter inviting her to a meeting to discuss her absence owing to work-related stress and anxiety. The Claimant says that the letter made her feel pressured to return. Mr Lomax explained to us that the letter was sent because the Claimant had been due to return at the end of January but had submitted a further note. Previous notes had been submitted of course, but the Claimant had not returned on their expiring either.

88. As already noted, the Claimant returned to work on 1 March 2019. She did not see her GP about that but did speak with her counsellor; she says she felt she had no choice.

89. Mr Lomax says in his evidence (SL46) that on the Claimant's return, informal catch-up meetings were held at least weekly and that they also had one formal meeting per month. The Claimant says (VH25) that she had weekly/fortnightly chats with Mr Lomax, lasting thirty minutes or less, which she says was not sufficient. She says that there was no time to cover her daily or weekly routines and so she would then have to email Mr Lomax. Mr Lomax told us the meetings were for the Claimant to raise whatever she wished and there was no limit on their length. There is no contemporaneous evidence of the Claimant saying that they were inadequate in any respect.

90. The Claimant agrees that she met with Mr Lomax regularly from the point at which she returned to work until she took annual leave in August 2019. It appears that none took place beyond that. Mr Lomax told us that they ceased from 22 July 2019 when he indicated that a FARM was to be arranged – see below. At page 946, which is a note of a meeting with the Claimant on 12 November 2019, Mr Lomax stated that he needed to understand why the meetings were no longer taking place. Whatever the reason, we were satisfied in the light of that comment that the Respondent did not stop them itself.

91. The Claimant says that after her return to work, whenever she was called out to police stations as cover without the mentor she had asked for, she did not feel safe. Mr Lomax says (SL48) that after the Claimant had built back up to operational work he assigned Jim Revill as her buddy, there being no point doing so before then as the Claimant was in work for so few hours and had a lot of learning and emails to catch up on. Shortly before the end of the phased return, Mr Revill was appointed as the Claimant's buddy for call outs; she gets on with him and accepts that it could not be guaranteed he would always be available.

92. The Claimant also wanted a buddy for visits. Mr Lomax told us that there were certain vehicles that neither Mr Revill nor the Claimant could drive and so it was not possible to send both to an operation the Claimant was assigned to in July 2019. He says that a Mr Kahn was assigned as the Claimant's buddy or mentor for those as he was leading on the visit, and that in any event they are police-led and low risk for IOs. We did not accept that evidence as at page 724, an email from John Astley (Chief Immigration Officer) to Mr Lomax of 18 July 2019 says expressly that a mentor could not be allocated for the visit, so that the Claimant had acted as cover. Mr Lomax could not recall the details of this occasion but says that both Mr Astley and Rebecca Ebourne, who seem to have

been responsible for allocation of officers to tasks, were told that a buddy should be assigned where possible.

July 2019

93. During their catch-up meeting on 22 July 2019, Mr Lomax suggested to the Claimant that the Respondent would hold a meeting concerning her sickness absence from 9 September 2018 to 28 February 2019 (the period not covered by the Injury Benefit payments) and that the Claimant may be given a warning. As she was back at work, the Respondent was thus operating the section of the AMP on Managing Attendance. The Claimant accepts that Mr Lomax had to invite her to such a meeting. She nevertheless told him that her absence was covered by fit notes, and that she had not been off since 1 March. Mr Lomax says (SL55) that he advised that the AMP was still live due to the Claimant's sick leave record. He explains at SL57 that the process had been suspended whilst the Claimant had an outstanding injury benefit claim, was undertaking a phased return and had a live OH referral. The Claimant raised having adjusted triggers for implementation of the AMP and Mr Lomax agreed to speak with her previous line manager about that.

94. The Claimant emailed Mr Lomax after their meeting (page 731), referring to Mr Lomax having said that he intended to conduct a FARM and to an incident involving a live firearm during the operation on 17 July 2019 referred to above. Mr Lomax told us that the operation had still been low risk, as the person in question did not actually wield the firearm (it was found in his vehicle) and the police dealt with it, with the Claimant and his colleagues at a distance. We accept that unchallenged evidence. The Claimant said in her email these two events less than a week apart had "triggered my work induced stress and anxiety".

95. Mr Lomax replied (pages 731-734), initially to ask that the Claimant complete an OH authorisation and then to explain that the FARM was required under the AMP – "the procedure for any person returning to work after a period of time that exceeds the trigger points for sickness will undertake a meeting to discuss … any further actions to assist with attendance". Mr Lomax went on to say that he would go into the FARM with a clear mind and listen and said there was no decision at this point. The meeting was to discuss the Claimant's absence and ensure that her attendance did not lapse.

1 August 2019

96. The absence management meeting took place on 1 August 2019 (pages 755-756). Mr Lomax explained its purpose – "to confirm where you are in the attendance management system, to clarify the details regarding previous absences are correct and to look for ways to help you". He explained the sickness absence triggers and that he was looking at 9 September 2018 to 1 March 2019 as the absence for this period was not considered to be due to injury on duty. The Claimant said that she had not taken any sick leave since March. Mr Lomax replied that her full return was on 24 June 2019 and that the injury benefit and the phased return had put the process on hold. He said there would be no action taken until the Respondent had obtained a further OH report.

97. In his letter following the meeting (page 757), Mr Lomax referred the Claimant to OH. He said that they would reconvene after that and that he would then make a decision about any action he needed to take. He wrote, "If the outcome is that a Written Attendance Warning should be given, this will be backdated to 24 June 2019 and any sickness absence in the interim period will count towards the improvement period".

98. The resulting OH report is at pages 799-800. It said that the Claimant was having CBT and was recovering well on her return to work until two setbacks in July (the operation on 17 July and her meeting with Mr Lomax on 22 July). She reported feeling bullied by management, that her mood had been low for two weeks, but that she was managing. The report said, "Her sleep is disrupted but her appetite and concentration are ok. Her motivation is low". It described her as functionally capable of the full range of duties, and said that she did not require any specific adjustments, concluding that she was "likely to render reliable service and attendance into the future if the issues around her perception of lack of support from management are addressed and she is able to attend CBT counselling regularly".

September 2019

99. The Claimant says that Mr Lomax tried to stop her attending a meeting at the Respondent's headquarters in London in September 2019. She had requested that three days that week be allocated to meetings; the Respondent's policy is that only two days can be allocated for such purposes and so Mr Lomax asked what the meeting was for. The Claimant replied that it was "official business" – it was in fact to talk with Mr McPherson regarding race issues at the Solihull office. There is no need for us to say anything further as the complaint about this matter was struck out.

100. Mr Lomax says that he received various concerns from colleagues about the Claimant's performance in and around September 2019. The complaints regarding Mr Lomax's actions following receipt of these concerns were struck out. It is however necessary for us to briefly note the following.

101. The main point in Mr Lomax's email to the Claimant of 12 September 2019 (pages 793-4), was that it had been suggested the Claimant did not carry out various checks properly. He had sent the email as the Claimant refused to meet with him for a chat. Mr Lomax told us it was standard practice not to give prior notice of a meeting where he wanted to discuss such matters. The Claimant replied to his email (pages 814-5) saying that it appeared what had been raised was personal and malicious, and saying that she wanted the names of those who had contacted Mr Lomax.

102. The Claimant says that Mr Lomax defended the colleagues who made accusations against her without saying who had made them. The Respondent's case is that as concerns had been raised, Mr Lomax had to raise them with the Claimant. He told us, and we accepted, that such matters are raised regularly about, and by, multiple officers. He receives one or two such emails a month, including regular emails about three of the Claimant's colleagues, two of whom are White and one Asian. In all cases, he has discussed with the subject of the concerns what was needed to rectify the issues raised. His approach is not to automatically look for bullying, harassment or discrimination when performance

issues are brought to his attention, but to clarify with the person complained about and with those complaining, their versions of events. He did not speak with one of the complainants in this instance, Steph Johnson – see page 786 – and says perhaps he should have. There was no disciplinary action against the Claimant, nor did Mr Lomax contemplate it. Some of the complaints about the Claimant surprised him, as he is clear for example that she is well able to write warrants, which is why he wished to speak with her.

Formal warning and appeal

103. On 10 October 2019, Mr Lomax gave the Claimant a first written warning, to last for twelve months, owing to her absence. The letter confirming the warning is at pages 856-7. It referred back to the meeting on 1 August, said that Mr Lomax had decided to give a first Written Attendance Warning and stated that he would "monitor your attendance for 12 months from 24 June 2019 to 23 June 2020". It went on to explain that the delay in following the AMP was due to the Respondent's policy of not applying it during a phased return and because of the OH letter of August 2019. The first three months of the overall twelve was an Improvement Period. If the Claimant's attendance was satisfactory in that period, her attendance would be monitored for a further nine months, called the Sustained Improvement Period "during which the warning is not live". As stated above, the relevant threshold for action is six days or three periods of absence; the Claimant had been absent for far longer than this, discounting the period cover by the injury benefit, although the letter did not specify the period of absence for which the warning had been given.

104. The Claimant says that the warning exacerbated her work-related stress and anxiety, which Mr Lomax does not doubt. She says that he could have exercised discretion not to warn her given that she had been off because of work-induced stress and anxiety.

105. The Claimant appealed successfully and the warning was rescinded in December 2019, by the appeal officer, Caroline Rothwell. Mr Lomax wrote to the Claimant to confirm this on 28 December 2019 (page 972). The Claimant suggested in her appeal (pages 929 and following) that she relied on new evidence though she could not recall for us what it was (if anything). Mr Lomax says that Ms Rothwell had more evidence than he did, but pages 973-4 suggest otherwise. These are emails from Ms Rothwell to Mr Lomax of 18 and 29 December 2019. She stated in her first email, "Due to the level of medical evidence supporting the condition of work induced stress and anxiety I have overturned the decision as I feel that this evidence supports discretion in this case". In the second she said, in response to Mr Lomax asking her whether the medical evidence she referred to was information provided after the meetings he had undertaken, "I think the evidence was all submitted to you before the meeting … I felt that the combination of medical evidence from the GP and the fact that Veronica had been through the injury at work process which clarified the injury at work, led to the evidence supporting discretion rather than a warning in this instance".

106. Mr Lomax says that any medical evidence from the Claimant's GP was not provided to him, but confirms that he had the Claimant's fit notes, which the Claimant says was all that Ms Rothwell was referring to. Mr Lomax knew when

giving the warning that the Claimant had applied for sickness excusal leave. He explained the purpose of the warning as ensuring that the AMP was not abused.

10 October 2019 shift change

107. Also on 10 October 2019, the Claimant was asked by OIC Aeltaf Khan to change her shift to attend a last-minute visit with him. She says that the duty list compiler, Rebecca Ebourne, had suggested he approach her, and that Mr Khan informed the Claimant that he had told Ms Ebourne of the shift change.

108. The Claimant says that following this event, Mr Lomax sent her an email alleging wrongdoing on her part and suggesting she had communication issues. The email is at page 875. It forwarded an email from the Duty CIO which told Mr Lomax that the Claimant had not reported for duty that day and asked if he was aware whether she was working a different shift to that on the rota. She asked, if not, whether Mr Lomax could contact the Claimant as soon as possible as she had welfare concerns for her. Mr Lomax emailed the Claimant to draw her attention to the Duty CIO's email and said:

"*On the duties you are recorded as MDO but after speaking with Aeltaf you agreed to go out on his visit as he was short staffed – thank you for doing this at short notice. //The main issue that I have seen is that the duties weren't updated. I have spoken to [John Astley and Rebecca Ebourne, the Duty Compilers], who advised that they were awaiting confirmation from yourself before amending any duties, but didn't get this so couldn't update accordingly. Can I ask that communication when amending duties are done with the compilers, as the last thing I want to do was disturb you when you are in later or potentially off in the future*".

109. Mr Lomax did not have a telephone number for the Claimant which is why he emailed her. She replied on 17 October 2019 (pages 879-880) to say that IO Kahn had informed her he would notify Ms Ebourne of the shift change. She went on to say that it was not the first time Ms Ebourne had miscommunicated issues about her to Mr Lomax and not the first time he had relied on miscommunications. As he had spoken to Mr Kahn, the Claimant could not understand why Mr Lomax had to email. She said, "blame seems to be quick to be apportioned to me at every available and slightest opportunity". Ms Ebourne told Mr Lomax (SL84) that she had been awaiting confirmation from the Claimant to amend her duties; as the Claimant did not so confirm, she could not update the duty list.

110. The Claimant accepts there was no threat of any sanction in Mr Lomax's email but says he accused her of wrongdoing and having communication issues in saying that she had not informed the duty compilers of her shift change. She says he took their word over hers and did not hear her side before sending the email. They are both White and so the Claimant says this was race discrimination.

111. No action was taken against either Ms Ebourne or Mr Astley for failure to allocate sufficient staff and update the list. The Respondent says any rota error was genuine. Mr Lomax told us there was no difference in the way he addressed the matter with Ms Ebourne and Mr Astley on the one hand and the Claimant on the other. All were asked to ensure changes were recorded correctly. At SL85,

and as stated in the note at page 950 (of a meeting of 12 November 2019 between the Claimant and Mr Lomax), Mr Lomax advised Mr Astley and Ms Ebourne that they needed to communicate better and that duties needed to be updated at every point possible. We accept based on this contemporaneous note that what Mr Lomax says in his evidence on this point is correct. At SL86 he describes it as just a communication problem between colleagues that he flagged to avoid it happening again. He says it is commonplace for the person whose shift it is to notify any changes to the compilers.

Protected acts/disclosures

112. The Claimant alleges she did three protected acts and made three protected disclosures as follows.

11 October 2019

113. The Claimant met with Mr McPherson, who was then the Respondent's Deputy Race Champion, raised with him the treatment set out in her grievances and stated she was the only Black IO at Solihull since September 2001. She says that it is clear that she was implying she had been discriminated against because of her race. She also told Mr McPherson that management in Solihull had been suppressing claims of discrimination and that she believed data protection laws had been breached when management accessed her medical information. In a follow up email to Mr McPherson on 22 October 2019 (page 1411) the Claimant said she wanted another role, in a managed move, but denies she thereby wanted Mr McPherson to get her a promotion.

114. Mr McPherson says (SM4) that he recalls the Claimant emailing him raising some issues. He did not ordinarily receive emails of that nature, as it was not his function to field individual employees' concerns. The Claimant indicated that he had approached him because she had not been able to resolve issues locally. Mr McPherson cannot recall if she mentioned bullying, harassment or discrimination specifically. In his oral evidence, he recalled that the Claimant raised wide-ranging concerns, being clear there was a racial element in them, but does not recall the specifics, though he does recall she was not happy with the response of local management to her concerns. It is quite plausible, he told us, that she raised being the only Black IO in the West Midlands, but he does not recall her raising the importance of the Team reflecting the public it serves – though he wholeheartedly agreed that is something the Respondent does strive for. He recalls the meeting being primarily about how the Claimant herself was treated, though he was aware of a wider context of some other employees within the service raising issues of discrimination.

115. As a result of the meeting, Mr McPherson took two actions (SM5). He wrote to the Claimant encouraging her to discuss issues with her line manager or other senior manager locally, or seek support from her union or HR. Secondly, he contacted someone in her business area and HR to say someone had emailed him with what seemed to be quite serious issues. He believes he also spoke to his HR Business Partner to see if they could find out who was the relevant HR person in the Claimant's work division so that they could ensure appropriate action was taken.

5 November 2019

116. On 5 November 2019, the Claimant had a telephone conversation with Caron Welsh in the Respondent's HR team. She says that she relayed the same issues as she had discussed with Mr McPherson, except data protection. She emailed Ms Walsh the next day (page 940) though that email was not relied on as a protected act or disclosure.

10 December 2019

117. The Claimant also had a conversation with Georgina Balmforth on 10 December 2019, which she says was the same as that with Ms Welsh. The Claimant said she believed management was failing to adhere to equality legislation in recruitment, sifting and recruiting people like them; that there were no BAME managers; and that managers were suppressing claims of discrimination – see the Claimant's further particulars at page 60 which she confirmed in her oral evidence.

118. The Respondent accepts that the above were all protected acts. It also accepts that the Claimant believed and reasonably believed that her disclosures tended to show that a legal obligation was being breached. The Claimant says she believed they also tended to show that her health and safety had suffered, given that – on her account – the Respondent agreed she had experienced work-related stress by giving her the additional sickness benefit. She also says she believed the disclosures were in the public interest because she was the only Black IO and they were operating in the West Midlands which is a racially diverse community. She says it is best for the public to see IOs as being representative of their community.

Request for alternative line manager

119. On 6 May 2021, the Claimant contacted Mr Foster regarding a change in line manager – page 1134. She told us she did not think it appropriate for Mr Lomax to be her line manager in view of these proceedings which were by then underway.

120. A discussion between Mr Foster and the Claimant took place that same day. The Claimant made clear she was not comfortable working with Mr Lomax. She mentioned unresolved issues in the team, but was not willing to discuss them with Mr Foster or provide more detail. Mr Foster did not know what she meant. He says he therefore could not conclude that a change in line management was necessary. He nevertheless suggested Nikki Swadkins as a possible alternative, which the C supported, though making clear that any change in line management would not be on basis of wrongdoing on Mr Lomax's part. Mr Foster told us that he knew allocating Ms Swadkins as the Claimant's line manager could be awkward, given various job changes Ms Swadkins had been through, but that did not necessarily mean it would not work. The Claimant agreed, though with marked reluctance, that Mr Lomax could continue to offer normal line management support until Ms Swadkins returned from a temporary promotion.

121. Mr Foster spoke with Ms Swadkins at some point after the meeting. She had gone through various role changes and had personal pressures as well. The latter led Mr Foster to conclude that it was not appropriate to give her additional

duties by allocating her as the Claimant's line manager. The Claimant was unable to comment on these matters in her evidence. There was another CIO reporting to Mr Foster, but he had recently started to act up so was not thought suitable. Mr Foster also did not think Ms Swadkins could give the Claimant any more support than could be provided by Mr Lomax.

122. Mr Foster wrote to the Claimant with his decision on 10 May 2021 (pages 1125-1130). He did not explain the reasons for refusing the Claimant's request, telling us this was to protect Ms Swadkins' information. He simply said that a line management move to Ms Swadkins would "not be appropriate at this time". He said he could discuss the matter again following a stress risk assessment or OH referral and that Mr Lomax would continue in the role of the Claimant's line manager "for the time being". In her reply, the Claimant asked if Andrew Monksfield or another CIO could manage her. They were not in Mr Foster's line management chain and so it appears that he did not consider this request, though he told us that Mr Monksfield was inexperienced.

123. Mr Foster says (MF18) that he was not aware the Claimant had ever "blown whistle" or raised grievances or formal complaints about being discriminated against. The Claimant told us she could not dispute Mr Foster's assertion to this effect and we therefore accepted his evidence on this point. He and the Claimant did not discuss her disclosures.

124. The Claimant says that discrimination against her is continuing. She has the new Claim referred to above. At VH55 she said that on 11 June 2020, an IO made a comment on Skype that he was "sick and tired of all this Windrush bollocks". She also says her work is still being scrutinised by Mr Lomax, for example at VH57, saying that he questioned her about not stopping someone when the Claimant says the person gave no reason to be stopped. She describes such actions as disproportionate and says they are because she is Black. She did not however take any of the Respondent's witnesses to any of these matters during cross-examination.

125. In relation to the present Claim, ACAS Early Conciliation took place from 20 to 23 December 2019. The Claim Form was presented on 12 January 2020. In seeking to explain why some of her complaints were made outside the statutory time limits, the Claimant said, in summary:

125.1. In relation to the complaint about Mr Bower's conduct in January 2018, she wanted the Respondent to resolve issues, had an eye operation and thereafter was not in the right mental state to submit a claim.

125.2. In relation to her complaint about the letter of 11 February 2019, she said she did not seek advice and that she had to get back to work.

125.3. In relation to her complaint about the meeting on 22 July 2019, she said that this constituted conduct extending over a period up to the warning in October 2019 and extending back to January 2018.

125.4. Permission to amend the Claim to include the complaint relating to Mr Foster's refusal to change her line manager in May 2021 was sought on 29 September 2021 – see page 1422. The Claimant says she raised this for the first time with her then lawyers in a conference call before a Case Management

Hearing on 12 September 2021.

Law

Disability

126. Section 6 of the Act provides (so far as relevant) that:

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

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

128. Schedule 1 also provides at paragraph 5 that "*(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if – (a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect. (2) Measures includes in particular medical treatment …*".

129. Section 212 of the Act provides that "*substantial*" means "*more than minor or trivial*".

130. In **Kapadia v London Borough of Lambeth [2000] EWCA Civ**, the Court of Appeal accepted a submission that it was for a claimant to prove that the impairment had a substantial adverse effect on his/her ability to carry out normal day-to-day activities or to prove that the impairment would have had such an effect but for the fact that measures were being taken to treat or correct the condition. Having in mind that burden, the Tribunal's task is to look at the evidence presented to it and decide the question on the balance of probabilities.

131. **Goodwin v Patent Office [1999] ICR 302** is well-established Employment Appeal Tribunal ("EAT") authority for the questions to be asked by tribunals in determining disability, encouraging them to take an inquisitorial approach to the issue. The EAT stated that the legislation requires a tribunal to look at the evidence by reference to four different conditions. Taking account of amendments to the legislation since the decision, the questions are stated by the EAT as follows: "*(1) The impairment condition. Does the applicant have an impairment which is either mental or physical? (2) The adverse effect condition. Does the impairment affect the applicant's ability to carry out normal day-to-day activities ... and does it have an adverse effect? (3) The substantial condition. Is the adverse effect (upon the applicant's ability) substantial? (4) The long-term condition. Is the adverse effect (upon the applicant's ability) long-term?*". The EAT stated that it would be useful for tribunals to consider these questions in sequence, though it remains necessary to make an overall assessment and not "*take one's eye off the whole picture*". The EAT went on to give guidance in respect of each question. In respect of the

adverse effect condition, it stated that "*the focus of attention ... is on the things that the applicant cannot do or can only do with difficulty, rather than on the things that the person can do*".

132. As indicated above, Schedule 1 paragraph 5 of the Act requires consideration of how an impairment would affect day to day activities if medical treatment ceased. According to the House of Lords decision in **SCA Packaging v Boyle [2009] ICR 1056**, what must be asked is what the effect of the impairment would be if treatment stopped. Whether it is likely that the impairment would have the required effect in that situation means it "could well happen" – see also paragraph C3 of the Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011). The EAT in **Fathers v Pets At Home Ltd and another [2013] UKEAT/0424/13** said that "relatively little evidence may in fact be required to raise this issue", in other words to require a tribunal to consider and address the point of the effects in the absence of medical treatment. Of course, what a tribunal makes of the evidence before it on this issue very much depends on the individual case.

133. As to whether the required effects of an impairment were long term, again the **SCA Packaging** judgment makes clear that where a tribunal is required to assess whether those effects are "likely" to last for at least 12 months, this means that it "could well happen". As paragraph 2 of Schedule 1 to the Act says, and paragraph C7 of the Guidance confirms, it is not necessary for the effect to be the same throughout the period being considered. What has to be considered is whether the effects were "likely" to recur, that word again meaning "could well happen".

134. The long-term question has to be assessed as at the time of the alleged discriminatory treatment. The Court of Appeal said in **McDougall v Richmond Adult Community College [2008] ICR 431** that in assessing likelihood in both respects, tribunals should only consider the evidence available at the time of the discriminatory acts. The assessment thus requires a prophecy of future events at those points, rather than recourse to actual evidence of subsequent events. This is reflected in paragraph C4 of the Guidance. In similar vein, on the question of whether the required effect had lasted 12 months, the EAT in **Tesco Stores Limited v Tennant [2019] UKEAT/0167/19**, held that it is the date of the alleged discriminatory act(s) at which this must be assessed, with the question being whether at that point there has been "12 months of effect".

135. Mr Feeny referred us to the decisions of the EAT in **J v DLA Piper UK LLP [2010] ICR 1052** and **Herry v Dudley Metropolitan Borough Council [2017] ICR 610**. We return to those decisions in our analysis below.

136. In **Royal Bank of Scotland PLC v Morris [2012] UKEAT/0436/10**, the EAT upheld an appeal against the tribunal's decision in that case that the Claimant was a disabled person. On the question of the effect of medication (what is sometimes known as "deduced effects"), the EAT found there was no explicit evidence and stated, "This is just the kind of question on which a tribunal is very unlikely to be able to make safe findings without the benefit of medical evidence". Similarly, "it would be difficult for the Tribunal to assess the likelihood of [the risk of recurrence of the required effects under paragraph 2(2) of Schedule 1] or the severity of the effect if it eventuated, without expert evidence". The EAT concluded, "The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under

the Act, give a tribunal a sufficient evidential basis to make common sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted".

Burden of proof

137. Section 136 of the Act provides as follows:

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

(2) If there are facts from which the court [which includes employment tribunals] 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.

138. Direct evidence of discrimination is rare and tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd [2005] ICR 931,** updating and modifying the guidance that had been given by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205.** The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that "there is nothing unfair about requiring that a Claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the Respondent's act was a discriminatory one) then the claim will succeed unless the Respondent can discharge the burden placed on it at the second stage".

139. At the first stage, the tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them**.** As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.

140. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. To discharge that burden, it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the relevant protected characteristic. That would require that the explanation is adequate to discharge the burden of proof on

the balance of probabilities, for which a tribunal would normally expect cogent evidence.

Discrimination arising from disability

141. As to what constitutes "unfavourable treatment", the Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230** held that it is first necessary to identify the relevant treatment and it must then be considered whether it was unfavourable to the Claimant. The Court said that little was likely to be gained by differentiating unfavourable treatment from analogous concepts such as "detriment" found elsewhere in the Act, referring to a relatively low threshold of disadvantage being needed. One could answer the question by asking whether the Claimant was in as good a position as others. In closing, Mr Feeny referred in this context to the Court of Appeal's decision in **Bolton St Catherine's Academy v O'Brien [2017] ICR 737** in support of one specific submission. We return to that case in our analysis below.

142. We draw the following principles from the relevant case law concerned with whether the unfavourable treatment can be said to be a proportionate means of achieving a legitimate aim (justification for short):

142.1. The burden of establishing this defence is on the Respondent.

142.2. The Tribunal must undertake a fair and detailed assessment of the Respondent's business needs and working practices, making clear findings on why the aims relied upon were legitimate, and whether the steps taken to achieve those aims were appropriate and necessary.

142.3. What the Respondent does must be an appropriate means of achieving the legitimate aims and a reasonably necessary means of doing so. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** it was said, approving Mummery LJ **in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293**, that what is required is: first, a real need on the part of the Respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end.

142.4. In **Hardy & Hansons plc v Lax [2005] ICR 1565** it was said that part of the assessment of justification entails a comparison of the impact upon the affected person as against the importance of the aim to the employer. It is not enough that a reasonable employer might think the treatment justified. The Tribunal itself has to weigh the real needs of the Respondent, against the discriminatory effects of the aim. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.

142.5. It is also appropriate to ask whether a lesser measure could have achieved the employer's aim – **Naeem v Secretary of State for Justice [2017] ICR 640**.

142.6. In summary, the Respondent's aims must reflect a real business need; its actions must contribute to achieving it; and this must be assessed objectively,

regardless of what the Respondent considered at the time. Proportionality is about considering not whether the Respondent had no alternative course of action, but whether what it did was reasonably necessary to achieving the aim(s).

Failure to make reasonable adjustments

143. Section 20 of the Act provides:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A 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.

144. Section 21 provides:

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

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

145. "Substantial" in this context means "more than minor or trivial" – section 212(1) of the Act. The Tribunal's task is to set out the nature, effects and extent of the alleged substantial disadvantage and assess it objectively. In other words, it must consider what it is about the PCP that puts the Claimant at the alleged disadvantage. As can be seen from section 20(3), a comparative exercise is required, namely consideration of whether the PCP disadvantaged the Claimant more than trivially in comparison with others. As indicated in **Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216** the comparator is merely someone who was not disabled. They need not be in a like for like situation, but should be identified by reference to the PCP, so as to test whether the PCP puts the Claimant at the substantial disadvantage. This would be the case when an employee's disability led to disability-related sickness absences that would not be suffered by the non-disabled.

Direct discrimination

146. Section 39 of the Act provides, so far as relevant:

(2) An employer (A) must not discriminate against an employee of A's (B)— …

(d) by subjecting B to any other detriment.

147. Section 13 of the Act provides, again so far as relevant:

(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".

148. The protected characteristic relied upon in this case is race. Section 23 provides, as far as relevant:

(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.

149. The Tribunal must therefore consider whether one of the sub-paragraphs of section 39(2) is satisfied (in this case whether there was a detriment), whether there has been less favourable treatment than an actual or hypothetical comparator, and whether this was because of the Claimant's race.

150. The fundamental question in a direct discrimination complaint is the reason why the Claimant was treated as she was. As Lord Nicholls said in the decision of the House of Lords in **Nagarajan v London Regional Transport [1999] IRLR 572** "this is the crucial question". Race being part of the circumstances or context leading up to the alleged act of discrimination is insufficient.

151. In most cases – such as **Nagarajan** – the act complained of is not in itself discriminatory but is rendered discriminatory by the mental processes (conscious or otherwise) which led the alleged discriminator to act as they did. Establishing the decision-maker's mental processes is not always easy. What tribunals must do is draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances. In determining why the alleged discriminator acted as they did, the Tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. It is enough for the protected characteristic to be significant in the sense of being more than trivial (again, **Nagarajan** and **Wong**).

Victimisation

152. Section 39(4) of the Act says that:

An employer (A) must not victimise an employee of A's (B): …

(d) by subjecting B to any other detriment.

153. 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 – …

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

154. It is not disputed that the Claimant did protected acts in this case. Other than time limits, the single issue is whether the alleged detriment was because of the protected acts.

155. No comparator is required for the purposes of a victimisation complaint, but the protected act must be the reason or part of the reason why the Claimant was treated as she was – **Greater Manchester Police v Bailey [2017] EWCA Civ. 425.** Again, this requires consideration of the mental processes of the decision-maker and again the protected act need not be the primary reason for the detriment, though it must be more than a trivial influence on that decision – see above.

PID detriment

156. Section 43A of the Employment Rights Act 1996 ("ERA") defines a "protected disclosure" as a qualifying disclosure made by a worker in accordance with one of sections 43C to 43H. Section 43B then defines what counts as a "qualifying disclosure". For the purposes of this case, this is any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject or (d) that the health or safety of any individual has been, is being or is likely to be endangered.

157. A "qualifying disclosure" is a protected disclosure if made in accordance with one of sections 43C to 43H. As far as relevant to this case, section 43C applies if a qualifying disclosure is made to the worker's employer.

158. It is of course for the Claimant to satisfy the Tribunal that she made protected disclosures. It is accepted that information was disclosed and that the Claimant believed, and reasonably, that the disclosures tended to show that a legal obligation had been, was being or would be breached. We need say no more about those matters, nor about the Claimant's reliance on believing there was a danger to health and safety.

159. What we had to decide therefore, and we were requested to do so because of the potential implications for any future litigation between the parties, is whether the Claimant reasonably believed that the disclosure of the information was in the public interest. As made clear in **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2018] IRLR 837**, the test is whether the Claimant reasonably believed that her disclosure(s) were in the public interest, not whether they were in fact (in the Tribunal's view for example) in the public interest. The worker must actually believe that the disclosure is in the public interest and the worker's belief that the disclosure was made in the public interest must have been objectively reasonable. Why the worker makes the disclosure is not of the essence, and the public interest does not have to be the predominant motive in making it. Tribunals might consider the number of people whose interests a disclosure served, the nature of the interests affected, the extent to which they were affected by the wrongdoing disclosed, the nature of the wrongdoing disclosed and the identity of the alleged wrongdoer.

160. The test the Tribunal must apply in determining the detriment complaints is whether any protected disclosure had a material influence on Mr Foster's conduct.

The question is not whether the protected disclosure was the reason or principal reason for that conduct. The correct approach seems to be:

160.1. The burden of proof lies on the Claimant to show that a protected disclosure was a ground for (a more than trivial influence upon) the detrimental treatment to which she was subjected. In other words, the Claimant must establish a prima facie case that she was subjected to a detriment and that a protected disclosure had a material influence on the Respondent's conduct which amounted to that detriment.

160.2. If she does, then by virtue of section 48(2) ERA, the Respondent must be prepared to show the ground on which the detrimental treatment was done. If it does not do so, inferences may be drawn against it – see **London Borough of Harrow v Knight 2003 IRLR 140, EAT**.

160.3. As with discrimination cases, inferences drawn by tribunals in protected disclosure cases must be justified by the facts it has found.

Time limits

161. As will appear from our analysis below, it was not in the end necessary for us to consider any time limit issues, and so accordingly we do not need to set out a summary of the relevant law.

Analysis

Race discrimination

162. We dealt with the complaints of direct race discrimination first, for reasons that will become apparent. These related first to Mr Bower's meeting with the Claimant in January 2018 and secondly to Mr Lomax's email to her on 10 October 2019 regarding the staffing rota.

163. The Claimant clearly reacted adversely to her discussion with Mr Bower, and we were satisfied that this reaction was the result of a genuine perception on her part as to what Mr Bower said at the meeting. We were not satisfied however, based on what we have concluded actually took place as set out in our findings of fact, that the Claimant could reasonably conclude that the discussion was a detriment as case law defines it. In other words, we did not think what was said could reasonably be said to have disadvantaged her. On our findings, there was no "telling off". Rather, the meeting was more in the nature of an exploratory discussion. We were concerned that to conclude that, conducted as it was, such a meeting amounted to a detriment would improperly restrict management ability to discuss operational matters with employees when needed. The complaint failed on that basis.

164. Even if what occurred at the meeting had been a detriment to the Claimant, we were clear that she was not treated less favourably than the Respondent treated or would have treated a comparator. Mr Bower's email to the team at page 416 raised issues regarding two visits. He did not single out or identify the Claimant or even identify the visit where she had been the OIC. Whilst we do not know the race of the OIC for the other visit, the email amply demonstrates Mr Bower's even-handed approach. We also note that in his role heading up the

team in Solihull, he reviewed and took action on many other visits as well. Further, he asked two other colleagues (Mr Lomax was one) to prepare debriefs, not just the Claimant.

165. As to the comparison the Claimant sought to draw with IO Swann, we did not think she was a proper comparator within the meaning of section 23 of the Act. The two situations were very different: one was operational, the other an issue between two colleagues. In any event, we noted that Mr Bower made clear to IO Swann how she had made the Claimant feel and did not seek to suggest to the Claimant that IO Swann had not been abrupt with her. He thus took the Claimant's concern at face value. Both he and IO Swann herself felt that she could have handled herself better. We do not think it can objectively be said therefore that Mr Bower "defended" IO Swann. Rather, as in his dealings with the Claimant in January 2018, he sought to hear from all those involved and, in both instances, let both individuals – the Claimant in January 2018 and IO Swann in Autumn 2019 – know what action he thought should be taken.

166. The complaint would therefore have failed because there was no prima facie case of less favourable treatment. Further, whether analysed as the Claimant failing to prove facts from which we could conclude that she had been discriminated against, or as the Respondent discharging the burden of proof had it been required to do so, we were also satisfied that the reason Mr Bower acted as he did was nothing to do with the Claimant's race. It is correct that Mr Lomax and other staff may have taken a different view to Mr Bower as to the operation and the need to follow it up, but his brief to turn the office around to comply with exacting national standards, his concern that he had heard the Claimant did not feel the operation was safe and his concern to get the Respondent's strategy right in the geographical area where it had taken place – these were very evidently the reasons for the meeting and for what he said to the Claimant. In other words, he discussed staffing of the operation and the need for a written debrief purely for operational reasons.

167. Turning to the email Mr Lomax sent to the Claimant on 10 October 2019, it cannot reasonably be said to have disadvantaged her. We did not characterise it as in any sense suggesting that she had "done something wrong" and/or had "communication issues". Rather, it was a balanced management communication, thanking the Claimant for doing the shift at the last minute, making clear Mr Lomax did not want to disturb her when she was going to be working a late shift or not working at all and asking her to ensure her shift rota was up to date. The complaint failed on that basis.

168. As set out in our findings of fact, we also concluded that Mr Lomax spoke in similar terms to Mr Astling and Ms Ebourne so that there was no less favourable treatment of the Claimant either. It was also plain in our judgment that the reason why Mr Lomax sent the email was not in any sense related to the Claimant's race but to ensure, by way of routine communication, the continuation of good operational practice.

169. We noted the relatively small number of BAME employees in the Solihull office at the time of both alleged acts of discrimination and that the Claimant had brought historic grievances alleging discrimination, but those matters were by no means sufficient to establish a prima facie case in respect of either complaint of race discrimination. Specifically in relation to the grievances, we were not taken

to any evidence based on which we could conclude that the Claimant's allegations set out in some of those grievances to the effect that she had been discriminated against were well-founded or otherwise suggested that there was some race discriminatory backdrop to the actions of Mr Bower or Mr Lomax. We also considered the performance issues raised about the Claimant by her colleagues as a further important piece of background evidence, but again were amply satisfied by Mr Lomax's clear evidence that this is something which happens regularly with colleagues of other races as well and that he takes the same approach in relation to all, namely raising the issue and hearing from all concerned.

170. In summary, for the reasons given above, the Claimant did not in either instance meet the burden of proof that initially rested on her. Even if she had, we were satisfied, again for the reasons set out above, that the Respondent had shown that its actions in both respects were in no sense whatsoever because of race.

Disability

171. We turned next to the question of whether the Claimant was a disabled person as defined by section 6 of the Act. As Mr Feeny pointed out, our first task was to decide on which evidence it was appropriate to base our analysis of this question.

172. We thought it right to disregard the reference in the report at page 649 to five days of absence for anxiety and depression in 2017, both given the fleeting nature of the absence and the fact that it refers to a somewhat different combination of alleged mental impairments than those relied on in this case. One of the main planks of Mr Feeny's submissions was that we should also disregard the Claimant's impact statement and oral evidence and attach little weight to what OH reported to the Respondent. His submission was that the GP records were more reliable, given that they were recorded contemporaneously in a forum where the Claimant did not expect the Respondent to see them, whereas she knew that it would see the OH reports and her impact statement and was obviously giving her oral evidence for the Tribunal. His case was that all of this other evidence was not consistent with the GP records.

173. We did not accept the submission that we should disregard the evidence other than the GP records for a number of reasons:

173.1. The first GP note in March 2018 noted that the Claimant was happy away from work, which she accepted was the case, and it also said that she declined counselling, but this is consistent with the Claimant's overall case that her anxiety and work-related stress arose in April 2018, which it appears was in connection with her contemplating returning to work after her eye operation.

173.2. We regarded the Claimant as overall a reliable witness, being prepared to give evidence that did not support her case, such as when she said that she was not able to put forward a basis on which she could say Mr Foster had knowledge of her protected acts/disclosures. As set out in our findings of fact, we did not accept her evidence in relation to the comment recorded by her GP on 3 April 2018 about her appetite, but that did not call into question the veracity of her testimony overall. Moreover, on the specific point of her appetite and indeed the

GP's comment on 3 April 2018 that she "copes well in all other aspects of life", this was right at the start of the period during which she says she experienced anxiety and work-related stress: the impact of impairments on day-to-day activities can vary over time as the Act itself expressly recognises.

173.3. The GP notes for 3 April 2018 referred to an impact on the Claimant's sleep and concentration, and said that often she did not want to get out of bed. Whilst admittedly not a full list, those are some of the effects on day-to-day activities that the Claimant referred to in her impact statement and oral evidence. Moreover, GP records are rarely a full picture. By way of example, it is inherently unlikely in our judgment that a reference to poor concentration in a GP note would go on to record reading or watching TV as illustrations of the same, even if such matters had been mentioned by the patient. At the very least, the absence of such details does not mean they were not referred to. GP records are usually a brief summary of a brief discussion. Furthermore, initially, as the records show, the main purpose in the Claimant seeing her GP was to get fit notes and appropriate referrals for further help.

173.4. The note of 3 April 2018 said that the Claimant was to seek advice if there was a further decline in her mood or anxiety. The Respondent submitted that it is notable that the GP records do not show her doing so. We have indicated in the previous paragraph some reasons why we did not agree that this was particularly noteworthy. Two further points should also be noted. First, the Claimant was to be reviewed in a further four weeks; the reference to seeking help in the event of further decline most likely meant any further decline within that four-week period. Secondly, the Claimant did see the GP on a monthly basis thereafter. In each instance she was signed off again and it was recorded on three of those occasions that she was awaiting counselling, which it is well-known takes time to materialise. The notes of each of those further appointments referred to anxiety and two of them made a connection to her work. We accepted that they did not record any additional impact of the Claimant's anxiety and work-related stress, but they did not in our judgment record anything inconsistent with the Claimant's other evidence of what was going on in this period. The same is true of the GP notes for October and November 2019.

173.5. CBT eventually began in August 2018. We accepted the Respondent's submission that we should attach little weight to the Claimant's evidence of her counselling and CBT sessions because she did not disclose the records of them – though we add that we saw nothing deliberate or suspicious in her failure to do so, particularly as we were informed on day 5 of the Hearing that she had requested them the previous day, to be told they were not available. In any event, she did not seek to give extensive evidence about those sessions and in our judgment, there was nothing inconsistent, illogical or otherwise suspect in her evidence that once she started CBT and, later, counselling, she did not see the need to share with her GP what she was telling those other professionals; she was seeing them for different purposes.

173.6. It also seems to us a somewhat Machiavellian suggestion that in various, doubtless much lengthier, meetings with OH professionals, the Claimant would have been careful to mention more things than she mentioned to her GP with the express understanding that the resulting reports would be read by the Respondent. There was a sufficient level of overlap between what the OH

reports recorded and the Claimant's impact statement and oral evidence to lend credence to the latter.

174. For all of these reasons, we accepted the Claimant's impact statement and oral evidence as part of what we needed to consider in determining whether she was a disabled person within the meaning of the Act. We now turn to that analysis, recognising that the burden of proving disability was on the Claimant and conscious that **Goodwin** reminds tribunals of the questions to ask, whilst encouraging them not to lose sight of the overall picture.

175. In **J v DLA Piper** (which we return to shortly in a different context referred to by Mr Feeny) the EAT made clear that in cases involving alleged mental impairments, it is perfectly acceptable and often helpful to begin with analysing whether there was a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities, as this will often answer the first question of whether there was a mental impairment. That was the approach we took. We were also very careful to confine our analysis to the evidence relating to the period April 2018 (when the Claimant says she first experienced work-related stress and anxiety), to October 2019 which is the last date on which she says she was discriminated against under the disability strand of the Act.

176. We noted the following:

176.1. The Respondent did not contest that the matters the Claimant referred to in her impact statement and oral evidence constituted normal day-to-day activities for the purposes of section 6. That was plainly an appropriate concession. Getting ready for work, household chores, food shopping, preparing food, gardening, socialising and sleeping are all plainly in that category.

176.2. Based on the evidence we took into account, the Claimant plainly experienced an adverse effect on her ability to carry out those activities, and we were in no doubt that it was a substantial adverse effect, given that this means it was more than minor or trivial. Focusing on what she could not do or only do with difficulty, in summary: she needed assistance with a variety of basic household and personal care tasks that she had previously undertaken herself without any support; she did not go out anywhere near as much as before, and for a period of a few months it appears hardly ever; and she did not attend the gym as frequently as before or converse with others when she did so. These were all significant, not minor or trivial, effects on normal life.

176.3. She had a ten-month absence from work, discounting the initial period for her eye operation.

176.4. She was referred by her GP for CBT and counselling.

176.5. The OH report on 23 August 2018 – which the Respondent accepted – recorded that the Claimant was experiencing moderately severe anxiety. Whilst it also said that the Claimant would return to work in two to four weeks, the fact is she did not do so.

176.6. The fact that the Claimant was not referred to a psychiatrist is plainly not determinative of the question of substantial adverse impact or even in our view material to that question. We were of the same view in relation to the fact that

the Claimant did not take medication. Whilst of course this was a matter for us to take into account, it cannot mean that a person cannot be disabled just because they make that choice. In fact, in our experience as an industrial jury, it is not unusual for people with stress, anxiety and similar conditions not to do so.

176.7. Finally, the Claimant did eventually return to work on 1 March 2019, but this was something she could only do with difficulty, unlike previously. Some of the impact on daily activities dissipated to some extent as time went on, such as her ability to do household chores, but her going to the gym and socialising – both there and more generally – was still affected in a more than minor or trivial way, and we accepted her evidence that she still needed help for a few months after 1 March 2019 to cook and do the gardening and that she still had trouble sleeping.

177. As to deduced effects, the question we had to consider was whether there could well have been a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities without the interventions she benefitted from. Counselling plainly appears to have helped her. We noted also that she still reported an impact on everyday her life to OH for the report produced on 4 January 2019, several months after the counselling started. We had regard to **RBS v Morris**, which we noted urges some caution on this issue where a mental impairment such as stress and anxiety is relied upon, but:

177.1. We accepted the Claimant's evidence of how the CBT and/or counselling helped her and what her position would have been without it. She had this support throughout much of the period with which we were concerned.

177.2. It seemed common sense to us that the Claimant would not have been in the improved position she found herself in by the time she returned to work without that professional input during the relevant period.

177.3. That conclusion is supported by the OH report at page 800, written on 19 September 2019, where OH were careful to say that she was "likely to render reliable service and attendance into the future if the issues around her perception of lack of support from management are addressed and she is able to attend CBT counselling regularly" (emphasis added).

178. For the reasons set out above, we were satisfied that from April 2018 to October 2019, the Claimant experienced a substantial (more than minor or trivial) effect on her ability to carry out normal day-to-day activities.

179. Taking the **J v DLA Piper** approach, we then worked backwards to the impairment question. With reference to **Herry**, the Respondent invited us to conclude that what the Claimant experienced was not a mental impairment but an adverse reaction to work events. We did not accept that submission for the following reasons:

179.1. The decision in **DLA Piper** – quoted in **Herry** – says that where it is found that there was a substantial adverse effect, in most cases a tribunal is likely to conclude that a claimant was indeed suffering clinical depression (as it was in that case) rather than simply a reaction to adverse circumstances: it was said to be a common-sense observation that such reactions (i.e., to adverse circumstances) are not normally long-lived.

179.2. The EAT in **Herry** said as follows (paragraph 56):

"*Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess*".

179.3. Plainly the Claimant had difficulties facing work, telling her GP for example that she was not able to return to work from the end of January 2019 because of a line management issue, whilst in the OH report of 4 January 2019 it was said that her perceptions of her work circumstances appeared to be driving her stress-related illness and absence. She may also have reacted to events at work in a way that others would not. All that said, as **Herry** and **DLA Piper** make clear and Mr Feeny properly acknowledged, the fact that what an employee experiences results from events at work does not mean they do not have a mental impairment. Many mental impairments result from life events; that does not mean a person is not disabled as a result. In **Herry** itself it was acknowledged that it should not be underestimated the extent to which work-related issues can result in a real mental impairment for many individuals. Moreover, it was not invariably the case that the impact of the alleged mental impairments on the Claimant's ability to carry out normal day-to-day activities followed directly from work events. For example, it was from April 2018 that she says she experienced work-related stress and anxiety. Although this was because of the thought of returning to work, the trigger event had taken place several months before (her meeting with Mr Bower).

179.4. Work-related concerns were thus a barrier to the Claimant returning to work sooner than she did, but her case was not same as Mr Herry's. He did not produce evidence of a substantial adverse effect outside of the inability to return to work; the Claimant did.

179.5. Whilst we make clear that we are not making any judgment on whether the Respondent's actions caused a mental impairment or illness for the Claimant, what we were dealing with in her case was her response to work-related issues resulting in a real mental impairment.

179.6. Her stance in relation to the issues she faced at work was not entrenched or a matter of personality or character. She still attended meetings with Mr Lomax when off sick, forcing herself to do so.

180. We were thus satisfied that the substantial adverse effects we have described resulted from the mental impairments of work-related stress and anxiety because that is what the GP notes said, supported by the fact that the Claimant was also sent for CBT/counselling. It might also be said that the Respondent giving the Claimant extended sick benefit is supportive of that conclusion.

181. The final question for us to consider was whether the substantial adverse effects of the impairment(s) were long term. This was conceded by the Respondent for all but the allegations relating to 11 February 2019, in other words for the complaints in the list of issues at paragraphs 5(ii) and (iii), 9(ii) and 11(i) and (ii). As to 11 February 2019 (issues 5(i) and 9(i)), the required impacts had not lasted for twelve months by then, even on the Claimant's own case, nor was there any evidence before us to show that they were likely to last for the rest of her life at that point. The question was therefore whether, as at 11 February 2019, those impacts were likely to last for twelve months, "likely" meaning "could well happen". That does not mean of course asking whether the effects were likely to last for twelve months from that point onwards, but whether it can be said that they were likely to last for a further two months, such as to mean that they were likely to have lasted for twelve months by April 2019. The effects for this purpose are of course the deduced effects we have described above, that is disregarding counselling or similar intervention.

182. We found the answer to the question to be yes, noting the following in relation to 11 February 2019:

182.1. The Claimant had been off work and had experienced the required effects of the impairment(s) for 10 months.

182.2. She had been signed off work for the same reason for another month.

182.3. The most recent OH report of 4 January 2019 did say she was functionally capable of returning to work but referred to some of the substantial adverse effects continuing.

182.4. CBT and/or counselling was continuing, as the same OH report noted.

182.5. As the Respondent itself said, previous fit notes had expired repeatedly without the Claimant returning to work. It could certainly be said at 11 February 2019 that this could well happen again, given that arrangements had been made for a return at the end of January but without success.

183. In summary therefore, we were satisfied that the Claimant established that she was a disabled person at the time of the events she complains about, that is from February to October 2019.

Knowledge of disability

184. There was no need for us to deal with the question of knowledge, as the Respondent accepted that if we found the Claimant was a disabled person at the relevant times, this was something it knew. There was no distinction drawn by the Respondent, in making this concession, between the various dates on which disability discrimination is alleged to have taken place, sensibly so given the

evidence of Mr Lomax about the OH reports in January and September 2019 respectively.

Discrimination arising from disability

185. It was conceded, if we held that the Claimant was disabled at the relevant times, that the treatment she says was unfavourable was because of her absences from work, which it was also accepted given arose in consequence of her disability, should disability be established. The Respondent did not take any point about whether absences prior to 4 February 2019, which is the first point at which we formally found that the Claimant was a disabled person, were not disability- related.

186. In light of the above, the first question in relation to the complaints of discrimination arising from disability was whether each of the matters the Claimant relied upon amounted to unfavourable treatment. The relevant case law makes clear that this is essentially equivalent to what is meant by a detriment, namely whether a reasonable person could consider the treatment to be to their disadvantage (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2001] IRLR 520**); as was said in **Williams**, the question is whether or not the Claimant was in as good a position as others; it is not a high hurdle.

187. Dealing first with the letter of 11 February 2019 (pages 635-6), was there treatment at all? We concluded that there was, being both the sending of a letter to the Claimant and the arrangement of a meeting with her. Was it unfavourable/detrimental? Again, we concluded that it was. Most of the letter was anodyne as one might expect, and we accepted that it did not itself constitute a sanction and could also be said in part to be supportive, for example raising the possibility that the Claimant's absence might still be supported. It began however, it must be said somewhat bluntly, with a statement repeating what Mr Lomax had said to the Claimant previously, namely that the Respondent would be considering whether the Claimant should be dismissed or whether her absence should continue to be supported. Given it required her to attend a meeting, one outcome of which could be dismissal, we determined that the Claimant could reasonably say the letter was to her disadvantage. With that meeting being arranged, she was certainly not in as good a position as others.

188. The same analysis must apply to what was said by Mr Lomax in the meeting on 22 July 2019, namely that a meeting would be held about the Claimant's absence and that she might get a warning. The Claimant accepts it was mandatory to hold a meeting under the AMP, given the length of her absence, but that cannot of itself mean there was no unfavourable treatment. The proper application of a policy is just as much capable of being unfavourable treatment as are individual actions unrelated to any policy. Again, no decision was taken or announced at the meeting, the announcement that there would be a formal meeting was plainly not of itself a sanction and again there was the possibility of the Claimant not being given a warning at all. Again however, the Claimant was told that she was to attend a meeting where a warning might be the outcome. Noting that establishing unfavourable treatment is not a high hurdle, the Claimant was not in as good a position as others and could reasonably consider herself disadvantaged.

189. We pause briefly at this point to say that we considered whether our finding that there was unfavourable treatment in these respects might be said to undermine the AMP (and policies adopted by other employers in similar terms). We were satisfied that it would not. As we will come to, an employer can always seek to justify a step taken under such a policy. That is ample safeguard both for the Respondent and other employers when preparing absence management policies and implementing them.

190. As to the warning on 10 October 2019, the Respondent accepted on the face of it that this was unfavourable treatment. What it said, in what Mr Feeny appeared to acknowledge was an ambitious submission, was that it cannot have been unfavourable treatment because the warning was later overturned. We did not accept that submission. He relied on **O'Brien**. That case seems to be to the effect that employment tribunals should consider the justification defence having regard to the information available to the employer at the appeal stage. It does not seem to us to address the question of unfavourable treatment at all, at least not in a way that would support Mr Feeny's submission that success at the appeal stage means that the earlier dismissal (or, as in this case, warning) stage was not unfavourable. Unfavourable treatment does not have to be permanent in its effects. At the time the warning was given, the Claimant was plainly not in as good a position as others; she successfully appealed the warning, but she had to go to the trouble of getting it overturned. All of that together meant that we were more than satisfied that it could reasonably be said that the warning was unfavourable treatment.

191. The second question for us to address was whether the unfavourable treatment was a proportionate means of achieving a legitimate aim – we will use "justified" for shorthand. The burden of proving this defence was on the Respondent and it was for the Tribunal to assess it, whatever the Respondent did or did not have in mind at the time.

192. We were satisfied that in general terms all three aims the Respondent relied upon were legitimate both for it and for employers generally – effectively managing resources, encouraging employees to maintain good attendance and treating employees consistently under the AMP. The Claimant did not really challenge that; her challenge, albeit put in her own words of course, was to the proportionality of the steps taken to achieve those aims.

193. We noted two preliminary matters. First, saying something in the Respondent's policy is not of itself enough to justify doing it, though it was not suggested by the Claimant – nor is it suggested by us – that the AMP sets out disproportionate or otherwise improper steps or sanctions. It did seem clear to us that the Respondent acted at all times within the terms of the AMP and that is a factor to weigh in the balance when assessing proportionality. Secondly, the Respondent did not produce any evidence at all on the impact of the Claimant's absence on its operations, nor did it evidence how other employees had been treated under the AMP. That was plainly an issue for the Respondent in demonstrating that it acted proportionately in relation to the first and third aims and is doubtless why Mr Feeny's submissions focused on the second, namely encouraging good attendance, where we accept that general propositions, our industrial experience and common sense play a key role.

194. Much, if not all, of what we had to say on justification applied to all three instances of unfavourable treatment, given that they share a common theme of application of the AMP. We focused therefore on the warning, but make some brief initial observations first on the other two matters:

194.1. The letter of 11 February 2019 was a fairly low-level step, simply inviting the Claimant to a meeting, albeit one at which dismissal was a possible outcome. The Claimant and Mr Lomax had a meeting in January 2019 and the Claimant was due to return to work but had not. Earlier sick notes had also expired without her returning to work.

194.2. On 22 July 2019, Mr Lomax mentioned the meeting that he would arrange at which the Claimant might be given a warning. That was evidently an even lower-level step than the letter of 11 February. As with that letter, a warning was only one possible outcome.

195. It must be the case that the Respondent was entitled to formally review the Claimant's absence and decide what to do about it, if anything (which is what both the letter and the 22 July meeting put in train), whether that be her continuing absence as at 11 February 2019 or her overall absence record (of around 6 months once the excluded period was discounted) as at 22 July 2019. This is because it was entitled to apply the AMP and to arrange a discussion with the Claimant, including to discuss whether her absence should be managed by the giving of a warning, or if it was continuing beyond the meeting that would have resulted from the 11 February letter, a decision that this could no longer be supported. In view of the absence record as it stood on both occasions, taking a step which would enable the Respondent to review it and decide what should happen next, was plainly proportionate.

196. Turning to the warning, on its face it seems obvious that after 6 months' absence – well beyond the trigger points in the AMP and well beyond what most if not all employers would consider necessitated a warning – it was a proportionate means of achieving the second aim. There is however the question of the successful appeal which was undoubtedly a not insignificant factor for us to consider. Mr Feeny submitted that Ms Rothwell's decision was wrong. We did not think we had to decide whether to accept that submission. Rather, our task was to decide ourselves whether Mr Lomax's warning was justified.

197. The warning was plainly rationally connected to the aim of encouraging good attendance. As the Respondent submitted, it was also a relatively low-level instance of unfavourable treatment in that it was nowhere near the dismissal stage. We do not say it had no impact on the Claimant, for the reasons we have already given, but even ignoring its being overturned, it was a limited impact, both in its seriousness and longevity, not least because the Respondent applied it from 24 June 2019 rather than the date of the warning itself, so that the Claimant got credit for her good attendance from then onwards, and also because the trigger points for further action would have been greater after the first three months of the warning, a period which had already expired by 10 October.

198. Could a lesser measure have achieved the legitimate aim? We concluded that it plainly could not. The only feasible alternative was no action under the

AMP at all, as there is no lesser sanction available, at least not that we were taken to. Further, the Claimant 's own evidence was that it was the prospect of formal action at the earlier stage when she was still off on long-term sick leave that led to her returning to work, showing that the application of formal action does have the required effect, however difficult that can be for employees. Moreover, this was not a case where a failure to make reasonable adjustments – or other discrimination considered by this Tribunal – had led to the absence.

199. In summary, notwithstanding Ms Rothwell's decision, we concluded that to hold otherwise than as set out above would serve to undermine the AMP. The same justification applies also to its application on 11 February and 22 July 2019 respectively. The complaints of discrimination arising from disability were not upheld.

Failure to make reasonable adjustments

200. These complaints could be dealt with more briefly. We did not have time to consider the Respondent's submission that the complaints should not be allowed to proceed at all because they are not in truth complaints of failure to make reasonable adjustments at all. Accordingly, we assessed them on their merits.

201. It was agreed that both PCPs were applied, and that the first PCP put the Claimant at the substantial disadvantage set out at issue 8(i), namely that she was more likely than someone who was not disabled to be given a warning or dismissed as a result of her disability-related absences. Again, the Respondent did not take any point about whether absences prior to 4 February 2019, which is the first point at which we formally found the Claimant to have been a disabled person, were not disability-related.

202. It was for the Claimant to prove the second alleged substantial disadvantage, namely that the threat of a warning or dismissal pressured her to attend work when she may not have felt otherwise able to do so, that is from 1 March 2019 onwards. We were not satisfied that she discharged that burden.

203. The Claimant only had to show that she was more than trivially disadvantaged in comparison with others, but it must be said that there was very limited evidence that could be said to be relevant to this question. We have already set out that we accepted the Claimant's oral evidence that she struggled to get out to work once she returned to it, feeling like it was her first day at school. We have also noted her general evidence that she felt pressured to return to work, which we can accept, and the fact that she made clear to Mr Lomax after their 22 July 2019 meeting that she felt unsupported by the application of the AMP and that it caused her stress and anxiety – see page 731.

204. Balanced against all of that however, on the evidence we were taken to, the Claimant neither at that meeting or elsewhere said to the Respondent that she did not feel able to attend work, nor anything to the effect that she felt unable to do her work but had no choice in the matter. Moreover, the only OH report we had after her return to work said that she was fit to be there, and on her own account she rendered effective service, including in relation to challenging situations. We did not think we could assume that the Claimant was put to the alleged substantial disadvantage, as a matter of common sense or judicial notice.

It had to be assessed on the evidence and we were not satisfied that the Claimant had shown that she was.

205. As to the steps the Claimant says the Respondent should reasonably have taken to overcome the first substantial disadvantage, it followed from our conclusions on discrimination arising from disability that we did not think the steps the Claimant contended for would have been reasonable for the Respondent to take. In short, it would not have been reasonable to not send the Claimant a letter saying that it may have to consider her dismissal after eleven months' absence (or ten months related to disability). Equally it would not have been reasonable not to give the Claimant a warning with a recent absence record of around six months, especially when OH had not advised that the triggers for application of these parts of the AMP should be extended in the Claimant's case and when in relation to the warning, the Respondent had taken account of the Claimant's good attendance from 24 June. Employers have to be able to manage attendance in this way, however difficult it may be, including in relation to disability-related absence.

206. As to the second PCP (the requirement to attend work), for the same reasons as already given in relation to issue 8(ii), we were not satisfied that the Claimant had met the burden on her of establishing the substantial disadvantage she relied upon, namely that attending work was often stressful and anxiety-inducing from 1 March 2019 onwards.

207. In any event, we concluded that the Respondent took the steps the Claimant says should reasonably have been taken – issue 11:

207.1. First, the Respondent plainly applied the OH recommendation to permit a phased return to work, even agreeing a longer period than OH recommended. It also implemented the recommendation to hold regular meetings between the Claimant and Mr Lomax. It is accepted that this happened from March to the end of July, when the Claimant went on annual leave. As set out in our findings of fact, the Respondent did not put a stop to those meetings. There was no failure on its part in this respect. All the managerial support referred to in OH reports (issue 11(ii)) was provided.

207.2. As to the provision of a buddy (issue 11(i)) we were satisfied that it would have addressed the alleged (but unestablished) substantial disadvantage caused by the PCP, in that it could have reduced the Claimant's anxiety about operational work. A buddy was however clearly provided. The arrangement failed on one occasion in July 2019, but as a result the Respondent deployed the Claimant to act as cover, thus negating any disadvantage.

These were the only steps rehearsed with us and, it having taken these steps, we did not identify others, based on the evidence before us, that the Respondent could have taken to avoid the substantial disadvantage (had it been made out).

208. There was no need for us to consider the question of knowledge of disadvantage. For the reasons given above, the complaints of failure to make reasonable adjustments were not upheld.

Victimisation

209. It was accepted that the Claimant did the three protected acts she relied upon and we were prepared to accept that it was a detriment to her not to permit a change in line manager when requested. Whatever the merits of the decision, this can reasonably be said to have been to the Claimant's disadvantage, even though she had not spelt out to Mr Foster the reasons for her request.

210. The complaint nevertheless failed on the basis that Mr Foster did not know of the protected acts when he took his decision – see our findings of fact on this point – and on the basis that he had reasons for his decision which were nothing to do with those acts, namely operational concerns and IO Swadkins' personal circumstances. Accordingly, the Claimant did not meet the burden of proof upon her to establish a prima facie case of victimisation, and even if she had, the Respondent had clearly shown that Mr Foster's decision was in no sense whatsoever influenced by the protected acts.

Protected disclosure detriment

211. This complaint was bound to fail on the same basis, in that Mr Foster did not know of any alleged protected disclosure when he took his decision in May 2021 and so cannot have been influenced by them.

212. The Respondent nevertheless asked us to consider whether the Claimant had made a protected disclosure in the first place. It accepted she had disclosed information and that she reasonably believed what she disclosed tended to show a legal obligation (under the Act) had been breached. The sole issue for us to determine therefore was whether she believed, and reasonably so, that what she disclosed was in the public interest.

213. The focus of the evidence was on the disclosure to Mr McPherson. Although we noted the Claimant's request for a managed move, the public interest does not have to be the main motive for the disclosure. That said, what was disclosed to him plainly centred on the Claimant's own grievances about how the Respondent had allegedly treated her. The allegations about suppressing complaints and data protection were also plainly personal to her. Further, whilst she said so to us, we were not taken to any part of her grievances where the Claimant said that it was important for the West Midlands public to see themselves represented in IOs within the service. Saying she was the only Black IO came closest to what she told us in oral evidence but her witness evidence in this respect was clearly that by mentioning it she was "implying that she had been discriminated against". Again, that was a personal interest, however important it may have been. We also noted Mr McPherson's evidence that he did not recall any discussion along the lines of what the public would be interested in, though of course he was aware of that wider context. The disclosures to Mr McPherson were, we concluded, not protected disclosures because the Claimant did not believe, nor did she reasonably believe, that they were in the public interest.

214. The disclosure to Ms Welsh was not protected for the same reason. We noted however that in the disclosure to Ms Balmforth, according to her further particulars, her oral evidence and the list of issues, the Claimant also raised that she believed management was failing to adhere to equality legislation in their

recruitment practices. We heard and were shown no evidence from Ms Balmforth and so accepted what the Claimant said was disclosed to her. Raising this, it is clear, was not about the Claimant's interests given that she was already in post; we were thus satisfied she believed that what she said was in the wider public interest. We concluded that she also reasonably believed this to be the case, given the high-profile nature of the Respondent, the nature and high profile of the work of the team in question and the Respondent's own wider sensitivity to ensuring such teams reflect the communities they work in.

215. Accordingly, whilst the complaint of protected disclosure detriment failed, that part of the disclosure to Ms Balmforth related to recruitment practices was a qualifying disclosure and because it was made to the Respondent it was also protected.

Conclusion

216. For all of the reasons set out above, the Claimant's complaints were not upheld. It was not necessary therefore for us to consider any questions related to time limits.

Note: This was in part a remote hearing. There was no objection to the case being heard remotely. The form of remote hearing was V - video.

Employment Judge Faulkner
Date: 15 November 2022