EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms S Anrude		Advisory, Conciliation and Arbitration Service (Acas)

Heard at: London Central **On**: 15-18 and 21 November 2022

Before: Employment Judge H Stout
Tribunal Member C Brayson
Tribunal Member S Soskin

Representations
For the claimant: Mr Patel (counsel)
For the respondent: Mr Kirk (counsel)

WRITTEN REASONS ON LIABILITY AND REMEDY

Judgment and reasons were given orally at the hearing. What follows is the corrected transcript. The Judge apologises sincerely to the parties for the delay in providing these Written Reasons. She is now aware that Written Reasons were in fact requested shortly after the hearing, but it was not until the Claimant's solicitor chased on 22 February 2023 that this came to her attention. The further delay in producing the Written Reasons is owing to pressure of work.

The type of hearing

1. This has been a remote electronic hearing under Rule 46. The public was invited to observe via a notice on Courtserve.net. There were no significant issues with connectivity.

2. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

The issues

3. The issues that we had to decide were agreed by the parties in the list of issues which was refined to a certain extent in the course of the hearing and to some extent in closing submissions as well, but in all matters of substance the case has remained as agreed on the list of issues, which is set out in an Appendix to this judgment.

The Evidence and Hearing

4. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents which were added to the bundle.

5. We explained our reasons for various case management decisions carefully as we went along.

6. We have heard evidence from the Claimant and Zeta Holbourne, her Trade Union Representative on her behalf and from the Respondent we have heard evidence from Claire Harwood (Duty Cover Team Manager), Richard Poore (Training Manager), and Louise Vince (Duty Cover Team Conciliation Manager).

Adjustments

7. The Claimant requested a 10 minute break every 2 hours, but we proposed aiming for a 10 minute break every hour and made clear that she (and other witnesses) could request breaks as needed. It was also agreed that if the Claimant wished she could while giving evidence wear dark glasses and/or dim the lighting in her room.

The facts

8. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

Background

9. Ms Anrude (the Claimant) began employment for ACAS as a Helpline Advisor and subsequently Conciliator based in the Respondents London Office. She started in employment on 30 September 2013. She has also latterly held roles as a Fair Treatment Contact, First Aider and Health and Wellbeing Champion for the Respondent. She remains in employment currently.

10. The Claimant worked in the Duty Cover Team (DCT). The DCT cover cases for individual conciliators who are absent for some reason. They do not have their own caseload. They handle multiple cases to ensure that urgent matters are dealt with. The DCT consists of 11 or 12 conciliators. They provide cover for the 100 or so individual conciliators who are employed by ACAS.

11. The Claimant's line manager during most of the period with which this claim is concerned was Ms Binns, who was from January 2018 the DCT Deputy Conciliation Manager. She reported to Ms Harwood, the DCT Manager. Ms Harwood retired in December 2021 and Ms Binns effectively 'acted up' from this point, assuming the role formally from June 2022. After December 2021, Ms Binns thus ceased to be the Claimant's line manager.

12. The Claimant and Ms Binns both believed they had a very good relationship before about May 2021.

The Claimant's disability

13. The Claimant suffers from a number of medical conditions, three of which are relevant to this claim:

    a. Cerebral vasculitis – since 1989;
    b. Dystonic left hand – since 1989;
    c. Long covid – the Claimant contracted Covid-19 in April 2020 and since April 2020 has suffered from 'Long Covid' or post viral fatigue.

14. The Respondent accepts that each of these conditions met the definition of disability within s 6 of the EA 2010, and that it had knowledge of those conditions at the times material to the claims, but does not accept that it had

knowledge of the substantial disadvantages to which the Claimant contends her conditions put her for the purposes of these claims.

15. The impact on the Claimant of her combined disabilities from April 2020 was significant. Long Covid interacted with the Claimant's pre-existing difficulties, exacerbating them. In summary, the combined effect of the Claimant's disabilities included the following during the time period with which we are concerned:

    a. She suffers extreme fatigue, especially after any physical activity or after work;
    b. If the Claimant has been working during the day she is unable to do anything else that evening;
    a. The Claimant struggles with any activity that requires the use of both her hands, including dressing and undressing, food preparation;
    b. She cannot reach anything using her left side;
    c. She struggles to stand for any length of time and can only walk for about 5 minutes before needing a rest;
    d. She suffers debilitating headaches;
    e. She is at greater risk of falls, and has fallen occasionally (chipping a bone in her shoulder on one occasion);
    f. The Claimant believes (and on the balance of probabilities we accept because it is commonsense) that she is more vulnerable to other illnesses as a result of her disabilities (for example, she contracted pneumonia in June 2021);
    g. She does not go out other than for things such as medical appointments;
    h. She cannot drive;
    i. She can no longer do her hobbies of fencing, swimming or gardening;
    j. The Claimant loves to cook but does not have the energy to cook apart from at the weekends or on days off;
    k. The Claimant cannot care for her children and her parents as she would want to;
    l. The Claimant is a practising Hindu but has been unable to go to temple and take part in other religious activities which are important to her (other than by Zoom); and,
    m. The Claimant no longer has energy to socialise and is severely restricted with how far she can travel and spends most of her time in the house.

<u>The Respondent's absence management policies</u>

16. The Respondent has a Managing Attendance Policy and Procedures (72). The version in our bundle is dated November 2019. That provides at paragraph 3.5 that sickness absence causes a particular concern once it reaches 8 working days in any 12-month period or on 5 or more separate occasions. This is a formal trigger for absence management procedures to be commenced, the

stages of which include a First Warning, Final Warning and ultimately dismissal.

17. The Claimant's trigger point had already been increased by the Respondent in 2017 to 16 days because of her other disabilities. Ms Harwood's understanding was that this was the maximum permitted by the Respondent's Human Resources (HR) department.

18. The Respondent's policy on approach to sickness absence when the Covid-19 pandemic started in 2020 was that sickness absence because of Covid-19 would not count towards review points for the purpose of the Respondent's sickness absence policy (125). From May 2021 the policy was amended (225) so as to provide:

> **32. Updated: How does sickness absence for Covid-19 affect the review point for attendance?**
> Where an employee has any of the main symptoms of coronavirus (COVID-19) and is in the self-isolation period, the sick absence will not count towards review points or towards half and nil pay calculations. Please contact your HR Business Partner for advice, especially where the employee's sickness absence was causing concern before contracting Covid-19.

19. The effect of this change was that for those like the Claimant with long Covid (without the main symptoms of coronavirus), sickness absence would need to be counted going forward.

20. The Supporting Attendance Guidance from December 2021 provided at paragraph 1.6 for managers to have a discretion to disregard other absences connected with the Covid-19 pandemic for absence management purposes (238):

> 1.6. The coronavirus (COVID-19) pandemic may impact other types of sickness absence, for example due to a deterioration in mental health or delays in receiving treatment. These absences are not automatically disregarded for attendance management trigger points/consideration points, but should be dealt with supportively by managers, who should consider whether a disregard or formal action is appropriate under the Attendance Policy.
>
> 6.2. If the initial assessment by the manager is that the absence is as a direct result of the impact of coronavirus (COVID-19), then the disregard of trigger/consideration points could be considered. This is to be determined based on the facts of each individual case. It may be more appropriate for the manager to hold an informal discussion rather than a formal meeting with the employee, even if they have already reached their trigger point. Please seek advice from the HR Casework team.

21. The Respondent's policy makes provision for phased returns to work, which the Respondent calls Part-Time Attendance on Medical Grounds (PTMG). The policy at para 6.31 provides in relation to returns to work after long-term absence:

> 6.31. The manager may want to consider:

> • Part-time working on medical grounds for the first 12 weeks (this may be less or more than 12 weeks depending on medical advice). The employee would either work shorter hours or less days or a combination of both. (See PTMG guidance for further details)
> • Allowing them the time and providing information so they can catch up on any new developments within the organisation
> • training on new equipment or new processes/procedures
> • information about what's been going on at work - for example, any events they may have missed or that are coming up.
> • Inviting them in for short visits prior to the return date.
>
> 6.32. If there is doubt about their ability to carry out their duties, then a referral to OHS may be appropriate to seek medical advice.

22. The PTMG Guidance provides, so far as relevant (949):

> 4. An individual may work reduced hours (PTMG) for a maximum period of 12 weeks to ease them back into their normal working routine. Only under exceptional circumstances should PTMG be extended beyond 12 weeks. (A period of 6 weeks will often be sufficient to facilitate a full return to contractual hours. This period is commonly recommended by OH).
>
> …
>
> 7. Line managers should consider OH/ GP advice when agreeing a phased return to work plan. They should also take account of the individual's normal working hours. Staff would usually be expected to attend on each of their normal working days, however in exceptional cases they may be permitted to work fewer days.

23. To support employee welfare and the management of attendance, the Respondent expects managers to carry out return to work (RTW) meetings with employees after every period of absence. It has a standard form that managers are expected to fill in, which sets out the purpose of the RTW meeting as follows:-

    a. Welcome the employee back to work and check that they are well enough to resume duties.
    b. To discuss what they are able to do following their return to work, taking account of any temporary workplace adjustments.
    c. To bring the employee up to date with work and developments in their absence.
    d. To explore any further support they may need.

24. The form then requires the dates of absence and reason for absence to be filled in, together with a tally of the total number of days sick in the last 12 months, notes of discussion with the employee about anything else that might be affecting their health, updates on what has happened at work, identification of whether they have hit or are close to hitting a review point for the purposes of the formal absence management procedures and any adjustments or support required. There is no express right to be accompanied to RTW meetings under the policy.

2019

25. From 24 January 2019, the Respondent was aware from an Occupational Health (OH) report of the Claimant's health conditions of vasculitis, dystonic left hand and severe headaches.

26. The Claimant's attendance was causing concern during this year. On 28 May 2019, the Claimant received a First Written Improvement Warning for Attendance (291) as she had had 49 days sick over 13 periods. The Claimant was set a 3-month improvement period and then a 12-month Sustained Improvement Period.

27. On 16 December 2019, the Claimant was placed on a Final Written Warning for attendance (299). She had had 24 days absence over 6 spells during the 12 months Sustained Improvement Period.

28. On 26 March 2020 Ms Binns informed the Claimant she had successfully completed Final 3 month improvement period. She was informed there would be a further 12 month period of review (307) and if attendance became unacceptable, it could lead to dismissal.

29. The Claimant accepted that the Respondent's prior handling of her sickness absence as chronicled above was not harassment, just the Respondent following its policy.

2020 – Covid-19 pandemic

30. When the first lockdown was announced, the whole of the DCT team, including the Claimant, began working from home on a full-time basis. In at least the Claimant's case, this has continued ever since.

31. In early April 2020, the Claimant contracted Covid-19. Save for some intermittent periods where she was temporarily able to work, she was absent from 8 April 2020 until May 2021. On the few days that she was able to work, there were return to work (RTW) meetings and recommendations from her GP for phased returns. The Claimant started some of these, in particular between 2 September 2020 and 16 October 2020 and a further two days' work on adjusted hours between 19 October 2020 and 2 November 2020. On each occasion, the Claimant became too unwell again and was unable to sustain attendance.

32. During her absence, the Claimant kept in touch regularly with Ms Binns, and relations between them were good. Sometimes it was Ms Binns who initiated contact, but mostly Ms Binns left it to the Claimant to contact her. Ms Binns was conscious of not wanting to exacerbate the Claimant's condition by speaking to her too much. In October 2020, Ms Binns supported the Claimant

to apply for a different role with the Respondent. In retrospect, the Claimant felt she was too ill to have tried for the role, and she was not successful. The Claimant on a number of occasions thanked Ms Binns for her support during this period.

33. By May 2021, the Claimant had been absent for in excess of 180 days, and none of it had been counted for the purposes of sickness absence triggers as it was all treated as Covid-related for the purposes of the Respondent's policy as it stood at that point.

34. The Respondent did not replace the Claimant during her absence or make any changes to the working hours of other employees in order to cover her absence. The DCT team simply coped with reduced team members. The effect of the Claimant's absence was thus to increase the workload of other team members in general terms, but Ms Binns' evidence was that the team 'coped'. No evidence was adduced of any measurable impact on service levels.

<u>May 2021 – attempt to return to work</u>

35. In a conversation with the Claimant in April 2021, Ms Binns suggested referring the Claimant to Occupational Health (OH).

36. By email of 30 April 2021 (377) to Ms Binns, the Claimant queried whether OH would be able to advise given how little was known about Covid Fatigue or long Covid at that point. She indicated that she had spoken to her GP who recommended a phased return as follows (as subsequently confirmed in a fit note: 384):

    a. 3-14 May, 11am-3pm
    b. 17-28 May, 10am-4pm
    c. 31 May-14 June, 9am-4pm

37. In that email of 13 April, the Claimant also asked that whenever her return to work (RTW) meeting took place *"due to the brain fog and sheer exhaustion I suffer things I tend to forget and sometimes misinterpret things so I would appreciate it if you would kindly allow me to have my union rep Zita Holbourne to attend with me"*.

38. Ms Binns spoke to the Claimant after this and told her that she did not think it was appropriate for a companion to attend the meeting because (as she put it in her witness statement), *"the meeting wasn't intended to convey a lot of information that Sara had to recall, it was simply a meeting so that Sara could update me on her health and so that I understood she was fit to return to work"*. Meetings were in Ms Binns' view supposed to be short and to take place as soon as possible on return to work to make sure she was fit to work before actually commencing her duties. She felt it would be difficult to fit meetings around a companion's availability. Ms Binns did not therefore make any effort

to accommodate the Claimant's request or take into account Ms Holbourne's availability when arranging the Claimant's first RTW of this period.

39. The RTW took place on 4 May 2021. The Claimant was not accompanied. A phased return at that point was agreed in accordance with her GP recommendations (381). It was agreed that an OH referral should be made despite the Claimant's doubts. No 'review by date' was agreed. Ms Binns wrote: *"We'll take each day as it comes and see how [the Claimant] progresses. Regular discussion to take place as any obstacles arise".*

40. On 5 May 2021 (385) the Claimant attended a dental appointment on a wrong day and was mortified about this, sending Ms Binns an email about this and the RTW meeting. The Claimant explained that anxiety on returning to work had really affected her and she was feeling stressed *"especially after our sudden back to work meeting"*. She said she was in tears typing the email and apologised and asked for *"kind understanding"*. Ms Binns accepted in oral evidence that she knew from this and other incidents that the Claimant was both very keen to return to work and keep her job and also very anxious about her health.

41. The Claimant only managed to attend work for 1 week before having to stop work again due to ongoing long-Covid symptoms.

42. On 10 May 2021 the Claimant met with OH. The report noted that she was at that point unfit for work as a result of a lung infection on top of long Covid symptoms. OH recommended that when the Claimant was fit to return she should return 11am-3pm for three to four weeks and *"if she copes well with that, then increase gradually over the subsequent three to four weeks"*.

43. OH also recommended: *"Careful pacing of her activities, and regular posture breaks i.e. normal breaks, task rotation and standing to stretch and move periodically, will all be important in managing her fatigue and pain."* Ms Binns did not specifically recommend or direct the Claimant to take breaks in the light of this report (or any later report), but both Ms Binns and the Claimant confirmed in evidence that the Claimant was free to take breaks during the day as she wished, and the Claimant gave evidence of how she would take breaks when needed, including sometimes lengthy breaks to allow medication to 'kick in' or because of headaches, as well as shorter breaks in her chair of what she called 'power naps'. The Claimant did not regard this sort of break as being a 'break' but we find that these were breaks from work that were additional to those taken by colleagues and that the Claimant was able to take them when she needed. We were not shown any evidence of the Claimant ever needing a break that was refused. Indeed, we observe that messages on 29 July (453) show Ms Binns advising the Claimant to take a break when she reported not feeling well.

44. On 14 May 2021 the Claimant had been diagnosed with pneumonia and was signed off from 10 May to 28 May 2021 (391). The GP revised

recommendations for a phased return starting on 24 May and up to 27 September 2021.

45. On 21 May 2021 the Claimant's GP revised her advice again (393), recommending:
    a. From 31 May to 28 June 2021 – 11am to 3pm (3 hours plus 1 hour lunch)
    b. From 29 June to 26 July 2021 – 10am to 3pm (4 hours plus 1 hour lunch)
    c. From 27 July to 30 August 2021 – 10am to 4pm (5 hours plus 1 hour lunch)
    d. From 31 August to 4 October 2021 – 9am to 4pm (6 hours plus 1 hour lunch)

46. In the meantime, Ms Binns had prepared a written plan for the Claimant's return to work. This was something she had never done previously. She sent it to the Claimant on 6 May 2021 stating in the email that it was so the Claimant would *"have some logical steps as to your goals to work towards"* (951). The plan sent at this point must have been an earlier draft than that which we have in the bundle at 952 because the version in the bundle has material entered after 6 May 2021.

47. On the version we have, Ms Binns copied the Claimant's GP's recommendation for a phased return to work into the top of the plan and then put in bold with yellow highlight next to it: *"As per ACAS policy PTMG is for a period of 12 weeks ends 20/8/21"*.

48. Ms Binns also colour-coded the plan itself using blue, yellow and green. Ms Binns used the colour-coding as a way of breaking up the text and making it easier to read, which she described in her statement as a "supportive mechanism", intended to assist the Claimant but also (and, principally, she said) for her own benefit so the different activities were clear. The Claimant felt the blue and green colours used by Ms Binns were 'nursery colours' and that she was being 'treated like a child'. She did not, however, complain about the use of colour-coding at this stage. In oral evidence, she said that this was because she was focusing on the fact that her GP's advice for a phased return to last until 4 October 2021 had been ignored with the planned proposed end date of 20 August (12 weeks). Although it is clear that when the plan was first sent by Ms Binns the Claimant's GP had not at that point advised that the phased return continue until 4 October 2021, we nonetheless accept in general terms the Claimant's evidence about her priorities around this time. We further infer that she did not complain immediately because she did not want to upset Ms Binns, but we accept that the Claimant was genuinely affronted by the use of colour-coding as she did complain about it not long afterwards at the informal concern meeting with Ms Harwood on 16 August and she appeared to us in evidence still to be genuinely upset by the colour-coding.

49. The Claimant's workload was also adjusted by her being allocated fewer cases to deal with (for example by way of reduced allocation of emails, or switching the phone to 'unavailable' so as not to have to take so many calls).

50. On 26 May 2021 at 14:02 the Claimant emailed a further fit note to Ms Binns (397). This email was prepared by the Claimant as a draft to send to Ms Holbourne, but was actually sent direct to Ms Binns, copied to Ms Harwood and Ms Holbourne. In the email, she acknowledged that there was no right to be accompanied to RTW meetings, but asked again if for her *"wellbeing"* she could be accompanied by Ms Holbourne. She wrote that *"because I am experiencing covid fog I found the meeting to be rushed and brash and I wanted to digest and take notes as I went along. I know you said you were taking a note but it was important for me to be able to process each part and respond at a pace I was comfortable with taking consideration of the conditions I am facing because of Long Covid. I do not ever wish to feel this way again"*. She wrote that she wished *"to avoid the same sort of bullish, and bombastic and very fast talking meeting we had last time".* She explained that the last meeting had left her feeling *"very let down and confused"*. She also complained about being asked to do administration rather than conciliation, and accused her of failing in her duty of care. The Claimant also said that she could not remember much of what had been said and described how ill she was at this point.

51. On 27 May 2021 at 16.01 the Claimant emailed Ms Binns to apologise for sending the previous email (404). She gave the email the subject heading, in block capitals, "A HUGE APOLOGY; I MADE A MISTAKE". This email made clear how sorry she was for sending the previous one and how she had not meant to send it, and did not wish to hurt Ms Binns' feelings and had not meant it as an attack on Ms Binns or Ms Harwood, but meant to send it to Ms Holbourne to consider and advise. She also acknowledged that Ms Holbourne was on leave and so would not be able to join them in a meeting until the following Thursday which was then a week away.

52. On 28 May 2022 at 14.02, not having spoken to the Claimant in the interim, Ms Binns replied to the Claimant's first email (i.e. the one that had been sent by mistake (399)). She began by acknowledging that the Claimant had said it was sent accidentally, but she felt that as her line manager and TU representative had been copied in, she should respond. Her response when printed out runs to nearly three pages and is longer than the Claimant's original mistaken email. It sets out Ms Binns' position on the support she has provided the Claimant over the year since she contracted Covid-19. Ms Binns in cross-examination accepted that it might have been an option to ignore the Claimant's first email or say that she would not respond until the Claimant had decided what she meant to write, but said that at the time she felt that as line manager it required a response. She said: *"given that C has brain fog and I think there are inaccuracies I think there needs to be a paper trail and given that I am the manager and we need to continue to work together there needed to be some address"*.

53. In Ms Binns's email, she disputed the Claimant's recollection of the RTW meeting, and stated that she felt she had supported the Claimant during her absences. It makes clear that as her absence is Covid-related it will not count

towards reducing her entitlement to full sick pay or for attendance monitoring purposes (that still being the Respondent's policy at this point). Ms Binns explained that it was not *"always"* feasible to allow a TU rep to be present at all RTW meetings and that: *"A manager needs to be able to have a conversation with their staff member when required, sometimes at short notice, and union representatives have other priorities and are not always available. It would not be appropriate to delay a return to work meeting pending the availability of your union representative"*.

54. The Claimant in cross-examination accepted that Ms Binns was entitled to a right of reply to her criticisms and that what she wrote was a respectful rebuttal. She denied when being cross-examined that she had asserted this amounted to harassment, but in re-examination she said Ms Binns' email was 'disingenuous' because it was not accurate (for example, suggesting that she had spoken to the Claimant's children on more than one occasion when that was not the case as far as the Claimant was concerned). The Claimant was also particularly offended by the reference by Ms Binns to her difficulty with remembering and Ms Binns' questioning of whether the Claimant was fit to return to work and do her job. Ms Binns, for her part, accepted that questioning the Claimant's ability to work in this email could have been particularly hurtful to her *"but it was not intended that way"*.

55. We find in relation to the Claimant's responses to questions in cross-examination regarding this and one or two other points of her case, that the Claimant's disabilities are such that she has difficulty holding in her head the detailed chronology of her own case and the contents of documents. She was trying hard to answer Mr Kirk's questions reasonably and truthfully and in our judgment accepted some of his points in cross-examination when that did not in fact reflect her genuine view either at the time of the matters with which we are concerned or now. In other words, this is one of those rare cases where we consider her answers in re-examination were (on some issues) more reliable than her answers in cross-examination and we have taken those to reflect her case.

56. At the time, the Claimant replied to Ms Binns' email at 16.06 on the same day (28 May) (404) saying how upset she was to have 'saddened and disappointed' Ms Binns and questioning whether she had not received her email of apology. She indicated that she should like the chance to respond to Ms Binns' very long email, but that she was also glad that Ms Binns had indicated they should move on and she intended to do so too. She sought to reassure her that her GP considered her to be fit for work and was happier that her phased return *"is much slower and more paced than before. So although we have been told I may have the odd bad day, the GP feels that the slow paced return will help me in the long run with the fog and the other issues I currently face…"*.

<u>June 2021 – return to work</u>

57. On 1 June 2021, the Claimant started her phased return working for 3 hours between 11am and 3pm with an hour for lunch. Her RTW meeting with Ms Binns (408) recorded her days of sick absence as 0 for the last 12 months as 'Covid-19 related' absences were still not being counted at this point. Ms Binns noted the Claimant's GP had recommended a 5-month phased return until 4 October 2021, but explained that the policy was for 12 weeks.

58. The Claimant was not accompanied and did not repeat her request to be accompanied at that meeting. We observe that the position at this point was that the Claimant had by email asked to be accompanied by Ms Holbourne at the meeting, then acknowledged that Ms Holbourne was on annual leave until the following Thursday (which would have been 3 June), and Ms Binns had made clear in her email that RTWs would not be delayed because of the availability of a TU representative. In those circumstances, the Claimant did not ask for anyone else to accompany her and the Respondent did not suggest anyone else who was available and could accompany.

59. The Claimant had a lot of annual leave to use up and emailed Ms Binns on 7 June 2021 thanking her for taking so much time with her that morning and requesting 24 days of annual leave in the next two months, with 11 days to be carried forward to the next leave year (410).

60. Between 10 and 14 June 2021 the Claimant was absent from work due to chest pain/shortness of breath connected with long Covid. The Claimant's evidence was that on the way to her chest x-ray she spoke to Ms Binns and was told (as she perceived) "flippantly" that Covid-related absences were now being counted for absence purposes. The Claimant remembers Ms Binns saying that this was a *"Cabinet office directive"*. The Claimant was shocked as she felt it would have such an impact on her. Ms Binns denies conveying this information flippantly or using the term Cabinet Office Directive but the substance of the conversation is agreed.

61. The Claimant returned to work on 15/06/21 and a RTW meeting was held at which the Claimant was not accompanied and did not ask to be. Ms Holbourne was on sick leave. This was the first meeting after the change in policy and the first time that the Claimant's sickness absence had been counted (414). The Claimant queried whether it should be as the absence was related to Long Covid, but Ms Binns' explained that "Long Covid" was not a term on the Respondent's I-Trent system so the reasons for absence that she entered on the system meant that the Claimant's most recent absences had been counted. Ms Binns noted that the Claimant was on a 12-week phased return but had been sick in the second week. (We observe that, given the content of these meeting notes, Ms Binns must be wrong in her statement when she identifies 16 June 2021 as the day on which she first knew about the change in policy on recording Covid-related absences as she evidently knew about it by 15 June at the latest.)

62. During this period, the Claimant and Ms Binns liaised regularly to maintain the daily log on the RTW plan. The Claimant was also being provided with training, side-by-side learning and other assistance to get her back 'up to speed' with work.

63. The entry on the log of 24 June 2021 gives an impression of how some working days went for the Claimant during this period. She was supposed to be working 11-3pm with 1 hour for lunch (total 3 hours). She started on time at 11am, took lunch at 11.09 when she had a *"dreadful headache"* and rejoined the team at 12.46, then logged off at 16.10 (an hour later than scheduled, but having done approximately the agreed 3 hours of work around feeling too unwell).

July 2021

64. On 6 and 7 July 2021, the Claimant was unable to work due to extreme fatigue. She returned on 8 July 2021 but was still struggling. Ms Binns was on annual leave and Ms Harwood did the RTW meeting with the Claimant.

65. On 13 July 2021 the Claimant was added to the allocations rota, so she could now do allocation of work to the team some mornings. On 15 July 2021 the Claimant was trained on Open-scape, so it was from that point that she could in principle start taking calls, but it was agreed to *"pace and do one call at a time"*, Ms Binns recording that the Claimant was *"… not expected to take calls all day as yet"* (689).

66. On 21 July 2021 the Claimant was having breathing difficulties and on 22 and 23 July 2021 she was absent for this reason.

67. On 22 July 2021, Ms Holbourne emailed Ms Binns on the Claimant's behalf requesting adjustments in relation to the phased return process and the counting of Covid related absences in much the same terms as the claims for reasonable adjustments being pursued in these proceedings (937). She asked that the Claimant's absence due to long-Covid should continue not to count towards her sickness record on the basis that it was disability-related absence, and that her phased return should continue beyond the standard 12 weeks until 4 October as recommended by the Claimant's GP on the basis that Long Covid amounted to "exceptional circumstances" under the policy because *"nobody has ever experienced Long Covid before this pandemic started – researchers and medical experts are still learning about it every day"*. We interject here that in cross-examination both Ms Harwood and Ms Binns accepted that in principle Long Covid could amount to exceptional circumstances under the Respondent's policy, but in the circumstances set out further below, they refused the requests made on behalf of the Claimant on this occasion.

68. The Claimant returned to work on 26 July 2021. At this point, Ms Binns had not yet replied to Ms Holbourne's email of 22 July 2021.

69. Ms Binns messaged the Claimant asking if they could do the RTW meeting when she was free, to which the Claimant replied saying she had tried to call but *"it went to answer"* and asking if the meeting could be scheduled for when Ms Holbourne was present. Ms Binns then telephoned the Claimant. There was a dispute between the two of them as to precisely what happened in this call, but having reviewed the emails that the two of them sent immediately afterwards (the Claimant to Ms Holbourne: 442; and Ms Binns to HR: 987), it seems to us that the material parts of that phonecall were as follows: Ms Binns wanted to have the RTW meeting in that phonecall as the Claimant was back at work; the Claimant protested because to her the RTW was not just an informal chat, but something that Ms Binns would document and she was uncomfortable with that as she felt that things 'got lost in translation misinterpreted or I feel slightly twisted' and wanted someone with her; the Claimant indicated that she would like Ms Holbourne to attend or, if Ms Holbourne was not available, then someone else (Ms Binns understood she meant another TU rep); Ms Binns was unhappy about the Claimant wanting a TU rep with her and terminated the call; Ms Binns then sought HR advice by email at 13.03 on 26 July 2021, copied to Ms Harwood; HR advised that although RTW meetings were informal *"it wouldn't be unreasonable to accommodate a return to work discussion with their TU rep present if they would find that beneficial"* and recommended the request be accommodated. Ms Binns did not follow that advice, but completed the RTW form and the RTW action plan on the basis that the Claimant had refused to attend the RTW meeting. Ms Harwood's recollection was that this was done after discussion with her and with someone else from HR, but Ms Binns had no independent recollection of that discussion. Whether or not there was such a discussion, however, there is no evidence before us that Human Resources advice changed from that which we see in the email of 26 July 2021.

70. The incident upset the Claimant and in her email to Ms Holbourne she wrote (443): *"I really don't want to have this sort of relationship with my manager, I hate bad feeling and not least because it affects my stress levels and in turn it exacerbates my breathing issues"*.

71. By letter sent by email on 28 July 2021 (despite its date of 16 August it was clearly attached to the email of 28 July) (448, 449), Ms Binns issued the Claimant with a Letter of Informal Management Advice, copied to Rebecca Harding of HR. This stated that the Claimant was expected to attend RTW meetings without a Trade Union representative and warned that continued refusals to attend may be regarded as a disciplinary matter. The letter included the following:

> You have refused to attend a return to work interview in line with these responsibilities citing that you will only attend should your Trade Union Representative be present. I am happy to consider all requests for support however on this occasion, I did not feel it was appropriate for your Trade Union Representative to be in attendance. It is important that I can have informal management discussions with you on a regular basis to ensure appropriate

> support is in place and discuss any concerns I have regarding your attendance. Facilitating trade union attendance for every meeting does not enable me to do this. A return to work interview is an example of an informal management meeting and I would remind you that there is no right to be accompanied.
>
> Going forward, I expect you to make every effort to attend informal management meetings and where this isn't possible, for you to engage in productive discussions to enable meetings to be rearranged as quickly as possible. I trust that these are reasonable and achievable objectives. Any concerns will be discussed through the usual management arrangements i.e. management coaching.

72. The letter concluded by indicating that further refusals to attend may be regarded as disciplinary matters.

73. We observe regarding this letter and the incident itself on 26 July 2021, that it was on this occasion Ms Binns and not the Claimant who had failed to 'engage in productive discussions to enable meetings to be rearranged as quickly as possible' as she had not delayed the RTW meeting even for a few minutes to allow the Claimant to see if she could find someone to accompany her, or made any suggestion as to who else could attend with her. Ms Holbourne was on Trade Union duties that day which, as she explained in evidence to us, did not mean that she was necessarily unavailable to accompany the Claimant. It would depend on what exactly she had on.

74. The Claimant having received that letter from Ms Binns replied to say that she was disappointed to have received it and Ms Binns in turn replied (454) to confirm that the Claimant had been *"very clear"* about refusing to participate in a RTW meeting and *"the letter stands"*, but was not a disciplinary letter *"but merely setting out my expectations going forward"*.

<u>August 2021</u>

75. On 2 August 2021, Ms Holbourne emailed Ms Binns formally requesting that the Claimant's absences be disregarded for trigger point purposes or treated as disability leave. She asked for an Equality Impact Assessment to be completed on the basis that (she wrote) Long Covid disproportionately impacts female and minority ethnic groups. She also asked for an extended phase return asserting that the Claimant's GP and OH recommended and supported that (although she accepted in oral evidence that OH's letter did not support it). Ms Binns replied on 3 August 2021 setting out formally the reasons for refusing the requested adjustments (932) as follows:

> <u>Reasonable Adjustment 1: Extended Phased Return</u>
>
> Sara planned to return on 4/5/20, she failed to attend beyond 1 week due to ongoing symptoms. She returned on 1/6/21. This is a total of 15 weeks for PTMG at 20/8/21. It is therefore my view that there has already been a significant period of support for Sara to return to work following her long-term period of absence. Along with a reduction in hours, Sara has had a number of weeks of significantly reduced

> workload e.g. she had 8 weeks where she was not asked to conciliate and was therefore not fulfilling a significant portion of her contractual duties. Acas will always aim to support staff with adjustments where reasonable, however this is now having significant impact on the service. As we are approaching peak holiday period, I am unable to accommodate a further period of PTMG as this would have an impact on our customers.
>
> Reasonable Adjustment 2: Discounting long Covid related absence for the purpose of the attendance policy
>
> As you are aware, Acas does not discount disability related absence for the purpose of the attendance policy as standard. There are cases where we increase the review point at which we invite staff to attend a formal attendance meeting in recognition that those with disabilities are likely to have an increased level of sickness absence. As you state in your email, Sara already has an adjustment in this regard. She has a 100% increase from 8 to 16 days and I do not believe that it is reasonable to further increase this. As stated above, regular absence has a significant impact on service delivery and this needs to be considered through the application of Acas' attendance policy.

76. In oral evidence, Ms Binns said that her position as set out in that email and elsewhere was based on HR advice as to the Respondent's policy, although she accepted that as a manager she did have a discretion to exercise both in relation to the length of the phased return and as to what absences were counted for trigger point purposes. She also accepted in oral evidence that part of her reason for not extending the phased return in the Claimant's case, or continuing to discount Covid-related absence, was because of the extent of the Claimant's previous absences, and previous 'failed' returns to work as a result of her condition. We add here that both Ms Binns and Ms Harwood both confirmed in oral evidence that they understood that the Respondent's attendance policies would impact more severely on the Claimant because of her disabilities than other employees.

77. So far as the impact on the service is concerned, we record that the Respondent's policy is that during school holidays up to 30% of staff are generally permitted to be absent (75% at Christmas), and during any term-time week 25% of staff are permitted to be absent. Those figures are applied across the organisation. This means that school holiday periods, especially the summer, tend to be the busiest times for members of the DCT because they have to provide cover for absent staff and more staff tend to be absent and this is not necessarily matched by the reduction in activity on claims during the holiday periods. Around August/September 2021 the Respondent was also generally in a very busy patch dealing with multiple enquiries regarding COT3s in the light of the Supreme Court's judgment in *Uber.*

78. From 05/08/21 until 13/08/2 the Claimant was signed off sick due to *"work related stress and bullying due to long covid"* (459). The same reason for absence was given for 20 August to 27 August (471).

79. On 6 August 2021, the Claimant's GP wrote a letter (605) stating that it was her opinion that the phased return to work should remain in place until 4

October 2021 and should not be altered or reduced in any way (page 605 of the bundle). The Claimant's GP also stated that Long Covid exacerbates her neurological disability and *"stress and bulling at work will only worsen the symptoms and delay her recovery"* [sic]. The GP stated that Long Covid had affected the Claimant for over 12 months and any related absences should be discounted for absence trigger points. No action was taken by the Respondent in respect of this letter. Ms Binns did not recall receiving it, but Ms Harwood did. Her view, as set out in her letter of 8 September 2021, and orally in evidence to us, was that there had been no bullying of the Claimant. We observe that it does not follow that even if there was (objectively) no bullying of the Claimant, that her perception of bullying was not the reason for her absence. We did not understand Ms Harwood to be questioning the genuineness of the sick note, just denying that there had (in her view) been any bullying.

80. The Claimant raised her concerns about Ms Binns' treatment of her with Ms Holbourne who in turn contacted Ms Harwood who arranged an informal meeting on 16 August 2021 to discuss her concerns. Those three individuals attended, together with a notetaker from HR. The Claimant indicated at the start of the meeting that she was happy for HR to take notes, and at the end she asked for copies of the notes and provided corrections to them (533, 630). However, in evidence to us she explained that she felt that this meeting was overly-formal and note-taking by HR was part of that. The Claimant said she felt she had to attend this meeting as her position was being threatened (628-634). The meeting itself felt 'very formal' to the Claimant and she felt 'cornered and threatened' by it.

81. At the meeting, Ms Harwood gave the Claimant an opportunity to explain what was concerning her about her relationship with Ms Binns, asking for examples of bullying and harassment, making clear that she was interested in what the Claimant had to say. The issues of adjustments to the policy on counting Covid-related absences and extending the phased return were also discussed. It was at this meeting that the Claimant first complained about the use of colour-coding on the RTW plan sent to her on 6 May 2021. She also complained about the letter of informal advice and explained how it had made her feel harassed. The Claimant became upset during the meeting when describing the effect of this on her and Ms Harwood offered her a short break, which they had. The Claimant was reassured by the HR representative that no hiring manager would have access to the letter of informal management advice. The Claimant explained that she felt that Ms Binns' communication with her had become curt, when it was not like that with other people. She explained it was not helping her recovery and referred to the sick note for stress due to workplace bullying. At the end of the meeting, the Claimant asked whether her phased return was still being cut off at 12 weeks or whether it would extend to 4 October 2021 as her GP recommended. She reiterated how exhausted Long Covid makes you feel. Ms Harwood concluded the meeting by saying she would consider the Claimant's request, but as matters stood she would be expected to do full hours from 24 August 2021.

82. The Claimant was on sick leave on the day of the 16 August meeting, and was exhausted by the meeting. She remained off sick until 2 September 2021.

83. On 20 August 2021 Ms Harwood a health capability meeting with the Claimant and Ms Holbourne, following which she sent a letter to confirm what was discussed (462). This letter comprised a review of the PTMG period. The letter recorded her sickness absence during the 12-week return to work period, explained that the Claimant's productivity had not improved to acceptable levels and that a further referral to OH was required. The letter stated that the Claimant's return to work was regarded as *"unsuccessful as I cannot see any evidence that a phased and gradual return to work has enabled you to sustain your attendance at work"*. The letter indicated that Ms Harwood was investigating whether the Claimant could benefit from the Long Covid Rehabilitation Service (LCRS) (a bespoke 8-week programme of support). Ms Harwood warned if this course was not successful in enabling sustained attendance then the Claimant would be referred for consideration under the Attendance Policy and that failure to demonstrate a successful return to work could lead to dismissal. Ms Harwood also informed the Claimant that she had the right to be considered for Ill-Health Retirement under the Civil Service Pension Scheme. She indicated that the Respondent would be guided by OH as to whether a further period of PTMG should be considered during the rehabilitation programme, but noted that this was 'not relevant immediately' as the Claimant was still signed off sick.

84. The LCRS option had not been available previously and was in its early stages. Ms Harwood accepted that there was no need for the PTMG to end before the LCRS commenced.

<u>September 2021</u>

85. The Claimant returned to work on 3 September 2021 and had a RTW meeting with Ms Binns. She was not accompanied to that meeting and did not ask to be (478). The Claimant felt under pressure, given Ms Binns' reaction to her previous requests and the letter of informal management advice, not to request to be accompanied. It was noted that a referral had been made for the LCRS and a response was awaited. The trigger had been reached for absence management, but no steps were taken to take any action under the attendance policy. It was noted that the Claimant was having "power naps" and "moving around regularly".

86. On 8 September 2021, Ms Harwood wrote a letter setting out her conclusions following the informal concerns meeting on 16 August 2021 (480). All the Claimant's concerns were dismissed, but she was reminded of her right to raise a formal grievance if she wished to do so. Regarding the question of extending the PTMG, the letter emphasised the need to look at this in the context of the Claimant's absences since April 2020. Ms Harwood refused to extend the

PTMG because of the history of support/adjustments/absence, and because *"it is peak holiday season on the DCT and this would likely impact customers"*, the PTMG had already been 15 weeks if counted from 4 May 2021 and it was unclear how a further 6-week period would support the Claimant in sustaining attendance.

87. Despite the content of this letter, we find as a matter of fact that the refusal to continue the phased return at the pace recommended by the Claimant's GP had no impact on the Respondent's ability to deal with customers. The difference between the GP's recommendation and full-time work was at this point just 1 hour per day. However, the Claimant was not expected by Ms Binns to do any more work in that additional hour than she was already doing (which was far below the level of productivity of colleagues). The difference between extending or not extending the phased return so far as Ms Binns was concerned was administrative: she no longer had to complete the action plan. In oral evidence she initially said that she also no longer needed to provide the Claimant with training, but she accepted that in fact training had either already happened or would have to be provided anyway if it was needed, so this is also not material.

88. So far as the Claimant was concerned, the additional hour meant that she was expected to be at her desk for longer. At this point she was unable to do anything much other than work and sleep. Sometimes she was so tired after work that she would not even eat, but just go straight to sleep.

89. Regarding accompaniment to RTW meetings, Ms Harwood wrote in the 8 September letter that she did not accept it would be practicable to arrange this and it was *"not in line with policy"*. She explained that it was normal not to be given notice of RTW meetings and that they needed to take place as soon as possible after the return to work. She indicated that notes would be provided so the Claimant would have a record of what was discussed and stated that Ms Binns was right to be concerned about the Claimant's ability to work if she could not remember the content of a short telephone conversation with her manager. However, she concluded that *"going forward … we will consider all requests for accompaniment at meetings on a case-by-case basis"*.

90. Regarding the tone of emails, Ms Harwood indicated that she considered Ms Binns' communications to be reasonable especially given the concern to put things in writing because of the Claimant's 'covid brain fog'. She stated that the letter of informal management advice was a *"good way"* to set out expectations and that HR advice had been given about that.

91. Regarding the Claimant's relationship with Ms Binns, Ms Harwood indicated that she understood that Ms Binns and the Claimant were mending their relationship after the accidental email. Ms Harwood said that if she wanted to move roles (485) to IC case-holder to be managed by someone else, this could be facilitated. The Claimant did not want to as she liked her job.

92. Ms Harwood concluded by expressing *"genuine sympathy for your health problems and on-going debility"* but that what she perceived as bullying and harassment were just examples of normal management action.

93. On 28 September 2021 the Claimant attended an OH assessment. The report (488-489) noted she was still suffering with Long Covid symptoms, but assessed as fit to work with management support and adjustments, and with a referral to the Long Covid Clinic. Weekly meetings with line manager, risk assessment, short breaks during the working day, flexible hours and permitting her to be accompanied to some meetings were all recommended to help her manage her issues with poor concentration. OH did not make any specific recommendations about phased return as the substantive advice at p 489 appears to have been given on the basis that a phased return was already "*in place"*. OH did observe that with Long Covid *"there are no limits to the types of adjustment that could happen"* but indicated this was a matter for management and HR. The Respondent did not carry out a risk assessment, nor were regular meetings arranged with Ms Binns following this advice.

<u>October 2021</u>

94. The Claimant was off work from 7 to 20 October 2021 due to Covid fatigue (511), migraines and because of a shoulder bone chip from a fall on 13 October 2021 caused by Covid weakness. During this period both the Claimant and Ms Binns chased up what was happening with the Long Covid recovery course.

95. On 25 October 2021 the Claimant submitted a formal grievance regarding discrimination which broadly matches the matters that she has raised with us in these proceedings (512). By way of outcome, she requested that the following reasonable adjustments be made:

> "Absences related to my disabilities which have been exacerbated by the effects of long covid are disregarded for trigger point purposes going forward and that any related previous absences (i.e. from June 2021 to date) are also disregarded for trigger point purposes.
>
> I am allowed to be accompanied by a rep or colleague for support to meetings to support me through them due to my disabilities impacted on memory and sometimes causing forgetfulness and confusion plus the impacts of brain fog caused by long covid on top of this
>
> I am permitted to take regular short breaks during each working day as needed to help with the impact of fatigue
>
> I am also requesting that any absences for shorter periods than a whole day are disregarded and that I do not suffer a detriment or penalty because of these ahead of the completion of the 8 weeks long covid programme.
>
> That the advice and recommendations of my GP and where applicable the OH doctors are followed including in relation to any phased returns that I may need in the future."

96. On 25 October 21 the Claimant contacted Acas *qua* claimant rather than *qua* employee and the period of Early Conciliation began.

97. On 27 October 2021 there was a phone call incident between the Claimant and Ms Binns. Ms Binns emailed the Claimant following that phone call and complained that she had put her on hold *"without warning … for over a minute before coming back to her"* (939). The Claimant's version of events is that the phone rang before she had a chance to put herself on 'not available' and that she put Ms Binns' call on hold because she was completing notes from a previous call because as a result of her brain fog she was worried that if she did not write up the notes straight away she may have forgotten. The Claimant's witness statement and oral evidence was that she knew it was Ms Binns calling and thought that she had answered the phone and told her she was putting her on hold for a few moments, but the Claimant's email at page 636 makes clear that she did not know it was Ms Binns calling. What the Claimant did to Ms Binns she therefore could have done to another customer and Ms Binns was concerned about that as a customer would already have been on hold for some time and she did not consider it acceptable for them to be put back on hold. Ms Binns told the Claimant this when she did speak to her on the phone and heard from the Claimant her explanation as to why she had done what she done, Ms Binns then followed it up with an email (939), in which she acknowledged the reasons the Claimant was wanting to write up notes for her because of her difficulties remembering matters from calls but saying that she was *"disappointed"* with the Claimant's conduct and concluding *"I trust this was a one off and should not happen again"*.

November 2021

98. On 2 November 2021 the Claimant returned to work and had a meeting with Ms Binns. She was again noted to have reached the 16 day trigger period at 73 days of absence on 4 occasions (including at least 16 days outside the PTMG period) and Ms Binns indicated that she would be sending the Claimant a letter placing her on a Performance Improvement Plan (607). It was noted, however, that the outcome of the referral to the Covid Rehabilitation Programme was still awaited. The Claimant was not accompanied to that meeting and did not ask to be. Ms Holbourne was on Trade Union duties on that day. In the end, no attendance or performance approvement plan letter was sent by Ms Binns following this meeting.

99. It was agreed by the parties that in general terms the Claimant's absence levels had broadly improved between at least September and November of 2021, in particular that the Claimant had sustained attendance during September.

100. On 18 November 2021 (610) Ms Harwood chased up the provision of the Long Covid Rehabilitation Programme which had still not started at this point and on 18 November the Claimant had a grievance meeting with Richard Poore (763).

101. On 22 November 2021 the Claimant had surgery on her shoulder and was absent until 14 December 2021.

102. The LCRS programme eventually started on 26 November 2021.

December 2021

103. On 6 December 2021 the ACAS early conciliation period ended.

104. On 14 December 2021 the Claimant emailed Ms Binns about arranging a RTW meeting and asked again to be accompanied by Ms Holbourne. Ms Binns' replied (982) indicating that although she had previously explained there was no right of accompaniment to a RTW meeting, if the Claimant would feel more comfortable, the meeting could be delayed a few days to allow Ms Holbourne to attend. The meeting in the end took place on that day. Ms Binns' evidence was that the reason for her change in her approach in relation to this request for accompaniment was that Ms Harwood in her letter of 8 September had indicated that requests would be dealt with on a case by case basis.

105. At that return to work meeting on 14 December 2021 Ms Binns informed the Claimant that no action would be taken in respect of her level of absence until after she had completed the Long Covid course (746).

106. The Claimant found the course helpful and recommendations were made as to adjustments and approaches that she could take. The Claimant during this period began increasing the length of her walks, walking with the aid of a stick to the end of the road initially and then a bit further but continued to find fatigue debilitating after a few hours of work she could still only eat, shower and sleep. During the course she began to improve and began to cook simple meals again. The Claimant suffered a family bereavement and missed the end of the course as she was on special leave during that time.

107. From 20 December 2021 the Claimant's Line Manager became Ms Stephens following Ms Harwood's retirement.

108. On 20 December 2021 the Claimant attended a meeting with the Long Covid course provider who made several recommendations for reasonable adjustments. The course consisted of fortnightly meetings with an advisor. The Claimant found the Long Covid rehabilitation course useful and as if it was the first time that her Long Covid was being taken seriously. The course provider recommended using a mind mapping tool that the Claimant found helpful for memory issues and brain fog. It was recommended that she keep a diary with a view to increasing her mobility (although she was doing this already). She began increasing the length of her walks, walking with the aid of a stick to the end of the road initially and then a bit further. However, the fatigue continued to be debilitating. After a few hours of work all she could do was eat, shower

and sleep. Her only outings were to hospital or GP appointments. During the course she began to improve, beginning to cook simple meals again. The Claimant's aunt died so she missed the end of the course as she was on special leave.

109. On 23 December 2021 the Claimant filed her claim in these proceedings. Further grievance investigation meetings took place in March 2022 and a grievance investigation outcome report was produced at the end of May 2021 and sent to the Claimant on 8 June. The grievance was partially upheld, it was accepted that going forward the Claimant should be permitted to be accompanied to meetings provided that this did not unreasonably delay the meeting. It was also accepted that there had been a delay in the commencement of the Long Covid programme. The Claimant's complaints regarding absence recording, phased return to work and bullying and harassment were not upheld, although it was recommended that the Claimant and Ms Binns should participate in mediation. This did not occur as HR failed to arrange it as, outwardly at least, the Claimant and Ms Binns were now communicating regularly without apparent issues.

<u>The impact on the Claimant of the matters about which she complains</u>

110. We have heard evidence from the Claimant as to the impact on her of the matters about which she complains. Prior to contracting Long Covid, the Claimant enjoyed her work and loved her job. In oral evidence, she told us that the effects on her of the matters about which she complains in these proceedings was that she did not feel she was being taken seriously or being believed. She felt the Respondent was treating her disabilities as a figment of her imagination, she felt she had to keep justifying herself and apologising, when she was told, as she perceived it flippantly, in June 2021 the Long Covid would be counted going forward for absence management trigger purposes she felt utterly hopeless as if the stuffing had been knocked out of her. As a result of her disabilities at that point she felt like a fragment of her former self and could do very little, she felt a great loyalty to the Respondent and believed that it was supposed to be a model employer, however its treatment of her felt like she was being kicked why she was down. She felt devastated, it affected her family and she cried a lot. The stress of dealing with the matters she is complaining about has exacerbated her recovery in her opinion. She was worried about losing her job, she felt that she need to concentrate on getting well but instead was trying to juggle her doctor's advice and what she felt she should be doing in work.

111. The Claimant was clearly upset talking about some of the treatment she was subjected to by Ms Binns in the course of the meeting with Ms Harwood on 16 August and her witness statement again makes clear that she felt 'helpless', devastated, 'tearful, 'withdrawn at home', 'destroyed' (paragraph 47).

112. The Claimant was so badly affected at the time that she had two weeks off for stress in August 2021 as a result of what she perceived to be the harassment by the Respondent.

113. In her statement for these proceedings, the Claimant explains that her symptoms have improved and she would now like to move forward with a clean slate with her previous sickness record being disregarded, but in oral evidence, she explained that her understanding is that her job is still at risk and the Respondent is awaiting the outcome of a further OH referral. She said that the matters she complains of in these proceedings are still affecting her emotionally.

Conclusions on liability

Failure to make reasonable adjustments

The law

114. Under s 20 of the EA 2010, read with section 39(5) and Schedule 8, an employer who applies a provision, criterion or practice ('PCP') to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to make reasonable adjustments in respect of a disabled person is discrimination against that disabled person. By section 212(1), 'substantial' in this section also means 'more than minor or trivial'.

115. An employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know both that the complainant has a disability and that he or she is likely to be placed at the relevant substantial disadvantaged (EA 2010, Sch 8, para 20): see further *Wilcox v Birmingham CAB Services Ltd* (UKEAT/02393/10) at [37]. On the question of the requirements for knowledge in this context, what is required is that the employer have actual or constructive knowledge of the facts that constitute the definition of disability under s 6 of the EA 2010. The employer must have actual or constructive knowledge that the claimant has an impairment that has each of the elements of the statutory definition of disability, i.e. that it has a substantial and long-term effect on her ability to carry out day-to-day activities: see *Stott v Ralli Ltd* (EA-2019-000772-VP) at [57]-[58] and the cases quoted therein.

116. In considering a reasonable adjustments claim, a Tribunal must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant: *Environment Agency v Rowan* [2008] ICR 218, EAT at [27] *per* Judge Serota QC. The Tribunal must

also identify how the adjustment sought would alleviate that disadvantage (*ibid,* at [55]-[56]), although an adjustment may be reasonable even if it unlikely wholly to avoid the substantial disadvantage: *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2017] ICR 160 at [29] . The nature of the comparison between disabled and non-disabled people is not like that between claimant and comparator in a direct discrimination claim: it is immaterial that a non-disabled person with all the characteristics of the disabled person but for the disability would be treated equally, what matters is whether *"the PCP bites harder on the disabled, or a category of them, that it does on the able-bodied"* as a result (for example) of the disabled person being more likely to be disadvantaged by the PCP than a non-disabled person: see *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2017] ICR 160 at [58].

117. The concept of a PCP does not apply to every act of unfair treatment of a particular employee. A one-off decision can be a practice, but it is not necessarily one; all three words connote a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again: *Ishola v Transport for London* [2020] EWCA Civ 112 at [38] *per* Simler J. For something to amount to a PCP, there does not have to be evidence that the employer has treated another employee similarly, but there must be an element of persistence or repetition about the way the employer has treated the individual complainant: *Williams v The Governing Body of Alderman Davies Church in Wales Primary School* (UKEAT/0108/19/LA) at [79] *per* HHJ Auerbach.

118. The duty to make reasonable adjustments may (indeed, frequently does) involve treating disabled people more favourably than those who are not disabled: cf *Redcar and Cleveland Primary Care Trust v Lonsdale* [2013] EqLR 791.

119. What is reasonable is a matter for the objective assessment of the Tribunal: cf *Smith v Churchills Stairlifts plc* [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer reached its decision to make or not make particular adjustments, nor with the employer's reasoning: *Royal Bank of Scotland v Ashton* [2011] ICR 632, EAT.

120. Carrying out an assessment or consulting an employee as to what adjustments might be required is not of itself a reasonable adjustment: *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664, EAT.

121. Although the EA 2010 does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors previously set out in the Disability Discrimination Act 1995 are matters to which the Tribunal should generally have regard, including but not limited to:

a. The extent to which taking the step would prevent the effect in relation to which the duty was imposed;
b. The extent to which it was practicable for the employer to take the step;
c. The financial and other costs that would be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities;
d. The extent of the employer's financial and other resources;
e. The availability to the employer of financial or other assistance in respect of taking the step;
f. The nature of the employer's activities and the size of its undertaking;
g. Where the step would be taken in relation to a private household, the extent to which taking it would: (i) disrupt that household or (ii) disturb any person residing there.

122. Under s 136 EA 2010, the Claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may even be as late as the tribunal hearing itself. Once that threshold has been crossed, the burden shifts to the Respondent to show that the proposed adjustment is not reasonable: *Project Management Institute v Latif* [2007] IRLR 579, EAT.

Conclusions

123. In closing submissions, the Claimant refined this claim to what comes to in substance a complaint about three PCPs, as follows:

a. **Absence policy** – the requirement that employees maintain a certain level of attendance with a maximum of 8 days' sick leave (including, from June 2021, Covid-related sick leave) before Attendance Procedures are engaged;
b. **Phased return policy** – the requirement that the Claimant complete her phased return within a 12-week period;
c. **Not permitting representation at RTW meetings**.

<u>Absence policy</u>

124. The first concerns the absence policy and is focussed on the trigger points in the attendance policy, and specifically in the Claimant's case the 8-day trigger as adjusted for her already to 16 days. The Claimant submits that either that trigger point should have been increased or that all Covid-related sick leave should continue to be discounted by the Respondent. Mr Kirk raised objection to the way the PCP had been formulated by the Claimant in the list of issues but did not object to it being classified as a PCP in so far as the claim was refocused specifically on the trigger points in the policy.

125. We find that those trigger points did place the Claimant at a substantial disadvantage. The Respondent argues that simply counting the absences is not in itself a disadvantage to the Claimant because a disadvantage only arises when someone has decided to take action. However, in our judgment, it was a more than minor or trivial disadvantage to the Claimant and would have disadvantaged others with her disability because the act of counting absences raises the possibility of formal action under the attendance procedure and thus increases pressure and stress on people in the Claimant's position and did increase it for her. In our judgment, that is a more than minor or trivial disadvantage. As a matter of fact in this case, it significantly impacted on the Claimant contributing to stress levels that resulted in two weeks off work for stress in August 2021.

126. We find that the Respondent knew the Claimant was at this disadvantage because Ms Binns and Ms Harwood both accepted that they understood in general terms that application of trigger points in the absence of management procedures would impact on the Claimant more than on others because of her disability, and they were aware of her sick notes.

127. We then consider whether or not it would be reasonable to make adjustments to the trigger point. The Respondent had of course already adjusted its standard policy from 8 days absence to 16 days for the Claimant which is a 100% uplift and the question for us is whether any further adjustment would have been reasonable?

128. In our judgment, the maintenance of 16 days as the trigger in the Claimant's case on the basis that that is the maximum ever allowed under the Respondent's policies does not appear to have taken account of her particular circumstances, or the fact that since that 16 days was agreed as a reasonable adjustment she has developed a further very significant disability of Long Covid. However, we agree with the Respondent that considering where that trigger should be precisely is not relevant to the claims raised in these proceedings because the Claimant has had such high levels of sickness absence that it does not make much sense to start considering whether the trigger point should be 20 days or 30 or even 150 days or 160 as picking a figure would be entirely arbitrary. What really matters is what the Respondent does in response to the Claimant's absence and we accept that it is reasonable in principle for the Respondent to have a trigger point at which absence starts to be counted towards a formal attendance management process because even the Respondent as a model and generally very tolerant employer reasonably needs to be able to monitor and address staff absence. All employers are entitled to dismiss employees ultimately who are unable to work with reasonable adjustments provided they follow reasonable procedures and ACAS is no exception to that. Indeed, as a publicly-funded body, it is important that public funds are safeguarded through the use of reasonable attendance management procedures. Although we are concerned about the arbitrary retention of 16 days as the adjustment for the Claimant in this case, especially given that the Respondent has not itself found that to be a useful or reasonable

figure at which to take action in the Claimant's case, in our judgment it is reasonable for the Respondent to have a trigger point for the Claimant, and for that to be considerably lower than the amount of absence that the Claimant has actually had in this case. Active management and monitoring of absence needs to start somewhere even for those with significant disabilities.

129. It follows that we do not consider that it would have been reasonable for the Respondent to continue discounting all long Covid-related absences. Other disabilities are not treated like that, and Covid is not the only virus that can cause long-term post-viral fatigue. Employers made exceptional arrangements when the pandemic began, but as time has gone on, the usual business requirements for monitoring and dealing with absence have become more important and the justification for treating those with long Covid differently to those with other similar conditions reduces. That is so even though long Covid is a relatively new condition in respect of which medical understanding is perhaps less developed than it is for other similar post-viral fatigue conditions. Absence affects other employees and the Respondent is as entitled as any other employer to take action to deal with it and that requires absence to be counted. There will, of course, need to be reasonable adjustments to what is done in response to that counting for those with disabilities, but the counting is in our judgement reasonable and justified.

130. We do not therefore consider there was a failure to comply the duty to make reasonable adjustments by the Respondent changing it policy in June 2021 to start counting Covid related absences for the purposes of its management procedures, nor was there any failure to comply with the duty to make reasonable adjustments in having a trigger point for the Claimant, albeit that 16 days does not in itself appear to be a justified number in our judgment.

Phased return policy

131. The PCP in this claim is the requirement that the Claimant complete her phased return within a 12-week period.

132. There is no dispute between the parties that this is a PCP, provided for in the Respondent's policy, and although there is a provision for exceptional circumstances in the policy, that discretion was not exercised in the Claimant's case. She was subject to the Respondent's standard policy where a phased return should be no more than 12 weeks.

133. We find that the PCP did put the Claimant at a substantial disadvantage because:

    a. It was not in line with her doctor's advice, and that caused her a level stress and distress;
    b. It meant that she had to try to work longer hours after 20 August than her doctor had recommended, and even one additional hour involves significant effort for someone with the Claimant's condition;

c. It also meant that she was subject to a review of the success or otherwise of her phased return at the 12 week mark and deemed at that point to have had an unsuccessful phased return, as set out in Ms Harwood's letter of 20 August. That review obviously came considerably earlier then was recommended by her GP.

134. All of that indicates the policy put the Claimant at a substantial disadvantage and the Respondent had all the evidence that we have about that, so we find that the Respondent also knew of the substantial disadvantage to the Claimant or, if it did not, it ought to have done.

135. We then consider whether it would have been reasonable to adjust that PCP by permitting the Claimant's phased return to continue until 4 October 2021 as recommended by her GP and we find that it would have been reasonable because:

a. The Respondent had no medical evidence at that point to contradict the GP recommendation. The OH recommendation of 10 May 2021 was for a return 11am-3pm for three to four weeks and *"if she copes well with that, then increase gradually over the subsequent three to four weeks"*. That of course does not point to a five month long phased return, but what is clear from is that the OH recommendation was that only if the Claimant was coping well should matters progress. In other words, the OH recommendation had left things open ended and was not in conflict with the advice from the Claimant's GP. Indeed, the implication of what was said on 10 May was that if the Claimant was struggling in the first three to four weeks, then the arrangement for phased return should have been extended, but of course nobody asked OH at that point.

b. The Respondent's handling of the phased return (and the other matters we are dealing with) had already caused the Claimant to be signed off sick with stress and the material aspect of that was quite simply the fact that the Respondent was not following the Claimant's GPs advice.

c. There had of course been a number of failed phased returns by the Claimant since April 2020, but what was clear was that this one was going better than previous occasions and common sense suggests that proceeding at the pace the Claimant believed was correct, on the basis of her GP advice, and thus minimising stress on her, was more likely ultimately to lead to a successful return.

d. There was no material advantage to the Respondent in ceasing the phased return at 12 weeks. It got no more work out of the Claimant after that than it would have got if it had followed her GP's advice.

e. The Respondent itself accepted that the Claimant could participate in the LCRS course without that having any material impact on whether or not she should be following phased return, and as the Respondent knew that that was not going to happen for some time, there was no reason to hurry the Claimant back to full-time working hours.

f. The Claimant's condition is such that it should have been obvious that she may in fact require permanently adjusted hours going forward as a reasonable adjustment and since the Respondent should not have been in the hurry for the reasons we have already indicated, this is a further reason why there should have been no urgency to get back to full-time working hours.

g. Refusing the Claimant's request meant that she was judged to have 'failed' the phased return at 12 weeks, whereas if that matter had been assessed on 4 October, she would at that point have managed a sustained period of 1 month at work and the picture might not have looked so bleak as far as the Respondent was concerned. We should add that we do not consider that that longer sustained period of work during September can be attributed to the Respondent's refusal to agree to an extended phased return as Mr Kirk suggested. There has been no suggestion in these proceedings that the Claimant is any way feigning her illness or that it is under her control in that way. There is no basis for suggesting that putting pressure on her makes it more likely that she will be able to work. She works when she is fit and not when she is not and what we see in the pattern of absence is that the GP's assessment, and the likely period of improvement in attendance, was more realistic than the Respondent's arbitrary 12 weeks.

136. For all these reasons, we conclude that the Respondent failed to comply with the duty to make reasonable adjustments when it refused to allow the Claimant to have the phased return in the way recommended by her GP.

<u>Not permitting representation at RTW meetings</u>

137. We find that the Respondent did have a PCP of not permitting representation at RTW meetings. Although in correspondence the Respondent has indicated that it is not a blanket practice or policy, in practice it is clear that it was. The Claimant first requested to be accompanied to the RTW meeting by email of 30 April, explaining that she needed to be accompanied because of her disability (Covid fog effects). Ms Binns refused even to attempt to accommodate that request for the meeting on 4 May 2021. Ms Binns' email of 28 May was in like terms. Her position was that it was not ever appropriate to delay a meeting pending a Trade Union representative's availability and, in practice this meant that the Claimant could not ever have representation, because Ms Binns' usual way of proceeding was to call the Claimant up on her return and expect her to have the RTW meeting immediately rather than making an arrangement in advance or giving her an opportunity on the day to

locate somebody to attend with her. In substance, therefore, we find that Ms Binns' position or her practice was one of blanket refusal of attendance with a companion at a RTW meeting.

138. We further find that it was because of Ms Binns' practice in that regard that the Claimant was not accompanied at the RTW meeting on 1 June, and the same goes for the meeting of 15 June. There was no repeated request by the Claimant to be accompanied on either of those occasions, but Ms Binns' policy had been made clear and we find that it was for this reason that the Claimant was not accompanied, rather than merely because she failed to repeat her request.

139. On 26 July, of course, the Claimant did renew her request for accompaniment at the meetings and this was again refused by Ms Binns. The issue here as in all meetings so far was not to do with the availability or not of Ms Holbourne. The Claimant was not accompanied and the meeting did not go ahead because of Ms Binns' practice of not permitting representation at RTW meetings. She ignored the Claimant's written request in advance to schedule the meeting when Ms Holbourne could attend and just rang the Claimant to have the meeting without attempting to schedule it to allow the Claimant to find someone to join her in the meeting. Ms Binns refused to delay the meeting even by a few moments to allow the Claimant to seek a companion or to try to find a companion for the Claimant herself.

140. Following this, the Claimant was issued with the letter of informal management advice. Again, although on the face of it that letter allowed for the possibility of accompaniment to RTW meetings, given what had happened on 26 July, the substantive effective of this letter was, we find, to make clear that requesting to be accompanied and asking for a meeting to be delayed whilst that was arranged could be treated as disciplinary matter. It is thus not surprising that in the face of that warning, the Claimant did not renew her request for representation on 3 September. However, it remains the case in our judgment that it was the Respondent's PCP that meant she was not accompanied on that date.

141. Following this, on 8 September 2021, Ms Harwood's letter indicated a change of stance to an extent in that, while acknowledging that the Respondent's policy was generally not to permit representation at RTW meetings, Ms Harwood did state that going forward requests would be considered on a case-by-case basis. The Claimant did not make a request for accompaniment at the 2 November meeting and we find that this was therefore a contributing factor in why she was not accompanied on that occasion because when she did make a request for accompaniment on 14 December, it was permitted by Ms Binns in the light of what she regarded as a change of policy indicated by Ms Harwood's letter of 8 September.

142. However, putting all that together, we find there was a practice by Ms Binns of not permitting accompaniment to return to RTW meetings and that PCP persisted from 30 April up until at least 8 September.

143. As to the question of substantial disadvantage, we find the Claimant was substantially disadvantaged for the following reasons by this policy:

    a. For someone in the Claimant's position with a history of absence, RTW meetings cover issues of real substance, including being meetings at which decisions are made about whether or not to refer to formal attendance management procedures, and about what adjustments should be made to work going forward, and counting of sickness absence – the very issues of substance we have been concerned with in these proceedings;

    b. Given that, it is important that the Claimant is able to engage in active discussion with her manager during those meetings, but that was difficult for her because of the concentration and 'Covid fog' difficulties resulting from her disability;

    c. In our judgment, it is no good her just having the notes of the meeting not only because her memory difficulties mean that she has difficulty in checking them for accuracy, but also because if she does not have a companion with her she is unable to make a full contribution to the meeting in the way that somebody without a disability is able to;

144. That the Claimant was under that substantial disadvantage we find that the Respondent knew or ought to have known because the Claimant had explained that disadvantage in her 30 April email and also repeated that explanation and expanded on it at subsequent requests.

145. We then consider whether it would have been reasonable for the Respondent to make adjustments to its policy and we conclude that it would have been for the following reasons:-

    a. We understand the Respondent's argument as to why it is necessary to have a RTW meeting very shortly after the actual RTW. We accept that the Respondent does need to be satisfied that the Claimant on returning to work is fit to return, but in our judgment that does not preclude permitting her to be accompanied. If the RTW meeting had even been scheduled the day before RTW for a particular time of the day of return, then it we expect that it would normally have been possible for the Claimant to have found, or Ms Binns to have found for her, an appropriate companion.

    b. Sometimes, especially where not much had changed since a previous RTW or after a short absence, it may well have been reasonable to delay beyond the first day of RTW. Anticipated RTWs like a number

the Claimant had where it was known a week or so previously when the Claimant's sick note would run out and she would return to work, it would have been very easy to arrange accompaniment for that particular day. What made it difficult to arrange accompaniment was Ms Binns' expectation that when she called the Clamant to RTW meetings, that should happen immediately without prior scheduling, but there is no reason at all why RTW meetings should be arranged like that.

146. It follows that there was a failure to make reasonable adjustments regarding accompaniment to RTW meetings.

Indirect discrimination

The law

147. By s 19(1) EA 2010 a respondent discriminates against a claimant if it applies a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of the claimant's. By s 19(2) a PCP is discriminatory if: (a) the respondent applies, or would apply, it to persons with whom the claimant does not share the characteristic, (b) it puts, or would put, persons with whom the claimant shares the characteristic at a particular disadvantage when compared with person with whom the claimant does not share it, and (c) it puts, or would put, the claimant at that disadvantage. It is a defence (under s 19(2)(d)) for the respondent to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

148. The burden of proof is on the claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. In an indirect discrimination case, this means that the claimant must prove the application of the PCP, the particular disadvantage in comparison to others and that the claimant was put at that disadvantage. The burden then passes to the respondent under s 136(3) to show that the treatment was justified.

149. Further guidance on the matters which the claimant has to prove was given by the Supreme Court in *Essop v Home Office* [2017] UKSC 27, [2017] 1 WLR 1343. The Supreme Court held that the EA 2010, s 19 did not require a claimant alleging indirect discrimination to prove the reason why a PCP put the affected group at a disadvantage. The causal link that must be established is between the PCP and the disadvantage. The proportion of those with the protected characteristic who can comply with the PCP must be significantly smaller than the proportion of those without the protected characteristic. It does not matter, in this respect, that the PCP does not disadvantage all those who share the protected characteristic.

150. As to the question of justification, a respondent must normally produce cogent evidence of justification: see *Hockenjos v Secretary of State for Social Security* [2004] EWCA Civ 1749, [2005] IRLR 471. What needs to be justified is the rule itself (*Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] ICR 704). The Tribunal must focus on the proportionality of having a rule at all, rather than the question of reasonableness of applying the rule to the particular claimant (*The City of Oxford Bus Services Limited t/a Oxford Bus Company v Mr L Harvey* UKEAT/0171/18/JOJ).

151. In *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700 the Supreme Court (see Lord Reed at para 74, with whom the other members of the Court agreed on this issue: see Lord Sumption, para 20) reviewed the domestic and European case law and reformulated the justification test as follows: (1) whether the objective of the PCP (the alleged legitimate aim) is sufficiently important to justify the limitation of a protected right, (2) whether the PCP is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether the impact of the right's infringement is disproportionate to the likely benefit of the PCP. (We have adjusted the language used by the Supreme Court to fit with that used in the EA 2010.)

152. In other cases, the question of whether a particular aim is legitimate has been expressed as being whether it 'corresponds to a real need' of the employer: see *Bilka-Kaufhau GmbH v Weber von Hartz* (case 170/84) [1984] IRLR 317. While a tribunal must take account of the reasonable needs of a respondent's business, it is for the tribunal to assess for itself both whether or not an aim is legitimate, and whether it is proportionate. It is not a 'range of reasonable responses' test: *Hardy and Hansons plc v Lax* [2005] IRLR 726, followed in *MacCulloch v Imperial Chemical Industries plc* [2008] ICR 1334 at paragraphs 10-12.

Conclusions

153. The first claim for indirect discrimination concerns the Respondent's phased return to work policy and the requirement that the Claimant completes her phased return within the 12 week period. That is a PCP for the reasons we have already held in relation to the reasonable adjustments claim.

154. We further find that the 12 week phased return policy puts or would put persons with whom the Claimant shares the characteristic at a particular disadvantage when compared with others. We acknowledge Mr Kirk's point that in most cases evidence of that group disadvantage is required, but it is not required in every case. Where it is intrinsically or inherently likely that people who share the characteristics of the Claimant will be disadvantaged by the particular PCP, we do not need evidence of that. In this case, we consider that people who have disabilities like the Claimant's (by which we mean long-term post-viral

fatigue conditions) would inevitably be disadvantaged by a fixed policy on 12 week phased returns as it is inherent in disabilities of that sort that progress to recovery is slow and that a successful phased return to full-time hours may therefore take longer than 12 weeks. We are therefore satisfied that there is evidence, or we can take there to be evidence, of group substantial disadvantage in this case.

155. We further find that the Claimant herself was obviously disadvantaged for the reasons we have given in answering the reasonable adjustments claim.

156. Further, when it comes to justification, again the same answer applies as for the reasonable adjustments claim, which is that there is nothing in our judgment wrong in principle with the Respondent having a general policy of 12 weeks as that provides good guidance to managers, but it is not proportionate or justifiable to maintain that in all circumstances including circumstances such as those of the Claimant.

157. The Respondent's aim of ensuring business continuity through satisfactory levels of attendance and service delivery is not rationally connected to the 12 weeks chosen. That is an arbitrary figure and what is needed to achieve satisfactory attendance and service delivery is something that needs to be flexible to the particular circumstances of the individual case and in cases like the Claimant's what is required to serve that legitimate requires adjustment to that 12-week policy for the reasons we have given in relation to the reasonable adjustments claim. In other words, a bright line rule on this sort of issue is not justifiable and not proportionate because there will be cases where the interests of the Respondent will not be served by the 12-week rule, and the impact on the individual of maintaining that rule will, as it is in the Claimant's case, be disproportionate.

158. The second indirect discrimination claim related to the Respondent's absence policy and the policy of no longer counting Covid-related absences for trigger point purposes. In regard to that, we find that it is a PCP for the same reasons that we considered under the reasonable adjustments claim.

159. We further find that there is inherent disadvantage to people with the Claimant's disability of Long Covid of Covid-related absences being counted and the Claimant was put at that disadvantage.

160. However, when we get to justification the answer is the same as for the reasonable adjustments claim, i.e. it is a proportionate means of achieving a legitimate aim for the Respondent to be able to count Covid-related absences. What it does with the results of that counting is a different question, but the mere counting is justified for the reasons we have given.

Harassment

The law

161. By s 40 EA 2010 an employer must not harass any employee or applicant for employment. By 26(1) of the EA 2010 a person harasses another if: (a) they engage in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of (i) violating the claimant's dignity or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. By s 26(4), in deciding whether conduct has the requisite effect, the Tribunal must take into account: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. In *Land Registry v Grant* [2011] EWCA Civ 769, [2011] ICR 1390 at [47] Elias LJ focused on the words of the statute and observed: *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment"*. While the threshold for the type of acts that may amount to harassment is higher than the detriment threshold for the purposes of direct discrimination, the EAT explained at [31] in *Bakkali v Greater Manchester Buses (South) Ltd* [2018] ICR 1481, that harassment involves a broader test of causation than discrimination and a *"more intense focus on the context of the offending words or behaviour"*. The mental processes of the putative harasser are relevant, but not determinative: conduct may be 'related to' a protected characteristic even if it is not 'because of' a protected characteristic. The provisions on harassment take precedence over the direct discrimination provisions: conduct which amounts to harassment does not (save where the harassment provisions are disapplied for the specific protected characteristic) constitute a detriment for the purposes of ss 13 or 27: see EA 2010, s 212(1).

162. The burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The Supreme Court has recently confirmed that this remains the correct approach: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 38.

Conclusions

163. The first alleged act of harassment is Ms Binns' email of 6 May 2021 attaching the RTW plan. We accept that this was unwanted conduct because the Claimant was genuinely upset by the use of colours on the plan which she viewed as demeaning. We accept this was related to the Claimant's disability as that was how she perceived it. She saw it as reflecting a view by Ms Binns that because of her medical condition she had become stupid. It was also from Ms Binns' perspective related to the Claimant's disability in the sense that Ms

Binns saw it as a supportive mechanism, which we find was in part with a view to assisting the Claimant because of her disabilities. We further accept that the Claimant perceived this conduct to be degrading or humiliating, but we find that it was not reasonable for her to perceive it in that way. Colour coding is a standard way of breaking up documents. Most people find it helpful and would not associate it with nursery. It was used in a similar form on the team diary, in other words team working in this DCT Team was not usually done on a colourless basis and as a matter of fact Ms Binns was principally using the colours for her own benefit. The fact that it was at least partly for Ms Binns benefit ought to have been obvious to the Claimant if she thought about it. For those reasons, we do not consider it was reasonable for the Claimant to regard this as harassment and we find it was not harassment in law.

164. The second alleged act of harassment concerns Ms Binns' email of 28 May to the Claimant that was sent following the Claimant indicating that her own previous email had been sent accidentally. We find that this email by Ms Binns was unwanted conduct because the Claimant had explained that she had not intended to send her previous email and her subsequent email had also made clear that she was shocked to receive such a response from Ms Binns given that she had explained the situation. The Claimant was also particularly offended at the time by Ms Binns' questioning of her ability to do the job and we have already set out why we find that what the Claimant said in re-examination about this letter was more reliable than what she said in cross-examination. We further find that the sending of this email was related to disability. That is because on the face of Ms Binns' email it mentions the Claimant's disabilities, particularly her difficulty in retaining information. That is given as her reason for wanting to write everything down rather than just having a conversation. The content of the email also deals with most of the issues that we have been concerned with in these proceedings, all of which relate to the Claimant's disabilities and needs arising from that. As to whether or not this email had the effect of violating the Claimant's dignity or creating an intimidating, offensive, hostile, degrading, or humiliating environment for her, we find that this letter did have the effect of creating an intimidating, hostile and humiliating environment for the Claimant because:

    a. It was a disproportionate response to an email that had been wholly withdrawn with a huge apology copied to all the recipients of the original email. In those circumstances, while we can understand Ms Binns wanting to 'lay down a marker' that she disagreed with what the Claimant had said and that she considered she had been supportive over the previous year, to respond to the Claimant's email as if it was one that had actually been intentionally sent was in our judgment unreasonable. It was a hostile act, and humiliating for the Claimant;

    b. The length and detailed content of Ms Binns' email were inappropriate and reasonably perceived by the Claimant as hostile and intimidating;

c. The questioning of the Claimant's ability to do her job in an email such as this was especially humiliating.

165. The third act of alleged harassment is that on 28 July 2021 the Respondent sent the Claimant a 'letter of informal management advice'. This was unwanted conduct as the Claimant did not need or want management advice and her immediate email response was that she was 'disappointed to receive it'. This letter related to the Claimant's disability because the Claimant was requesting to be accompanied at RTW meetings because of her disability. The letter of informal management advice therefore relates to that for the purposes of harassment. The letter in itself refers in bold to the need to make reasonable adjustments for those with disabilities, but then of course refuses to make the adjustment the Claimant was seeking. All of that is sufficient to make it relate to disability for the purposes of harassment. We further find that sending that letter created an intimidating and hostile environment for the Claimant. She had been, for some time, requesting a reasonable adjustment to the Respondent's policy in relation to accompaniment to RTW meetings for reasons connected with her disability. She decided to make her request more emphatically in that single telephone call on 26 July by saying that she did not want to have the RTW meeting unless she was accompanied. Without any attempt to make the adjustment sought by the Claimant, Ms Binns sent her a letter threatening her with disciplinary proceedings if she ever asked again to be accompanied at a meeting rather than going ahead with it immediately at the time that Ms Binns wanted to hold the meeting. This was more than heavy-handed in our judgment, it was hostile and intimidating. Of course, we have already found that it also amounted to a failure to make reasonable adjustments. All of that means that it is an act of unlawful harassment in our judgment.

166. The fourth alleged act of harassment concerns the meeting on 16 August 2021, the informal concern meeting. This was unwanted conduct because the Claimant was unhappy about it being a relatively formal meeting with a notetaker present and she was unhappy about the length of the meeting. It related to her disability in the sense that the meeting was about matters concerning the Claimant's disability and the management of it, but in our judgment the format of that meeting was not related to the Claimant's disability but merely a normal management step in response to informal concerns being made of the sought that would have been adopted regardless of whether or not the individual had a disability. We further find that this does not amount to harassment under the EA 2010. It was not reasonable for the Claimant to experience this as being harassment. It was a reasonable response by Ms Harwood to the informal concerns that had been raised with her by the Claimant's Trade Union representative. It is good practice at such meetings to have a notetaker and the length of meeting is really attributable to the number of issues that the Claimant had at that point about the way that she was being treated. It was right and good practice that she was given the opportunity to raise those informally with Ms Harwood in the course of that meeting. The notes of the meeting in our judgment show that it was a good and open meeting

at which the Claimant had the opportunity to say what was concerning her. All of that cannot reasonably be regarded as harassment. Indeed, it was in our judgment an entirely appropriate response to the situation.

167. The fifth alleged act of harassment is that on 20 August 2021 the Respondent sent an email to the Claimant threatening her with a performance improvement period. This is the letter from Ms Harwood of that date. We accept that this was unwanted conduct because the Claimant was not happy to receive a letter saying that her phased return had not been successful. So far as the Respondent's argument that as a matter of fact this allegation is not made out because the letter does not refer to a performance improvement period, we do not find that to be a material point. The letter threatens referral to attendance management procedures, which we accept could reasonably be understood by the Claimant as a threat of a performance improvement period as that is how the Respondent dealt with matters previously with the Claimant. Moreover, on an objective reading of the letter, it is more readily understood as a threat to move straight to considering dismissal if the LCRS process fails - that is the intimation of the reference to ill health retirement - and so, objectively, the letter goes even further than the Claimant understood it as going. In any event, so far as a substance is concerned, the Claimant's understanding of it as threatening a performance improvement period was in our judgment an appropriate summary of the effect of that letter. The letter obviously related to the Claimant's disability because it concerned her ill health and the consequences of it. We do not find, however, that the letter constituted harassment because, aside from the fact that that letter marks the point at which the Respondent failed to make reasonable adjustments in relation to the 12 week phased return, there is nothing wrong with the letter itself. It captures the facts of the Claimant's situation and her absence record appropriately and sets out the various options for the future fairly and accurately. It does not in itself amount to harassment.

168. The sixth alleged act of harassment is that on 27 October 2021 Ms Binns sent the email to the Claimant chiding her for putting her on hold during the call on that day. We find that this email was unwanted conduct as far as the Claimant was concerned. We find it was related to the Claimant's disability because Ms Binns was taking especial care to write things down for the Claimant because of her difficulties with memory and we infer that is part of the reason why she sent an email in addition to speaking to the Claimant on the phone on that day. Further, the whole incident happened because of the Claimant's need to make notes immediately following a previous call which is in itself related to her disability. All of that means that it is related to disability for harassment purposes. However, we do not find that the email sent by Ms Binns crossed the threshold for harassment. It is sharper in tone than was perhaps necessary in the circumstances, but in our judgment it was reasonable to send an email to record the content of what had been discussed on the phone. There was justification for raising this with the Claimant as it was not good customer service to put someone on hold again after they had already been waiting for some time and there was reasonably a need for Ms Binns to make clear that it

was not all right to deal with telephone calls like that. Notwithstanding the Claimant's perception, therefore, we find that this was not harassment.

Discrimination arising from disability

The law

169. In a claim under s 15 of the EA 2010, the Tribunal must consider:
    a. Whether the claimant has been treated unfavourably;
    b. The reason for the unfavourable treatment;
    c. Whether that reason is something arising in consequence of the employee's disability;
    d. Whether the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on;
    e. If so, whether the alleged discriminator has shown that the treatment is a proportionate means of achieving a legitimate aim.

170. The question of whether something arises in consequence of disability is an objective question and does not involve consideration of the mental processes of the alleged discriminator: *Pnaiser v NHS England and anor* [2016] IRLR 170, EAT at [31]. Whether something arises 'in consequence of' is a looser connection than 'because of' and might involve more than one link in the chain of consequences: *Sheikholeslami v University of Edinburgh* (UKEATS/0014/17/JW) at [66].

171. Then the Tribunal must consider what the reason was for the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator. The test is the same as for direct discrimination, i.e. the 'something' must be the conscious or unconscious reason for the treatment, in the sense of having a more than minor or trivial influence on the unfavourable treatment, even if it is not the main or sole reason: *Pnaiser* (ibid) at [31].

172. While it is a necessary element of liability for the employer to have knowledge (or constructive knowledge) of the disability, it is not necessary that the employer should know that the relevant 'something' arose in consequence of the Claimant's disability when subjecting the Claimant to unfavourable treatment: *York City Council v Grosset* [2018] ICR 1492 at [39].

173. An employer also has a defence to a claim under s 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. If the aim is legitimate, the Tribunal must consider whether the means used to achieve it correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question and are necessary to that end: *Stott v Ralli Ltd* (EA-2019-000772-VP) at [79]. Assessing proportionality involves an objective balancing of the discriminatory effect of the treatment on the employee and the reasonable needs of the party responsible for the treatment: *Hampson v Department of Education and Science* [1989] ICR 179,

CA and other cases summarized recently in *Department of Work and Pensions v Boyers* (UKEAT/0282/19/AT) at [29] *per* Matthew Gullick (sitting as Deputy High Court Judge). The test is an objective one, not a range of reasonable responses test (*Stott*, ibid, at [80]).

174. If there is a link between reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of indirect discrimination and/or discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering questions of justification' and it is unlikely that a disadvantage that could be alleviated by a reasonable adjustment will be justified: *Dominique v Toll Global Forwarding Ltd* (UKEAT/0308/13/LA) at [51] *per* Simler J.

175. The burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation or defence, that the Respondent has acted unlawfully. The burden then passes to the Respondent under s 136(3) to show that the treatment was not unlawful. The burden is on the Respondent in relation to both the knowledge defence and the justification defence.

Conclusions

176. Taking the first claim relating to counting long Covid-related absences towards the absence triggers from 1 June 2021 onwards, we find that amounted to unfavourable treatment for the same reasons as it constituted a substantial disadvantage for the reasonable adjustments claim. The reason for the treatment we find was at least in part because of the history of the Claimant's absences, which had been lengthy. Ms Binns accepted in evidence that that was part of her reason for not exercising discretion in relation to the Claimant on this issue. That refusal was first formally communicated to the Claimant by email on 3 August 2021. That reason is one that arises in consequence of the Claimant's disability because her absences were caused by her disability. However, when we come to the question of justification, we get the same answer as we got for failure to make reasonable adjustments, i.e. it is a proportionate means of achieving a legitimate aim to start counting Covid-related absences.

177. The second discrimination arising from disability claim relates to the requirement for the Claimant to attend meetings unaccompanied on 1 June 2021, 15 June 2021, 28 July 2021, 3 September 2021, and 2 November 2021. We find that that amounted to unfavourable treatment for the reasons that we found that there was substantial disadvantage in not allowing the Claimant to be accompanied to meetings. But the reasons for the treatment are that Ms Binns did not want a Trade Union representative to attend RTW meetings, she wanted to have the meetings quickly and when she wanted to have them, and it was the Respondent's normal policy not to allow Trade Union representatives

to attend RTW meetings. Those reasons are not causally related to the Claimant's disability, so on a s.15 claim this particular issue goes no further. Had we found Ms Binns reasons related to the Claimant's disability then we note of course that this claim would have failed for the same reasons that the reasonable adjustments claim in relation to this failed, but we do not get to that stage in relation to this particular claim.

178. So far as the letter of informal management advice on 28 July 2021 is concerned, we find that to be unfavourable treatment for the reasons that we found it to amount to harassment. The reason for the treatment in the mind of Ms Binns was, we find, as is stated on the letter, the Claimant's refusal to attend a RTW meeting without a companion being present. We then have to ask ourselves whether that is a reason related to the Claimant's disability. We find that it is sufficiently causally connected. The reason the Claimant refused to attend without a companion was in material part because of her Covid fog which is part of her disability. As a matter of law there can be more than one cause or link in the chain between the reasons for the treatment and the disability and in our judgment this is sufficiently close a link to mean that the reason for the treatment complained of here (the issue of that letter of informal management concern) is something arising in consequence of the Claimant's disability. Had she not had the disability, she would not have been asking to be accompanied to the meeting and she would not have ended up with an informal management letter of concern regarding a refusal not to attend. We then ask ourselves whether that treatment was justified and the treatment was not justified because there was a failure to make reasonable adjustments in relation to the policy of permitting companions to attend RTW meetings. So that 28 July letter is also an act of unlawful discrimination arising from disability.

179. The next discrimination arising from disability claim concerns the 20 August 2021 email which the Claimant characterised as threatening her with a performance improvement period. For the reasons we have already given, we do not think anything turns on how that letter is described by the Claimant. We have considered the substance of the letter, the reason that letter is sent is because of the Claimant's absences during the phased return period, together with a history of absence and failed returns since April 2020. All that is clear from the letter itself. Those reasons are all somethings arising consequence of the Claimant's disability. We then consider whether there was justification for sending that letter. Although there is nothing wrong with the letter itself and it did not amount to harassment, because there was a failure to make reasonable adjustments in relation to the length of the phased return period, the consequence of which was that the Claimant's phased return should not have been reviewed at that point at all, it follows that the sending of that letter of 20 August was not justified and amounted to unlawful discrimination arising from disability.

180. The final allegation relates to the decision of 20 August to cut short the Claimant's phased return to work despite advice from her GP. In the way that

we have analysed the claim, that raises no different considerations from the previous allegation and so that claim succeeds for the same reasons.

Time limits

The law

181. Section 123 of the EA 2010 provides as follows*:*

> **123 Time limits**
> (1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of—
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
> (b) such other period as the employment tribunal thinks just and equitable.
> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

182. Time limits are extended for ACAS Early Conciliation in accordance with s 140B as follows:

> **140B Extension of time limits to facilitate conciliation before institution of proceedings**
>
> (1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).
> . . ..
> (2) In this section—
> (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought,
> and
> (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
> (3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.
> (4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
> (5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

183. The early conciliation period does not extend time where the time limit has already expired: *Pearce v Bank of America Merrill Lynch and ors* (UKEAT/0067/19/IA) at [23].

184. In computing the primary time limit, conduct extending over a period is to be treated as done at the end of the period (s 123(3)(a)). For this purpose conduct extends over a period if it amounts to a 'continuing state of affairs': see *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686, [2003] ICR 530. An in-time act that is not unlawful cannot provide the 'link' to an unlawful out-of-time act: see *South Western Ambulance Service NHS Foundation Trust v King* (UKEAT/0056/19/OO) at [32]-[33].

185. The burden is on the Claimant to convince the Tribunal that it is just and equitable to extend time. In *Robertson v Bexley Community Centre t/a Leisure Link* [2003] EWCA Civ 374, [2003] IRLR 434, CA, the Court of Appeal stated ([24]) that when employment tribunals consider exercising the discretion under what is now s 123(1)(b) EA 2010, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'

186. Although the Tribunal has a broad discretion, two factors are almost always relevant: the length of, and reasons for, the delay; and whether the delay has prejudiced the Respondent: see *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] ICR 1194 at [19].

187. The fact that an internal appeal is ongoing is not ordinarily sufficient of itself for time to be extended, although it is one factor to be taken into account: see *Apelogun-Gabriels v Lambeth* [2001] EWCA Civ 1853, [2002] ICR 713 at [16].

Conclusions

188. The parties are agreed that anything that happened before 26 July 2021 was outside the prima facie three month time limit in s.123 of the EA 2010 as that is extended by virtue of s.140B of that Act where there has been a period of ACAS early conciliation. We have therefore to consider whether in respect of the claims that we have found succeeded they were brought within that three month time period or, if not, whether they amounted to continuing acts beginning before but ending within the three month period and, if not, whether or not it would be just and equitable to extend time in respect of them.

189. So far as the failure to make reasonable adjustments claims are concerned, we found that there was a failure to make reasonable adjustments in respect of the 12 week phased return period. Although a decision to that effect was first made in June 2021, there was a specific request to reconsider it which was answered afresh on 3 August 2021 by Ms Binns in her email and in our

judgment that was more than a simple repetition of her previous decision but was a reconsideration and a fresh decision that was in time in respect of which a challenge could be brought. In any event, the nature of the 12 week phased return PCP is in our judgment one that was ongoing and up for review and reconsideration at any point up to the expiry of that 12 week period, so that the failure to adjust this should be seen as a continuing omission up until the point that the Respondent did something inconsistent with extending the period, which was the letter of 20 August 2021. This claim was thus in time.

190. The claim in respect of the failure to make reasonable adjustments in not permitting representation at RTW meetings was also an ongoing policy from which the Claimant began requesting adjustments at various meetings from 30 April 2021 onwards. Two of the meetings in respect of which she has brought claims are 1 June and 15 June are in principle out of time and viewed in isolation, but in fact those meetings were not even the subject of specific requests, the reason the Claimant was not accompanied at them we found was because of the Respondents ongoing policy that continued in place from that point until at least 8 September 2021 when it was potentially varied by Ms Harwood's letter, with the most serious element of this complaint being the meeting on 26 July and formal warning letter of 28 July which of course are in time. As such, there was an ongoing state of affairs and/or a continuing omission that continued into the primary three month time limit window.

191. Even if we are wrong about either of those complaints being in time, we would consider it just and equitable to extend in relation to those failures to make reasonable adjustments because we have found the Claimant's case to be meritorious and only a very short extension of time is needed. The claims are very similar (indeed, in some respects, identical in nature) to claims that are in time. The reason for the delay is because there was a developing state of affairs and the Claimant is not in our judgment to be criticised for not proceeding to a formal complaint earlier. Contacting ACAS qua Claimant rather than qua employee must have been a difficult step for her. In that respect we have taken note of her frequent references to the stressfulness of dealing with her own issues despite being a trained conciliator. On the other hand, there is little prejudice to the Respondent of extending time given that we have already had a trial and consideration of the potentially out of time elements took only a tiny proportion of the trial time. The only real prejudice for the Respondent is that it may as a result be liable for a very slightly higher injury to feelings award than might otherwise be the case. But that is in our judgment in the interests of justice given the merits of the claim and the relatively small sums at stake (albeit sums that will no doubt be significant to the Claimant as an individual). It is also relevant, albeit certainly not a decisive factor, that the Respondent is ACAS and the body charged by the government with setting employment standards for other employers. Putting all that together, we consider it would be just and equitable to extend time even if (contrary to our primary conclusion) those claims are prima facie out of time.

192. So far as the indirect discrimination claims are concerned, the Claimant succeeded in relation to the 12 week phased return policy and precisely the same considerations apply as to the failure to make reasonable adjustments. Either it is in time or, if not, it is just and equitable to extend time.

193. So far as the harassment claims are concerned, we found two acts of harassment to be made out: first, the 28 May email from Ms Binns; secondly, the 28 July letter of informal management advice. The 28 July letter is in time, the 28 May email is prima facie out of time, but we find that act of harassment is part of a continuing state of affairs linked with the matters that we have found to be in time, in particular the 28 July letter and also the other acts of discrimination of different types that we have upheld. These acts are all to a significant extent products of the relationship between Ms Binns and the Claimant and that was a relationship that in particular soured over the emails of 26 and 28 May 2021 and continued that way subsequently including in a way that crossed the harassment line again on 28 July with an act of discrimination that is in time. On that basis there is a continuing act from 28 May through to the start of the three month period and the claim is in time. However, even if we are wrong on that for the same reasons already set out above, we would consider it just and equitable to extend time in relation to that 28 May act of harassment.

194. So far as discrimination arising from disability claims are concerned, the claims that we have upheld are all in time.

Remedy

195. Compensation for discrimination is to be awarded on a tortious basis (s 124(2)(b) and (6)), i.e. it should put the claimant back in the position they would have been but for the discrimination: *Ministry of Defence v Cannock and ors* [1994] ICR 918. There is no statutory cap on discrimination awards and recoupment does not apply.

196. In addition to pecuniary losses, the Tribunal may make an award for injury to feelings. The guidance in *Prison Service and ors v Johnson* [1997] ICR 274 remains relevant:

    a. awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party;
    b. an award should not be inflated by feelings of indignation at the guilty party's conduct;
    c. awards should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches;
    d. awards should be broadly similar to the range of awards in personal injury cases;

e. tribunals should bear in mind the value in everyday life of the sum they are contemplating; and tribunals should bear in mind the need for public respect for the level of the awards made.

197. The Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury following *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879 for claims presented on or after 6 April 2021 is as follows:-
    a. a lower band of £900 to £9,100 (less serious cases);
    b. a middle band of £9,100 to £27,400 (cases that do not merit an award in the upper band); and
    c. an upper band of £27,400 to £45,600 (the most serious cases), with the most exceptional cases capable of exceeding £45,600.

Injury to feelings

198. In this case the Claimant at the end of the liability hearing submitted that if all the claims of discrimination were found to be made out the Claimant's injury to feelings should be put at around £15,000 mark and Mr Kirk for the Respondent at that point submitted that about £10,000 would be the appropriate figure. In the light of our judgment that it is only part of the claims that succeed Mr Patel now modifies that to £12,000 and Mr Kirk reduces his to £6,000.

199. We find that the impact on the Claimant of the matters that we have had to consider was significant in terms of the injury to her feelings. She was a vulnerable individual as a result of her ill health and so perhaps was more hurt by the Respondent's conduct than someone less vulnerable would have been. However, compensation for discrimination is awarded on the tortious basis and the Respondent must take the Claimant as it finds her.

200. The discrimination we have found began at the end of April 2021 and continued until around 4 October 2021 when her phased return ought to have ended as we found. In our judgment, therefore it was about five months in length, but the impact on her of those events has continued as is shown through her pursuit of a formal grievance with the Respondent and her bringing of this claim and the evidence that she has given to us of the ongoing impact on her.

201. The injury to feelings sounded in August 2021 in two weeks of sickness absence owing to stress, but has not otherwise caused or contributed to any specific psychiatric injury. Rather, the Claimant has suffered injury to feelings below that medical threshold in terms of feeing helpless, devastated, tearful, withdrawn at home and the other matters that we took into account in our liability judgment.

202. Some of that hurt is as a result of matters that we have ultimately found not to be unlawful, in particular the Respondent's decision to start counting Covid related absences which was clearly significant for the Claimant in terms of increasing stress levels for her. Likewise, some of the matters that the

Claimant regarded as harassment, in particular the colour coding of the RTW plan, the handling of the meeting on 16 August and Ms Binns' reaction to the telephone call on 27 October were clearly all small but significant contributors to her injury to feelings, but we did not find those incidents to be unlawful and so we do not compensate her for those.

203. We are, though, satisfied that the things that we have found to be unlawful accounted for the major part of the Claimant's injury to feelings, in particular the failure to comply with her GP's advice and extend her phased return, the deeming of that phased return to be a failure on 20 August and the handling of her request for companionship in RTW meetings, in particular by way of that 28 July letter and, of course, Ms Binns' reaction to the Claimant's mistaken email in her email of 28 May. In our judgment, this is appropriately reflected by an award for injury to feelings that falls squarely at the threshold of the lower and middle bands of Vento. As it happens, that is roughly half way between the two figures given to us by the representatives, but we have not approached this as an exercise in dividing the difference between them. Although £9,100 may appear to be a somewhat arbitrary figure, in our judgment this is case that properly fits at the very top of the lower band and at the very bottom of the middle band, bearing in mind the factors that we have set out in our judgment. That award properly reflects the injury to the Claimant's feelings and the seriousness of the matters about which we have heard, but also recognises that they are not as serious in duration or character as the cases that normally fall properly into the middle band, which includes cases where there has been a dismissal.

204. We further consider that it is appropriate to award interest on that award calculated from 15 August 2021 (being a date agreed between the parties) to 21 November 2022 (464 days) at the judgment rate of 8% per annum, which equates to a daily rate of £1.99 and thus to a total of £925.48

_____

Employment Judge Stout

23 March 2023

REASONS SENT TO THE PARTIES ON
24th March 2023

FOR THE TRIBUNAL OFFICE

APPENDIX: LIST OF ISSUES

Disability (s. 6 Equality Act 2010)

1. The Respondent admits that the Claimant had the following disabilities :

    a. cerebral vasculitis (at all material times)
    b. dystonic left hand (at all material times)
    c.
    d. 'long Covid' (from 14 May 2021).

Jurisdiction

2. The Claimant contacted ACAS on 25 October 2021, ACAS issued the certificate on 6 December 2021, and the Claimant presented her ET1 on 23 December 2021.

3. Did any of the Respondent's alleged unlawful acts/omissions referred to in the claims below occur on or before 26 July 2021?

4. If yes, were the Claimant's complaints about those matters presented in/out of time?

5. If out of time, was there a continuing series of acts the last act of which a complaint was timely presented?

6. If out of time, is it just and equitable for the Tribunal to extend time to allow those complaints to be presented out of time and determined on their merits?

Claim #1: Discrimination arising from disability (s.15 EqA 2010)

7. Did the Respondent subject the Claimant to the following treatment, and if yes was that unfavourable treatment of her:

    a. from about 1 June 2021, the Respondent counted the Claimant's 'long Covid'- related absences towards her absence trigger points

    b. the Respondent required the Claimant to attend the following meetings unaccompanied:

        i. meeting on 26 July 2021

        ii. 'return to work' meetings related to her absence (on 1 June 2021, 15 June 2021, 3 September 2021 and 2 November 2021)

    c. on 28 July 2021, the Respondent sent the Claimant (and the Claimant received) a 'letter of informal management advice'

    d. on 20 August 2021, the Respondent sent an email to the Claimant threatening her with a performance improvement period

    e. on 20 August 2021, the Respondent cut short the Claimant's phased return to work despite advice from the Claimant's GP

8. The Respondent concedes knowledge or constructive knowledge of cerebral vasculitis and dystonic left hand as disabilities at all material times and of long covid as a disability from 14 May 2021.

9. Was the treatment because of one or more of the following "*somethings*":

    a. Claimant's absences

    b. Claimant's 'brain fog', memory issues

    c. Claimant's 'long Covid' symptoms

10. Did the 'somethings' above arise in consequence of the Claimant's disabilities of cerebral vasculitis and/or long Covid?

11. Were the following legitimate aims of the Respondent: (a) ensuring business continuity through satisfactory levels of attendance and service delivery (the Claimant accepts this was, at least in principle, a legitimate aim) and (b) the need to encourage the prompt completion of a return to work meeting without delay for an employee returning from sickness absence as part of the active management of attendance and protection of health and safety.

12. Was the treatment of the Claimant a proportionate means of achieving either of those aims?

Claim #2: Indirect disability discrimination (s.19 EqA 2010)

13. Did the Respondent apply the following PCPs to the Claimant:

    a. Respondent's phased return policy

    b. requirement that Claimant complete her phased return within 12 week period

    c. policy from June 2021 of no longer discounting Covid-related absences for absence-related trigger points

    d. Respondent's absence policy

14. Did or would the Respondent apply the above PCPs to persons who did not share the Claimant's disabilities?

15. Did the application of the PCPs put the Claimant, because of her disabilities of cerebral vasculitis and/or long Covid, to the following particular disadvantage(s)?

    a. because she had to complete her phased return within a 12 week period, the Claimant's recovery was halted and she became ill;

    b. because she was more likely to be absent in consequence of her disabilities, the Respondent's absence management process/policies were more likely to be applied to the Claimant;

    c. the Claimant was more likely to be absent and/or require additional time to recover.

16. Did or would the application of the PCPs to persons who shared the Claimant's protected characteristic of disability (cerebral vasculitis and/or long Covid) put them to the same disadvantage(s)?

17. Did or would the application of the PCPs to persons who did not share the Claimant's protected characteristic of disability (cerebral vasculitis and/or long Covid) put them to the same disadvantage(s)?

18. Were the following legitimate aims of the Respondent: (a) ensuring business continuity through satisfactory levels of attendance and service delivery (the Claimant accepts this was, at least in principle, a legitimate aim) and (b) the need to encourage the prompt completion of a return to work meeting without delay for an employee returning from sickness absence as part of the active management of attendance and protection of health and safety.

19. Was the treatment of the Claimant a proportionate means of achieving either of those aims?

Claim #3: Failure to make reasonable adjustments (ss.20-21 EqA 2010)

20. Did the Respondent apply the following PCPs to the Claimant (and if so, when):

    a. Respondent's absence policy

    b. Respondent's phased return policy

    c. requirement that Claimant complete her phased return within 12 week period

    d. requirement that Claimant be fit in order to undertake the duties of her post

    e. policy from June 2021 of no longer discounting Covid-related absences when determining whether absence trigger points have been reached

    f. policy of not permitting representation at return to work meetings

21. Did the application of the PCPs put the Claimant, because of her disabilities of cerebral vasculitis and/or long Covid, to the following substantial disadvantage(s):

    a. because she had to complete her phased return within a 12 week period, the Claimant's recovery was halted and she became ill;

    b. because she was more likely to be absent in consequence of her disabilities, the Respondent's absence management process/policies were more likely to be applied to the Claimant;

    c. the Claimant was more likely to be absent and/or require additional time to recover;

    d. the Claimant was more likely to be considered absent because her Covid-related absences were not discounted when determining absence trigger points;

    e. the Claimant had difficulty concentrating, understanding and following what was said if she attended meetings unaccompanied.

22. When the PCPs were applied to the Claimant:

    a. The Respondent concedes knowledge or constructive knowledge of cerebral vasculitis and dystonic left hand as disabilities at all material

times and of long covid as a disability from 14 May 2021.

b. did the Respondent know, or ought it to have known, that the application of the PCP put the Claimant to the above disadvantages?

23. Did the application of the PCP put persons who did not share the Claimant's disabilities of cerebral vasculitis and/or long Covid to the above disadvantage(s)?

24. Would the Respondent taking the following steps have avoided the above disadvantages:

a. extending Claimant's phased return until 4 October 2021

b. allowing Claimant to be accompanied at return to work meeting on 28 July 2021

c. discounting Claimant's long Covid-related absences towards absence trigger points

d. allowing Claimant to take short breaks as/when required during work day

e. providing Claimant with a different line manager after Claimant raised concerns in an informal management meeting on 16 August 2021

25. Did the Respondent take such steps?

26. If not, was it reasonable for the Respondent to have to take such steps to avoid the disadvantage?

Claim #4: Harassment (s.26 EqA 2010)

27. Did the Respondent engage in the following conduct:

a. on 6 May 2021, Louise Binns sent an email to the Claimant relating to the Claimant's return to work plan

b. on 28 May 2021, Louise Binns sent an email to the Claimant relating to the Claimant's back to work meeting

c. on 28 July 2021, the Respondent sent the Claimant (and the Claimant received) a 'letter of informal management advice'

d. on 16 August 2021, the Respondent held an informal concern meeting with the Claimant

e. on 20 August 2021, the Respondent sent an email to the Claimant threatening her with a performance improvement period

f. on 27 October 2021, Louise Binns sent an email to the Claimant

28. Was that conduct unwanted by the Claimant?

29. Did that conduct relate to the Claimant's disabilities of cerebral vasculitis and/or long Covid?

30. Was the effect of the conduct to violate the Claimant's dignity (the Claimant accepts this was not the purpose)?

31. Was the effect of the conduct to create an intimidating, offensive, hostile, degrading or humiliating environment for the Claimant (the Claimant accepts this was not the purpose)?

32. Was it reasonable for the conduct to have that effect, taking into consideration the Claimant's perception and the other circumstances of the case?

Remedy (EA 2010, s 123)

33. To what compensation is the Claimant entitled (she claims only an injury to feelings award)?