EMPLOYMENT TRIBUNALS

Claimant: Ms J Moore

Respondent: Home Office

Heard at: London South

On: 16,17,18,19 January 2023 (evidence); 20 January 2023, 7 and 13 February 2023 (Chambers)

Before: Employment Judge Sekhon
Ms C Bonner
Mr R Singh

Representation
Claimant: Ms Grace, Counsel
Respondent: Mr Crawford, Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. **The claims of direct disability discrimination contrary to section 13 Equality Act 2010, and discrimination arising from disability (contrary to section 15 Equality Act 2010) are not well founded and are dismissed.**
2. **The claim of failure to comply with the duty to make reasonable adjustments contrary to section 20/21 Equality Act 2010 is not well founded and dismissed.**
3. **The claim of victimisation contrary to section 27 Equality Act 2010 is not well founded and dismissed.**

REASONS

Background of the claim and this hearing

1. This is the reserved judgment with reasons following the hearing on 16, 17, 18, 19 January 2023 and subsequent days in Chambers listed above.

2. The claimant, Ms Moore, commenced working for the respondent, Home Office, on 26 March 2001 (nearly 22 years) and continues to work as a Senior Executive Officer as a Country Manager for India and Bangladesh. The Home office is a government department for immigration and passports, drugs policy, crime, fire, counterterrorism, and police.

3. By claim form issued on 26 March 2021, the claimant makes complaints of disability discrimination, specifically direct discrimination (section 13 Equality Act 2010), failure to make reasonable adjustments (section 20/21 Equality Act 2010), discrimination arising from disability (section 15 Equality Act 2010) and victimisation (section 27 Equality Act 2010).

4. The claimant stated she has suffered from depression since 2002/2003. It is accepted by the respondent by letter dated 29 April 2022 that the claimant is a disabled person by reason of depression at times material to this claim and that she has done so since 2009.

5. In the ET3, the respondent denies that the claimant has been discriminated against and or treated detrimentally as alleged. The respondent does not accept that reasonable adjustments were not made save that they accept that mentoring was not implemented, however this decision was made further to a discussion with the claimant, and this did not put her at a substantial disadvantage. The respondent denies that the failure to uphold the grievance appeal against her sickness absence warning amounted to a detriment. The claimant had a high level of sickness absence, and the respondent asserts it was entitled to expect minimum levels of attendance from its employees.

6. With an ACAS certificate dated 15 January 2021 to 26 February 2021, the respondent asserts that the Tribunal do not have jurisdiction to hear any discrimination claims in so far it relates to acts or omissions that took place prior to 16 October 2020 and they deny that the allegations amount to conduct extending over a period within in the meaning of section 123 (3) (a) of the Equality Act 2010.

7. The Tribunal were provided with the following: -

   (a) Ms Moore's witness statement dated 22 December 2022 and undated statements on behalf of the respondent from (1) Mr Mahbub Uddin. (2) Mr James Stephenson; 3) Mr Phillip Smith. Mr Crawford asked each witness to sign and date their statement if they accepted this was accurate before they gave evidence. The Tribunal clarified with both parties, that the witness statements were exchanged on 22 December 2022.

   (c) An agreed evidence Bundle – indexed with 1142 pages.

   (d) An additional Bundle of Documents (pages 613-632) which is a transcript of an interview that took place on 5 November 2020 with the claimant and Sharon Jones, Investigating manager for the Professional Standards Unit. The Tribunal were informed that this was an unredacted transcript copy of the interview in the bundle. Having clarified the matter with the parties, the Tribunal was advised that this document could be ignored as a redacted copy was in the bundle and both Counsel had no intention of referring to it during their cross examination of the witnesses.

   (e) Respondent's Chronology

   (f) Claimant's Position statement.

10. There was a case management hearing before Employment Judge Wright on 19 May 2022 by CVP. The original claim was made against the Home Office and Mr Uddin, the claimant's line manager, but after the respondent accepted vicarious liability for Mr Uddin, Employment Judge Wright dismissed the case against him.

11. The Case Management Order did not record any adjustments that the claimant needed for this hearing. At the outset of the hearing this was discussed and agreed with the claimant. The claimant is a disabled person by reason of depression. To assist the claimant in managing the impact of her disability at this hearing, it was agreed that she may need to take regular breaks. It was agreed she would indicate when a break was required if she felt unable to continue. Throughout the hearing the claimant was able to take breaks as and when she needed. Mr Crawford confirmed that the respondent witnesses did not require any reasonable adjustments.

12. The claimant also stated that she had difficulty processing information due to the medication she was on and that she may need questions repeated or that there may be a delay in answering. It was agreed with the respondent and the Tribunal that when asking questions, they would ensure that questions were repeated if necessary and time would be given for the claimant to respond. This was accommodated throughout the hearing.

13. This claim was listed for a five-day in person final hearing to deal with liability and remedy. Based on the discussions with the parties, the Tribunal informed the parties that it was not possible to hear submissions on remedy within the time allotted to the Tribunal. It was also clear that the Tribunal did not have sufficient time to deliberate and to deliver a judgment. The Tribunal therefore informed the parties that they would reserve the decision and the case may be part heard but that the Tribunal panel would arrange to meet for deliberation as soon as they could. Further days in Chambers took place on 7 and 13 February 2023.

The complaints and the issues

14. The complaints and the issues as to liability have been agreed by the parties and following a Case Management Hearing before Employment Judge Wright, a draft List of Issues was provided to the Tribunal at pages 62 of the bundle, but the document was headed draft List of Issues and contained track changed comments.

15. At the outset of the hearing, the Tribunal clarified with the parties what further amendments were required to the List of Issues at page 62 and requested a clean copy to be provided to the Tribunal. The amendments included that the draft List of Issues should be a stand-alone document that did not refer to other documents including the Particulars of Claim and that this should provide specific dates that it is alleged that the acts/ omissions occurred. The Tribunal confirmed that these were the only issues that they would determine.

16. An amendment was made to the List of Issue by Ms Grace on the morning of day 4 as she accepted that she omitted "*C will contend that the formal absence management warning appeal process, should have been completed by December 2020"* from paragraph 10(d). Mr Crawford accepted that this was an omission and not an additional issue and the Tribunal allowed for the amendment to be made and Ms Grace provided a final copy of the List of Issues to the Tribunal and respondent.

17. The Tribunal heard oral submissions from both Counsel. Both Counsel provided the Tribunal with their final written submissions and the Tribunal were very grateful for the assistance we received. We shall not set out the entirety of the parties' submissions but took them into account in reaching the decisions set out below. We have dealt with the

parts of the submissions that seem to us to be the most important within our discussions and conclusions.

18. The Tribunal commenced their findings of fact and deliberation on the fifth and final listed day of the hearing. However due to the extent of documentation in the bundle and the documentation that was relevant to the List of Issues and to which the Tribunal were referred, the Tribunal sat further on Monday 23 January 2023, 7 and 13 February 2023 in order to reach a final decision. The Tribunal also found that it was necessary to analyse the text messages and emails between Mr Uddin and the claimant at certain times to fully understand what had occurred and this took time. This is referred to in the Finding of Fact.

Relevant Law

19. The Tribunal has also taken fully into account all the authorities cited in the submissions from the parties.

Equality Act 2010 claims – general law and Statutory Code of Practice

20. The power of the Equality and Human Rights Commission to issue a code of practice ("the Code") to ensure or facilitate compliance with the Equality Act 2010 is afforded by Section 14 of the Equality Act 2006. Paragraph 1.13 of the Code explains that:

"The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings."

21. Ms Grace submits that the claimant will rely on the following paragraphs of the Code:

a. *Paragraph 17.21*, which states that although there is no automatic obligation to extend contractual sick pay beyond the usual entitlement when a worker is absent as a result of disability-related sickness, an employer should consider whether it is reasonable to do so.
b. *Paragraph 6.24*, which provides that there is no onus upon a disabled person to suggest what adjustments should be made; however, where the disabled person does so, the employer should assess whether this is reasonable in avoiding the substantial disadvantage.
c. *Paragraphs 6.32 and 17.80*, which state that it is good practice for an employer to ask a disabled employee about possible adjustments and agree any proposed adjustments in advance.
d. *Paragraph 6.32* where it sets out that it is a reasonable adjustment to provide mentoring to a disabled employee.
e. *Paragraph 6.30*, which provides that the act does not allow an employer to justify a failure to make a reasonable adjustment. Where the duty applies, the question is whether or not the adjustment is objectively reasonable. If it is, then the failure to make the adjustment is unlawful discrimination.

Direct discrimination (Section 13 of the Equality Act 2010)

22. Section 13 of the Equality Act 2010 provides:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

23. The test posed by Section 13 above is an objective one: the fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment. On comparison between the claimant and the case of the appropriate comparator, real or hypothetical, there must be no material difference between the circumstances relating to each case (section 23(1) Equality Act 2010). The Tribunal were referred to ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** *[2003] IRLR 285.*

24. The fact that a claimant has been treated less favourably than an actual or hypothetical comparator is not enough to establish discrimination, something more is required, as referenced by Mummery LJ in ***Madarassy v Nomura International plc*** *[2007] ICR 867.*

25. In considering direct discrimination, the courts have held that the best approach to deciding whether allegedly discriminatory treatment was 'because of' a protected characteristic is to focus on the reason why, in factual terms, the employer acted as it did.

26. This will often involve an enquiry as to the mental processes which led A to take a particular course of action in respect of B which may be conscious or subconscious. The subjective motivation of the alleged discriminator is irrelevant. (see ***Nagarajan v London Regional Transport and others*** *[1999] ICR 887 (HL).*

27. The Tribunal must then consider whether the protected characteristic played a significant part in the treatment. As the House of Lords put it in ***Nagarajan*** *at 512 - 513:*

"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision […] If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out".

Burden of proof

28. The provisions relating to the burden of proof are to be found in Section 136 the Equality Act 2010 which provides: -

"*(1) This section applies to any proceedings relating to a contravention of this Act.*
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision"

29. The conventional approach involves a two stage approach by the Tribunal (see ***Igen Ltd and others v Wong and other cases*** *[2005] ICR 931* and ***Hewage v Grampian Health Board*** *[2012] ICR 1054).* At stage 1 the question is: can the claimant show a prima facie case? If the claimant can show such a prima facie case then the Tribunal moves onto stage 2 and asks itself: is the respondent's explanation sufficient to show that it did not discriminate?

30. The two-stage process is such that initially it is for the claimant to prove, on the balance

of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. The phrase "could conclude" means that "a reasonable Tribunal could properly conclude from all the evidence before it that there may have been discrimination. ***(Madarassy v Nomura International PLC [2007] IRLR 246).***

31. At the second stage, discrimination is presumed to have occurred, unless the respondent can show otherwise. The standard of proof is again, on the balance of probabilities. To discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the claimant's protected characteristic. The respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory. The term 'no sense whatsoever' is equated to 'an influence that is more than trivial' **(see *Nagarajan –v- London Regional Transport [1999] IRLR 573, HL; and Igen Ltd –v- Wong, as above).***

32. This approach was approved by the Court of Appeal in ***Ayodele v Citylink and anor*** *[2017] EWCA Civ 1913.* The Supreme Court in ***Efobi v Royal Mail Group Limited*** *2021 ICR 1263* held that the enactment of section 136 EqA did not change the requirement on the claimant to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment Tribunal could infer an unlawful act of discrimination.

33. A flexible approach to the burden of proof provisions is required. It may be appropriate on occasion, for the Tribunal to consider the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (***Laing v Manchester City Council and others*** *[2006] IRLR 748****; Madarassy v Nomura International plc [2007]*** *IRLR 246, CA.)* It may also be appropriate for the Tribunal to go straight to the second stage, where for example the respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by such an approach since it effectively assumes in his favour that the burden at the first stage has been discharged ***(Efobi v Royal Mail Group Ltd [2019] ICR 750, para 13).***

34. As noted in the cases of ***Hewage v GHB [2012] ICR 1054*** *and* ***Martin v Devonshires Solicitors*** *[2011] ICR 352,* careful attention is required where there is room for doubt as to the facts necessary to establish discrimination as the Tribunal may be in a position to make positive findings on the evidence one way or the other. However, if this approach is adopted it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment. The approach set out in Hewage was endorsed and applied to the Equality Act 2010 burden of proof reversal provisions by the ***Court of Appeal in Ayodele –v- Citylink*** **[2017] EWCA (Civ) 1913.**

35. Inferences can only be drawn from established facts. They cannot be drawn speculatively or on the basis of a gut reaction or "mere intuitive hunch" (***Chapman v Simon [*****1994] IRLR 124, per Balcombe LJ ¶33).**

36. Discrimination cannot be inferred from unfair or unreasonable conduct alone (***Glasgow City Council v Zafar*** *[1998] ICR 120)* and there must be something to suggest that the treatment was due to the claimant's possessing a protected characteristic **(*B and C v A*** **[**2010] IRLR 400**).** It is not sufficient to shift the burden of proof that the conduct is simply

unfair or unreasonable if it is unconnected to a protected characteristic (***Comr of Police of the Metropolis v Osinaike*** (*2010) 907 IDS Brief 15).*

37. Ms Grace referred the Tribunal to the case of ***R (on the application of Coll) v Secretary of State for Justice*** *[2017] UKSC 40*, the Supreme Court held that direct discrimination can materialise as a risk to a claimant with a particular protected characteristic (see in particular paragraphs 31 and 32). The respondent submits that this authority does not assist the Tribunal in finding if the alleged acts of discrimination in this case are proven.

38. Ms Grace also seeks to rely on the Court of Appeal in **Keefe v Isle of Man Steam Packet Co** [*2010] EWCA Civ 683* who articulated the principle that "*a defendant who has, in breach of duty, made it difficult or impossible for a claimant to adduce relevant evidence must run the risk of adverse factual findings*." In these circumstances, "*the court should judge a claimant's evidence benevolently and the defendant's evidence critically*." (ibid).

Failure to make reasonable adjustments (section 20-21 Equality Act 2010)

39. Section 39(5) Equality Act 2010 applies to an employer the duty to make reasonable adjustments. Further provisions about the duty to make reasonable adjustments appear in Section 20 Equality Act 2010 which provides as relevant:

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

Section 21 Equality Act 2010 provides as relevant:
"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."
...
The word 'substantial' used in sub-section 20(3) is defined in section 212(1) of the EA 2010 and means 'more than minor or trivial'.

40. The proper approach to reasonable adjustments claims remains that suggested by the EAT in ***Environment Agency v Rowan*** *[2008] IRLR 20*. A Tribunal should have regard to:
    - the provision, criterion or practice applied by or on behalf of the employer; or
    - the physical feature of premises occupied by the employer.

- the identity of non-disabled comparators (where appropriate); and
- the nature and extent of the substantial disadvantage suffered by the claimant.

41. The importance of a Tribunal going through each of the constituent parts of the provisions relating to the duty to make reasonable adjustments was emphasised by the ***EAT in Environment Agency –v- Rowan [2008] ICR 218*** and reinforced in The ***Royal Bank of Scotland –v- Ashton*** *[2011] ICR 632* and the Court of Appeal in ***Newham Sixth Form College v Sanders*** *[2014] EWCA Civ 734.*

42. In 'reasonable adjustments' cases the claimant is required at the first stage: (a) to establish the provision, criterion or practice relied upon; and (b) to demonstrate substantial disadvantage. The burden then shifts to the respondent to show that no adjustment or further adjustment should be made **(*Project Management Institute v Latif [2007] IRLR 579).***

Reasonable steps

43. The question for the Tribunal is whether, objectively, the respondent has complied with its duty to make reasonable adjustments: see ***Tarbuck v Sainsbury's Supermarkets*** *[2006] IRLR 664*. Ultimately, it is the Tribunal's view of what is reasonable that matters: see ***Smith v Churchills Stairlifts plc [2006] ICR 524 at 46.***

44. In ***Leeds Teaching Hospital NHS Trust v Foster*** *EAT 0552/10* the EAT held that there does not necessarily have to be a good or real prospect of an adjustment removing a disadvantage for that adjustment to be a reasonable one. It is sufficient for the Tribunal to find that there would have been a prospect of it being alleviated.

45. The uncertainty of whether a particular adjustment would be effective is relevant, but this does not mean that taking the step is not reasonable as set out by Elias LJ in ***Griffiths v Secretary of State for Work and Pensions*** *[2017] ICR 160.*

Meaning of "PCP"

46. The words "provision criterion or practice" (PCP) are not defined in The Equality Act 2010. The Commission Code of Practice paragraph 6.10 says the phrase *"should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions".*

47. The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in 2018 in ***Sheikholeslami v The University of Edinburgh UK*** **EATS 2018** by Mrs Justice Simler at paragraph 48 and in ***Ishola v Transport for London [2020] EWCA Civ 112*** Lady Justice Simler stated at para 35:

"In context and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a

hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one." (emphasis added).

48. The requirement to demonstrate a 'practice' does not mean that a single instance or event cannot qualify but that to do so there must be an 'element of repetition' see ***Nottingham City Transport v Harvey*** *UKEAT/0032/12JOJ.* This might be demonstrated by showing that the treatment would be repeated if the same circumstances ever arose again.

49. Paragraph 6.2 of that Code describes the duty to make reasonable adjustments and the Code gives guidance about what is meant by reasonable steps at paragraph 6.23 to paragraph 6.29. We do not set out the paragraphs here.

50. The reasonableness of an adjustment falls to be assessed objectively by the Tribunal **(*Morse v Wiltshire County Council*** *[1998] IRLR 352).*

51. In respect of claims that there were failures to make reasonable adjustments the burden is on the employee to show that there was some policy, criterion or practice or physical feature that placed her at a substantial disadvantage and that there was some apparently reasonable adjustment that would alleviate the disadvantage. If the employee discharges that burden, then to escape liability the employer must show that it would not have been reasonable to expect it to make any adjustments. ***Latif v Project Management Institute*** *[2007] IRLR 579* ***and HM Prison Service v Johnson*** *UKEAT/0420/06.*

Discrimination arising from disability: section 15 Equality Act 2010

52. Section 39 of the Equality Act 2010 ("the Act") provides, so far as relevant:

"(2) An employer (A) must not discriminate against an employee of A's (B)— ...(c) by dismissing B.

53. Section 15 of the Equality Act 2010 says:

"15 Discrimination arising from disability:-
(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

54. In ***the Secretary of State for Justice and anor v Dunn EAT 0234/16 the EAT*** confirmed the position in the Statutory Code of Practice para 5.2, that the four elements that must be made out in order for the claimant to succeed in a Section 15 claim are:
    - There must be unfavourable treatment.
    - There must be something that arises in consequence of the claimant's disability.
    - The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and
    - The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

55. The correct approach was considered by the Court of Appeal in ***City of York Council v Grosset [2018]*** *IRLR 746* per Sales LJ (at para 36 onwards):

'36. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability.
The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something" ...The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something" ....'

56. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme*** *and anor 2019 ICR 230,* SC the Supreme Court approved the guidance in the Statutory Code. The Statutory Code describes what might amount to a detriment in paragraph 5.7. The Statutory code sets out at paragraph 5.6 that in asking whether treatment is unfavourable there is no need to seek a comparison with the treatment of others.

57. The approach to the question of whether unfavourable treatment is 'because of' 'something arising in consequence' of disability is that set out in ***Pnaiser v NHS England and*** *anor 2016 IRLR 170, EAT where Simler P* (as she was) set out at paragraphs (a) to (h) the elements that the Tribunal must identify and determine. We do not set these out here.

58. To demonstrate that unfavourable treatment was 'because of' something arising in consequence of disability it is sufficient to show that the 'something' was an effective cause and, if it was, it is immaterial that there were other effective causes of the treatment see ***Hall v Chief Constable of West Yorkshire Police*** *2015 IRLR 893,* ***EAT and Charlesworth v Dransfields Engineering Services Ltd*** *EAT 0197/16****.***

59. The Statutory Code sets out the requirements of the justification defence that the employer must prove, namely that the treatment is a proportionate means of achieving a legitimate aim. The material paragraphs are 4.26 to 4.32 and will not be reproduced here. The test is the same as in justifying treatment that would otherwise be unlawful direct discrimination. A convenient summary the relevant principles is set out in ***Chief Constable of West Yorkshire & another v Homer [****2012] ICR 708* in the opinion of Lady Hale where she said:

". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group." He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:

First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

60. As the Court of Appeal held in ***Hardy & Hansons plc v Lax [2005]*** EWCA Civ 846, [2005] ICR 1565 [31, 32], "it is not enough that a reasonable employer might think the criterion justified. The Tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement."

Victimisation (Section 27(1) of the Equality Act 2010)

61. Section 27(1) of the Equality Act 2010 defines victimisation as where:

"a person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act".
Section 27(2) of the Equality Act 2010 states
" Each of the following is a protected act--
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act."

62. As with direct discrimination, victimisation need not be consciously motivated. If A's reason for subjecting B to a detriment was unconscious, it can still constitute victimisation (***Nagarajan v London Regional Transport [1999] IRLR 572*).**

63. The protected act must be a real reason for the treatment **(see *Chief Constable of West Yorkshire Police v Khan*** *[2001] ICR 1065 per Lord Scott at ¶77)* Further, as held by the Court of Appeal in ***Igen Ltd v Wong*** *[2005] ICR 931,* for an influence to be "significant" it must simply be: "*an influence which is more than trivial."*

64. The EAT in the Chief Constable of ***Kent Constabulary -v- Bowler [2017] UKEAT/0214/16*** gave guidance on detriments in victimisation claims:

"Determining whether the treatment that B is subjected to amounts to a detriment involves an objective consideration of the complainant's subjective perception that he or she is disadvantaged, so that if a reasonable complainant would or might take the view that the treatment was in all the circumstances to his or her disadvantage, detriment is established. In other words, an unjustified sense of grievance does not amount to a detriment; the grievance must be objectively reasonable as well as perceived as such by the complainant".

Time Limits

65. The relevant time-limit is at section 123 Equality Act 2010. The Tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

66. Alternatively, the Tribunal may still have jurisdiction if the claim was brought within such other period as the employment Tribunal thinks just and equitable as provided for in section 123(1)(b). The Tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** *[2021] EWCA Civ 23****,*** the best approach is for the Tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay.

67. Laing J stated at ¶30 of her judgment in **Miller v Ministry of Justice** [2016] UKEAT/0003/15/LA: "*What weight [the ET] decides to give to those factors, having decided that they are relevant in any case, is, axiomatically, a question for the ET"*.

68. It is for the claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the rule ***(Bexley Community Centre (t/a Leisure Link) v Robertson** [2003] EWCA Civ 576**).***

69. Where the reason for the delay is because a claimant has waited for the outcome of his or her employer's internal grievance procedures before making a claim, the Tribunal may take this into account ***(Apelogun-Gabriels v London Borough of Lambeth and* anor 2002 ICR 713, CA*).*** Each case should be determined on its own facts, however, including considering the length of time the claimant waits to present a claim after receiving the grievance outcome.

70. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period. It was confirmed by the Court of Appeal in ***Lyfar v Brighton and Sussex University Hospitals Trust*** [2006] EWCA Civ 1548 that the correct test as regards continuing acts of discrimination is that set out by Mummery LJ in ***Hendricks v Metropolitan Police Commissioner*** [2002] EWCA Civ 1686. In that case, Mummery LJ held at ¶52 that (emphasis added):

    "*The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period.' […] Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs*".

71. By subsection 123(3)(b), a failure to do something is treated as occurring when the person in question decided on it. In the absence of evidence to the contrary. A person is taken to decide on a failure to do something when that person does an act which is inconsistent with doing it or, in the absence of such an inconsistent act, on the expiry of the period on which that person might reasonably have been expected to do it.

72. In claims for reasonable adjustments, this means time will start to run when an employer decides not to make the reasonable adjustment relied upon (***Humphries v Chevler Packaging Ltd** [2006] EAT0224/06).* Alternatively, in a claim when an adjustment has not been actively refused time runs from the date on which an employer might reasonably have been expected to do the omitted act (***Kingston upon Hull City Council v Matuszowicz** [2009] ICR 1170 CA).* This should be determined having regard to the facts as they would reasonably have appeared to the employee, including what the employee was told by his or her employer ***(Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194, CA).*

Rationale for primary findings

73. In arriving at our primary findings, we have had careful regard to all the evidence put before us. We have considered the coherence, consistency, and general plausibility of the witness evidence that we heard and have read. We have also attached particular importance to contemporaneous documents and the way that Ms Moore communicated to the respondent.

74. We find that Ms Moore was sincere and set out what she perceived events to be as a true account of the facts. However, for the reasons we have given below, the contemporaneous documentation did not always support Ms Moore's account.

75. We found that Mr Uddin was a poor witness in that he was unable at times to explain to the Tribunal what he had put in his witness statement or assist the Tribunal by referring to the bundle. However, the Tribunal accept that the passage of time had affected his ability to recall events clearly which impacted on the quality of evidence that he was able to provide.

76. We found Mr Smith to be a credible witness and he was able to articulate the reasons for his conclusions that he reached in detail. We sympathise for the difficult personal events that took place at the time he was re hearing the grievance.

77. The Tribunal was unable to follow Mr Stephenson's reasoning on certain points and, on occasions, his recall was less than perfect but this is not surprising due to the passage of time and his limited involvement in this case.

Findings of fact

78. Throughout the finding of fact, the witnesses are referred to by use of abbreviations set out below: -

- Ms Moore, claimant ("C"),
- Mr Mahbub Uddin ("MU"), Ms Moore's line manager,
- Mr Mark Griffiths ("MG"), Mr Uddin's line manager.
- Mr James Stephenson ("JS"), Decision Manager for claimant's appeal against her written absence warning.
- Mr Phillip Smith ("PS"), Decision Manager who re heard the claimant's grievance after her appeal.
- Ms Anita Bailey ("AB"), Decision Manager for the original grievance.
- Mr Doug Campbell ("DC"), Investigating Officer for the original grievance.
- Mr Graham Ralph ("GR"), Appeal manager for the grievance.
- The member of C's team who raised a sexual harassment allegation is referred to as "XX".
- The member of the team covering the claimant's role in 2019/2020 is referred to as "S".
- Annette Myers "AM", Trade Union representative, who assisted the claimant.
- Various HR case managers have been involved in the case and we have used their initials only or simply referred to them as case managers.

79. No disrespect is intended to the witnesses / personnel above for use of such shorthand, but such abbreviations have been used simply to reduce the length of the Judgment and in the hope that this will be easier to navigate and read and also to protect the identity of certain employees of the respondent where their identity is not relevant. The Tribunal also refer to the relevant pages of the bundle below.

80. Set out below are the findings of fact the Tribunal considered relevant and necessary to determine the issues we were required to decide. We do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. The Tribunal has, however, considered all the evidence provided and has borne it all in mind.

81. Due to the nature of the allegations spanning over several years and relating to events, for example alleged weekly meetings and alleged assistance / support provided over certain periods of time, the Tribunal reviewed the contemporaneous evidence including text messages and emails for these periods of time and were taken to these by Mr Crawford. The Tribunal considered that this was an important exercise to understand the chronology of events, any resultant delay in implementing measures and whether this could be avoided as well as the respondent's knowledge at the material times to assist the Tribunal to answer why they find the respondent acted as they did.

Factual Background

82. The C commenced working for the respondent, Home Office, on 26 March 2001 and continues to work as a Senior Executive Officer as a Country Manager India and Bangladesh in the Home Office. The C has been line-managed by Mr Mahbub Uddin ("MU") since 2016. The exact date is unclear from the evidence.

83. The C has suffered from depression since 2002/2003. The respondent accepts that the C's depression amounts to a disability and accepts knowledge of this disability since 2009.

The Respondent's Policies

84. The Tribunal were referred to the following policies in the bundle by both Counsel, Mr Crawford, and Ms Grace. We do not set out the text of the relevant sections of the policies here but refer to these in our discussion below where relevant. However, we have read and considered the policies that were in the bundle.

(a) Home Office HR policy and guidance implemented 15 September 2014 and updated June 2019 "the Attendance Policy"

85. This Attendance policy is at pages 78 -124 of the bundle and sets out guidance for managers for the procedure that should be used when managing attendance including continuous sickness absence which is defined in paragraph 75 as more than 14 consecutive calendar days. The policy states it is not mandatory to follow the procedure in the policy but is a tool of support for managers and managers should also seek advice from the HR casework team. The Tribunal find that the collaboration and communication between the employee and manager is a common theme throughout the Attendance policy.

86. The Attendance policy sets out roles and responsibilities for managers and employees to manage absences from work, how referrals can be made to Occupational Health (OH), how to manage reasonable adjustments, support, rehabilitation and return to work. It also sets out the sickness notification procedure and the procedures the manager should follow when the employee is away on sickness absence and what steps managers should take when the employee returns to work. An employee can also use annual leave concurrently during a period of sickness.

87. At paragraph 21 the policy sets out that when the claimant is away on sickness absence that the manager should carry out a stress risk assessment if the absence is stress-related and consider a referral to Occupational Health.

88. The Attendance policy at paragraph 52 sets out that each employee has a default trigger point (called a Consideration Trigger Point) for sickness absences of 6 working days or when 3 spells of sickness absence is taken within a rolling period of 12 months. The policy states that these trigger points can be reasonably adjusted for disabled staff but should be reviewed regularly (recommended quarterly but dependent on the circumstances of each case). At paragraph 47 and Annex G, the policy sets out six exceptions where sickness absence will automatically not count towards Consideration Trigger points (set out below).

89. Paragraph 48-50 sets out that if the employee's sickness absence level gives cause for concern but is below the Consideration Trigger Point, the types of informal action a manger should take. At paragraphs 55-56, the policy sets out if the employee has reached / exceeded a Consideration Trigger Point for their sickness absence level the manager should hold a Formal Attendance Meeting to decide whether to take formal action. The policy sets out the types of formal action that can be taken including a first written attendance warning, a final written attendance warning or consideration of dismissal and in what circumstances the written attendance warnings should not be given, the grounds for appeal against an attendance warning and how an appeal should be managed.

90. Appendix F sets out that that managers should keep documents, emails, notes of meetings (both informal and formal) electronically or in a folder for the member of staff and review all case documents (at least) on an annual basis, destroying documents where there is no further ongoing action and gives examples of when these documents should be kept.

(b) HR Policy and Guidance - Grievance Resolution Policy and Procedure - Published 13 October 2020 "the Grievance Policy"

91. This Grievance policy is at pages 141 -187 of the bundle and sets out guidance for procedure to use when there is a concern or grievance relating to the treatment of an employee, including grievances about bullying, harassment (such as sexual harassment) or discrimination and provides advice for both managers and employees on the sources of support that are available. The grievance must be raised without reasonable delay and within 3 months of the event or issue taking place.

92. On page 145, the Grievance policy states that, *"All actions should normally be taken within the set times contained in this procedure. It is recognised that this is not always possible due to the complexity of the case or circumstances such as working patterns, shift working, annual leave, public holidays and/or employee absence or disability, in which case all actions should be completed as soon as reasonably possible. The reasons for any delay should be recorded."*

93. In respect of the Grievance outcome, the policy states on page 164 that if the decision is not to be made on the same day or within 5 working days of the hearing, for example, because further investigation is needed, the complainant, and the respondent (if there is one), must be given a reason for the delay and told when to expect a decision. Employees have 10 working days from the date of the written decision in which to send their written appeal.

(c) HR Policy and Guidance Discipline Policy and Procedure - Published 13 October 2020 "the Discipline Policy"

94. This Discipline policy is at pages 188 -256 and sets out the procedure to use when it is suspected or alleged that an employee has failed to meet acceptable standards of behaviour or conduct, including on-line behaviour. It will help managers to decide what level of action is appropriate to deal with an alleged discipline matter.

Claimant's first sickness absence - 3 December 2018 to 14 March 2019

95. The C was absent from work between 3 December 2018 and 14 March 2019. A signed note from the C's GP, Statement of fitness for Work is signed from 3 December until 8 February 2019 citing that the C is suffering from anxiety, depression, and medication side effects. There is no sickness certificate in the bundle for the further period of sickness absence from 8 February 2019 until 14 March 2019.

96. During this period, the C kept in touch with her line manager, MU, by texts & emails (at pages 261 – 279, 283-284). The Tribunal have reviewed the text messages and find that MU was always polite and courteous in his text messages and emails evidenced by him asking C how she was and stating, "hope you feel better".

97. MU texted C on 28 January 2019 and tried to call on 30 January 2019 asking if C was coming into work as she was due back, and he was seeking an update.

98. MU texted C regularly seeking an update. MU offered to speak to C on 10 January 2019 and 22, 23,25 January 2019, 4, 5 February 2019 to complete the OHS referral.

99. On 6 February 2019 at 15.20, C responded to MU's message offering to speak stating, "*Been with mum past couple of days".* MU offered to speak to C on 7 or 8 February 2019. C responded on 8 February stating, *"sorry was with mum again today. She's not very well."*

100. On 11 February 2019, C offered to come to the office to complete the OHS referral. The Tribunal find this meeting took place, and that MU discussed her state of health, the OHS referral and return to work.

101. On 22 February 2019, MU asked C when she is available for a telephone conversation. C responded, "*Sorry my sister was unwell yesterday, so I was running after the kids and didn't get a chance to call. I'm now not feeling well today".*

102. MU suggested speaking on Monday 25 February 2019, C agreed, however from MU's text on 26 February 2019, the Tribunal find that this discussion did not take place. C texted on 26 February 2019 confirming that she is not feeling well and can barely talk because her throat is sore. She suggested speaking on 27 February 2019 but on 27 February stated she, "*still feels awful and have barely any voice."*

103. On 4 March 2019, C offer to speak on 5 March 2019 and stated, *"Sorry. Last week was just a write off.".* On 6 March 2019, MU texted and apologised that he was not in touch on 5 March as he had a full day of meetings. He offered to speak that day or the following day. C responded that she would call him that afternoon. It is unclear if this discussion took place.

104. On 7 March 2019, MU texted C asking when she would like to speak that day. C suggested speaking at 16.54 but MU explained he was on a train. C agreed to speak on 8 March 2019, MU called C but did not receive a reply and suggesting speaking on

Monday 11 March. There was no response from C. MU texted again on 11 March 2019 asking C to call him. On 12 March 2019, MU asked C if she would like to attend EURINT India working group meeting. C confirmed she would attend, and MU sent C the agenda for the meeting to her personal email address as she could no log on.

105. On 20 March 2019, MU texted C confirming she could access her IT account. The Tribunal have found no further references in the bundle in 2019 that show that C had any further issues with accessing her IT equipment.

Occupational Health (OH) report dated 12 March 2019 (pages 280-282)

106. An OH assessment was completed by Bruce Ormiston (Occupational health advisor) on 12 March 2019. The Tribunal find that this is a central document to the issues in the case and discuss the contents below. This document sets out her return to work should commence on 18 March 2019. This stated,

"Recommendations to Manager / HR:

- *Please consider a 6-week phased return to work schedule commencing on Monday 18/3/19. You can discuss and agree the finer points of this schedule at the planned meeting on Friday 15/3/19.*
- *The phased return to work schedule **can consist** of the following:*
- *6 weeks duration*
- *Reduce hours, tasks and responsibilities by 50%*
- *Weekly incremental increases until 100% is achieve by the end of week 6.*
- *Weekly review of her progress.*
- *Identification of a workplace mentor to be available for direct support at work.*
- *Regular management meetings*
- *Ability to attend all scheduled medical appointments if she is unable to arrange these for outside of her normal working hours.*
- *Attendance management discretion/flexibility – trigger point adjustment*
- *Management discretion when considering ways to address the recent long-term absence.*
- *Stress management – to identify stressors and ways in which they can be addressed.*

Recommendations to Employee:

- *Please keep your line manager aware of your progress.*
- *Please engage with all organisational support."* ***(Tribunal emphasis added)***

C return to work on 15 March 2019, meeting on 18 March 2019, Phased Return

107. The C returned to work on 15 March 2019 for the EURINT India working group meeting. It is disputed whether a meeting took place between MU and C on this day. The Tribunal find that the C told her OH assessor that she had planned to meet MU on 15 March 2019.

108. The Tribunal find from texts between MU and C on 18 March 2019 that they met in the afternoon at approximately 3.30 pm on floor 19 which is a restaurant area. It is not clear how long this meeting lasted but the Tribunal find MU would have stayed for as long as needed to discuss the key issues with C. It is disputed by C that the contents of the OH report were discussed at this meeting or that this was a formal return to work meeting or

that the need to identify a mentor was discussed. There are no notes of this meeting in the bundle.

109. The Tribunal find that the meeting on 18 March 2019 was not a scheduled meeting with a booked room. The Tribunal find that at this meeting, MU did discuss the contents of the OH report dated 12 March 2019 with the claimant including the identification of a mentor and treated this as a Return-to-Work meeting.

110. C texted MU on 22 March 2019 stating that she forgot to take her tablets yesterday and that she would try and log on at home and get her laptop working. On 25 March 2019, MU asked to speak to C when she got in, but she confirmed that she had another meeting. On 27 March 2019, C texted MU stating she had some stomach pains/ issues and would try and catch up on emails at home and come in the following day. MU and C agreed to speak on 28 March 2019.

111. On 28 March 2019, C attended the office and MU agreed to speak to C at 1215 by phone. A text that day states from C to MU states, "We got cut off but that's all fine". At MU's request. C emailed MU on 28 March 2019 with her proposals for a 6-week phased return. She stated, *"Thought that it might be good to try and have a plan."* This email at page 290 sets out only C's suggestions for working hours over the following 4 weeks.

112. MU responded on 29 March 2019 at 12.37, *"Thanks and content with the plan below. Have a good break and we will have a catch up on return."*

Meetings from April 2019- October 2019

113. The C was on annual leave between 1 and 15 April 2019, during which she fell over and hit her head which caused her to suffer post-concussion symptoms. C informed MU that she was working from home on 15 April so that she could attend the doctors.

114. The Tribunal have reviewed the texts and emails between MU and C from April 2019 onwards and make the following findings on whether meetings took place and the reasons for this. The Tribunal find MU was polite and courteous in his text messages and emails. The Tribunal find that between April 2019 and October 2019, on the balance of probabilities, MU offered to speak to the C on a weekly basis but that meetings did not take place for a combination of reasons including that C was unwell, MU was unwell and in hospital and that C had to change her working arrangements and take leave / work from home at the last minute or retrospectively.

April 2019

115. C is on holiday between 1 and 15 April 2019. No meeting can take place in the week commencing 15 April 2019 as C is unwell. MU and C are both ill for parts of the following week so no meeting can take place in the week commencing 22 April 2019.

116. In the week commencing 29 April 2019, MU was unwell and on 30 April 2019 told C he needed to go into hospital for tests. MU offered to meet C on 1 and 2 May 2019 but C said she was unwell as the doctors think she had a muscle spasm in her neck and a trapped nerve from whiplash. On 2 May 2019, she stated, *"I'd like to meet next week as I don't think my return to work has gone to plan and I'd like to extend the phased return and discuss job role etc happy to get a doc certificate is necessary.".*

May 2019

117. In the week commencing 6 May 2019, MU agreed to meet C on 7 May 2019, but he is admitted to hospital and signed off for the rest of the week and said, *"Can you please ask your return / phased return to work with Mark. I'll let him know. Thanks and hope you are feeling better".*

118. C confirmed to MU that she would speak to MG. C emailed MG on 7 May 2019 explaining that she had suffered from post-concussion syndrome since she returned from holiday in America and asking to discuss extending her current phased return period. She stated in this email,

"The OHS referral therefore made a number of recommendations which we felt would help which unfortunately for various reasons haven't been implemented.
2) During both my absences from work and return to work I have had limited meetings to discuss issues etc. I did meet with Mabs at the start of this phased return, and ***he has been supportive throughout,*** *but I feel that I need further ongoing support to be effective."* ***(Tribunal emphasis added)***

119. MG arranged to meet C on 9 May 2019, but she did not attend and informed him after their meeting was due to take place that she was unwell with sickness and nausea due to the painkillers she was taking for her head pain. MG confirmed he was worried when she did not attend, and he texted her work phone. MG offered to speak to her on 10 or 13 May 2019 and emailed her on 15 May 2019.

120. For the week commencing 13 May 2019, C is unwell and not working. For the week commencing 20 May 2019 and 27 May 2019, MG offered for C to speak to Diane whilst he was on leave, but C did not arrange to do so. MG tried to speak to C on his return on 30 May 2019, but C did not respond until 3 June 2019.

June 2019

121. For the week commencing 3 June 2019, C and MG meet on 4 June 2019 and it is unclear whether MU and C met on 5 June 2019. On MU's return to the office, he is on a phased return.

122. On 4 June 2019, C emailed her union representative to raise issues of lack of support and stating that since her return only the phased return recommendation had been implemented and only then because she put a proposed plan together for consideration. The email is at page 336. The Tribunal do not produce this email here but refer to it in the discussion below.

123. For the week commencing 10 June 2019, C is on leave for part of the week. MU offered to speak to C on 12 and 13 June 2019 but C did not attend as she was unwell due to her head injury. By email on 13 June 2019, MU confirmed that he would approve a workstation assessment for C and look into what was required as an appropriate chair. He also stated, "*Please keep me updated and in the meantime if there are any other reasonable adjustments that need to be made I'm happy to consider."* C did not respond to this email.

124. On 14 June 2019, C and MU agreed to speak at 2.30 p.m. It is unclear if this meeting take place.

125. For the week commencing 17 June 2019 and 24 June 2019, MU is away from the office and C texted MG on 20 June 2019 stating her head is throbbing and on 26 and 27 June, C could not log on as she was feeling sick. MG asked C to contact MU who was back on 27 June.

July 2019

126. For the week commencing 1 July 2019, C was on leave on 1 July and went to the doctors as she was struggling with head problems. On 2 and 3 July 2019 C was unwell with head problems. On 5 July 2019, MU, and C were due to meet at 2.30 p.m. It is unclear if this meeting took place.

127. For the week commencing 8 July 2019, C and MU agreed to meet on 11 July 2019. It is unclear if this meeting took place. C emailed her union representative on 11 July 2019 stating, *"I have been doing a phased return, although again have been left mostly to my own devices… OHS recommendations are still o/s although I am having a meeting with Mabs today when some of these items may be discussed."*

128. For the week commencing 15 July 2019. C emailed MU on 15 July 2019 requesting an extension to her return to work to 8 weeks as, *"This gives us opportunity to complete the stress risk assessment and other actions".* C and MU met for a Stress Risk Assessment (SRA) on 16 July 2019. This was emailed to C by MU on 16 July 2019 to sign and date. The SRA is at page 345/346 dated 17 July 2019. MU on 18 July 2019 booked a room for an SRA review on 1 August 2019. It is unclear if MU and C spoke on 1 August 2019. C confirmed on 1 August 2019 that she had an emergency with her mother and would not be in the office and she had to swap her days off.

129. For the week commencing 22 July 2019, MU rescheduled their meeting to 25 July 2019 to accommodate C having been delayed at her mother's house, having eye problems and problems with the heat.

130. For the week commencing 29 July 2019, in response to C's question, by email dated 31 July 2019, MU stated that the interviews relating to the sexual harassment allegation being made by XX are likely to take place the following week. The Tribunal find that MU had taken on the role of investigating the sexual allegations made by XX which would usually have been carried out by C as XX's line manager.

August 2019

131. For the week commencing 5 August 2019, it is unclear whether a meeting took place or was offered to C by MU. For the week commencing 12 August 2019, C texted MU on 15 August 2019 saying that she forgot to take her pills and felt unwell. At MU's request, C confirmed she was in the office on 16 August 2019 and MU asked to catch up with C. It is unclear if this meeting took place.

132. For the week commencing 19 August 2019, C was unwell all week with a cough and headache. For the week commencing 26 August 2019, 26 August was a Bank Holiday and C confirmed she had a day off on 27 August 2019. C was due to come into the office on 28 August 2019 but did not attend as there was a "kerfuffle in chemist with her prescription" and "she couldn't find her laptop". On 29 August 2019, C told MU she struggled with sleep and would take half day leave. On 30 August 2019, at 12.17, C

stated that she was heading into the office explaining that she was unwell the previous evening and it "*has taken me a while to get going".* She was to complete an urgent FOI request for MG. it is unclear whether C and MU had a meeting on 30 August when C was in the office.

September 2019- Formal Attendance Meeting invite

133. For the week commencing 2 September 2019, MU and C met on 3 September 2019 after MU requested a meeting on 2 September 2019. MU's email of 2 September states*, "I need to re-schedule the postponed formal attendance management meeting from a couple of months ago, but before that would like to review actions from the OHS referral and Stress RA."*

134. For the week commencing 9 September 2019, MU and C met on 10 September 2019 to complete an SRA. This is discussed below.

135. By email of 11 September 2019, MU attached a letter inviting C to a Formal Attendance Management meeting on Thursday 19 September 2019. This can be found at pages 372, 373. This meeting did not go ahead as C texted MU on 17 September 2019 stating that she had a sore throat, temperature, and cough. She was still ill on 18 and 20 September 2019 and for the week commencing 23 September 2019. On 30 September 2019, C confirmed to MU that she was on leave until 4 October 2019. C is then unwell, and her second period of sickness absence begins on 7 October 2019.

Events on 9 and 10 September 2019

136. C emailed her union representative on 9 September 2019 stating that things "*had a significant impact on my mental health and wellbeing, specifically related to the handling of XX's complaint. I really want to send something myself as I am frankly astounded at the lack of support and the expectations placed upon the both of us. This is not the kind of management/support I expect given the circumstances."*

137. A meeting took place between MU and C on 10 September 2019 between 1 and 2 pm. C and MU reviewed the Stress Risk Assessment. C alleges at this meeting that MU told her that she should look for another job if her role was too stressful or if her depression made the role unsuitable. MU denies this. There is no note of the meeting. The note of the SRA is at pages 379,380,381. The Tribunal set out their findings in the discussion below.

138. C emailed her union representative on 10 September 2019, at 15.26 stating, "*Health is up and down. The additional stress has been taking a toll. I have flagged this to Mabs again today during a catch-up meeting and review of my stress risk assessment. Mabs was talking about having the formal sickness absence meeting next week – Thursday morning 19th September before I go on leave."*

139. On 11 September 2019, C wrote to her Union representative "*I was a bit shell shocked after yesterday's catch-up meeting and some of the things that were discussed. I am seriously considering that I am going to have to raise this with Elaine as a major issue in terms of handling and approach to sexual harassment within the unit. I was considering sending something to Mark but given that he is still within the line management chain, and no disrespect intended male, this needs to be raised in another way."*

140. The Tribunal find that in neither email to her union representative that C raised the serious issue that she was asked to find another job by MU or that she was concerned as a mentor has not been identified by MU. The Tribunal do not find the reference to being shell shocked related to this issue but that this related to the sexual allegations made by XX.

7 October 2019 – second period of sickness absence (until 12 January 2020)

141. MU sent C an email on 7 October 2019 enclosing the SRA reviewed on 10 September 2019 and asking her to review and sign this. The SRA is at pages 379,380,381.

142. MU texted C on 8 October 2019 and 14 October 2019, asking her to update him on her movements. On 18 October 2019, C told MU that she has been signed off until 4 November 2019.

143. On 30 October 2019, MG sent C a text stating, *"sorry to bother you on your personal mobile but I'm worried as I haven't heard from you, and I've tried emailing calling work mobile. Are you okay?"* On 31 October 2019, MU texted C offering to speak on 1 November, he called C on 4 November but received no response, he texted C on 4 November and 6 November asking her to get in touch and to confirm how she is.

144. C responded on 6 November 2019 stating she would *"hopefully be able to come in next week."*. On 7 November 2019, MU asked C to contact him on Monday 11 November by 10:00 am to update him. C did not do so. C texted MU on 11 November at 18.36 stating that she would go to the doctor and on 13 November 2019 told MU she had a doctor's certificate until 20 November 2019. MU suggested speaking on Monday 18 November 2019, but C did not respond.

145. On 20 November 2019, MU texted asking if C will be in work tomorrow. C texted on 21 November 2019, that she would see the doctor and update him. MU asked C to update him on 22 November 2019 and 25 November 2019.

146. On 27 November C texted MU that, "*I have a few personal things going on which are causing extreme stress. Have been unable to sleep. Doctor has signed me off until 9 December. Will e-mail certificates. Sorry for delay."*

147. On 29 November 2019, MU texted C, "*Hope you are feeling better and thanks for the update. Could we speak this afternoon for a catch up. Want to discuss if there is anything we can do to support you and also, we need to have a formal attendance review meeting which I will write to you about."*

148. On 2 December 2019, MU texted C explaining that he has just tried to call her but got no answer. He asked that she call him so they can have a conversation.

149. C texted MU on 5 December 2019, *"sorry had a lot going on. .. Free to talk tomorrow afternoon. I anticipate being back next week.* "

150. On 6 December 2019, MU texted asking what time C is free to speak. C responded on 10 December 2019, stating that she had a current certificate until 6 January 2020. She offered to speak to MU on 11 December 2019. She confirmed she received a letter stating she would go on nil pay from 23 December 2019 due to the length of time she had been off sick in the last four years.

151. On 10 December 2019, MU texted C explaining that he cannot speak on 11 December but can speak on 12 December 2019. On 12 December 2019, MU texts C, *"yet again you have failed to get in touch when you have said you would. You have also failed to send me your sickness certificate. Could you confirm today when you will forward your sickness certificate and if you will be available on either Monday or Tuesday for an informal review discussion. Thanks."*

152. C agreed to speak on Monday 16 December 2019, but MU called and got no response. C offered to speak on 17 December 2019, but she did not call MU. MU offered to speak to C on 23 December 2019 and on 8 January 2020. C responded on 8 January 2020 hoping to attend the office the following day. She said she still had problems with insomnia and concentration but most of the side effects had resolved.

153. MU asked C on 9 January 2020 for an update. C emailed MU on 10 January 2020 stating that the doctor had signed her off and given her a fit note for a phased return and altered hours. MU responded and suggested meetings at 3 pm on Monday 13 January 2020 in room 202.

Sickness certificates

154. On 21 October 2019, 31 October 2019, 7 November 2019, 13 November 2019, 22 November 2019, 2 December 2019, 12 December 2019, 9 January 2020, MU texts C requesting a copy of her sickness certificates. C sent MU some sick certificates on 16 December 2019. MU emailed in response that he did not have sick certificates for 17/9/19 to 20/9/17 and 7/10/19 to 11/10/19. C responded explaining that she could self-certify for those weeks and had holiday booked also. The Tribunal note that none of these sickness certificates were in the bundle and the Tribunal do not know the reason C was signed off work by her GP.

Return to work meeting on 13 January 2020

155. C returned to work on 13 January 2020 and met with MU. MU's note of Return-to-work meeting on 13 January 2020 is at page 403/404 of the bundle which he sent to C by email. The relevant extracts are discussed below.

156. The relevant extracts of this note are: -

""• We discussed the cause of your absence, and you said it was stress related due the situation within the team regarding XX which you felt had become too much and not manageable. In addition, there were other issues in the team, this alongside work was overwhelming and added to stress levels and mentally you could not cope. ….

• I confirmed that I would write to you following the completion of the phased return inviting you to a formal attendance management meeting as you had exceeded the consideration trigger points.

We agreed the following actions:

• Phased return to work and reduced hours for the period of the 'Fit Note'. ……

• Going forward I said we would review during our weekly meeting and confirmed expectation was that your attendance will increase every week and at full capacity at the end of the agreed phased return period.

• You were going to see your GP when the period covering you Fit Note expires and I agreed to review the phased return.

• In regards to workload, initial focus should be on getting your laptop working, catching up on emails and missed training. To address team/line management issues you highlighted, I confirmed that you will not have any line management responsibilities at present.

• We will review the current Stress Risk Assessment (I have attached an updated SRA which I'm happy to discuss during the weekly review meeting).

• We will have weekly review meetings to monitor progress against the agreed actions.

• I will invite you to a formal attendance management meeting.

Do get back to me if any amendments are required or I have missed anything. "

157. MU and C carried out the SRA on 16 January 2020, and this is at page 405-407. The Tribunal find that neither the note of the meeting on 13 January 2020 nor the SRA dated 16 January 2020 refer to a mentor.

13 January 2020 to 24 March 2020 – Laptop issues

158. C emailed MU on 20 January 2020 apologising for the lack of contact last week stating that she had a few family issues and that she would attend the office on 22 January 2020. MU agreed to speak to her then. C did not tell MU until prompted on 22 January that her laptop was still not working.

159. C did not meet with MU despite daily requests from him for her to do so on 27, 28, 29, 31 January 2020 and on 3 February 2020 she did not keep the meeting they had arranged.

160. On 5 February 2020, MU asked again to speak to C and suggested speaking on 6 February 2020, but she did not do so as her husband was unwell. MU and C agreed to meet on 13 February 2020, but it is unclear if this meeting took place. C sent MU a special leave request on 27 April 2020 for 10 -14 February 2020 for caring for her husband. MU agreed this on 28 April 2020.

161. C took last minute leave on 17, 18 and 19 February 2020 and did not work on 20 February 2020 as her sister was unwell. She attended the office on 21 February in the afternoon but was then out of the office for two weeks (with her husband for a check-up, at the therapist and doctors as she was then unwell).

162. C failed to respond to MU's request for an update on 2 March 2020 and then confirmed on 5 March that she had hurt her ankle but may attend work on 6 March 2020. She did not attend work on 6 March 2020 and when she attended work on 9 March 2020, she failed to inform MU that she had come in so he could not speak to her despite his request for her to do so.

163. MU told C he needed to speak to her on 10 March 2020. He tried to call C and email C on 10 and 11 March 2020 but she failed to pick up his calls. MU asked C to attend the office on 11 March 2020 and meet IT but C did not do so.

164. MU asked C when she was coming into the office on 12 March,17 March and also called C on 18 March 2020. C did not drop her laptop into the office until 18 March 2020. The

Tribunal find that that the reason for C not going into the office earlier was because she was away from home and had no door key to access her laptop.

165. MU asked C to update him about the laptop on 19 March 2020. C did not respond to MU until 23 March 2020 when she confirmed she dropped this off on 18 March 2020 and needed to collect this but "*was feeling a bit under the weather so was waiting to see how that panned out, but OK now apart from a slight earache."*

166. MU asked C to tell him once she had collected the laptop. C emailed MU on 24 March 2020 confirming that she has retrieved the laptop and had gone through the set up process and *"all appears to be good."*

167. The Tribunal refer in their discussion below to relevant emails during this period. The Tribunal find the email from C to MU on 27 April 2020 (pages 871 and 872) of her whereabouts between 14 January 2020 and 24 March 2020 provides further evidence of the days C was in the office and the reasons she was not able to work or progress getting her laptop fixed. This is discussed further below.

Phased return in 2020

168. C emailed MU on 25 March 2020 confirming she would like to undertake a phased return. MU sent C an email on 31 March 2020 setting out their discussion on 26 March 2020 in which they discussed C's phased return to work and MU asked C to confirm her phased return to work for days over the next few weeks.

169. On 20 April 2020, C asked MU to extend her phased return to work for another 2 weeks. MU suggested discussing this at their meeting on 22 April 2020, but C asked this to be moved to 23 April 2020. It is unclear if this meeting took place.

170. On 30 April 2020, MU emailed C with the heading catch up and sets out that at their meeting on 28 April 2020 they discussed an extension to C's 4 week phased return to work which concluded on 1 May as C was struggling in terms of concentration and there were some personal circumstances (separation from C husband) that C was working through, that he agreed to extend the phased return to work for a further 2 weeks (w/c 4 and 11 May) and expected C to be at full capacity in the w/c 18 May.

Equipment

171. The Tribunal find that requests for office equipment were made by C on 30 March 2020 and agreed by MU on 31 March 2020 and again on 16 June 2020 and approved by MU on 17 June 2020 and he suggested discussing this further during their catch-up meeting scheduled the following afternoon. On 27 August 2020, C informed MU that she was waiting for further equipment and MU on the same day forwarded her request to the Returns Engagement Team and they approved her request.

172. By email dated 30 April 2020, MU stated, *"You confirmed that the flexibility in work pattern had helped. Also, the equipment you had ordered (laptop riser, keyboard and mouse) to assist home working was now making a difference in terms of back, chest and lung pains. The only item that remained outstanding was a headset to aide with Skype calls. I was pleased to hear that the flexible working pattern was helping and that the equipment was making a difference to your wellbeing.* ***I asked you to let me know if there was anything more I could do." (Tribunal emphasis)***

C end of phased return on 18 May 2020

173. C sent MU an email on 4 May 2020 asking for a catch up as, *"I think that it would be useful to map out a return to taking over the teams, I understandably don't want to be overwhelmed but by the same token it is useful to know what's going on…..I have not been advised, nor has it been discussed with me that I am not going to still team lead the BGD, LKA and IND teams so I would rather there not be any hostility or staffing issues."*

174. MU responded on 4 May saying he would forward a diary invite. On 12 May 2020 C suggested items for discussion as "*Update on annual leave situation, Discussion re team dynamics and future plans, Review of work situation and phased return."*

175. C and MU met on 14 May 2020 and at this meeting it was agreed that she would resume her full-time hours from week commencing 18 May 2020. Following this meeting C emailed MU, "*... In terms of the future, I would certainly be interested in undertaking some short term project work, especially anything related to process. Rather than day to day work and team management for the time being."*

Formal Attendance Meeting invite in June 2020

176. MU invited C on 22 May 2020 to a Formal attendance meeting on Friday 5 June 2020. The email is at page 464,465,466. This did not take place as c's union representative was on compassionate leave. MU agreed to reschedule the meeting. The delay in rearranging the meeting was due to C's delay in providing MU with dates when her union representative was available.

177. On 28 May 2020, C wrote to her union representative. The Tribunal have read what the C describes as a short background in her email and the relevant extracts are referred to and discussed below. This is at pages 468 and 469 of the bundle.

178. On 23 June 2020, C emailed MU stating that she considered an OHS referral would be useful. MU agreed. C was offered a consultation with OH on 6 July by telephone, but this did not take place as the OH advisor stated that C was not available on mobile telephone. The appointment was rearranged for to take place 21 July 2020.

OHS report dated 21 July 2020 (pages 512-514)

179. The OHS report is at dated 21 July 2020 (at pages 512, 513, 514) and was carried out by Ms Rachel Carr. The Tribunal find that this report does not specifically refer to the requirement of a mentor but states,

"To avoid repetition, please read this report in conjunction with all previous OHS reports (last one dated 12 March 2019) as that advice also remains valid.

Summary - Based on the information available to me in my opinion Ms Moore is fit to continue with her current role.

Relevant history / current situation - I believe that she has had some absences from work due to these difficulties. She reports work related stressors prior to her absence.

Recommendations to Manager / HR - I believe that Ms Moore is currently working with some restrictions to her responsibilities. It is expected that Ms Moore will be fully functionally capable of the full range of duties in her job description in the long term but in my opinion responsibilities should be reintroduced slowly over a period of time and with support…..

Recommendations to Employee:

I have discussed with Ms Moore the need to keep open lines of communication. She should work within her limitations at all times and seek assistance if finding tasks difficult. Regular breaks and the use of focus/relaxation apps such as Headspace or Relax Melodies may be helpful.."

Formal Attendance meeting on 27 August 2020

180. MU emailed C on 25 August 2020 inviting her to a formal attendance meeting on Thursday 27 August 2020. The letter is at pages 529, 530,531. The relevant extracts are:

"You have been absent for 231 days between 4 October 2018 and 12 January 2020 on 7 occasions. This means you have reached or exceeded your Consideration Trigger Point of 24 days and I must now formally consider action needed to help improve your attendance.

On 11 September 2019 I invited you to a formal attendance meeting on 19 September 2019 which you were unable to attend due to sickness absence. The meeting was rescheduled to Friday 5 June 2020 however was postponed for an OHS referral. This has now been completed and a report has been issued….. During the meeting I will also discuss the period of sickness absence I would have discussed had the meeting on 19 September taken place….I will let you know what further action will be taken within 5 working days of the meeting."

181. C emailed her Union representative on 27 August 2020. This is on page 536. We do not set this out but discuss the relevant extracts below.

" Work place mentor – discussed and I agreed that this would be helpful; never put into place ….

Chronology of some important dates …..

• 17/07/19 – stress risk assessment completed for the first time – at this stage I raised that the main issue I faced was with regards to management of the team and supporting team members. …

• 10/09/19 – flagged issues again during review of SRA – I think that this was when I was told if it was too much I could move teams….

182. On 11 September 2020, MU emailed C the minutes of the formal attendance meeting that took place on 27 August 2020 and requested C track change any amendments. The notes of the meeting are at page 539, 540. The Tribunal have read the minutes of the meeting and refer to the relevant extracts in the discussion on the issues below.

Work request and C availability from July 2020 to October 2020

183. On 13 July 2020 C emailed MU if she could assist with work involving repatriation flights as she "*appear to be somewhat at a loose end. Might be nice to be involved in something different temporarily."* On 14 July 2020 MU agreed to this.

184. On 18 August 2020, C emailed MU, retrospectively asking for special leave for Tuesday 4th August to Friday 7th August (4 days) as she was unable to return to work due to being restricted on travelling to the UK pending the outcome of a COVID test and for special leave for Tuesday 11th to Friday 14th August as she had to dash over to see he mother at short notice. She states in this email,

"..bearing in mind that I am still struggling both physically and mentally with various issues. Luckily my lung pain seems to have eased a little, which is good. My ear pain seems also to be resolved. However my mental health still fluctuates due to various issues, although the break and time away definitely helped. I recently discovered that my husband is being made redundant following his period of furlough. My house is now on the market and fingers crossed that it gets an offer/sold before things become too difficult. I am still residing at an alternative address. So not entirely the best situation at all. The doctor is monitoring but there is no option to increase my medication, only to change it, which has its own challenges and means tapering off the current ones with accompanying side effects before starting a new prescription."

185. C emailed MU on 17 September 2020, "*Apologies for the lack of contact. It's been a rather manic unsettled week. Last week I was unwell. Extremely lethargic and very bad headache etc. I am sure it is linked to something. Perhaps having had Covid. My hair is also falling out in clumps now. Very stressful. I have also unfortunately had some family issues, including my cat being extremely unwell. So I have been rather frantic with worry, barely sleeping and very anti-social and upset. I would like to take this week as leave and return on Monday. I hope that this is ok."*

186. MU responded on the same day, *"Sorry to hear about the issues you mention below. Happy to approve the leave and hope you feel better soon. Let me know if there is anything I can do, and the Employee Assistance Programme is also available if you would like to speak to an independent source…. Let me know how you are feeling on Monday and if you require further leave, I'm happy to consider."*

Formal Written Warning for Attendance

187. MU emailed C on 28 September 2020 (at pages 561, 5623) at 14.19 enclosing a formal letter dated 28 September 2020 informing her of his decision to give C a first Written Attendance warning. The letter is discussed below. Extracts of the letter is set out below:

"We discussed your sickness absence between 4 October 2018 to 24 July 2020 and I provided the details of the 7 occasions you were absent. I outlined the reasonable adjustments put in place to support your return to work which were in line with the OHS recommendation report from March 2019.

Measures implemented:

1. *Phased return to work which included reduced hours/days.*
2. *Stress Risk Assessment completed.*
3. *Regular meetings with line manager weekly initially then fortnightly*
4. *Reduced work responsibility including removal of line management responsibilities.*
5. *Flexible work pattern including pre Covid-19 working from home.*

6. Annual leave requests approved to allow time to take rest.

A follow up OHS report was commissioned in July 2020 which recommended a continuation with some of the implemented measures. During the discussion you raised concern that only a few recommendations from the first OHS report had been implemented and due to work issues, felt overwhelmed and indicated the appropriate support structures were not in place resulting in a further period of sickness absence. You pointed out the stress risk assessment was not done until later in 2019 and there remained the issue of a work buddy. You had raised these concerns with Mark Griffiths. At present, other than the work buddy issue you acknowledged that everything was in place, and you were back at work having regular meetings with your line manager, have all the necessary IT equipment to work from home, line management responsibilities have been removed from yourself and there was a stress RA in place although was reviewed a while ago.

Your union representative expressed concern that the sickness absence being linked was not over the usual rolling 12-month period, it was a period covering nearly two years. She was concerned that no meeting had taken place last year regarding the initial absences and felt that you were not supported when you returned from sickness absence. OHS recommendations had not been implemented immediately and not all procedures relating to the absences had been completed. Annette asked for line management discretion for 'Disability and reasonable adjustments' exception to be applied as there was very little contact during the initial absences and little support on return to work. She repeated her concern about linking the periods of sickness absence for more than the rolling 12-month period.

Upon consideration of all the information available and having excluded the two absences between 4 October 2018 to 14 March 2019, I have decided that the 5 occasions of sickness absence between 15 August 2019 to 24 July 2020 (12 month rolling period) warrants a first Written Attendance Warning….."

Appeal of the Formal Written Attendance Warning

188. On 30 September 2020, C emailed MU requesting an independent appeal Manager who has had no previous involvement in her case. On 16 October 2020, MU confirmed that Mr James Stephenson ("JS") would consider her appeal. C emailed JS on 30 October 2020 enclosing her Notification to appeal against the issuing of a first written warning (page 940) together with additional information outlining her case and grounds for appeal. This included a timeline of completion / implementation of OHS recommendations at page 946 and her view on the weighting that each OHS measure would assist her on page 947.

189. C emailed JS on 16 November 2020 seeking an update on her appeal. JS responded on 16 November 2020 stating, *"Yes it is, I haven't been able to get to this yet but I will do so by the end of the week -apologies."*

190. On 4 December 2020, JS emailed C, "*Just to reassure you that I haven't overlooked this. I have read your grounds but obviously I need a bit of context so have asked your LM for the warning letter, interview records and a response to the assertion that the elements outlined in your OHS reports were not taken forward."*

191. On 7 December 2020, MU responded to JS enclosing relevant documents and stating: -
,

"Decision to issue the warning was not taken lightly, it was done after considering all the information including representations made by Joni during the FAM. I felt the 5 occasions of sickness absence (15 August 2019 to 24 July 2020 - 12 month rolling period) warranted a warning. Do get back to me if you require any further information."

192. C emailed JS on 23 December seeking an update and when the hearing will take place. On 4 January 2021, JS emailed C stating, "*As you can see, I put a discussion in with you for tomorrow – apologies for the delays (I was seconded into another job but Mark was keen that I retained this). Is a hearing tomorrow too soon? Would you prefer longer?"* C responded on the same day explaining that her union representative is out of the office on 12 January, and she will check what date is suitable.

193. JS responded on 4 January 2021, *"Sure, ok – no problem. Just let me know. Again, sorry for the delay – I genuinely closed down all my IE work as part of the secondment (which I am still on) and honestly forgot about my responsibilities on this but I'm fully up to speed now and do shout if you have questions prior to fixing a hearing date."*

194. C responded confirming that her union representative is available on 14 January 2021 and JS stated he will reset the meeting date to then. A note of the appeal hearing with C, her union representative and JS on 14 January 2021 is at pages 746-747. The Tribunal refer to any relevant extracts in their discussion below. The Tribunal note that this note is short and does not contain the date, time, or duration of this meeting or any comments made by C.

195. JS emailed C on 19 January 2021 enclosing the note of the meeting of 4 January 2021. He stated he will start on the decision and will aim to get the decision to her "early next week".

196. C emailed JS on 24 January 2021 seeking an update. JS responded to C on 28 January 2021, *"I'm halfway there to writing it, and with a bit of luck I hoped to finish it tomorrow. I will let you know if it will take me any longer."*

197. On 28 January 2021, JS wrote to C, seeking further information about absences between 14 January to 25 March 2020 as he noted that these are not mentioned or used in the warning.

198. On 1 February 2021, JS emailed MU, asking *"Do you have the HR advice where they supported linking the 5 absences into a 12-month period, hence requiring the warning? Did they indicate anything about her depression being classed as a disability and potentially exercising discretion on that basis? Have you - or have you considered - changing her trigger points? "*

199. MU responded on 1 February 2021 stating that he had discussed C's case with an HR case manager and then excluded two of the seven absences focusing on 5 absences in the 12-month rolling period. He confirmed he did not think the trigger points required adjusting and that in relation to the depression point nothing was raised by the HR case manager.

200. On 3 February 2021, C emailed JS, updating him on her absences between 14 January and 25 March 2020. JS responded to C that he will try and complete his report tomorrow (4 February 2021).

201. On 10 February 2021, C emailed JS stating*, "I am sorry to chase again but when might you expect to issue a decision regarding my appeal? It has been over three months since I submitted this (30 October 2020) and four weeks since our appeal meeting…."*

202. On 10 February 2021 at 11.29, JS emailed C stating, "*Apologies, I've been incredibly tied up. I do still hope to complete it this week. There's nothing further that I can see I need; I just need to be able to find sufficient time to do this properly. Apologies you have had to wait."*

203. He emailed again on 10 February 2021 at 16.09 enclosing the appeal document and stated*, "I'm sorry it took me a little longer than planned. I am happy to discuss it with you once you have read it if you would like to."*

204. The letter dated 10 February 2021 titles "outcome of appeal hearing" can be found at pages 808-810. The Tribunal refer to the relevant extracts in the discussion below. The conclusion states: -

"Weighing the grounds of appeal and points put to me in the appeal hearing against the original decision made by the Decision Manager, I consider this was a reasonable decision. I do feel there were flaws made by the line management chain in terms of brevity and transparency but that their decision can be justified."

Job advertisement – 19 October 2020

205. On 19 October 2020, a job advert named "Immigration Enforcement Expression of Interest Job advert and Application template" was sent out and is at pages 257-260 of the bundle. It Is not in dispute that this advert was for the full-time role and was C's job and that this was advertised as "expected to last 3-4 months but could be subject to an extension". The closing date for the application was 28 October 2020 and it stated that further details could be obtained from MU. It is not disputed that before this was drafted and advertised MU did not discuss the job advert with C.

206. After seeing the job advert on 19 October 2020 C emailed her union representative and the relevant extract of this email is, *"At no point have I said that I cannot do the job or don't expect to be reinstated in my post. In fact as they are aware the main stressors were lack of management support, failure to implement adjustments in a timely manner and the sexual harassment issue. Most of these issues have been resolved and I therefore see no issue in returning to post. I never asked to be taken out of the role at any stage. I have continually* ***over the past few weeks*** *asked Mabs what he wants me to do and what work is available.* ***Something that I was going to raise in my next catch up was when I was expected to return to my main role****." **(Tribunal emphasis).***

207. On 21 October 2020 C emailed Ms Jones and C emailed MU on 23 October 2020 in stating that the disciplinary investigation into her conduct appears to have been predetermined as her role has been advertised and reserving the right to raise a grievance.

208. C emailed MU and MG on 19 October 2020 asking them to explain why her job was advertised. MU responded on 20 October 2020, *"Yes, it is your SEO position which S has been covering for the last four months. S was due to cover until end December, however she will be moving on shortly, so I have decided to advertise the position to ensure there is coverage. Happy to discuss during our next catch up*. " C then asked *"What risk is there to coverage?"* and MU responded, *"Risk is without coverage the*

staffing (personal/resourcing) issues on both teams that S has been managing would resurface. As I said happy to discuss further during our catch up."

209. MU emailed C on 23 October 2020 explaining he was going to discuss this at their meeting at 1.30 but C had internet issues and he rescheduled a "*catch up call to Monday at 2:30pm".* This meeting did not take place.

210. C emailed MU on 10 November 2020, *"….As you know on a number of occasions over the past couple of months (8 Oct discussion, 28 Sept discussion, 18 Aug discussion, 13 July email, 12 May email etc) I have raised with you that I feel I have capacity to increase my workload and to take up more of my duties (if not all of them) from before I was signed off sick. …..*

I am keen to start reintroducing my duties as recommended by OHS, as I have previously indicated to you. During our recent conversation on 8th October when I raised this point again, you advised me that you had spoken to Mark but neither of you could identify anything and would let me know if something came up. (You also suggested that I look at expressions of interest and see if anything appealed to me."

211. On 10 November 2020, MU emailed C confirming he was happy to speak to C and had arranged to do so previously but C could not attend. He arranged a call to speak the following day. C and MU met on 11 November 2020.

212. Following C and MU's meeting on 11 November, MU emailed C on 11 November 2020, setting out a summary of their discussion. The relevant extracts are: -

"I set out my reasons for advertising the role as an EoI for a short-term period:

• It was a continuation of the position currently being covered by S.

• There were ongoing staffing issues relating to personal issues and resourcing and at the back of my mind these were part of my consideration as previous management issues on the team impacted your wellbeing and led to a period of sickness absence.

• When we recently reviewed your stress risk assessment we had agreed in the 'Relationships' row under action that there would be no team or line management responsibilities…..

I noted your concerns and accepted that I should have discussed with you prior to the post being advertised. I apologised that had not happened and explained that it wasn't until after our last catch up that S brought to my attention, she had been successful on securing another post. As things were moving at pace, it was an oversight on my part, however as soon as you had brought to my attention, I had signalled my willingness to discuss. I had arranged meetings, but you were not able to attend the dates. As I was on leave last week on my return, I had arranged the meeting for today. I proposed that if you were ready to step back into the role, I'm happy to consider and put on hold bringing someone in. There would be a 2–3-week handover of the role and I would also support. I asked for your view and if there was anything you wanted to suggest.

You stated that you felt you were now being pushed into the role rather than being eased into it as per the OHS recommendation. … I also felt that a 2–3-week handover from S was sufficient to get re-aquatinted with the team/work and repeated again that I would also provide the support and consider any work I delegated to you.

You again registered your upset in the way this been handled and said you would think about my proposal. You also asked about what other work would be available. I didn't

think there was anything else but would discuss with Mark and revert back to you. .. In the meantime you were going to think about my proposal, and I would discuss with Mark if there was any other work within RL that would be suitable."

213. On 16 November 2020, C emailed MU setting out her concerns that by advertising her role this was her *"effectively been suspended via the backdoor"* or *"If not suspension then disability discrimination"*. She stated in this email "*It makes little sense to recruit someone new to cover, when the permanent post holder (me) is available and able to slot in.(And should have done so some time ago)…*

    5) You developed a proposal to resume my role, mid meeting, stating that there was 2-3 weeks available for a handover from S should I wish to take over which should be enough. …."

214. On 16 November 2020, MU emailed C,

    *""**I can assure you that there was no other reasons for advertising the post other than those I mentioned during the discussion. (Tribunal emphasis).** During our discussion I agreed to check with Mark if there was any other suitable work within RL that you could do, he confirmed that was no other work. Should you decide to step back into your role I'm happy to agree a work plan that will ease you back into the role and at a pace that you are comfortable with. Please let me know your decision and in the meantime, I will arrange a catch-up meeting for this week."*

215. On 20 November 2020, C emailed MU stating that she wishes to return other role but that she considers she has been forced back into her job in a manner which has not been duly considered and is not what was outlined by OHS.

216. MU responded to C on the same day, *"My expectation has always been that you would step back into the role when you were ready to. That is why the role had only been filled on TCA and not advertised substantively. … I'll draw up a workplan and share with you on Monday. In the meantime, we can discuss at 2."*

217. On 27 November 2020 MU emailed C with a revised plan after receiving C comments on his original plan set out in his email of 23 November 2020. The email chain is called "Handover plan" and refers to the plans discussed the previous week and confirming a meeting to discuss further on 24 November 2020 at 12.00 pm.

Handwritten notes

218. There are handwritten notes by MU at pages 546-557 for the meetings between MU and C on the following dates and times: - 26/3/2020 (13.15-13.30), 28/3/2020 (12.20), 8/4/2020 (12.15-12.40), 16/4/2020 (15.30-1545) 28/4/2020 (15.30-16.55), 14/5/2020 (15.30), 3/6/2020, 12/6/2020 (15.00-15.23), 24/6/2020 (12.00), 18/8/2020 (12.20-12.55), 28/8/2020 (14.20-14.35), 11/9/2020 (13.45), 28/9/2020.

Stress Risk Assessments

219. The Tribunal find that Stress Risk Assessments were carried out on the following dates by MU: -
    - 16 July 2019 (at pages 345,346)
    - 10 September 2019 (at pages 379-381)
    - 16 January 2020 (at pages 405-407)
    - 9 October 2020 (at pages 588-589)
    - 27 January 2021 (at pages 773-775)

- 26 May 2021 (at pages 931-934)

220. The Tribunal find that the SRA form set out clearly in a box format what the claimant considers are stressors under her work demands (including her workload, work patterns and working environment), what support she requires to manage these, information on relationships to promote positive working and what her role was within the organisation and any organisational change that needs to be managed. There is also a box to be completed for factors outside of work that may be causing stress or affecting the claimant's performance at work, what support the claimant is getting from family and friends and whether there is enough support from her GP, counsellor, and medical professionals. There is a box for any additional comments.

221. The Tribunal find that the SRA forms were sent by MU to C to review, check and sign.

Disciplinary

222. The respondent received a picture of a person that looked like C who had a sexually explicit website offering explicit services. On 16 July 2020, MG sent MU an email attaching a screenshot of a picture to assist with his conversation with C the following week to establish whether this picture was of her.

223. On 11 August 2020, the HR case manager asked whether the meeting with C had taken place and whether there was any progress with the investigation. MU responded on the same day explaining that C had been on leave since 13 July and he had arranged a meeting with C to discuss the image with C on 13 August 2020. MU also received an email from another Manager on 13 August 2020 whom had received a link to a website offering sexual services that looked like C and she referred the matter to MU.

224. MU met with C on 18 August 2020 to discuss the information he had received. On 18 August 2020, MU sent an email to the HR case manager (page 525 of the bundle) seeking advice on the next steps and stating that he had spoken to C and showed her the image and she sounded surprised and said, '*looks like me, don't remember*'. MU clarified with C that she was stating the image was not of her and that there was nothing she wanted to tell him. MU told C that he would take HR advice on next steps and hoped to get back to her in the next few days and he reminded her that telephone advice and counselling was available from EAP. A note of the discussion with C made by MU is at page 572. There is no correspondence to show that this was sent to C for her comments/ amendments.

225. On 18 August 2020, HR advised MU that a formal investigation would need to be carried out and asked MU to draft the terms of reference (HIN01) for MG and HR to consider.

226. MU emailed the HR case manager on 20 August 2020, stating, *"It was indeed a difficult meeting and if I'm honest awkward. On the IM, when Mark and I discussed a couple of weeks ago we agreed that should an investigation be required I would be the DM. When Mark initially discussed with PSU they stated that they undertake these types of investigations so I think sensible for them to investigate and it also keeps outside the line management chain. Regarding the level of alleged misconduct, I'm undecided on whether it is serious or gross. I'm swaying towards the latter given the alleged misconduct could bring the department into disrepute and there seems to be significant breaches of security rules, HO employment T&Cs and the CS code. I'll get started on the HIN01 but will not be able to complete the section where I need to provide the detail as Mark has the initial information and at present is on leave until 1/9."*

227. On 17 September 2020, MU provided the draft HIN01 to MG and a senior Investigator from the PSU. On 21 September 2020, the PSU confirmed that Sharon Jones (SJ) would be the investigating Manager. On 22 September 2020, MU sent the HR case manager a draft Notification of Discipline Investigation letter (HIN01 and HIN08 forms) requesting her comments.

228. The discipline investigation notification form (HIN01) was completed by MU on 28 September 2020 (pages 567-571) which stated that the areas of concern related to the breach of Conflicts of interest and activities outside official duties policy and the breach of Personal conduct policy.

229. MU emailed SJ on 28 September 2020 apologising for not getting the investigation commission to her the previous week as C had been away from the office for two weeks and returned that day. SJ confirmed that she would contact C to arrange an interview and MU confirmed that the terms of reference were the areas of concern listed above.

230. MU emailed C on 28 September 2020 at 14.29 enclosing a formal letter dated 28 September 2020 informing her of the decision to conduct an investigation about an allegation of misconduct to gather facts to establish whether formal action is appropriate in line with the Discipline Policy and Procedure. The letter is set out at page 564 and 565. The Tribunal find that this disciplinary letter was sent 10 minutes after MU sent C an email informing her that she would receive a Formal Written Attendance Warning.

231. C's union representative emailed MU on her behalf on 29 October 2020 raising that Ms Jones letter of 3 October 2020 to C set out a pre-determined view of the allegations and a lack of impartiality. MU's response to this on 9 November 2020 is that he does not agree with this and refers to the wording of the letter and how this should be read in context. C's union representative also stated, *"It is further noted that this disciplinary is taking place immediately after the issuing of an unfair warning against Joni ….. These elements also point to a possible underlying motive to target Joni and may suggest the disciplinary has been predetermined*." MU responded, "*I can assure you that that is not the case and has no relation to the two issues you mention."*

232. A meeting took place between SJ (Investigating officer for the Professional Standards Unit), C and her union representative on Thursday 5 November 2020. A summary and a transcribed note of the interview can be found at page 608-632 of the bundle. The issues relating to the disciplinary investigation are not issues before the Tribunal and we do not need to make a finding of fact about the contents of the note. The Tribunal note however that it is no longer disputed by C that the image MU showed her was her and she accepted that she does offer sexual services on her website. Correspondence to C from the respondent on 27 January 2021 confirmed "as requested" that the disciplinary process would be paused while the grievance process is completed.

MU contact with HR case manager

233. The Tribunal have seen in the bundle correspondence between MU and HR Case manager from 7 February 2020 to 24 September 2020 in which MU provides regular updates about C including times she is off sick, whether she has returned to work and the position with her phased return.

234. On 7 August 2020 and 15 September 2020, MU and AV had a meeting. There are no notes of this meeting in the bundle.

235. MU emailed AV on 23 September 2020 enclosing a draft letter to C notifying her of his decision to issue a first written attendance warning and seeking AV's comments and on this and asking if he could confirm the grade of the appeal manager. AV responded on 24 September 2020 having reviewed the letter.

Grievance on 4 January 2021

236. One of the issues before the Tribunal is the delay in carrying out the grievance, the appeal to the grievance and the rehearing of the grievance and the Tribunal must find the reasons for any delays. The Tribunal note the pages of relevant documents but do not seek to set these out here as they are lengthy and instead, we refer to the relevant extracts in our discussion below.

237. C entered her grievance on 4 January 2021 (at pages 892 – 899) in relation to mistreatment by her line manager and employer, that constituted Disability Discrimination contrary to the Equality Act 2010, including repeated failures to make reasonable adjustments. A decision and Investigating manager were not appointed until 29 January 2021. There is therefore a short delay in this being arranged.

238. C informed the respondent on 20 January 2021 that she submitted a claim to ACAS on 15 January 2021 and in this email sent the HRG01 form. The respondent acknowledged receipt of the grievance on 11 January 2021 and receipt of the HRG01 on 21 January 2021. The Tribunal have seen no evidence that this delay was caused by commencement of early conciliation through ACAS on 15 January 2021.

239. On 3 February 2021, AB and DC interviewed MG, a note of the meeting is at pages 801-803. MU provided DC a written response to questions about the grievance. This at pages 826, 827. On 11 February 2021, DC interviewed MU. The notes of the meeting are at pages 876-879. On 1 April 2021, MU responded to further queries set out in DC email of 18 March 2021. This is at pages 868-870.

240. DC contacted C on 1 February 2021 to arrange an interview. DC did not meet the C until 4 March 2021 as this needed to be rescheduled to accommodate the C's union representative. DC sent the C the draft notes of her interview on 11 March 2021 but due to vaccine side effects, side effects of swapping medication and the C's internet going down she did not send back her amendments until 7 May 2021. The notes of the meeting are at pages 831- 841. This delay is not because of the respondent's conduct.

241. On 28 April 2021, the HR case manager emailed AB stating, "*I have been requested the grievance documents by GLD relating to the ET that Joni has put in, so would it be possible to have the original grievance by Joni as soon as possible as I don't have a copy?"* On 29 April 2021, DC (following a request by AB) asked C for final edits to the interview notes by 7 May 2021 otherwise the unamended originals would be used to progress the matter.

242. On 5 May 2021, DC confirmed that all interviews for the investigation were complete. DC sent his Investigation report to the parties on 11 May 2021.

243. On 19 May 2021, AB emailed the HR case manager stating she had received the completed investigation report and wanted some advice on the findings and the link to the

current Employment Tribunal. The HR case manager suggested a meeting. There are no notes of the meeting in the bundle.

244. On 28 May 2021, the grievance hearing took place with C and her union representative. The note of the meeting can be found at paged 974.

245. On 11 June 2021, AB wrote to C advising her that she has *"taken a decision not to uphold your grievance after careful consideration."*

Grievance Appeal

246. On 25 June 2021, C submitted an appeal in relation to the grievance decision issued on 11 June 2021 by AB. C's grounds for appeal is at page 980. C sought for a different decision manager to provide a full and proper outcome supported by detailed reasons.

247. On 28 June 2021, GR was appointed as the Appeal manager to the grievance. On 2 July 2021, GR contacted AB stating, *"Can we have a chat about your original decision next week please? I just need to get some more information about the decision making and thought processes that led to that decision – more than is in the papers that I have."*

248. AB responded the same day saying *"I am not sure we can have that conversation. There is a parallel tribunal already running and we need to ensure there is a clear gap between my decision and then your consideration. I have sent you everything I hold in terms of papers. Am copying in Ny who was my case manager for a view. If of course it is fine to speak I am happy to do so."*

249. On 5 July 2021, GR emailed HR seeking advice on AB's response. On 13 July 2021, The HR case manager emailed GR stating that the HR case manager who assisted AB with the original grievance had said, *"I don't believe I have any record of any advice given pertaining to the decision of the grievance. Conversations may have been had between myself and the decision manager, Anita Bailey, but I don't think at any point I would have steered her in one way or the other. I think there was a general agreement, however, that there was not a great deal of evidence to support the statements made in the grievance."*

250. On 21 July 2021, C emailed GR with a further complaint to add to the grievance. GR continued to review the appeal and grounds and arranged to interview the claimant on 23 July 2021 and send C the draft notes on the meeting on the same day. C provided amendments to the notes on 2 and 16 August 2021. The notes of the meeting are at page 1052.

251. On 5 August 2021, GR sought advice from HR as to whether he could revert back to Ms Bailey for further information as having looked at the papers and spoken to the C he said he did, "not think that the Decision Manager gave a full account of their reasoning around the decision". HR recommended to GR that he hear the appeal so that his recommendation (for more detail to be provided) within the appeal outcome completed his obligations under the grievance policy for the appeal.

252. Between 23 August 2021 and 31 August 2021, GR was on leave. GR informed the HR case manager that he could not reach a conclusion on C's grievance without AB's rationale for her decision. GR states in his email to HR on 8 September 2021, *"If Anita refuses or provides an inadequate response then I will say that I cannot make a decision on the grievance (in effect partially upholding it) because of the lack of reasoning from the*

Decision Manager and formally refer it back for a fresh decision (not a fresh investigation) with fully reasoned decisions."

253. On 15 September 2021, DC emailed AB seeking further information on the points raised in the grievance. AB responded on the same day stating, "*Thanks for your email. My response was considered, detailed and was also sense checked by HR professional assigned to support me. You have my rationale in writing. Whilst I understand Joni did not like my decision that does not per se mean it was flawed but ultimately that is your role to consider and why we have this process in place. I have looped in my HR casework support. You will have to be more specific about what it is you are seeking from me please as the rationale below is simply Joni's perspective as opposed to your ask? "*

254. On 17 September 2021, discussions with GR and HR took place about whether the case should be reheard.

255. On 2 November 2021, GR informed C that the grievance should be reheard and notified C that Philip Smith (PS) had been appointed.

Rehearing of the Grievance

256. Mr Philip Smith (PS), was appointed to rehear the grievance and on return from annual leave on 15 November 2021, he contacted C. An interview date was arranged promptly within a few weeks (2 December 2021) but then had to be rescheduled as the C contracted covid and was out of the office until 26 January 2022. The interview took place on 10 February 2022. C's amended notes of the meeting are at page 1075. On 18 February 2022, C sent PS further information (her sickness absence record).

257. There is then a delay until the end of March 2022 and the C chases PS on 25 March 2022, asking *"Is there any update on the outcome of our meeting on 10th Feb? It has been 6 weeks and the uncertainty and delay is causing additional stress and having an impact on my mental health."*

258. On 28 March 2022, PS's secretary emailed the HR case manager stating, *"…Also Phillip has had to de-prioritise the grievance due to the impact the Ukraine crisis has had on the Home Office."* On 30 March 2022, PS emailed C stating, *"Apologies for the delay. As you will appreciate, the day job has become a little frantic over the last five weeks. I have also been caught up in a couple of high priority discipline cases in my FDA role. I expect to have a decision for you by the end of next week".*

259. On 6 April 2022, PS emailed C with further queries re trigger points and asking for further details on her sickness absence. C responded to PS queries on the same day and explaining that she was on leave until 19 April 2022 and "*The absences for the 4 years prior to going on nil pay at the end of 2019 amount to 378 days. (11/01/16 to 12/01/20) As my absences over this period amounted to more than 365 days in 4 years I went onto nil pay. I have attached payslips confirming that my salary went on to nil pay and that annual leave was used to cover this. I also have a letter somewhere but it was sent in hard copy and I have moved twice since then so I am not entirely sure where this is and it would take me some time to dig out."* In response, PS stated that he has been unwell, but he still expected to have a decision ready for review by HR that week.

260. On 20 April 2022, PS emailed C, "*I was unwell in the week before Holy Week, and then had a family emergency (sister in ITU) during Holy Week. I didn't plan on issuing a decision*

while you were out of the office anyway, as that would have eaten into your appeal window. I have discussed my proposed outcome with HR and have nearly finished drafting it. That will be done before I begin AL on Saturday. Please find attached a note of our meeting. If there are any major discrepancies therein, which would be likely to influence my decision, please let me know by 9am on Friday 22 April."

261. On 21 April 2022, C emailed PS stating that she would respond to the notes of their meeting in 7 days. On 4 May 2022, C emailed PS explaining that she had yet to look at the notes of their meeting as she had had tooth ache and death of close family member and had been on leave. She requested time to review the notes until 9 May 2022. On 12 May 2022, C asked PS if she could review the notes of their meeting by 17 May 2022.

262. On 15 May 2022, PS emailed C explaining that he is flying out that day as someone close to him had been taken to hospital. He stated, *"… once I'm back I will let you know, as this will inevitably delay my ability to issue the decision on your grievance."*

263. On 24 May 2022, the response to the appeal to the grievance was sent to C and is set out at pages 1120-1127. This upholds one aspect of C's grievance, namely that the respondent's failed to identify a mentor. On 10 June 2022, C appealed against this decision.

Conclusion and Findings

264. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal and the applicable law. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise. We set out our responses to the List of Issues as follows:

List of issues

DISABILITY (section 6 EqA)

The respondent accepts that the claimant had a disability within the meaning of s.6(1) of the Equality Act 2010 (EqA) at the material times, namely depression. The Respondent accepts that they had knowledge of the disability from 2009 onwards.

<u>Direct disability discrimination (sections 39(2)(d) and 13 EqA)</u>

4. Who is the appropriate comparator?

The claimant sets out that the hypothetical comparator is someone who is the same as C in all material respects but who does not have C's condition of depression.

5. Did the Respondent treat the Claimant less favourably than the comparator? The less favourable treatment relied upon by the Claimant is set out in paragraph 19 a to i of the Claimant's Particulars of Claim.

a. Mr. Uddin's ongoing lack of interest and lack of support towards C and his failure to adhere to R1's policy on managing sickness absence (runs throughout from 3 December 2018 and remains ongoing);

General observations in relation to support given by Mr Uddin to the claimant.

293. The respondent submitted that there are "repeated examples of Mr Uddin demonstrating sincere interest and support towards the claimant." The Tribunal accepts this submission and find that throughout the text messages and emails between the claimant and Mr Uddin that are in the bundle before them, spanning periods when the claimant was away on sickness leave and when she had returned to working either on a phased return basis or full time, he was polite and patient and responded promptly or provided an explanation when he could not.

294. There are numerous examples of this in the texts and emails that the Tribunal have seen, however one example that stood out to the Tribunal of this is demonstrated when Mr Uddin was in hospital for his own personal health reasons, he texted the claimant from hospital to explain what had happened and arranged for Mr Griffiths to cover his line management responsibilities in his absence. This shows that Mr Uddin put in place a level of support for the claimant in his absence and does not support that he showed a lack of interest towards her.

320. In her written submissions, Ms Grace suggested his lack of support to the claimant was evidenced by Mr Uddin's management style which she submitted "might be characterised as reactive rather than pro-active". The Tribunal find that Mr Uddin proactively and regularly contacted the claimant whilst she was on absence leave to seek an update and offered days and times when he was available to speak. the claimant's evidence is that she had informed Mr Uddin that she preferred communication by text message and not by telephone as her evidence in her disability statement is that she finds it difficult to engage with this type of communication when unwell. Mr Uddin was therefore restricted to this method of communication to support the claimant. The Tribunal note the Attendance policy at paragraph 17 sets out that the manager should message or e-mail only if a telephone call is not possible.

295. The Tribunal refer to an email from the claimant to her union representative on 28 May 2020 in which she stated relating to her absence from 7 October 2019 to 12 January 2020, "*At no stage during my numerous absences was I ever contacted for a meeting as per the guidance….. I have also felt that during my recent period of sick leave some actions of my manager have bordered on harassment. Constant texting and requests to call, despite me asking previously not to talk on the phone because it exacerbates my condition, is stressful and I want everything in writing."*

296. The Tribunal find that the claimant's statement to her union representative is contradictory as on the one hand she asserts that Mr Uddin did not contact her for a meeting but on the other hand she suggests Mr Uddin constantly texted her and asked for her to call. This suggests to the Tribunal that she is unclear herself about the level of communication and contact she was expecting of Mr Uddin.

297. The Tribunal find that any requests made to Mr Uddin by the claimant were responded to promptly by Mr Uddin and almost always in the positive. This included changing the times when the claimant was due to meet Mr Uddin, the claimant changing the days that she could work or times she could come in the office, agreeing to last minute leave requests and special leave requests, agreeing extensions to her phased return. It is not in dispute that Mr Uddin organised a workstation assessment and agreed requests for other equipment to assist with the issues that had arisen due to the claimant's post-concussion syndrome. Mr Uddin described to the Tribunal that he was trying to be

supportive by being flexible. The Tribunal accept this evidence is borne out of from the text message and emails we have seen.

298. The Tribunal were referred to the claimant's email to Mr Griffiths on 7 May 2019 whilst Mr Uddin was in hospital in which she describes that Mr Uddin had been supportive throughout but that she felt she needed further ongoing support to be effective. The Tribunal refer to this at paragraph 118 above and find that this was contemporaneous evidence of how the claimant felt at the time and does not support her current allegation.

299. However the Tribunal accept that Mr Uddin may have given the claimant the perception that she was not being supported, at times, and note that the claimant has described to her union representative in her letter dated 28 May 2020, *"as being left to my own devices to organise a workstation assessment"* and in her email to Mr Uddin on 10 March 2020 in relation to fixing her laptop as *"left to fend for myself".* However, the Tribunal find on both these occasions once the claimant articulated to Mr Uddin that she needed help, in relation to the workstation the claimant texted Mr Uddin on 2 May 2019 and upon his return from hospital and sick leave to the office he organised this on 13 June 2019; In relation to the laptop on 10 March 2020, Mr Uddin responded immediately, he tried to call her, he spoke to IT and found a solution that would mean her laptop could be fixed in a few hours if she attended the office. The Tribunal do not accept the claimant's perceptions were therefore borne out.

300. The Tribunal note Mr Uddin's line management responsibilities spanned a time when the claimant was not in the office due to sickness absence and then returned on a phased return with limited time in the office and then due to the lockdowns resulting from the Covid 19 pandemic both Mr Uddin and the claimant were working from home. This would have provided practical difficulties in monitoring the claimant and whether she felt supported. The Tribunal find that in these circumstances there was a need for the claimant to inform her manager when she needed any additional support.

The allegation 4 (a) as drafted

301. This is a broad allegation spanning over 4 years and the Tribunal cannot be expected to respond to an allegation which does not provide sufficient particularity and note in any event that there is an overlap of this allegation and allegation 5 (b) below.

302. This allegation was made in the Particulars of Claim. The respondent set out in their Grounds of Resistance that "It is contended that the claimant has not specified how the Second Respondent did not follow the policy." The Tribunal have not seen any attempts by the claimant to do so. In her submissions Ms Grace referred to Mr Uddin's failure to hold a stress assessment with the claimant before she returned to work and the Tribunal will therefore make a finding on this allegation in relation to the lack of support from Mr Uddin and will limit its decision to any issues put before them by Ms Grace in her written submissions. These are as follows: -

(a) failing to hold regular meetings, (The allegation that there was a failure to hold regular management meetings is set out in allegation 5 (b) (ii) below and the failure to carry out a weekly review of progress is at allegation 5 (b) (iv) below. We therefore do not respond to that here).

(b) failing to keep any sort of record of the claimant's concerns or needs, and

(c) failing to support her in her own role as line manager following the return from the First Period of Absence, from December 2018 to March 2019

319. Ms Grace sets out in her submissions that this is not an exhaustive list, but the Tribunal find that it is for the claimant to set out her case and for the reasons set out above it is only able to deal with the matters put clearly before them. Furthermore, the respondent cannot be expected to address allegations without any particularity. Dealing with each in turn: -

Stress assessment before the claimant returned to work

321. Ms Grace stated that Mr Uddin failed to follow the attendance management policy and arrange to meet the claimant before she came to work and carry out a risk assessment as set out in paragraph 21 (set out at paragraph 87 above).

322. Mr Uddin accepted that a stress risk assessment did not take place. The claimant's evidence and as set out in her disability impact statement is that during a depressive episode "*even a simple thing like making a phone call cause me anxiety*" and that she had told Mr Uddin that she preferred to be contacted by text during these times.

323. The Tribunal find that when the claimant was away on sickness absence on both occasions, 3 December 2018 – 14 March 2019 and 7 October 2019 to 12 January 2020, Mr Uddin worked within these parameters and texted the claimant asking whether she wished to speak by phone and offering times he was available. He often had to text the claimant on the day she was due back into work to find out if she was coming in. It is only when there were prolonged periods when the claimant had not replied to his texts that he attempted to call the claimant and the evidence from the texts we have seen show that the claimant does not pick up her phone on these occasions. This is supported by Mr Griffiths in his statement to Mr Campbell on 3 February 2021 in which he stated,

"Instances where JM has not come into work or not logged on have been of great concern and Mr Uddin and I have tried a number of routes to make contact with JM in these instances including going through the contact process a number of times which involved attempting to contact next of kin. …. Mr Uddin has made every effort to meet with JM, accommodate her needs and to be flexible and support her to get back to work."

324. In respect of the first sickness absences, (3 December 2018 – 14 March 2019), as set out in paragraphs 95-105 above, the Tribunal find that Mr Uddin arranged for an OHS referral when the claimant's doctor suggested this, and the claimant had agreed to consent to this. They arranged to meet on 11 February 2019 to complete the OHS referral and it was reasonable for Mr Uddin to await the outcome of the OHS report which would provide a more comprehensive opinion rather than carry out a stress risk assessment himself.

325. In respect of the second absence (7 October 2019- 12 Jan 2020), as set out in paragraphs 141-153 above, the Tribunal find due to the issues in contacting the claimant whilst on sick leave, it was not practicably possible for Mr Uddin to carry out a stress risk assessment as he could not speak to the claimant and she failed to respond to his texts and calls (30 October 2019, 21 October 2019, 4 November 2019, 6 November 2019, 29 November 2019, 2 December 2019, 6 December 2019). Mr Uddin set out in his text to the claimant on 12 December 2019 that she had failed to get in contact when she said she would.

326. The Tribunal find that the claimant on numerous occasions in both absences failed to notify Mr Uddin before 10 a.m. on the first day of her sickness absence as set out in paragraph 16 of the Attendance policy.

327. The Tribunal find that both Mr Uddin and the claimant breached the Attendance Policy. However, the Tribunal find that Mr Uddin tried to comply with the Attendance Policy as far as practicably possible and he took reasonable steps to try to speak to the claimant during the two periods she was absent, and the stress risk assessment could not take place without claimant's input and co-operation. The Tribunal find that during both absences Mr Uddin took reasonable steps to try and support the claimant by keeping in touch with her. The Tribunal find it was reasonable in all the circumstances for Mr Uddin not to hold a stress risk assessment before the claimant returned from both leaves of sickness absence (3 December 2018 – 14 March 2019) and (7 October 2019- 12 Jan 2020).

Failure to keep records.

328. In respect of the failure to keep any sort of records of the claimant's concerns or needs, the Tribunal note the contents of the respondent's HR Policy and Guidance on Attendance management procedure ("Attendance policy") sets out at Appendix F and referred to in paragraph 90 above.

329. The Tribunal find that the Attendance policy envisages a clear paper trail of written records of meetings notes, emails and documents to be kept by Mr Uddin and that the claimant would fall into several of the categories listed on the policy. There is no dispute between the parties that there is an absence of written records between the claimant and Mr Uddin in the bundle relating to any meeting that took place 2019 and most notably so the return-to-work meeting on 18 March 2019. Mr Uddin explained that he does not know where these notes are as he was away from the office during covid. The Tribunal has been furnished with texts and emails from 2019 onwards and there is a record of the stress risk assessment dated 17 July 2019.

330. There are handwritten records at pages 546 – 577 relating to meetings in 2020 (the dates for which are listed above at paragraph 218). The Tribunal was advised that these are handwritten notes made by Mr Uddin during Covid when he was working from home. However, the Tribunal were not taken to these documents by Ms Grace or Mr Crawford, and it is not possible to decipher a number of the handwritten comments. Mr Uddin accepted that these were on pieces of paper and explained that this because he was working remotely due to covid.

331. There is also a handwritten note provided by the claimant on 8 October 2020 at page 577 but it was not possible for the Tribunal to decipher the handwritten comments. It is of note that the claimant has not disclosed any further notes of her meetings with Mr Uddin and that her note of 8 October 2020 was on a scrap of paper, an issue for which Ms Grace criticised Mr Uddin. However, the Tribunal accept the policy sets out that it is the responsibility of the manager to keep notes of the meetings.

332. The Tribunal find there is more documentation relating to meetings that took place when the claimant returned to work in January 2020 and started working when her laptop issue was resolved on 24 March 2020. The Tribunal find that Mr Uddin's practice in 2020 was to email the claimant with the key points from their meeting / discussion. Examples of

this is the email setting out a summary of the return-to-work meeting on 13 January 2020, there are Return to work forms signed by the claimant on 20 November 2020 and an email detailing the SRA discussion of 26 May 2021. The Tribunal also note that it is the claimant's case that any issues with whether regular meetings took place are said to have been resolved by March 2020.

333. The allegation relating to the lack of documentation therefore appears to relate mainly to 2019. Mr Uddin's evidence was that the IT system had changed since 2019 and that it is now possible to upload medical certificates and information onto the system. In 2019, you could not upload notes. The Tribunal accept that this may be the case but note that there was nothing precluding Mr Uddin from sending an email in 2019 to the claimant as he did in 2020 confirming the key points of their meetings. The Tribunal do accept however that it was reasonable in 2019 to keep handwritten notes of the meetings with the claimant and accept that Mr Uddin appears to have changed his practice in 2020 to some extent, although the Tribunal note that he still had handwritten records for the meetings in 2020 as evidenced from the handwritten notes in the bundle.

334. The Tribunal find that it is disappointing that there are no notes for the meetings in 2019 put before the Tribunal. The claimant was away on absence leave in 2018/2019 and Mr Uddin should have been aware of his responsibility to keep notes of meetings upon her return. Mr Uddin told the claimant he intended to invite her to a formal attendance meeting on 11 September 2019 and the Tribunal note that his meeting notes would have been relevant for this to take place. As set out below this meeting could not take place and he had to defer this so such notes should have remained relevant and important. The Formal attendance meeting did not take place until 27 August 2020 so such notes would have been relevant until at least then.

335. The Tribunal accept that covid may have affected how he worked when he was remote, but the Tribunal have been offered no real explanation why the 2019 notes are no longer available. Mr Uddin simply stated that he kept notes, but he does not know where these are. He told DC on 11 February 2021 that, "*these meetings are recorded in his notebook which he is unable at present to retrieve from the office due to COVID restrictions."*

336. In relation to the meetings, Mr Uddin accepted that he organised his meetings though outlook, but the Tribunal were not provided with a list of when these invites were sent. This issue was further compounded by Mr Uddin's inability to recollect anything in his oral evidence about certain issues and at some points not even communicate what he had set out in his witness statement or assist by referring to the bundle on points raised with him.

337. However , the Tribunal do not find that the lack of notes of meetings in 2019 supports an *ongoing* lack of interest and lack of support towards the claimant as the Tribunal find that Mr Uddin's practice for keeping notes had changed in 2020 and the Tribunal do not find that there is any evidence before them that the lack of notes in 2019 was because Mr Uddin had a lack of interest in the claimant. However disappointing, the Tribunal accept Mr Uddin's explanation that the handwritten notes are lost, and he did not have access to these during the grievance in 2021 due to the national restrictions on working in the office due to covid.

<u>Failing to support the claimant in as a manager herself</u>

338. The claimant's evidence is that she was notified of sexual harassment by someone in her team on 4 June 2019. She states that she told Mr Uddin on 16 July 2019 that, *"one of the biggest stressors at work was the issue with my team member and the sexual harassment claim. This was taking a long time to resolve and was a source of discomfort and unrest within the team. When asking Mr Uddin how to try and manage this, his suggestions were that my team member should work from home or go and sit on another floor on her own. I didn't think that this was particularly helpful and excluding her from the team was not going to be beneficial."*

339. The Tribunal find however that the SRA completed on 16 July 2019 which the claimant was asked to sign is silent on stating that the sexual harassment allegation was one of the claimant's biggest stressors at work. It merely states, "Behaviour and conduct of some staff in the team". The SRA was a document which was specifically in place to record what the claimant felt were stressors inside and outside work and to discuss with her manager how these stressors could be managed. The claimant does not explain in her witness statement why the SRA which she signed does not refer to this particularly as this was an obvious place to raise this. The solution to the issues with the team were listed as: -
    - *Support from Line Manager _ Mabs*
    - *Identify other sources of support- Mabs/ Joni*
    - *Arrange team Away Day- Mabs/ Joni/HEOs*
    - *Consider swapping HEO line management chain- Joni*

340. "*Under consider swapping HEO line management chain",* it is unclear to the Tribunal if this relates to the sexual allegation issue and no evidence was provided by both parties. Irrespective, the Tribunal would expect the SRA to set out specifically that the claimant was being stressed by the sexual allegation issue within her team and it does not do this. Further, the Tribunal note the claimant was responsible for swapping HEO line management chain and jointly responsible for some of the other actions. Mr Uddin's evidence is that the SRA form at pages 345 to 346 of the bundle is a complete and accurate note of their discussion. The Tribunal accept this evidence and they note that this was signed off by the claimant.

341. The claimant's evidence is that "*After this period and until the beginning of September 2019…. was causing significant ongoing stress which I continually flagged to Mr Uddin and received little assistance to manage or resolve the issues. …..On 10 September 2019 I met with Mr Uddin again to review the stress risk assessment and I again flagged the issues with the sexual harassment complaint and the additional stress this was causing. … Again, no support or help was given nor suggestion as to how this would be managed if this happened.*"

342. The SRA of 10 September 2019 does not mention the sexual allegation complaint and is identical to the SRA dated 16 July 2019 under "*Behaviour and conduct of some staff in the team."* The Tribunal would expect that by this time the sexual harassment allegation had been ongoing for some time and considering the claimant's evidence she says she was struggling to cope with the ongoing stress that the SRA would reflect this. It was not put to the Tribunal that the contents of the SRAs were not accurate and disputed by the claimant.

343. Whilst the Tribunal have seen emails from the claimant sent to her union representative on 9 and 10 September 2019 where she references how XX's complaint is being handled and that this is having a "*significant impact on my mental health and wellbeing"* and *"the*

additional stress has been taking a toll", the Tribunal find that there is no email / written communication to Mr Griffiths or Mr Uddin about the concerns that she raised with her union representative and specifically this is not recorded in the two SRA's completed by Mr Uddin on 16 July 2029 and 10 September 2019 which is where the Tribunal would expect this to be discussed and recorded.

344. The claimant has not stated what support it is that Mr Uddin should have given her. Mr Uddin's evidence was that he was involved with the sexual allegation investigation which ordinarily the claimant should have carried out as the Line Manager as he accepted that this would have been stressful for the claimant. In these circumstances, the Tribunal find it was reasonable to leave the claimant to carry out pastoral care for her team member. The Tribunal find the claimant did not ask Mr Uddin to take over the pastoral care of her team member.

345. For the reasons above, the Tribunal do not find that there was a failure to support the claimant in her own line management duties.

346. The Tribunal have not been provided with any evidence that the claimant was treated less favourably than the hypothetical comparator namely someone who is the same as the claimant in all material respects but who does not have the claimant's condition of depression. If the Tribunal were to accept Ms Grace's submission that Mr Uddin as a manager was more reactive than proactive towards the claimant, there is no evidence before the Tribunal that Mr Uddin was not the same with his other reports.

347. In any event, the Tribunal do not find evidence as a matter of fact that Mr Uddin held an attitude of ongoing lack of interest and lack of support towards the claimant and this allegation fails for the reasons given above.

b. The failure by R1 and Mr. Uddin to properly implement the March 2019 OH recommendations, namely:

<u>General observations</u>

348. The Attendance policy states that,

"12. Employers are required under the Equality Act 2010 to make reasonable adjustments to enable employees with disabilities to attend work and carry out their roles effectively."

349. It was accepted by the claimant under cross examination that the Attendance policy requires a collaborative approach between the manager and the employee and sets out, *"The manager and employee should work together and adopt a work-focused approach. They should explore what the employee can do, or might be capable of doing with help and support, to continue to work or return to work whilst they recover."* The Tribunal find that the collaboration and communication between the employee and manager is a common theme throughout the Attendance policy.

350. The Tribunal accept Mr Crawford's submission that the Attendance policy provides guidance to both the employee and manager and of relevance the wording of the policy uses the word "should" rather than "must" when setting out what course of action should take place whether that be a meeting or discussion (formal or informal). This is contrast to other parts of the policy where the word "must" is used for example where the

"manager must seek an employee's consent to a referral". The Tribunal find that the wording of the policy is therefore deliberate and seeks to set out best practice, provide guidance and flexibility to the manager and employee in certain circumstances.

351. Both parties accept that recommendations were made in the OHS report of 12 March 2019 as set out in paragraph 106 above. The Tribunal note the wording set out in this report in the Recommendations to manager / HR. On page 281, this states, *"please consider a 6 week phased return to work…."* and then states, *"The phased return to work schedule **can** consist of the following:…. Identification of a workplace mentor to be available for direct support at work."*

352. The Tribunal find that the words "consider" and "can" do not impose an obligation on the Manager to carry out the recommendations in the report but rather are suggestions of what adjustments could be considered. Accordingly, the Tribunal accept the respondent's submission that the recommendations in the OH report were not mandatory. However, the Tribunal accept that this should be read in line with the following paragraphs of the Attendance policy,

"13. In addition to adjustments that employers are legally obliged to make, it is good practice to consider all requests for adjustments…."
14. Any adjustments should be regularly reviewed to ensure they continue to be effective or to identify whether further adjustments are needed….."

353. The OHS report also sets out in the "Recommendation to the Employee" that the claimant should, "Please keep your line manager aware of your progress. Please engage with all organisational support." The Tribunal find that the OHS report suggests a collaborative approach between the Manager and the employee and relies on the employee informing the Manager of "progress". The Tribunal is satisfied this would include what is/ is not working for the employee with a view to reverting back to the recommendations and discussing these if so required. The Tribunal find that such an approach is flexible and would have to be so to work in practice and in order to provide a bespoke plan for each employee.

354. In respect of the OHS report dated 21 July 2020 (Page 512-514) as set out in paragraph 179 above, the Tribunal find that this does not impose any further / additional obligations on the Manager as the 12 March 2019 report and states that the report should be read in conjunction with the OHS report dated 12 March 2019, "as that advice also remains valid" but this also sets out that the OH adviser discussed with Ms Moore the need to keep open lines of communication and seek assistance if finding tasks difficult.

355. Ms Grace states in her submissions that the respondent has put forward a novel line of argument that the onus was upon the claimant to ensure that the adjustments were made, and she should have asked for these more frequently. The Tribunal find that the wording of the OHS policy and keeping in mind the practicalities of the situation where it is only the claimant who will know what is / is not working and whether her circumstances have changed mean that a collaborative approach needs to be taken when considering adjustments.

356. The claimant accepted that her depressive symptoms fluctuated and that at times her medication was changed. In these circumstances the Tribunal find it was reasonable for Mr Uddin to expect that the claimant needed to keep open lines of communication with him of what she required and what was / was not working and ensure that she made

herself available to have regular discussions with him. The Tribunal find that if she was having difficulty with any specific task, she should inform her manager.

357. However, in order to keep open lines of communication, the Tribunal find that the claimant needed to have been given regular opportunities to raise such issues and that the weekly meetings, regular SRA's would have been some avenues for doing so but that it was possible for the claimant to also communicate with Mr Uddin by email making written requests or asking to speak to him about certain issues.

358. As referred to in paragraphs 171 and 172 above, the Tribunal find that the claimant was able to communicate by email with Mr Uddin when seeking a number of workplace adjustments including a workstation assessment and office equipment and that each time she asked for these adjustments, Mr Uddin responded positively and without delay.

359. The claimant was also able to communicate with her union representative in detailed emails on a number of occasions 11 July 2019, 9, 10 and 11 September 2019 and 28 May 2020 about how she was feeling and what she felt that she needed, and these are referenced to in the finding of fact. The Tribunal find however that there are no corresponding emails in the bundle to Mr Uddin on or around these dates raising the same issues she raised with her union representative.

18 March 2019 meeting

360. There is a dispute between the parties as to whether Mr Uddin and the claimant discussed the workplace recommended adjustments in the OHS report dated 12 March 2019 and more widely whether this was a Return-to-Work meeting.

361. As set out in paragraphs 108,109 above, the Tribunal find that a meeting took place on the claimant's return to work on 18 March 2019. Whilst we find that there was no scheduled meeting on 18 March 2019 as we have not seen a diary invite, we have seen contemporaneous text messages that this took place on the 19th floor of the Home Office building at around 3.30 pm. Text messages at the time confirm this and that Mr Uddin stated he needed to leave at 4 p.m. Mr Uddin stated in his oral evidence that he would have stayed at the meeting for as long as needed. The claimant's witness statement does not mention this meeting, but she accepted in cross examination that this meeting took place.

362. There are no notes of this meeting in the bundle and there is no follow up email to the claimant from Mr Uddin setting out the contents of their agreement / discussion. There is a dispute between the claimant and Mr Uddin as to whether the OHS recommendations in the 12 March 2019 OHS report were discussed at this meeting. Mr Uddin states that, "*we discussed the adjustments the claimant may require in order to support her return to work including the recommendation in the OH report."*

363. The claimant says in her witness statement that, "*there was never a meeting to discuss the contents and reach an agreement on how the recommendations should be progressed. I took the initiative and sent an email to Mr Uddin proposing a phased return schedule so that I could have some structure and he agreed to this".*

364. The email to which the claimant refers is dated 28 March 2019 (at paragraphs 111) and sets out solely her suggestion for a phased return to work in terms of hours and dates and her need to collect a sickness certificate that afternoon. If there was no meeting and

she took the initiative as she says than it is unclear to the Tribunal, why the claimant would not set out her plan for each of the recommendations made in the OHS report or set out in her email that these needed to be discussed and planned for.

365. The Tribunal find that the claimant was a senior manager herself and would have been aware of the procedures that are required for an employee when returning from sickness absence leave and it would have been reasonable in her email to Mr Uddin to set out where his actions had been lacking. Further the Tribunal do not find that the claimant would have referred to Mr Uddin as supportive in her email to Mr Griffiths on 7 May 2019 (set out at paragraph 118) if no meeting had taken place when she returned to work and in contrast the Tribunal would expect the claimant to inform Mr Griffiths that she had yet to have a meeting with Mr Uddin to discuss the OHS recommendations.

366. Having considered all the evidence, and in the absence of notes, the Tribunal prefer the evidence of Mr Uddin on this point. Mr Uddin was aware that the OHS report had been obtained having made a referral for this and whilst he could not recall specific details of the meeting, his evidence is that the OHS recommendations were discussed. The Tribunal find that this would be a logical and reasonable step to take on the first meeting with the claimant and that it would be bizarre to have no discussion at all about how the claimant would start work from 18 March to 28 March 2019 (when the claimant sent her email).

367. The Tribunal also accept Mr Uddin's evidence that he would have asked the claimant to propose a plan of how a phased return would work for her and then he would review this. The Tribunal accept this reasoning as it would not have been practical for Mr Uddin to draft this himself without knowing the claimant's holiday and therapist appointments dates which would need to be taken into account. The Tribunal find that the email of 28 March 2019 from the claimant to Mr Uddin was because Mr Uddin had asked the claimant to do so.

368. Ms Grace has raised in her submissions that the Tribunal could infer from the fact the meeting took place on 19 floor and not in a formal meeting room that this was not a Return-to-work meeting and that Mr Uddin suggested that holding a meeting in the canteen was normal when it is not appropriate for discussing, publicly, someone's medical history and the adjustments they need. The Tribunal do not accept this point as providing any evidence from which they can infer Mr Uddin's attitude or whether this was not a formal meeting. The Tribunal questioned Mr Uddin on the availability of meeting rooms, and he stated that these were not always available and needed to be pre-booked. The text messages on 18 March 2019 show that the meeting was not scheduled beforehand. The "canteen" on the 19th floor was described as a large area with separate booths and would not have been busy at 3.30 pm outside of lunch time. Further the Tribunal note several references in the bundle to meeting taking place on 19th floor, including Mr Griffiths arranging to meet the claimant there.

i. Identification of a work place mentor to be available for direct support at work (recommended on 12 March 2019 and 21 July 2020 and has never been implemented);

369. It is not in dispute between the parties that a work mentor has never been identified and therefore there had not been a mentor in place to provide direct support to the claimant at work. It is also accepted that a recommendation to the Manager included, *"Identification of a work place mentor to be available for direct support at work"* in the

OHS report of 12 March 2019 and that the 21 July 2020 states that the reports should be read in conjunction with the 12 March 2019 report (as set out at paragraphs 106 and 179 above).

370. Mr Uddin states that he requested the claimant to let him know whom she would like as a mentor as she needed to feel comfortable with the person. Mr Uddin accepted that his statement was not worded correctly which stated the claimant never came back to him with a preference for a mentor as during cross examination he accepted that the claimant did ask for Heather Drysdale in 2020 but that when he asked Ms Drysdale, she could not assist due to pandemic. This is also set out in paragraph 28 of Mr Uddin's witness statement. The Tribunal find that this must relate to a discussion in 2020 as Mr Uddin refers to the pandemic.

371. Mr Uddin accepted that he did not go back to Heather Drysdale on 27 August 2020 when a mentor was discussed with the claimant at the formal attendance meeting. Mr Uddin disagreed that that the claimant raised that she required a mentor to help her with her stress before their meeting on 27 August 2020. He accepted that he discussed with the claimant on 9 October 2020 the need for a work buddy or additional support during the SRA. He accepts this because otherwise he would not have noted this. He noted that this was a joint action for the claimant and Mr Uddin to take forward. He recalls sending her some information on the mentoring scheme, but no further details were provided to the Tribunal.

372. Mr Smith stated in his report dated,

"There appears to have been confusion over the nature of the support that a mentor would provide during the phased return, who might be a suitable mentor and the extent to which Mabs considered that he had delegated to you the responsibility of finding someone suitable. This recommendation was not implemented. There was no acceptable reason for that management failure.
If I am wrong that the recommendation to provide a mentor did not extend beyond the period of the phased return I note that the adjustment has still not been made, though seemingly without adverse impact in terms of sickness absence…..
I uphold your grievance in respect of the management failure to implement this recommendation promptly, or at all. As the adjustment was related to your disability the failure to implement it would be capable of amounting to disability discrimination if the lack of a mentor placed you at a substantial disadvantage."

373. The Tribunal do not accept the view of Mr Smith or Mr Uddin that a work placement mentor was only to be considered for the six-week period or for the period of phased return to work. The Tribunal find that even if this was the case, it is clear that this was being discussed with the claimant in 2020 by Mr Uddin so therefore this was not Mr Uddin's belief at the time.

374. The Tribunal find that there is no contemporaneous documentation in which the claimant has referred to requiring a mentor/ buddy to Mr Uddin or Mr Griffiths until the discussion with the claimant on 27 August 2020 with Mr Uddin when she stated, *"The only outstanding point was regarding the work buddy which would be helpful. She commented that she would not have been sick due to stress had all OHS recommendations been implemented."* The Tribunal find that the SRA's dated 16 July 2019 and 10 September 2019 refer to, "*Identify other sources of support"* but these do not use the term work mentor or buddy. Further the Tribunal find that this was an action that the claimant and

Mr Uddin held jointly, which means that the onus to identify the source of support did not lie with Mr Uddin alone.

375. The Tribunal find that there was no request for a work buddy / mentor in the emails the claimant sent to Mr Uddin seeking other workplace adjustments, (workstation, chair, monitor, etc) and she never responded as such to Mr Uddin's email dated 13 June 2019 (at paragraph 123) or 30 April 2020 (at paragraph 172) when he asked the claimant to let him know if there are any other reasonable adjustments that need to be made.

376. Further the numerous emails from the claimant to her union representative do not refer to the lack of implementation of a mentor as an issue. The email dated 4 June 2019 identifies that a workplace mentor has not been implemented but says nothing further and the other emails dated 11 July 2019, 9, 10 and 11 September 2019 and 28 May 2020 do not mention a workplace buddy / mentor specifically or that the claimant considers a mentor is required. The claimant's email to her union representative dated 27 August 2020 only accepts that a mentor had been discussed and that she would find it helpful (paragraph 181 above).

377. The Tribunal find that after the OHS March 2019 report there was an initial discussion about all the OHS recommendations including the workplace mentor and Mr Uddin requested that the claimant revert back to him if she wished to progress this and identify whom she would like as a mentor. The Tribunal find that there was then a continuing dialogue between the claimant and Mr Uddin of the reasonable adjustments that the claimant required at the SRA's. The Tribunal find there was some discussion 2020 about the name of a mentor but Ms Drysdale could not take this role on. The Tribunal find that it was reasonable for the identification of a mentor to be a shared one between Mr Uddin and the claimant and for Mr Uddin to expect the claimant to suggest suitable mentors and keep open lines of communication on this issue. The Tribunal find that the claimant did not raise this with Mr Uddin until 27 August 2020.

378. The Tribunal find that the claimant was capable of asking for reasonable adjustments by email and did so by email dated 30 March 2020, 30 April 2020, 16 June 2020 and 27 August 2020 (as referenced in paragraph 171). The Tribunal find that the claimant was capable and comfortable articulating personal and difficult issues by email and making requests by email as she did so in her email to Mr Uddin on 18 August 2020 (as set out at paragraph 184) when seeking special leave.

379. Further the email from Mr Uddin to the claimant on 30 April 2020 (at paragraph 172) following their catch up that week also does not refer to a buddy / mentor when discussing equipment adjustments and how she was working and in the context of reasonable adjustments he also stated, "*.I asked you to let me know if there was anything more I could do".*

380. The Tribunal accept that from 27 August 2020 the position changed as the claimant stated to Mr Uddin that she felt a mentor would assist her. This in conjunction with the fact that this was one of the original reasonable adjustments set out in the March 2019 OHS report, means that Mr Uddin at that stage should have considered with the claimant how this could be progressed. The fact that this was raised again in the SRA dated 9 October 2020 provides credence to the fact that the claimant had at this stage identified that this was a reasonable adjustment that she considered would help her. The Tribunal find that this would have been a shared action as the Tribunal accept Mr Uddin's assertion that the claimant would have to feel comfortable with the mentor identified.

381. The Tribunal have seen no documentation in the bundle that the claimant has contacted Mr Uddin identifying further alternatives to Heather Drysdale. There is no evidence of what further action Mr Uddin, or the claimant took. However in the subsequent SRA's on 27 January 2021 and 26 May 2021, there is no mention that a mentor is discussed, or the claimant needs this to manage her stressors, although there is a heading "*Support other than Line Manager"* and the list states,

    "If required:
    Contact DD Mark Griffiths.
    Contact EAP for support/advice.
    Mental health first aiders available
    including IE Wellbeing lead Jack Summers
    Refer to wellbeing and staff support
    information on Horizon.
    LM available to discuss any issues."

382. It is unclear to the Tribunal whether Mr Uddin and the claimant agreed that the list above was sufficient in place of a mentor to help manage the claimant's stressors as no evidence has been provided to the Tribunal by either party.

383. The Tribunal note that the SRA on 27 January 2021 was after the claimant submitted her grievance on 4 January 2021. The claimant's grievance (pages 892-899) does not make any specific reference or allegation that the identification of a mentor is outstanding and needs to be considered. The grievance refers by way of background to the lack of implementation of the OHS recommendation in the 12 March 2019 report from 15 March 2019 to October 2019 which she alleges led to a deterioration in her health and the need for sick leave in October 2019. The thrust of the grievance relates to the advertisement of her role on 19 October 2020 without discussion with her beforehand. However, in the requested resolution section on page 899 these states, "*Full implementation of all adjustments recommended by OHS without delay"* but this does not specify what these are and they are not referenced elsewhere in the grievance. The Tribunal note that by May 2021 the last OHS report was 10 Months old.

384. Based on the information before us, the Tribunal find that after the claimant identified she would like assistance of a mentor/ buddy on 27 August 2020, there were further discussions with her on this issue at the SRA's dated 9 October 2020, 27 January 2021 and 26 May 2021. The Tribunal find that the claimant signed off these forms and had agreed with Mr Uddin that the support she required was a set out in the SRA's and this did not include a work mentor/ buddy. The Tribunal find that the claimant's grievance dated 4 January 2021 provides further evidence to support their view.

385. The Tribunal note that the outcome of Mr Smith's report dated 24 May 2022 stated,
    "If I am wrong that the recommendation to provide a mentor did not extend beyond the period of the phased return, I note that the adjustment has still not been made, though seemingly without adverse impact in terms of sickness absence. If you consider that this adjustment is still necessary, you should engage in a discussion with your managers about the nature and duration of the mentor support required and work with them on identifying a suitable and willing mentor".
    .
386. The Tribunal find that as a matter of fact by 24 May 2022 the respondent had still not identified a workplace mentor. They do not dispute this. The Tribunal have no evidence

before them beyond May 2022 and what has occurred since this date and the Tribunal find that as of 24 May 2022, Mr Smith put the onus back on the claimant to confirm that she required a mentor. The Tribunal has not been provided with any documentation to confirm that the claimant has done so and had set out that this was a pressing issue.

387. In summary, The Tribunal have seen no evidence that the respondent has refused to make a reasonable adjustment of a mentor. The Tribunal find that prior to 27 August 2020, Mr Uddin and the claimant had discussed the requirement of a mentor and Mr Uddin had asked the claimant to identify someone she would feel comfortable with. There was an ongoing dialogue through SRAs and the claimant agreed the support structure that should be in place. This did not include a work mentor/ buddy. the claimant suggested Ms Drysdale in 2020 but she could not take this role on. Once the claimant stated that this would be helpful on 27 August 2020, further discussions took place with her on 9 October 2020, 27 January 2021 and 26 May 2021 and an agreed support structure was put in place by the respondent with the agreement of the claimant and this did not include a work mentor/ buddy.

388. The Tribunal have not seen any evidence that we could infer or find that Mr Uddin would have treated a hypothetical comparator differently and no evidence was put to the Tribunal that this would not have been a shared action with the respondent and hypothetical comparator also. The Tribunal also find the respondent would have had the same practical difficulties in putting in place a mentor for a hypothetical comparator due to the covid pandemic which commenced in March 2020, the work generated as a result and the requirement for remote working.

ii. Regular management meetings (recommended on 12 March 2019 and 21 July 2020 implemented in March 2020)

389. In respect of regular management meetings between the claimant and Mr Uddin, from the texts and emails in the bundle the Tribunal have set out above in their finding of fact the dates that meetings were offered and took place (as set out from paragraphs 107-167).

<u>2019</u>

390. In summary, the Tribunal find that in March 2019, there was a return-to-work meeting on 18 March 2019 and there was then a delay in meeting as the claimant was unwell / busy with another meeting, but the claimant and Mr Uddin spoke the following week on 28 March 2019.

391. The Tribunal find in April 2019, due a combination of the claimant being on leave and unwell having hit her head and Mr Uddin being away on sick leave these cannot practically take place. In May 2019 whilst Mr Uddin is away on sick leave Mr Griffiths promptly takes over line managing the claimant and offers to meet her but due to a combination of the claimant being unwell and Mr Griffiths being on leave, a meeting does not take place until 4 June 2019. The Tribunal note that the claimant was offered an alternative person to speak to in Mr Griffith's absence which the claimant did not follow up on.

392. When Mr Uddin returned to the office in June 2019 on a phased return, the Tribunal find that meetings took place and were offered to the claimant, but she could not attend on certain weeks due to leave and ill health.

393. Except for weeks commencing 29 July 2019 and 5 August 2019 when it is unclear whether a meeting took place or was offered to the claimant by Mr Uddin, weekly discussions appear to have taken place in July 2019 and were offered to the claimant in August. The claimant was not well enough to attend meetings for the latter part of August 2019 and the Tribunal find that reasonable attempts were made by Mr Uddin to arrange these.

394. In September 2019 weekly meetings took place for the first few weeks but thereafter were cancelled / cannot take place due to the claimant's illness and annual leave. The claimant was on sick leave from 7 October 2019 until 12 January 2020. A return-to-work meeting took place between the claimant and Mr Uddin on 13 January 2020.

2020

395. For the period 13 January 2020 to March 2020, allegation 5(d) sets out that the claimant did not have a laptop during this period and the Tribunal set out the chronology below and do not repeat that here. In summary, the Tribunal find that Mr Uddin made reasonable and repeated attempts to speak / meet with the claimant during this period but that due to a combination of the claimant's ill health and lack of attendance in the office during January, February, and March 2020 due to personal reasons, meetings could not practicably take place. The Tribunal also find that the claimant failed to engage with Mr Uddin during this period and avoided meeting him as she failed to meet him on 9 February 2020 when she attended the office. It is accepted by the claimant that she had regular management and weekly meetings from March 2020.

396. From the Tribunal's analysis above from paragraphs 158-167, it finds that weekly reviews of progress / management meetings took place or were offered as often as they practically could, and the respondent took reasonable steps to try to institute and arrange for such meetings to take place. The Tribunal accept Mr Uddin's evidence that it was not practical in the situation to offer the claimant recurring weekly meetings at set times as the claimant required flexibility for her appointments, and this would not have worked particularly whilst she was undergoing a phased return to work. The Tribunal are satisfied that Mr Uddin or in his stead Mr Griffiths made reasonable attempts each week to speak and where possible to meet with the claimant and they accept Mr Uddin's evidence that this was simply not possible in some weeks due to a combination of factors. The Tribunal have set out above at paragraphs 158-167 their findings of the factors that precluded meetings taking place.

397. Further the Tribunal find that the factors that precluded meetings from taking place were not possible to predict as meetings were often cancelled at the very last minute by the claimant and / or she took leave that was not planned and / or she changed when she was coming into the office and when she was working from home which would have made it even more difficult for Mr Uddin to ensure that weekly meetings took place. This is further evidenced by repeated emails in July 2019 from Mr Uddin to the claimant requesting her to confirm her movements in the previous weeks as her plans had changed, and he had found it difficult to monitor. The Tribunal accept Mr Uddin's evidence that it was the line manager's responsibility to ensure that meetings took place but find that whether meetings take place requires a commitment from both parties.

398. The Tribunal do not have notes of the meetings between the claimant and Mr Uddin and both in oral evidence the claimant and Mr Uddin could not always recall whether the

meetings referred to above took place. The Tribunal note however that such meetings were offered to the claimant. The claimant was aware of the contents of the OHS report dated 12 March 2019 in which it was recommended that she engage with organisational support. The Tribunal accept the respondent's submission that she would have been the best person to assess whether she needed more line manager support and could have requested meetings at any time if for any reason meetings that were arranged did not take place. Ms Grace referred the Tribunal to two emails dated 5 June 2019 and 5 July 2020 in which she requested such meetings. The Tribunal find this provides evidence that the claimant felt comfortable to do so.

399. The Tribunal therefore find as a matter of fact that regular meetings did not take place between the claimant and Mr Uddin until March 2020 but for the reasons set out above, the respondent offered weekly and regular meetings to the claimant, and these took place as far as practicably possible, and the respondent acted reasonably in all the circumstances to make this reasonable adjustment. Based on the Tribunal's factual findings, set out above, this claim fails.

iii. Attendance management discretion/flexibility – trigger point adjustment (recommended on 12 March 2019 and 21 July 2020 and has never been implemented)

400. The OHS recommendations to the manager in the 12 March 2019 OHS report included, *"Attendance management discretion/flexibility – trigger point adjustment".*

401. The OHS report dated 21 July 2020 stated, *"I am hopeful that with support Ms Moore will continue to render reliable service and attendance into the future, but managers should consider when discussing absence triggers that due to the nature of her concerns she is likely to have higher absence levels than her unaffected peers.*
Clinicians prefer not to comment on absence-management or trigger thresholds, specifically as the Courts and Employment Tribunals have indicated that it is a management decision and not a medical decision about whether or not an adjustment or restriction is acceptable from an organisational perspective…"

402. The Tribunal accept Mr Uddin's evidence that the claimant's previous line manager (Ms Ford) had adjusted her sickness entitlement to the highest trigger points available at the respondent firm and that he did consider the trigger point levels but elected not to adjust them. Mr Uddin accepted in cross examination that he had not checked with HR whether the trigger point could be increased further. The Tribunal find that in all the circumstances it was reasonable for him not to revert to HR if he had no intention of further increasing the trigger point limits.

403. Mr Uddin's evidence was that he was aware that the claimant's trigger point was already very high and set at four times the default Consideration Trigger Point for Home Office staff at 24 working days or 12 spells of sickness absences. The Attendance policy states at paragraph 52 that the default Consideration Trigger point is 6 working days or 3 spells of sickness absence. Mr Smith in his report dated 22 May 2022 concluded, *"While the absence management guidance does not stipulate a maximum uplift to triggers, I agree with Mabs' assessment that a four-fold increase was both generous and sufficient."*

404. The Tribunal find it was reasonable for Mr Uddin to use his discretion to consider that the trigger points in placed were sufficient in all the circumstances.

405. Mr Uddin stated that the claimant was absent for 126 days between 4 October 2018 and 22 August 2019 (10.5 months). She therefore exceeded the 24 days by a considerable degree. The Tribunal find that any reasonable adjustment made by Mr Uddin to the trigger points would have still resulted in her triggering the trigger points due to the large number of days she was absent.

406. Further the Tribunal find that the Attendance policy sets out at Paragraph 54 that if the sickness absence levels exceed the Consideration Triger Point that the manager should arrange a formal meeting to discuss attendance with the employees when she returns to work. It follows that there is not an automatic sanction to the employee but that this would lead to a discussion about the employee's attendance and how this could be improved.

407. Based on the Tribunal's factual findings, set out above, this claim fails.

iv. Weekly review of progress (recommended on 12 March 2019 and 21 July 2020 and implemented in March 2020)

408. We refer to the Tribunal's comments under allegation 5 (b) (ii) which apply to this allegation. Based on the Tribunal's factual findings, set out above, this claim fails.

v. Management discretion when considering ways to address the recent long-term absence (recommended on 12 March 2019 and 21 July 2020 and has never been implemented)

409. The OHS recommendations to the manager in the 12 March 2019 OHS report were: - *"Management discretion when considering ways to address the recent long term absence."*
410. As set out above, Mr Uddin stated that the claimant was absent for 126 days between 4 October 2018 and 22 August 2019 (10.5 months) and after discussion with HR, he told the claimant on 11 September 2019 he would be inviting her to a Formal Attendance Meeting. This meeting did not take place due to the claimant being unwell and she was then away for a further period of sickness until 12 January 2020. Mr Uddin advised the claimant on 29 November 2019 (paragraph 147 above) and at the claimant's return to work meeting on 13 January 2020 (paragraph 156 above) advising her that he would be arranging a formal attendance review meeting.

411. The claimant did not start working until 24 March 2020 as her laptop was not fixed. The claimant was then on a phased return, and it was agreed that she would resume her full-time hours from week commencing 18 May 2020.

412. Mr Uddin sent the claimant an email on 22 May 2020 enclosing a letter for a formal attendance meeting on Friday 5 June (paragraph 176 above). This was rearranged as the claimant's union representative could not attend. The claimant then delayed providing Mr Uddin with convenient dates to re book the meeting and explained she was having internet issues, asthma, and ear issues. In the interim the claimant agreed an OHS referral would be useful, and Mr Uddin arranged this. This took place on 21 July 2020. The claimant then had a difficult time with her mum. Mr Uddin emailed the claimant on 18 August confirming he had arranged a formal attendance meeting to take place on 27 August 2020 as she had exceeded the Consideration Trigger Point of 24 days (paragraph 180 above).

413. The relevant background above is important to set out as the claimant criticises Mr Uddin for arranging a formal attendance meeting when she had a period of good attendance. The Tribunal find that Mr Uddin instituted the formal attendance meeting based on the claimant's attendance in September 2019 and for the reasons given above this did not take place until 27 August 2020. Mr Uddin kept the claimant informed that it was his intention to hold a formal attendance meeting and he arranged this promptly once the claimant had completed her phased return to work and then rearranged this to after her OHS referral had taken place.

414. The Tribunal find that at the time Mr Uddin initially instituted the Formal attendance hearing the claimant's absence was very high of 231 days between 4 October 2018 and 12 January 2020 on 7 occasions. The Tribunal note that Mr Uddin was using the date of 4 October 2018 as this was the original date from which he instituted the meeting in the first place. After taking HR advice and hearing representations from the claimant he reduced this to 12 month rolling period. The Tribunal find that it was reasonable based on the chronology and the level of the claimant's absence for Mr Uddin to hold a formal attendance meeting despite the claimant's recent improved attendance.

415. When applying his discretion to originally institute a formal attendance meeting on 11 September 2019, the Tribunal have considered what Mr Uddin would have known about the claimant's attendance from his text messages and emails with the claimant. Based on the findings of fact at paragraphs 107-140, the Tribunal find that Mr Uddin would have known that since the claimant's return to work in March 2019, she had suffered from ongoing issues resulting from post-concussion syndrome which commenced after her holiday on 1- 15 April 2019, a muscle spam in her neck and trapped nerve due to whiplash in May 2019, had head issues and eye problems in July 2019, an emergency with her mum on 1 August 2019, a cough and headache in August 2019 and these were issues not related to her disability and had affected her attendance at work either resulting in sick leave, retrospective annual leave and / or swapping her days of work.

416. When applying his discretion to proceed with a formal attendance meeting and send the invite on 11 August 2020, from paragraphs 158-167, the Tribunal find that Mr Uddin would have known that following the claimant's return from sickness absence leave on 13 January 2020, that she had personal issues such that she had to care for her husband after his surgery and when he was unwell in February 2020, she needed to look after her niece and nephew, she hurt her foot/ ankle in March 2020, for which she took special leave, retrospective leave, to cover her time away from the office for issues that were not related to her disability.

417. The Tribunal find that in all the circumstances including the claimant's history, the level of the claimant's sickness and Mr Uddin's knowledge that the claimant had taken time off and was absent from work for issues other than her disability, Mr Uddin used his discretion reasonably to institute a formal attendance meeting initially in September 2019 and to continue with this in August 2020. Further the purpose of the meeting was to discuss the claimant's attendance with her and would not automatically lead to a sanction as set out in his letter dated 25 August 2020 (paragraph 180 above) .

418. The claimant has also argued under this allegation that Mr Uddin should have used his discretion to backdate her formal absence warning. The Tribunal have considered the evidence before us and accept the findings in Mr Smith's report where he states in his report that,

"During our meeting your union representative accepted that there is no statement of policy or principle relevant to your circumstances on when a warning must be backdated. She accepted, on your behalf, that a decision to backdate is a matter of discretion for the manager issuing the warning.
I accept that, following a period of largely uninterrupted service after the Oct '19 absence, you found it disappointing that Mabs and James decided against backdating your warning. I am unable to identify any basis on which they can be said to have exercised their discretion unreasonably.
In reaching that decision they may well have felt that it was appropriate to mark the need for you to provide more regular and effective service over the following twelve months, rather than for the shorter period that would have applied had they backdated the warning. Had that been their motivation then, taking account extended absences over a number of years, I do not consider that it would have been an unreasonable or improper motivation."

419. After the formal attendance meeting on 27 August 2020 and before Mr Uddin gave the claimant a formal attendance warning on 28 September 2020, the claimant wrote to Mr Uddin on 17 September 2020 as set out at paragraph 185 stating that she "has *been rather frantic with worry, barely sleeping and very anti-social and upset."*

420. This email and his previous knowledge of the claimant's attendance would have been in Mr Uddin's mind at the time he made the decision to issue the formal attendance warning and whether or not he should apply discretion when considering ways to address the claimant's recent long-term absence including backdating the warning. The Tribunal find that it was reasonable in all the circumstances for Mr Uddin to conclude not to do so.

421. The Tribunal have not been provided with any evidence that the claimant was treated less favourably than the hypothetical comparator namely someone who is the same as the claimant in all material respects but who does not have the claimant's condition of depression. Based on the Tribunal's factual findings, set out above, this claim fails.

vi. Stress management – to identify stressors and the ways in which they can be addressed (recommended on 12 March 2019 and 21 July 2020 and partially implemented on 18 July 2019, 10 September 2019, and 16 January 2020 by way of stress risk assessments ("SRAs") but no ongoing stress management has been implemented)

422. The OHS recommendations to the manager in the 12 March 2019 OHS report were: -
"Stress management – to identify stressors and ways in which they can be addressed."

423. Ms Grace cross examined Mr Uddin that an SRA was not sufficient to identify the claimant's stressors and the ways they can be addressed. The Tribunal accept Mr Uddin's evidence that he believed the SRA adequately complied with the recommendation in the OHS report as the claimant had every opportunity during the discussion to raise issues that she considered were stressors inside and outside work and the SRA form was used to record any issues that she raised, what action should be taken, by whom and by which date.

424. The Tribunal refer to their findings at paragraphs 220,221 above. The Tribunal find that the SRA form was in a format to prompt Mr Uddin and the claimant to discuss the stressors that were affecting the claimant and the key issues relating to this. Mr Uddin and the claimant both had an opportunity to populate the form with their views under

these headings. Mr Uddin sent the SRA forms for the claimant to review and sign if she considered they were complete and an accurate recording of their discussion. The Tribunal find that if for any reason the discussion between Mr Uddin and the claimant omitted an issue, the claimant could have raised this with Mr Uddin and amended the SRA form before signing this.

425. For the reasons given above, the Tribunal find that the respondent put in place the SRA as a reasonable adjustment to comply with the recommendation in the OHS report and in all the circumstances took reasonable steps to identify stressors and ways in which they can be addressed.

Timing of SRA's

426. The claimant concedes that this recommendation has been partially implemented as SRA's took place on 18 July 2019, 10 September 2019, and 16 January 2020 but that no ongoing stress management has been implemented. Further Ms Grace raised issue with the timings of the SRA's, namely the initial delay in completing the first SRA and the timing of the SRA's there after.

427. The Tribunal find as set out in paragraph 219 above that SRA's were completed on 16 July 2019, 10 September 2019, 16 January 2020, 9 October 2020, 27 January 2021 and 26 May 2021 and the forms are in the bundle.

428. The timing of the first SRA was on 16 July 2019, 4 months after the claimant had started work on March 2019. The Tribunal accept that there was a delay by Mr Uddin in carrying the SRA out. However, based on the finding of fact at paragraphs 107-128 above), the Tribunal find that the first SRA on 16 July 2019 was carried out as soon as reasonably practicable and within a reasonable period when the claimant returned to work and the delay was due to the combination of the fact that the claimant and Mr Uddin were unwell and both on phased return to work for various periods until this date.

429. The Tribunal find from paragraphs 129-134 above that the next SRA took place 2 months later (10 September 2019) despite that the Tribunal have seen that this a room was booked for the SRA to be reviewed on 1 August 2019. The Tribunal note from the texts and emails that the claimant had an emergency on 31 July 2019 with her mother and so she was not in the office on 1 August 2019. She forgot to take her pills on 15 August 2019 and Mr Uddin asked to catch up with her on 16 August 2019, it is not clear if this meeting took place. the claimant was then unwell with a headache and cold and she was due to attend the office on 28 August 2019 but there was a "kerfuffle in chemist with prescription" and "she couldn't find her laptop". She appears to have attended the office on the afternoon of 30 August 2019. On 2 September Mr Uddin told the claimant that he would like to review the actions from the OHS referral and carry out an SRA. The Tribunal find based on this chronology that the SRA on 10 September 2019 was held as soon as reasonably practicable after the SRA on 16 July 2019 and that the delay was because the claimant had an emergency on the date the original SRA was planned on 1 August 2019 and then because of the claimant's illness and inability to come into the office after that.

430. The next SRA took place on 13 January 2020. The Tribunal note that the claimant was away on sick leave from 7 October 2019 to 13 January 2020 and have set out above that their view above that it was not reasonably practicable for Mr Uddin to arrange an SRA

during this period as the claimant was not actively communicating with Mr Uddin and not responding to a number of his texts / phone calls during this time.

431. The next SRA is on 9 October 2020. The claimant returned to work only after her laptop was fixed on 24 March 2020 and did not actively start work until this date. This was at the time that the country was in lockdown. The Tribunal have been given no explanation for the delay by Mr Uddin in his witness statement, save for that he scheduled the SRA reviews to take place very three months to make sure they were fit for purpose. The claimant completed her phased return to work on 18 May 2020. The Tribunal note that the claimant was referred by Mr Uddin for an OHS report dated 21 July 2020 and the OT would have discussed her stressors with her and recorded this in the report. The Tribunal find that in all the circumstances this was sufficient record for Mr Uddin to rely on and was carried out 4 months after the last SRA. The initial OHS appointment on 6 July 2020 did not go ahead as it is recorded the heath adviser could not contact the claimant. the claimant explained no one had contacted her at the time agreed. This accounts for the delay in the OHS being carried out.

432. The next SRA was on 27 January 2021, 3 months after the previous one. The final SRA that the Tribunal have was completed on 26 May 2021, 4 months after the previous one.

433. The Tribunal find that there was effectively a review of the claimant's stressors every three months from when she returned to work following her first absence in March 2019 until 26 May 2021. The Tribunal note the next SRA was due to take place on 26 August 2021, but no explanation has been given to the Tribunal by the respondent as to why there are no further SRA's after May 2021. The claimant has also provided no evidence of when this should have taken place and the dates these have been omitted save that the allegation is ongoing.

434. The Tribunal have no information as to whether there was a discussion between Mr Uddin and the claimant to confirm that the SRA's should continue indefinitely or within a timeline following the OHS dated 21 July 2020 and whether these are needed if the claimant's attendance at work and ability to manage her depression has changed. The Tribunal note that the SRA on 27 January 2021, records in the additional comments section, *"We agreed to a review in 3 weeks in the meantime our weekly meetings would continue, and any concerns/issues would be discussed then or, if required, at ad hoc meeting."* and the SRA dated 26 May 2021 states*, "We agreed to a review in 4 weeks. I will arrange and also weekly catch-up meetings."*

435. The Tribunal have not been provided with any evidence that the claimant was treated less favourably than the hypothetical comparator namely someone who is the same as the claimant in all material respects but who does not have the claimant's condition of depression.

436. The Tribunal find that regular SRA's were in place from the date of the 12 March 2019 OH report until May 2021 and that any delays in these taking place was reasonable in all the circumstances. In the absence of the claimant providing clear allegations about the respondent's failure in carrying out SRA's after May 2021, this claim fails.

vii. Phased return – no discussion of how tasks and responsibilities would be reduced and the Claimant instigated her reduction in hours (March 2019 and January 2020)

2019

437. As set out and for the reasons given above the Tribunal find that a Return-to-work meeting took place on 18 March 2019. The Tribunal prefer the evidence of Mr Uddin that he asked the claimant to set out her proposals of how her phased return would work and that it was reasonable for him to do so. If the claimant felt that she could not cover certain tasks and responsibilities, then the Tribunal find that she would have raised this with Mr Uddin also.

438. Based on the findings of fact above set out at paragraph 110-112 above the next time the claimant and Mr Uddin met was on 28 March 2019 following which the claimant set out in her email of 28 March 2019 her proposals for her phased return ending on the week commencing 13 May 2019. Mr Uddin responded that he agreed the plan the day after the claimant proposed this.

439. The claimant set out by email dated 2 May 2019 that she would like to extend her phased return and Mr Uddin agreed to meet her to discuss this on 7 May 2019 but unfortunately, he was admitted to hospital. In his absence the claimant emailed Mr Griffiths on 7 May 2019 but due to the claimant's illness (sickness and nausea) they do not meet until 4 June 2019. The phased return was extended and on 15 July 2019 the claimant asked Mr Uddin to extend this as*, "This gives us opportunity to complete the stress risk assessment and other actions."*

440. The Tribunal find that the claimant also had an opportunity to revisit tasks and responsibilities, on 16 July 2019 during the SRA to discuss her responsibilities as she remained on a phased return during this period.

441. The Tribunal find that a phased return was put in place by Mr Uddin as soon as he could after the claimant provided him with her proposals and that attempts were made by management to meet the claimant when she proposed amendments to her phased returns but that these meetings did not take place promptly due to a combination of factors, including the claimant being unwell. However, the adjustments as requested by the claimant were then made by the respondent.

2020

442. In January 2020, the Tribunal find that Mr Uddin met with the claimant on 13 January 2020 and sent her an email (page 403/404 of the bundle) and at paragraph 156 above. This confirms that a phased return to work was discussed and the agreement between the claimant and Mr Uddin at their meeting. The notes also states that Mr Uddin would review attendance during their weekly meeting and confirmed that his expectation was that the claimant attendance will increase every week and be at full capacity at the end of the agreed phased return period. The claimant agreed to see her GP when her Fit Note expires and Mr Uddin agreed to review the phased return. The note sets out that the claimant will not have any line management responsibilities from January 2020.

443. The claimant did not get access to her laptop until 24 March 2020 and emailed Mr Uddin on 25 March 2019 asking to commence her phased return then. Mr Uddin agreed this by email following their discussion on 26 March 2019. On 20 April 2020 the claimant emailed Mr Uddin asking to extend her phased return for 2 weeks and this was discussed at a meeting on 23 April 2019 (rescheduled by the claimant from 22 April 2019). Following a discussion, by email dated 30 April 2019, Mr Uddin agreed to extend the phased return,

expecting the claimant to be at full capacity in the week commencing on 18 May 2020. Further to a meeting on 14 May 2019, the claimant's phased return ended on 14 May 2020, and it was agreed that she would resume her full-time hours from week commencing 18 May 2020.

444. The Tribunal find from paragraphs 156,168-170 above that the claimant's phased to return to work was discussed promptly on her return on 13 January 2020 and that when adjustments were required and requested by the claimant Mr Uddin offered and arranged to meet with the claimant promptly to discuss this and followed up a note of the discussion by email. Mr Uddin accommodated the claimant's requests for any adjustments. The agreement between the claimant and Mr Uddin records discussions around work responsibilities and notes that the claimant would no longer have line management responsibilities. The claimant's responsibilities were also reviewed and discussed at the SRA's that took place and the Tribunal found that one was carried out on 16 January 2020.

445. Based on the Tribunal's factual findings, set out above, this claim fails.

c. The comments made by Mr. Uddin to the effect that the Claimant should be looking for a new job (made on 10 September 2019 and on or around September 2020)

<u>10 September 2019</u>

446. The claimant witness statement states that the meeting on 10 September 2019, "*Mr Uddin told me that I should look for another job if I could not handle the stress…..Following this meeting I flagged the issues with my union rep again as I was astounded that this was the response to me expressing concerns and the extreme stress that I was under. This email can be seen on page 365 and 366 of the bundle."*

447. The emails to which the claimant refers are dated 10 and 11 September 2019 to her trade union representative are at paragraphs 138,139 above.

448. The Tribunal do not find that these emails support that Mr Uddin told the claimant to look for another job if she could not handle the stress. Firstly, they do not specifically state this which the Tribunal find the claimant would set out in plain words had this happened. Secondly the shock to which the claimant refers in her email of 11 September 2019 reads plainly to the Tribunal as if her shock relates to the handling of XX's sexual harassment allegation.

449. The claimant had a Stress Risk Assessment on 10 September 2019, and it is not disputed that a meeting took place between the claimant and Mr Uddin that day. Mr Uddin in his witness statement stated that in the context of the claimant querying whether she should look for a new role, Mr Uddin offered to assist her with exploring new opportunities. In cross examination, Mr Uddin could not recall the discussion, but he was clear in his evidence that he would not have told the claimant to find another role because he would never say this to anyone.

450. The claimant stated in her grievance on 4 January 2021,
"On 10 September 2019, at a point where many adjustments were still outstanding, and I was under the continued stress of the mishandling of my subordinate's grievance, my line manager suggested that if things were too much for me to handle that maybe it would be easier if I just looked for another role. This was outrageous. I had a medical report

explaining the adjustments needed to my role, but they had not been implemented. To suggest that it was for me to go and find another role, rather than being able to rely on those reasonable adjustments being made, was completely unreasonable, and belied a total lack of patience and acceptance of the need to make reasonable adjustments for my disability on the part of my line manager."

451. The Tribunal find that is a dispute of fact of what was said at the meeting on 10 September 2019. The Tribunal find there was some discussion between Mr Uddin and the claimant regarding other work / roles available on 10 September 2019 and the Tribunal accept that this is something that Mr Uddin offered to assist the claimant with. The Tribunal find that if Mr Uddin had told the claimant to find another job if she couldn't' handle the stress as she says that this would have been set out in her email to the union representative and she would have specifically referred to this as the claimant herself has described this as outrageous. Further when asked to clarify how she reacted when Mr Uddin said this to her, the claimant was not able to provide a convincing explanation to the Tribunal. The Tribunal do not find that Mr Uddin told the claimant words to the effect that she should look for another job.

452. Based on the Tribunal's factual findings, set out above, this claim fails.

<u>September 2020</u>

453. Putting aside the respondent's closing submissions that the claimant did not mention the 2020 incident in her witness statement, and that the note of the meeting at page 577 was not exhibited to the claimant's witness statement at this stage.

454. The Particulars of Claim refer to this allegation at 19 (c) as Mr Uddin made comments to the claimant to the effect that the claimant should be looking for a new job "on or around September 2020". The Tribunal accept that the claimant's witness statement does not refer to any conversation with Mr Uddin in September 2020 telling her to find another job. What the claimant's statement does say is that on 8 October 2020,

"During a catch-up meeting Mr Uddin said again that I should consider applying for expressions of interests and other roles".

455. The claimant states this related to her discussion with Mr Uddin about what work she should be doing as she stated she had nothing to do. The Tribunal find of significance that the claimant's evidence is not that Mr Uddin told her to get another job if she could not handle the stress but that she should consider applying for other roles, which is not the same thing particularly as the claimant had not put Mr Uddin's words in any context. The claimant refers to page 577 which is allegedly her handwritten note of a catch-up meeting with Mr Uddin on 8 October 2020. This is not referred to in her witness statement, it is difficult to decipher and, in any event, if this is evidence that Mr Uddin told her to look for another role if she could not handle the stress the note does not state this. The Tribunal do not attach any weight to this evidence. Even if the Tribunal were to consider the handwritten notes, the most this note provides is that there was a conversation took place with Mr Uddin around expressions of interest.

456. Without any particularity to the allegation Mr Uddin's witness statement does not respond to this allegation save that his oral evidence was that he would never say such a thing. The Tribunal refer to the further emails between Mr Uddin and the claimant on 10 and 16

November 2020 and the note of their meeting from 10 November 2020 at paragraphs 210-214 above.

457. The claimant did not refer any discussion in or around September 2020 with Mr Uddin in her formal grievance dated 4 January 2021. She told DC in interview on 1 February 2021 that,

"Indeed, by September 2020, he was telling me that no one could identify any work for me to do. His line manager, Mark Griffiths, also gave me this message. My line manager suggested around this time that I should look at job advertisements and consider applying for other roles, despite knowing that an extant sickness absence warning (which I am appealing – see below) being in place which he knew would prevent me from successfully doing."

458. The Tribunal find that all of the emails above do not provide evidence that the claimant is being asked by Mr Uddin to find another role if she could not handle the stress. The Tribunal do not have any evidence that a meeting took place in September 2020 where Mr Uddin told the claimant comments to the effect of look for another job.

459. The Tribunal find that there was a discussion with the claimant and Mr Uddin on 8 October 2020 where a discussion about the availability of work took place. The Tribunal accept Mr Uddin's email of 16 November 2020 as putting the conversation the claimant refers to in context and that he agreed to speak to Mark Griffiths to see if there were any suitable roles that the claimant could do. The Tribunal do not find that Mr Uddin told the claimant she should look for another job if she could not handle the stress or comments to the effect of look for another job.

460. Based on the finding of fact, the Tribunal does not deal with the evidential issues raised by the respondent and this claim fails.

d. Lack of assistance provided by Mr. Uddin to the claimant when she experienced IT problems in Jan – March 2020;

461. The Tribunal have reviewed the texts and email provided in the bundle from pages 411 to 444 for this period have prepared a chronology in the finding of fact above set out at paragraphs 158-167 above.

462. In summary, the Tribunal find that the claimant returned to work on 13 January 2020 and had an interview with Mr Uddin and that the claimant did not tell Mr Uddin until prompted on 22 January that her laptop was still not working. After that, the claimant does not keep Mr Uddin updated that her laptop is not working and there are long delays in the claimant getting in touch with Mr Uddin or progressing to fix her laptop due to the claimant's issues at the time of being ill, caring for husband, taking leave and that these are the delays that caused the laptop to not be operational for a period of 2 months.

463. The Tribunal find the email the claimant sent to Mr Uddin on 27 April 2020 (pages 871 and 872) of her whereabouts between 14 January 2020 and 24 March 2020 provides further evidence that the claimant was in the office for only 6 days during this period (27 Jan, 31 Jan, 21 Feb, 9 March, 18 March and 24 March 2020) and the rest of the dates she was not in the office for the following reasons: -
    - non-working days for phased return,
    - at therapist or doctors' appointments,

- on annual leave,
- taken special leave to care for her husband,
- unwell due to medication issues,
- unwell due to injuring her foot,
- unable to retrieve laptop from home due to husband being away and having no door key and
- being at her mother's house organising for lockdown.

464. The Tribunal find that each time the claimant updated Mr Uddin on the position on the laptop and asked for help from Mr Uddin he aids the claimant promptly as evidenced below: -

(a) On 27 January 2020 Mr Uddin gave the claimant the number for the IT helpdesk on the same day she asked for this.

(b) Mr Uddin told the claimant to go to the helpdesk at Apollo House on 29 January 2020 when she told him she couldn't find her ID number to reset her password.

(c) The claimant did not tell Mr Uddin in her email of 31 January 2020 that he is required to reset her password and says that *"it will need to be enabled via IT now."* She then suggested in her email on 3 February 2020 at 17.39 that she told him in her email of 31 January and on 3 February that the password needed to be reactivated via IT by her manager. The Tribunal do not find that this is correct. In any event on 4 February 2020, Mr Uddin put in a request for her to have IT access after establishing her login ID and date of birth from her. He then sought MG approval and confirmed on 5 February that the claimant had been granted IT access. The Tribunal find this action was swift and assistance was provided within a reasonable timescale.

(d) The claimant did not tell Mr Uddin until 21 February 2020 that she was coming in that day to sort out her laptop and only when prompted by Mr Uddin on 28 February 2020 did she tell him that her laptop wouldn't accept her password. The claimant then did not attend the office until 9 March 2020 and Mr Uddin advised her to go and see the helpdesk when she came in that day.

(e) The claimant emailed Mr Uddin on 10 March 2020 informing him that although her account is active, her laptop had been disabled. Mr Uddin tried to call the claimant on 10 and 11 March 2020 and on 11 March 2020, Mr Uddin spoke to IT and emailed the claimant to tell her they can rebuild her laptop in a few hours, and he asked her to come into the office and get this fixed that day. The claimant did not attend the office until 18 March 2020 to drop off her laptop and did not tell Mr Uddin she has done so until 23 March 2020 when he chased her about this.

(f) The claimant did not pick her laptop up until 24 March 2020. The claimant has provided no reason why this could not be picked up sooner between 18 and 24 March 2020.

465. The Tribunal find that the claimant had told Mr Uddin that when she was off sick she prefers to be contacted by text/ email. However the Tribunal find that the period 13 January to 24 March 2020 the claimant was considered well enough to return to work and there is therefore no reason why she could not speak to Mr Uddin by telephone or attend the office when she was asked to do so.

466. Ms Grace accepted that she did not expect Mr Uddin to pick up the claimant's laptop for her and arrange for this to be fixed but the Tribunal find short of this there is very little Mr Uddin could do. The Tribunal accept Mr Uddin's evidence that he was not an IT professional, and all such issues were handled by IT. Further laptops at the respondent's firm were personal to each employee and he would not have had the knowledge of know how to fix this. The issues the claimant faced were handled by IT in steps, first her password did not work, then her IT account needed to be enabled by her manager, then her laptop was disabled and needed to be rebuilt. It was not until one problem was fixed that the next issue became apparent.

467. Ms Grace referred the Tribunal to the claimant's email of 10 March 2020 as indicating her frustration that no one had told her that the HO protocols had changed in the previous months (9 December 2019) disabling a laptop after a certain period. There is no evidence before the Tribunal that Mr Uddin knew or should have known about this protocol and the Tribunal find that Mr Uddin's prompt attempts to help the claimant when she informed him that her laptop was still not working were reasonable in all the circumstances, particularly as he was also making best attempts to speak to the claimant from 27 January 2020 and the claimant was not engaging with him.

468. Further the Tribunal note that Mr Uddin asked the claimant to tell him when she came into the office on 9 March 2020 and the claimant failed to do so. If the claimant had wished to, she could have arranged to see Mr Uddin on 9 March 2020 and discussed the issue regarding the laptop. She then failed to pick up the phone when Mr Uddin called on 10, 11, 18 March 2020 and failed to respond promptly to his texts on 12 March 2020 or respond to tell him when she is coming into the office as he requested. The Tribunal find that the claimant had told Mr Uddin that when she is off sick she prefers to be contacted by text/ email. However, the Tribunal find that the period 13 January to 24 March 20202 the claimant was considered well enough to return to work and there is therefore no reason why she could not speak to Mr Uddin by telephone or attend the office when she was asked to do so.

469. The Tribunal have read Mr Smith's outcome letter dated 24 May 2022 at page 1115 in relation to his findings on the laptop issue. The Tribunal agree with Mr Smith's findings having reviewed the claimant's emails of 27 April 2020 and find that this accords with the Tribunal's findings set out above.

470. The Tribunal have not been provided with any evidence that the claimant was treated less favourably than the hypothetical comparator namely someone who is the same as the claimant in all material respects but who does not have the claimant's condition of depression. The Tribunal accept Mr Uddin's evidence that he would not have been able to fix the claimant's laptop and that he had to defer to IT on this issue and find that he would have done the same for a hypothetical comparator.

471. Based on the Tribunal's factual findings, set out above, this claim fails.

e. On 28 September 2020 the decision of Mr. Uddin to issue the claimant with a warning for her sickness absence and not to discount the disability related absence on the grounds that adjustments had not been made.

472. The respondent's Attendance Policy sets out at paragraph 47 that,
"Exceptions

47. There are six exceptions where sickness absence will automatically not count towards Consideration Trigger points – see Annex G for further information. Discretion may be awarded in other cases, subject to evidence-based decisions by line managers. The six automatic exceptions are for individual absence periods that relate to:

I. Pregnancy

II. Disability and reasonable adjustments which would enable the employee to return to work have not yet been considered or made…. ."

473. Mr Uddin in his letter to the claimant on 28 September 2020 sets out the request made by the claimant and her union representative that the Disability exception at paragraph 47 of the policy should be applied (paragraph 187 above).

474. Mr Uddin only stated that upon consideration of all the information available he decided that the 5 occasions of sickness absence between 15 August 2019 to 24 July 2020 (12 month rolling period) warranted a first Written Attendance Warning, but he did not provide an explanation for the reasoning in this letter as to why he did not consider that the exception at paragraph 47 did not apply.

475. At the Formal attendance meeting on 27 August 2020, the meeting notes state,
"Mr Uddin noted Joni's concerns and said recommendations from the OH report have been implemented although acknowledged some had been delayed. JM pointed out that not all had been implemented last year when she returned to work. There also remained the issue of a work buddy. Mr Uddin commented that it had been discussed but put on hold due to COVID-19, he was happy to review and previously, through discussions with Joni, had identified Heather Drysdale in RL."

476. In his witness statement Mr Uddin stated that the OH recommendations from the 12 March 2019 report were put in place and he explained the delays for these were because of his ill health or as the claimant was not able to attend meetings. He was aware that a mentor had not been put in place, but it was his evidence that he had discussed this with the claimant and the claimant was to come back to him if she wished to pursue this. He stated that, "*I had not been advised by HR to consider disability leave and therefore did not do so".*

477. During his oral evidence Mr Uddin stated several times that in reaching his decision he spoke to HR. The Tribunal have seen emails between Mr Uddin and AV, HR case manager, (paragraphs 233-235) commencing on 7 February 2020 where Mr Uddin provides AV updates on the claimant's progress and Mr Uddin's actions. There are no notes of the advice that HR gave the claimant which he states would have been in discussion by telephone or skype. The emails suggest a meeting took place between Mr Uddin and AV between 15 and 23 September 2020. The Tribunal find that the decision to give a Formal Attendance Warning was considered by Mr Uddin with an HR representative for the respondent and do not consider that this decision was taken without a review and discussion on the issues the claimant raised.

478. The Tribunal have paid close attention to the wording of the exception set out at paragraph 47. The policy states "*sickness absence will automatically not count towards Consideration Trigger points"* so this is not a matter for discretion for the manager if the test is met. The test is *"Disability and reasonable adjustments which would enable the employee to return to work* ***have not yet been considered or made****" (Tribunal emphasis).*

479. The Tribunal find that Mr Uddin's evidence, contrary to the claimant's views, was that the reasonable adjustments from the March 2019 report had all been put in place and even though the mentor was not in place it had been "considered" by the claimant and Mr Uddin and in 2019 he was waiting for the claimant to revert to him with a potential candidate who she felt comfortable with and who could potentially undertake that role. The Tribunal accept the respondent's evidence that the claimant would need to feel comfortable with a mentor and a mentor of the respondent's choice could not be forced upon her as this would potentially defeat the purpose of the reasonable adjustment. The Tribunal find it was reasonable to ask the claimant to identify candidates for a potential mentor if she felt this would assist her.

480. The SRAs that took place on 19 July and 10 September 2019 both do not refer to a mentor / buddy when the Tribunal would expect this issue to be discussed by the claimant if she felt this was central to managing her stress. The SRA forms states under "behaviour and conduct of some staff in the team" that the claimant and Mr Uddin have a shared action to "Identify other sources of support".

481. The Tribunal find that this action was both Mr Uddin and the claimant's responsibility and have not seen any correspondence, emails, or texts in 2019 that provide evidence that the claimant identified other sources of support and informed Mr Uddin of this or vice versa. To the extent that this "other source of support" was referring to a mentor / buddy, the Tribunal find that this was discussed between Mr Uddin and the claimant on 19 July and 10 September 2019 and therefore the reasonable adjustment would have been further considered.

482. The Tribunal therefore find that it was reasonable for Mr Uddin not to apply the disability exception on the basis that it was his genuine belief that all reasonable adjustments had been considered or made from the OHS report in 2019.

483. As to the timing of the letter on 28 September 2020 giving the claimant a formal attendance warning, the Tribunal find that Mr Uddin and the claimant met on 27 August 2020. The notes of their meeting states that Mr Uddin advised the claimant that, "*he was on leave from 28 August 2020 and on return in week commencing 7 September will follow up with HR and Mark. He hoped to make decision soon after that."*

484. The Tribunal find that on his return from annual leave, Mr Uddin sent out the notes of the meeting on 27 August 2020 to the claimant on 11 September 2020. He then arranged to speak to AV, HR case manager between 15 and 23 September 2020. Mr Uddin emailed AV on 23 September 2020 a draft letter to notifying the claimant of his decision to issue a first written attendance warning seeking his comments. AV responded on 24 September 2020 having reviewed the letter. The earliest time that Mr Uddin could have given the claimant the attendance warning letter was Friday 25 September 2020. This was given to the claimant on her return to the office on Monday 28 September 2020 after being away for 2 weeks. The Tribunal find that this was the earliest date that the outcome of the formal attendance meeting could have been given to the claimant.

485. The Tribunal have not been provided with any evidence that the claimant was treated less favourably than the hypothetical comparator namely someone who is the same as the claimant in all material respects but who does not have the claimant's condition of depression. Based on the Tribunal's factual findings, set out above, this claim fails.

f. On 28 September 2020 initiating a disciplinary process against the claimant. This was initially investigated by Mr. Uddin. It is contended that this is evidence that the Respondent and Mr. Uddin had a predetermined outcome in mind and wished to terminate the claimant's employment. the claimant relies in particular on the emails of 11 August 2020 to 20 August 2020, 9 November 2020.

486. The Tribunal find that the disciplinary notice was given to the claimant, 10 minutes after the formal first written attendance warning. Mr Uddin accepted that the first written attendance warning was given to the claimant by email at 2.19 p.m. and at 2.29 p.m. the claimant was sent a letter initiating a formal disciplinary process.

487. The Tribunal note in the finding of fact (paragraphs 227-230) that there are emails relevant for the timing of the disciplinary notice, confirming that on 22 September 2020, Mr Uddin sent the HR case manager a draft Notification of Discipline Investigation letter requesting her comments, and these were received on 23 September 2020. Mr Uddin sent the notice to the claimant on Monday 28 September 2020. The claimant was away from the office for two weeks and returned on 28 September 2020.

488. The Tribunal find that the issuing of 2 notices on the same day was carried out as this was the earliest date that he could do so as the claimant returned to the office on that day after 2 weeks. It was reasonable for Mr Uddin to want to send these to the claimant as soon as she returned from annual leave as she was waiting the outcome from the Formal Attendance meeting and Mr Uddin had already taken longer than 5 working days to provide her with the outcome. Further it was reasonable for Mr Uddin to issue the letter informing the claimant of the disciplinary investigation as the emails between himself and Ms Jones from the PSU show that the PSU wished to commence their investigations and were waiting for him to inform the claimant. This is evidenced by Mr Uddin's apology to Ms Jones on 28 September 2020 for not being able to send the information sooner.

489. The Tribunal accept Mr Uddin's explanation that on 28 September 2020 he was carrying out admin that day. The Tribunal did not find that the delivery of both notices the same day show that the respondent had a pre-determined outcome or that this was in fact a "rouse" to get her to leave. For the reasons given above, the Tribunal do not find that Mr Uddin would have treated a comparator any differently to the claimant in the circumstances where Mr Uddin was keen to inform his report of the outcome on both issues as soon as he could, and this was the claimant's first day on return to the office after a period of 2 weeks.

490. The Tribunal reviewed each email (11 August 2020 to 20 August 2020, 9 November 2020) to which the claimant relies on in turn: -

491. The emails dated 11 – 20 August 2020 are set out at paragraphs 223-226 above and the Tribunal do not find that these emails provide any evidence that shows the respondent had a predetermined outcome in mind and wished to terminate the claimant's employment.

492. The Tribunal do not read the email of 20 August 2020 as making a predetermined outcome and note the use of Mr Uddin's language by use of the word "could be determined" and "it seems". The Tribunal accept Mr Uddin's explanation that in order to draft the terms of reference (which he had been requested by the HR case manager to do) he reviewed the polices to establish which level of misconduct the claimant's alleged

action could fall under. His evidence was that he was undecided whether this could fall under serious of gross misconduct.

493. The Tribunal accepts that the letter written to the claimant on 28 September 2020 does not make specific reference to serious or gross misconduct, however the Tribunal find that the HIN01 form completed by Mr Uddin refers to policies that had been breached and sets out a section named Areas of concern that the claimant's behaviour could bring the department into disrepute (paragraph 228). The Tribunal accept it was reasonable for Mr Uddin to identify the policies that have been breached and it would be reasonable to look at these when completing the form and also to identify the areas of concern in order to complete the HIN01 form, and the categories the claimant's alleged behaviour could fall into.

494. Mr Uddin's response of 9 November 2020 to the claimant union representative email of 29 October 2020 is set out at paragraph 231 above and do not find that this email provides evidence of a predetermined outcome to wish to terminate the claimant's employment.

495. Mr Uddin states in his witness statement that Mr Griffiths considered it was appropriate for the HO Professional Standards Unit (PSU) to investigate the claimant's conduct and as an entirely separate body were to investigate, he did not accept that the outcome of the investigation was pre-determined as the claimant alleges. The Tribunal accept the explanation of the PSU's involvement in the investigations provides evidence that there was not a predetermined outcome by the respondent as a separate body was requested to investigate the claimant's conduct.

496. The Tribunal do not find that the emails identified above provide any evidence of a pre-determined outcome or wish to terminate the claimant's employment. However, they do provide an explanation of why the letter instigating a formal disciplinary notice was not sent in August as the respondent was following a process by which Mr Uddin planned to meet with the claimant in the first instance which took place on 20 August 2020 and Mr Uddin then needed to draft the HN01 form and liaise with Mr Griffiths who was away on leave until 1 September 2020. Mr Uddin was also on leave until the week commencing 7 September 2020.

497. Based on the Tribunal's factual findings, set out above, this claim fails.

g. The decision to advertise the Claimant's role (without prior discussion or notice to her) on 19 October 2020 having previously told her there was no work for her to do.

498. It is not disputed by Mr Uddin that he did not discuss the job advert (at page 257 of the bundle) with the claimant in advance of this being advertised on 19 October 2020. Mr Uddin accepted that this was for the claimant's entire role and that the advert stated that this would last for 3 -4 months but could be subject to an extension.

499. Mr Uddin's explanation for not speaking to the claimant in advance is that this was an oversight for which he apologised and because things were moving at a fast pace as he explained the person covering the claimant's role was moving on 14 December 2020. His witness statement states that he was notified on Tuesday 13 October 2020 that the person covering the claimant's role had secured a promotion. The job advertisement went out on Monday 19 October 2020, within 6 days of finding out that the person

covering the claimant role was moving on. The Tribunal accept that this was put in place in a very short time frame and may have affected Mr Uddin's ability to speak to the claimant in the interim.

500. The Tribunal find that Mr Uddin did not know that the person covering the claimant's role was leaving when he met with the claimant on 8 October 2020 or carried out the SRA on 9 October 2020. Further Mr Uddin's explanation is consistent with the email Mr Uddin sent the claimant on 20 October 2020 (set out paragraph 208 above) and on 11 November 2020 (set out paragraph 212 above) following a meeting between the claimant and Mr Uddin and the explanation he gave Mr Campbell during an interview on 11 February 2021. The Tribunal have considered and accept this evidence.

501. Mr Uddin stated that when the claimant raised with him that she could take her role back, he immediately offered to remove the role and discussed with her that she could take back her role if she felt able. Mr Uddin denied that the job advertisement was a way to replace the claimant in her role and stated that it was always his intention that the claimant revert to her role. The Tribunal accept Mr Uddin's evidence and find that Mr Uddin's emails to the claimant of 11 November 2020 and 16 November 2020 (set out paragraph 212-214 above) are consistent with this evidence.

502. The claimant states at paragraph 73 of her statement that prior to 19 October 2020 when the job was advertised that she had raised with him on many occasions (*8 October discussion, 28 September discussion, 18 August discussion, 13 July email, 12 May email etc)* that she had capacity to take on more work including resuming her normal duties and that she had never asked to be relieved of her duties. This is consistent with what the claimant told Mr Uddin by email dated 10 November 2020 (paragraph 210). It is the claimant's evidence that it seemed to her that the decision to end her employment had already been made on 19 October 2019 or that there was a determined attempt to remove her from her role permanently. The Tribunal do not find that the claimant's evidence is consistent with the contemporaneous evidence they have seen.

503. The claimant's email to her union representative on 19 October 2020 (paragraph 206) stated that she had raised with Mr Uddin what work there was to do over the last few weeks and that she was going to raise returning to her main role with him at their next catch up, suggesting that she had not done so previously.

504. There are no notes of the 18 August, 28 September or 8 October 2020 discussions between the claimant and Mr Uddin but there was an SRA on 9 October 2020, 10 days before the advert went out. The Tribunal find that this does not state that the claimant was ready to take back her job and contrary to this, the SRA states, "No time or line management responsibilities – ongoing until advised further", which was a central part of her old role.

505. In the claimant's email to Mr Uddin of 4 May 2020 (Page 949), she states, "*She has obviously done a good job managing in my absence, but my expectation is that I will be resuming my role in due course."* The Tribunal find the thrust of this email is the claimant complaining about the person who is carrying out her role. It is not an email that the Tribunal read as the claimant stating that she wants her role back at that point or providing a timescale of when she wishes to do so.

506. In the email to Mr Uddin on 12 May 2020, the claimant suggested the items for discussion for their meeting on 14 May 2020 were *"Update on annual leave situation, Discussion re*

team dynamics and future plans, Review of work situation and phased return". The claimant emailed Mr Uddin on 14 May 2020 after the meeting (paragraph 175) stating she would prefer undertaking, "*short-term project work, rather than day to day work and team management for the time being."* This email does not support that the claimant identified that she wished to resume her old role or even to start carrying out parts of it.

507. In the email of 13 July 2020 (paragraph 183), the claimant asked Mr Uddin if she could take on some work supporting upcoming repatriation charter flights from Romania and Poland and Albania, and she states it would be "*nice to be involved in something different temporarily."* The Tribunal note that in this email the claimant stated she was "*at a loose end"* but further note that she did not ask to resume her old role or to start carrying out parts of it. Mr Uddin agreed for the claimant to undertake this work.

508. The Tribunal find that there are also conflicting points made by the claimant regarding her ability to do the role. She emailed Mr Uddin on 23 October 2020 stating, "*Despite previous sickness absence and work-related stress, I am back at work and able to work to full capacity. There is no reason to continue to take my role from me, especially when current cover is coming to an end."* However when Mr Uddin offered her the role, she did not take this up immediately and asked about what other work would be available at a meeting on 11 November 2020 and said she would think about the proposal. The Tribunal find that even on 11 November 2020 the claimant was not actively willing to take on her old role even though it was available.

509. For the reasons above, the Tribunal do not find any evidence to support that the claimant sought to resume her role as she suggests in the 8 Oct discussion, 28 Sept discussion, 18 Aug discussion, 13 July email, 12 May emails and we therefore do not find that she told Mr Uddin that she wished to do so before 19 October 2020.

510. Mr Uddin's evidence is that he decided the claimant was not ready to take on her role as staffing issues were a main stressor for her and he did not want to put pressure on the claimant to do so and that is the reason he advertised her role. The Tribunal need to consider what was in the Mr Uddin's mind when he arranged to advertise the claimant's job on 19 October 2020 and had decided that the claimant was not ready to take on her old role.

511. The Tribunal note that the claimant had taken special leave between 4 and 7 August 2020 due to COVID restrictions and between 11 and 14 August 2020 due to personal issues with her mother. The claimant sent an email to Mr Uddin on 18 August 2020 set out at paragraph 184 above referring to, *"struggling both physically and mentally with various issues".* Following this a formal attendance meeting took place on 27 August 2020. The claimant then emailed Mr Uddin on 17 September 2020 at paragraph 185 above referring to being, "*rather frantic with worry, barely sleeping and very anti-social and upset."*

512. The claimant was given a formal written absence warning on 28 September 2020 and informed that a disciplinary investigation will take place by PSU on 28 September 2020. She informed Mr Uddin and Mr Griffiths of her wish to appeal the formal absence warning. A meeting took place between the claimant and Mr Uddin on 8 October 2020 and an SRA took place on 9 October 2020.

513. The Tribunal find that in all the circumstances, it was reasonable for Mr Uddin to consider that the claimant was not ready to take on her previous role, for the reasons he has given

and his knowledge at the time. The Tribunal make this finding based on the personal issues that the claimant said she was undergoing in her email of 18 August 2020 and 17 September 2020 and the discussion at the SRA dated 9 October 2020 where the claimant told Mr Uddin that she did not want to undertake line management responsibilities.

514. Given the reasons Mr Uddin has stated for his failure to tell the claimant about the advertisement and his decision to advertise the claimant's role which we have accepted, we find no reason to believe that this would not apply to a hypothetical comparator.

515. Based on the Tribunal's factual findings, set out above, this claim fails.

h. The failure by Mr. Uddin to have any, or any proper, plan in place by November 2020 for handover of work back to the Claimant.

516. The Tribunal refer to the discussion under allegation (g) above in which the Tribunal found it was reasonable for Mr Uddin not to consider that the claimant could take back her role when advertising her role on 19 October 2020. The Tribunal found that that there was no evidence that the claimant asked Mr Uddin for her role back and that the SRA dated 9 October 2020 was inconsistent with this as it stated that, "Remove team, country and line management responsibilities". Mr Uddin set out in his witness statement that this work was being covered by himself and their team members and the plan of taking on another team member was to allow the claimant to continue to work at a pace which suited her and would relieve pressure on Mr Uddin and the rest of the team.

517. The Tribunal find that Mr Uddin had a plan to reintroduce the claimant to her role at a pace that suited her and find that the notes of the meeting of Mr Uddin and Mr Campbell on 11 February 2021 (page 879) provide evidence of this,

"Doug asked what support he had put in place in terms of returning to work and taking on her extra work to achieve 100%. Mahbub explained they had agreed a plan; the work was coming through him and he was sending it on to her but only giving the priority work. He could see what work she had to do. He had reviewed the SRA, was scheduling weekly catch up meetings and she continued to see her therapist weekly."

518. The claimant stated in her email on 23 October 2020 that there was no reason to continue to take her role from her. However, despite this email, the Tribunal find that when Mr Uddin offered the claimant her old role back, the claimant had still not accepted to take on her old role by 11 November 2020 and at the meeting on 11 November (paragraph 212) stated that she wished to consider the proposal and asked Mr Uddin to check with Mr Griffiths whether there was any other work which was suitable as evidenced by Mr Uddin's email of 16 November 2020 (paragraph 214 above).

519. The Tribunal find that until the claimant had confirmed that she would take back her role that no plan could be put in place by Mr Uddin. The Tribunal find that Mr Uddin at their meeting on 11 November 2020 (paragraph 212) provided a suggested plan, but the claimant did not consider that this was sufficient. Mr Uddin told the claimant on 16 November 2020 (paragraph 214) that he would be happy to agree a work plan with the claimant if she decided to step back into the role and she did not do this until 20 November 2020 (paragraphs 215) when she stated that she felt forced back into her job.

520. As set out in paragraphs 216,217, Mr Uddin's email of 20 November in response states they were due to meet at 2 p.m. It is unclear whether this meeting took place, but Mr

Uddin then sent the claimant a plan on Monday 23 November 2020 and states, *"as discussed last week, below is a draft work plan. Let me know if you have any comments and we will begin with the meeting tomorrow at 12:00. I'll send a diary invite for that now."* The claimant and Mr Uddin were due to meet on 24 November 2020, but the Tribunal do not know if this meeting took place. The claimant sent a revised plan to Mr Uddin on 27 November 2020. The email chain is called "Handover plan" and refers to the plans discussed the previous week.

521. The Tribunal find that as soon as the claimant agreed to return to her role, Mr Uddin prepared a plan which was discussed and subsequently agreed by the claimant. The Tribunal find that in all the circumstances a 2 week handover for the claimant taking back her role was reasonable and the respondent put in place support for her to do so as set out in Mr Uddin's email of 23 November 2020. The Tribunal find that the claimant's email of 16 November 2020 supports this when she states, *"It makes little sense to recruit someone new to cover, when the permanent post holder (me) is available* ***and able to slot in****.(And should have done so some time ago)"* ***(Tribunal emphasis)***

265. The Tribunal find that it was reasonable for Mr Uddin to take a flexible approach and work with the claimant to agree a work plan once she confirmed that she would take back her old role. The Tribunal find that the claimant's approach to taking her role back was not collaborative. She insisted in her email of 23 October 2020 that she was ready to resume her role but her subsequent conduct is not consistent that she was willing to do so. She did not arrange to meet with Mr Uddin when he asked her to and did not confirm at their meeting on 11 November that she would resume her old role, causing a delay in the time she had for a handover. She asked Mr Uddin to identify other work and sets out in her email of 20 November 2020 that she had been forced back into her job in a manner which has not been duly considered and is not what was outlined by OHS.

522. The Tribunal find that Mr Uddin by advertising the role in the first instance was attempting to avoid the claimant being put in this position. He describes in his witness statement his reasons for doing so were that he did not *"want Joni to feel pressured to volunteer for work that she did not feel ready to take on"* and "*Taking on another team member of staff would allow Joni to continue to work at a pace which suited her and would relieve the pressure on the rest of the team and me".* The Tribunal accept this evidence.

523. The Tribunal note the following extracts from Mr Smith's report dated 23 May 2022 set out at page 1114 of the bundle,

"I consider that there is a conflict in your statements about your ability to resume the full duties of your role. On the one hand you stated that it was unreasonable of Mabs to consider offering a further period of TCA as you were willing and able to resume your full duties, while in your email to him of 20th November you stated that it was unreasonable of him to expect you to resume those duties with a handover of only two and a half weeks……
In your grievance you complain that you felt there was a concerted management effort to prevent you resuming your role. Yet when Mabs agreed not to proceed with his proposal for a further period of TCA you expressed the view that you were being "forced back into" your job with undue haste…..
I do not consider it was unreasonable for Mabs to have believed that a two-week handover would have been sufficient."

524. The Tribunal accept Mr Smith's conclusions, and we find these are consistent with those of the Tribunal from the evidence we have seen.

525. Based on the Tribunal's factual findings, set out above, this claim fails.

i. Mr. Stephenson not upholding the appeal against the sickness absence. In particular, the appeal officer accepted a significant number of the Claimant's appeal points but nevertheless did not uphold her appeal on 10 February 2021.

526. The appeal against the sickness absence warning was carried out by Mr Stephenson and he produced an outcome letter on 10 February 2021 titled "Outcome of Appeal Hearing" and this can be found at pages 808-810.

527. As set out in paragraphs 188-204, the Tribunal find that Mr Stephenson carried out reasonable investigations including seeking a response from Mr Uddin on the appeal, holding an interview with the claimant and then seeking further clarification on outstanding points from the claimant and Mr Uddin. He then issued his decision on 10 February 2021. The Tribunal find however that the notes of his meeting with the claimant at page 746 are brief (about one page long), they do not record the date, time of the meeting, the time of length of the interview and do not specifically record what the claimant said.

528. The Tribunal find that the dates that the First written sickness warning were given were in relation to the 5 occasions of sickness absence between 15 August 2019 to 24 July 2020 (12 month rolling period).
    1. 15/8/19 1 day, nervous system/other
    2. 20/8/19 - 22/8/19 3 days, cough/cold
    3. 17/9/19 - 29/9/19 4 days, cough/cold
    4. 7/10/19 - 12/1/20 98 days, stress
    5. 22/7/20 - 24/7/20 3 days, ear related

529. Mr Uddin excluded the following two absences between 4 October 2018 to 14 March 2019 following HR's advice to refer to a 12-month rolling period only,
    6. 4/10/18 - 23/10/18 20 days, anxiety and depression
    7. 3/12/18 - 14/3/19 102 days, anxiety and depression

530. The Tribunal also note that Mr Uddin excluded the time off between 13 January 2020 and 24 March 2020 when the claimant's laptop was not working.

531. Ms Grace cross examined Mr Stephenson on the reasons behind his decision. Ms Grace's submission was that Mr Stephenson's reasoning was irrational as in his outcome letter he accepted that there was a delay in implementing the recommendations from the first OHS report (March 2019) and that, "*all he can see that happened in 2019 (prior to the longest element of your sick leave later that year) was the proposal and agreement of a stress risk assessment."* He states, *"I can objectively say it is regrettable it took at least six months (excluding the period you were absent from) to implement them."* He then goes on to say that the exception on disability grounds would be exercised where there are reasonable adjustments which would enable the employee to return to work have not yet been considered or made. He states, *"I have given this consideration, but such adjustments had been considered and almost fully made prior to the issue of the warning. Those that had not been made were not, in my view, sufficiently material."*

532. He comments in his report that, "*Nevertheless, the original OHS report (March 2019) indicated there should be a phased return, stress management, flexibility (to attend appointments etc) and regular management meetings. All of these have been implemented in January 2020 (or thereabouts).*"

533. Ms Grace submits that this is a factor that was not relevant for what Mr Stephenson needed to decide as he needed to consider what was in place before the claimant went on sick leave for stress on 7 October 2019. The Tribunal accept that this is correct when deciding whether the disability exception at paragraph 47 of the HR Policy and Guidance Attendance Management Procedure should apply and note that the 7 October 2019 to 12 January 2020 absence must be automatically not counted towards the Consideration Trigger point if it is found that criteria for the exception are met. The Tribunal find that the test Mr Stephenson was applying was as set out in his outcome letter of what adjustments were in place in January 2020,

"*All of these have been implemented in January 2020 (or thereabouts) though I can see that meetings were perhaps not as regular as they could have been, though I think that can be equally attributed to both parties. Therefore, I can't conclude that your line manager didn't consider or make relevant adjustments as claimed.*"

534. Regardless of the findings of the Tribunal for the purposes of this claim, the Tribunal must assess the reasonableness and logic of Mr Stephenson's decision making at the time and as set out in his outcome letter of 10 February 2021. Mr Stephenson's outcome letter does not assist to explain his conclusion save that this states that the regular management meetings were not as regular as they could have been but that was attributable to Mr Uddin and the claimant.

535. Mr Stephenson did not accept that his reasoning was flawed, although he repeated that he considered there were sufficient reasonable adjustments in place when the claimant was given the warning and he did not consider a mentor was a necessary adjustment for the claimant to return to work and that his decision was justified. He did not accept Mr Campbell's criticism of his report in which Mr Campbell states,

" I am not however certain of the safety in law of the Appeal manager's assertion "Those that had not been made were not, in my view, sufficiently material." The EQA does not provide room for exemptions unless there are significant compelling grounds. Additionally the point at discussion was not around her returning to work but rather adjustments to support her in work enabling her to become fully effective."

536. The Tribunal find that Mr Campbell's criticisms of Mr Stephenson's report did not set out that Mr Stephenson had applied the wrong test when considering whether the disability exception should apply as Ms Grace had put to Mr Stephenson.

537. Having reviewed the outcome letter on 10 February 2021, contemporaneous documents and having heard Mr Stephenson's' evidence, the Tribunal find that Mr Stephenson incorrectly believed that the reasonable adjustments should have been considered or made at the time of giving the warning rather than before the sickness absence was taken and made his findings on what reasonable adjustments were in place in January 2020.

538. The Tribunal find that the outcome letter does not carry out a careful analysis as Mr Smith has done on what OHS recommendations were in place before the claimant went on

sickness absence leave in October 2019 and glosses over much of the detail. His focus is on what occurred when the claimant returned to work in January 2020. His discussion on the OHS recommendations does not list the reasonable adjustments suggested in the 12 March 2019 OHS report and when discussing what reasonable adjustments he considered were in place in 2019, he does not refer to whether the claimant was offered a phased return and whether she was able to attend scheduled medical appointments, which the claimant would accept were both in place. His findings on what OHS recommendations were in place in 2019 were therefore plainly wrong but as this was not the focus for his decision, he did not take the time to set this out the detail.

539. Further Mr Stephenson states in his outcome letter that, *"I can see that there was a delay in implementing the recommendations from the first OHS report (March 2019) and I've been offered no good explanation for that",* but he did not seek further details from Mr Uddin or the claimant on what reasonable adjustments were implemented and when in 2019 when he wrote to them at the beginning of February 2021 seeking further clarification. Instead he asked the claimant further information about absences between 14 January to 25 March 2020 which demonstrates his focus was on what occurred when the claimant returned to work in January 2020.

540. For the purposes of this allegation, the Tribunal do not need to comment on the reasons for the delay in Mr Stephenson progressing the grievance appeal in January and February 2021, however we take this into account when looking at Mr Stephenson's thought processes at the time and the reasons he acted in the way he did. As Mr Stephenson did not accept that his analysis was flawed, he did not give the Tribunal a reason for this.

541. The Tribunal accept Mr Stephenson's evidence that at that time he was in a very high-pressured role, and he was also undertaking a secondment, as this is corroborated in his emails to the claimant at the time (see paragraphs 189,190, 192, 193, 202above). He accepted there was a delay and apologised for this and explained that he did not anticipate when he took the appeal on that he would be that busy and therefore did not make arrangements to manage this at the outset. The Tribunal find that Mr Stephenson produced his outcome letter at a time when he was under pressure with a high workload and little time to complete the outcome letter and this is reflected in the lack of detail in his meeting note with the claimant and the outcome letter.

542. Mr Stephenson told the Tribunal that he did not speak to Mr Uddin and only contacted him by email and the Tribunal have seen those emails. Mr Stephenson told the Tribunal he did not know the claimant and he believes that it may have become apparent during the appeal process that the claimant raised a grievance and commenced ACAS early conciliation, but he cannot recall any specific details. This is discussed further in allegations relating to Victimisation below.

543. Based on the contents of his report we found that Mr Stephenson did not uphold the appeal because he was flawed in his reasoning and was not applying the correct test to the disability exception. Had Mr Stephenson done so, he would have had to potentially carry out further investigations and he would have had to set out in detail when he considers each reasonable adjustment was in place and whether these were made or considered before October 2019 and the focus of his analysis would have been different.

544. The Tribunal have to find whether the claimant received less favourable treatment compared to the hypothetical comparator. The claimant has not provided the Tribunal

with any primary facts upon which we can infer that Mr Stephenson would not have made a flawed decision had he been required to do so for a hypothetical comparator. The Tribunal find that Mr Stephenson's lack of analysis and detail in his report was caused due to the time and work pressures he was facing in 2021 exacerbated by his secondment and the work generated due to the pandemic and this is reflected in the delay in him progressing which he explained in contemporaneous emails at the time. The Tribunal find that his flawed decision was due to human error and not influenced by the claimant's disability. On this basis the Tribunal do not find that the claimant has received less favourable treatment compared to a comparator.

6. If so, has the Claimant satisfied the tribunal on the balance of probabilities that there are facts from which the tribunal could decide, in the absence of any other explanation, that the less favourable treatment was because of her disability?

7. If so, has the Respondent shown that the less favourable treatment was not because of the Claimant's disability?

545. The Tribunal have set out their finding of fact on each of the allegations and have set out whether the allegations fail as a result. The Tribunal have given the reasons for their decision.

546. The Tribunal has been given no evidence from the claimant to show that the respondent would have treated a hypothetical comparator differently save for stating that this would have been the case.

547. The Tribunal do not find that the claimant has satisfied them, on the balance of probabilities, to show there are facts from which the Tribunal could decide, in the absence of any other explanation, that the less favourable treatment where identified above was because of her disability. The claimant has invited the Tribunal to make inferences based on Mr Uddin's disinterest, inaction, failure to provide records, lack of support and that he did not take seriously the impact of her condition which she says is indicative of a discriminatory mindset. The Tribunal has set out in the discussion above why they do not agree with the claimant's perception of Mr Uddin on these points and have given their reasons for doing so based on the facts that the Tribunal have found. To do anything else would be to speculate which the Tribunal cannot do. As a result the Tribunal do not consider that a proper inference can be drawn from the evidence to show that the claimant's disability is the reason or had a significant influence on why the respondent acted as he did.

548. The Tribunal accept her job being advertised without discussion shortly after being given a written warning and a letter initiating a disciplinary investigation into the claimant's conduct outside of work on the same day would have impacted the claimant's perception of Mr Uddin and his motives and also Mr Stephenson's outcome decision not upholding the claimant's appeal against the written sickness warning. However the Tribunal have examined the facts closely in relation to these allegations and have set out their views above and find the respondent's explanation as sufficient to show that Mr Uddin and Mr Stephenson did not discriminate against the claimant on the grounds of disability.

549. The parties did not identify detriment as an issue in relation to the direct discrimination complaint, but it is a matter the Tribunal needs to consider. Discrimination under section 13 of the Equality Act is not unlawful unless made so by another relevant section of the Act. The section which must be relied on in this case is section 39 which makes discrimination unlawful, amongst other things, where an employee is subjected to a

detriment at work. Due to the factual findings that the Tribunal have made, we have not gone on to consider under each allegation whether the claimant was subjected to a detriment. We would have concluded, for the reasons given above, that the direct discrimination complaints are not well founded.

Reasonable adjustments – sections 39(5) and 21 EqA

The provisions, criteria or practices (PCPs) relied upon by the Claimant are:

a. A requirement to be fit for work and to undertake full contractual duties.
b. A requirement to provide regular and consistent attendance at work.
c. The application of the Respondent's absence management procedure and the triggers used by the Respondent when managing absence by way of warnings.
d. The alleged practice of dealing with grievances/grievance appeals/appeals against sickness absence warnings in a delayed manner.
e. Advertising an employee's existing role as a vacancy without first discussing it with the employee.

The substantial disadvantage relied upon by the Claimant for each of the above PCPs is:

a. The Claimant is more likely to be given sickness absence warnings (which affect her ability to apply for internal job vacancies) and ultimately a greater risk of being dismissed.
b. As in a.
c. As in a.
d. Increased stress due to the delays and uncertainty and exacerbation of her depressive condition (which in turn leads to greater risk of being given sickness absence warnings and dismissal).
e. As in d.

8. As a matter of fact, were the above alleged PCPs applied in respect of the Claimant? The Respondent accepts that (a) – (c) of the PCPs relied upon by the Claimant are applied. For the avoidance of doubt, the Respondent does not accept that (d) and (e) amount to PCPs and/or are applied by the Respondent.

550. The Tribunal note that there is no dispute that (a) to (c) above are applied and it is accepted that these are PCP's. There is a dispute between the parties whether (d) and (e) amount to PCP's and are applied by the respondent.

551. The Tribunal find that (d) and (e) do not amount to PCP's. The pleaded PCPs at d and e above are not sufficient to fall within the meaning of *"provision, criterion or practice"* in section 20 Equality Act. This requires at least *"some form of continuum in the sense that it is the way in which things generally are or will be done".*

<u>d. The alleged practice of dealing with grievances/grievance appeals/appeals against sickness absence warnings in a delayed manner.</u>

552. None of the respondent's witnesses accepted that there is a practice of dealing with grievances/grievance appeals/appeals against sickness absence warnings in a delayed manner and they were able to give evidence for the reason for the delays.

553. The Tribunal refer to the findings of fact at paragraphs 188-204 and 236-263 and the discussion below considering all the evidence for the reasons for the delays in respect of the grievance/grievance appeal/rehearing of the grievance and the appeal against the sickness absence warning and why these delays occurred. The Tribunal found that the delays in these processes taking place were multifactorial including personal issues / sickness issues being experienced by the claimant, work issues specifically related to the pandemic which was an extraordinary and unprecedented event and specific personal issues relating to Mr Smith. The delays can be explained as issues specific to the individuals involved in the processes associated with unusual one-off events. The delays cannot therefore be said to have been caused by the way "things are generally done or will be done". We therefore find that no such PCP was applied.

e. Advertising an employee's existing role as a vacancy without first discussing it with the employee.

554. As set out above at allegation 5(g), Mr Uddin's evidence for not discussing the vacancy with the claimant before advertising the role was that this was an oversight due to the fast pace that things were progressing and the deadline that the person filling the claimant's role at the time planned to leave. The advertisement went out 6 days after S had stated she was leaving the role. Mr Uddin did not accept that it was his practice not to discuss vacancies with employees but that in this particular instance this is what happened. The Tribunal accept this explanation and note that Mr Uddin was apologetic for his oversight.

555. There is no evidence that there was a general practice of advertising an employee's vacancy without first discussing it with them. The claimant relies on the facts in her own case as this is what happened to her. We agree with the respondent's submission that there is no provision criterion or practice here, since there is no evidence of an element of repetition, which is required for there to be a provision criterion or practice. We therefore find that no such PCP was applied.

9. If so, did the application of any or all of them put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

Substantial disadvantage

a. A requirement to be fit for work and to undertake full contractual duties.

b. A requirement to provide regular and consistent attendance at work.

c. The application of the Respondent's absence management procedure and the triggers used by the Respondent when managing absence by way of warnings.

10. If so, did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage?

The Claimant contends that the Respondent failed to make the following adjustments (by reference to each PCP identified above):

a and b Implementing the OH recommendations contained within the reports dated 12 March 2019 and 21 July 2020, specifically:

i) Weekly review of her progress, regular management meetings and reintroduction of her responsibilities with support.

556. The Tribunal have found as a matter of fact set out at allegations 5 (b)(ii), 5(b)(iv) and 5(b)(vii) above that the weekly review of her progress, regular management meetings and reintroduction of her responsibilities with support were carried out by the respondent on her return to work in March 2019 and January 2020 as far as practicably possible and that in all the circumstances reasonable steps were taken by the respondent to make these reasonable adjustments.

557. The Tribunal find that in all the circumstances, the respondent complied with its duty to make these reasonable adjustments. For the reasons given above, this claim fails.

ii) Identification of a workplace mentor to be available for direct support at work.

558. The Tribunal have found as a matter of fact set out at allegations 5 (b)(i) above that the respondent put in place reasonable steps to enable the identification of a mentor by agreeing with the claimant for her to identify a suitable candidate and reviewing and agreeing the support structure in place at work at SRA meetings on 16 July 2019, 10 September 2019, 13 January 2020, 9 October 2020, 27 January 2021 and 26 May 2021.

559. The Tribunal do not find that the absence of a mentor created a substantial disadvantage for the claimant in respect (a), (b) or (c) above because contrary to the claimant's assertions, a mentor was not identified by the claimant and reported to the respondent as something that would assist with her stressors until 27 August 2020.

560. The Tribunal find that the claimant did not refer to the issue of identification of a mentor as being of importance in her contemporaneous emails to her union representative in 2019/2020, she did not raise this or request this in her emails with Mr Uddin/ Mr Griffiths as she has with other adjustments that she required, and the claimant did not identify this as a requirement / need when discussing stressors with Mr Uddin at the various SRA meetings that took place until 9 October 2020. The Tribunal find that the very purpose of the SRA's was to discuss stressors and adjustments that could be put in place by the respondent to assist the claimant and the lack of reference to a mentor when discussing sources of support undermines the claimant's claims now.

561. Further if the claimant felt that the absence of a mentor had put her at a substantial disadvantage and that this was one of the adjustments that would have assisted her from not requiring sickness absence leave in October 2019, then the Tribunal would expect her to raise this with the respondent at her return-to-work meeting on 13 January 2020 and at the SRA that took place on 16 January 2020. Both the contemporaneous meeting notes and SRA form do not refer to a mentor and the claimant had an opportunity to amend these (paragraph 156 above). In addition the Tribunal find that the claimant did not raise the need for a mentor as a specific requirement with her occupational adviser at the OHS assessment on 21 July 2020.

562. The claimant submitted her sickness absence warning appeal on 30 October 2020 and at page 947 set out that she considered a mentor would have assisted her by 30% and was of the highest priority as a reasonable adjustment. The Tribunal find that this document was written in retrospect and is the claimant's subjective opinion at that time. The Tribunal do not accept that this is consistent with the claimant's view between March

2019 and 27 October 2020 as evidenced by the contemporaneous documentation that the Tribunal have referred to above.

563. The Claimant stated in her meeting with Mr Uddin on 27 August 2020, *"Mr Uddin asked if there was anything else Joni wanted to add….. The only outstanding point was regarding the work buddy which would be helpful. She commented that she would not have been sick due to stress had all OHS recommendations been implemented."*

564. Further the Tribunal find that the claimant discussed identification of a work buddy or additional support with Mr Uddin on 9 October 2020 but that in subsequent SRA's dated 27 January and 26 May 2021, she has not actively pursued the need for a work buddy as a source of support as she has not agreed this in the subsequent SRA's with Mr Uddin and she has agreed to put in place other sources of support. The Tribunal also find that the claimant was told by Mr Smith on 24 May 2022 that she should discuss the need for a mentor with her line manager if she felt this was still required. The Tribunal have not been provided with any documentation that the claimant has advised the respondent that this is the case.

565. The claimant' s evidence is that towards the end of September 2019 she discovered that her team member/subordinate had gone off work on long term sickness leave due to stress and she felt overwhelmed at this development as having more work had always caused her work-related stress to increase which in turn resulted in a decline in my mental health. She stated that this in addition to the lack of reasonable adjustments meant she was not able to cope and from mid-October 2019 she was signed off again by my GP.

566. The claimant therefore submits that a work mentor / buddy would have resulted in her not needing sickness absence leave in October 2019. The Tribunal asked the claimant what she felt that a mentor would assist her, and she told the Tribunal that she had tendencies of perfectionism and if she was not achieving at a certain level this exacerbated her feelings of failure. She did not want to say certain things to Mr Uddin as this may impact on her performance review and she would have found it useful to have non-judgmental person helping her.

567. The Tribunal have considered this, and we are unclear of exactly what role a mentor could take in supporting the claimant that she was not receiving from other sources that would have put her then at a substantial disadvantage. The Tribunal accept that the type of support would depend on the who the mentor was, the relationship she/ he had with the claimant and how often they could speak. The Tribunal note that in 2019 the claimant did have access to weekly therapist appointments.

568. The claimant states in her witness statement that one of the main factors for needing sickness absence leave in October 2019 was that the stress of dealing with XX's sexual allegation which was made in June 2019 and what she describes as the lack of support from Mr Uddin. The Tribunal have set out their findings on this issue at allegation 5(a) above. The Tribunal find that Mr Uddin took over the grievance investigation which the claimant would have had to do otherwise, and the claimant was providing pastoral care for XX (paragraph 130 above). This was a sensitive issue and one that she may not have been able to discuss with a work mentor subject to who that person was. The Tribunal find in this context, a mentor is unlikely, on the balance of probabilities, to have assisted her in her work role in these circumstances.

569. The Tribunal have also set out above in the finding of fact what occurred from May 2019-October 2019 (paragraphs117-140) and allegation 5(b)(ii) the reasons meetings did not take place during this time. The claimant hit her head in April 2019 and suffered from post-concussion syndrome and as a result she was unable to make a number of meetings with Mr Uddin and Mr Griffiths in April / May / June / July 2019 and was on sick leave for days because of this. She had an emergency with her mother on 1 August 2019 and she was unwell for issues unrelated to her disability from 19 -29 August 2019 and on 17 September 2019. The Tribunal find based on the contemporaneous texts and emails we have seen between May and October 2019 and the claimant's inability to attend meetings with Mr Uddin, due to her periods of illness and her personal issues, it is unlikely that she would have been able to have regular meetings with a mentor even if one had been identified and that she was therefore not put at a substantial disadvantage by a mentor not being in place.

570. The Tribunal note that on her return to work on 13 January 2020 the respondent removed line management responsibilities from the claimant, and it is the claimant's case at the formal attendance meeting with Mr Uddin on 27 August 2020 that she had good attendance in 2020. In the contexts of the three PCP's, the Tribunal then find that the claimant was not at a substantial disadvantage for not having a mentor in place from 2020 onwards as this did not affect her attendance at work or for her to be fit to carry out her contractual duties.

571. For the reasons given above, this claim fails.

c Attendance management discretion/flexibility when considering ways to address long term absence including trigger point adjustment. Discounting disability related absence (as recommended by the OH reports (28 September 2020 to 10 February 2021).

572. The Tribunal have discussed their findings at allegations 5 (b)(iii), 5(b)(v), 5(e) and 5(h) above.

573. In summary, the Tribunal accept Mr Uddin's evidence that he did consider the trigger point levels but elected not to adjust them. The Tribunal find it was reasonable for Mr Uddin to use his discretion to consider that the trigger points in place were sufficient in all the circumstances as they were four times higher than non-disabled staff and they were at the highest level available at the respondent firm. Further the Tribunal find that these trigger point adjustments were in place before 2019 and the claimant was therefore not at a substantial disadvantage compared to non-disabled employees as the respondent had already taken reasonable steps for the claimant to avoid the disadvantage of needing to attend work regularly and consistently and when the absence management procedure would have been triggered.

574. The Tribunal find that in all the circumstances, Mr Uddin used his discretion reasonably to originally institute a formal attendance meeting in September 2019 and to invite the claimant to a meeting August 2020 as the claimant's level of sickness was very high and the purpose of the meeting was to discuss this with the claimant.

575. The Tribunal find that it was reasonable in all the circumstances for Mr Uddin to conclude not to backdate the sickness warning and not to discount the absences using the exception for disability related absence. The Tribunal find that Mr Stephenson carried out appropriate investigations but was focused on the wrong issue and was flawed in his

reasoning when considering whether the formal warning should be appealed, and this was due to human error. If Mr Stephenson carried out a proper fact finding in relation to the reasonable adjustments in place in 2019, on the balance of probabilities, the Tribunal find that he would have applied the right test for the disability exception.

576. The Tribunal find that in all the circumstances, the respondent took reasonable steps to comply with its duty to make these reasonable adjustments. For the reasons given above, this claim fails.

d Dealing with such processes promptly and without delay (stress management recommended as an adjustment in the OH reports). the claimant will contend that the formal absence management warning appeal process, should have been completed by December 2020; the claimant will contend that the grievance process should have been completed by April 2021 taking into account delay on the claimant's part; that the grievance appeal process should have been completed by September 2021; the reheard grievance should have been completed by March 2022).

577. The Tribunal have found that this PCP does not apply so they do not comment on this allegation.

e Discussing the proposed advert with the Claimant first (stress management recommended as an adjustment in the OH reports).

578. The Tribunal have found that this PCP does not apply so they do not comment on this allegation.

Discrimination arising from disability – sections 39(2)(d) and 15 EqA

11. Did the Respondent treat the Claimant unfavourably? The alleged unfavourable treatment relied upon by the Claimant is set out in paragraph 22 a to c of the Particulars of Claim.

12. If so, was the Claimant's absence something arising out of her disability?

The Respondent does not concede that the Claimant's absences arose from her disability.

13. If the answers to questions 11 and 12 are "yes", was the unfavourable treatment because of her absence?

14. If so, can the Respondent nonetheless show that the treatment was a proportionate means of achieving a legitimate aim?

The legitimate aim on which the Respondent will rely is that it is entitled to expect minimum levels of attendance from its employees and manage employees' sickness absences to ensure that it provides an efficient service to its end users and to minimise the impact on its employees.

a. Receiving nil pay for the period 23 December 2019 to 12 January 2020. The "something" was the claimant's absence which arose in consequence of her disability.

579. The Tribunal refer to paragraph 259 in the finding of fact to an email from the claimant to Mr Smith dated 6 April 2022.

580. The Tribunal have been given no information of the dates or reasons for the claimant's absences of 378 days over the preceding 4-year period and whether these absences relate to her disability. The Tribunal are unable to say whether the claimant was treated unfavourably without further information or whether this was something arising out of her disability. This claim fails for lack of particularity and evidence.

b. Being given a warning for her sickness absence on 28 September 2020. It is contended that this amounts to discrimination arising from disability as the claimant was treated unfavourably by being given a warning, because her sickness absence which rose in consequence of her disability.

581. The Tribunal have discussed this above at allegation 5(b)(e). The Tribunal accept that being given a sickness warning **could** constitute unfavourable treatment and that if so, this would be something arising out of disability.

582. However for the reasons given above, the Tribunal have found that the respondent did not treat the claimant unfavourably by giving her a sickness warning. The Tribunal have found that Mr Uddin genuinely believed that the reasonable adjustments in the OHS report dated 12 March 2019 report had been considered or made and it was reasonable for him to do so, therefore the disability exception did not apply. The Tribunal have found that the respondent took reasonable steps to implement the reasonable adjustments. The respondent also followed their internal procedures and the Attendance policy and had increased the Consideration trigger points to account for the claimant's disability. The policy stated that the warning sought to alert the employee that their attendance level must improve and provide the individual with a period when they can demonstrate an improvement in attendance.

c. The decision not to withdraw the warning for sickness absence communicated to the Claimant on 10 February 2021.

583. The Tribunal have found that the decision not to withdraw the sickness absence warning was due to Mr Stephenson focusing on the wrong issue and a flawed analysis. The Tribunal accept that resulted in unfavourable treatment to the claimant as she was entitled to receive an appeal that dealt with the issues correctly and for the right reasons.

584. For a complaint of discrimination arising from disability to succeed, the unfavourable treatment must be because of something arising in consequence of disability. We accept that the "something arising" identified by the claimant was in consequence of disability as this related to her to consider whether the disability leave exception should apply to her absences.

585. However, the claimant has failed to prove facts from which we could conclude that the flawed grievance process, which was the claimant alleges the basis for the decision not to withdraw the warning for sickness absence, was because of this something arising out of her disability. the claimant is seeking to rely on the alleged effect of the respondent's conduct, not the cause of its alleged conduct; the claimant is considering matters the wrong way round. The Tribunal have made a finding of fact that the cause of Mr

Stephenson's conduct was due to human error caused by time restraints and workload issues. The Tribunal therefore conclude that this complaint is not well founded.

586. To deal with all the issues and if the Tribunal have erred on the (a), (b) and (c) above, the respondent has set out that the legitimate aim on which they rely is that it is entitled to expect minimum levels of attendance from its employees and manage employees' sickness absences to ensure that it provides an efficient service to its end users and to minimise the impact on its employees.

587. The Tribunal accept the respondent's submissions on this point. The Tribunal have found that in all the circumstances, the respondent took reasonable steps to put the reasonable adjustments set out in OHS report dated 12 March 2019 in place and to adjust the Attendance Management policy by increasing the claimant's Consideration Trigger Points to account for the claimant's disability and that these were in place at the time the claimant was away for sickness absence in October 2019 and the relevant sections of the Attendance policy in relation to disability was considered and applied before she was given the sickness absence warning. The Tribunal find that the respondent has shown that this was a proportionate means of achieving a legitimate aim (set out above).

Victimisation – sections 39(4)(d) and 27 EqA

15. Did the claimant do a protected act? The protected acts relied upon by the claimant are lodging a grievance on 4 January 2021 and commencing ACAS early conciliation on 15 January 2021 in respect of a claim for disability discrimination. The respondent accepts that these acts amount to protected acts.

588. It is unlawful to victimise a worker because she has done a "protected act". In other words, a worker must not be punished because she has complained about discrimination in one or other of the ways identified under section 27 of the Equality Act 2010. The Claimant's complaint of victimisation is set out at paragraphs 15-22 of the List of Issues.

589. The claimant relies upon two protected acts listed at paragraph 15. Dealing with these each in turn: (a) her grievance dated 4 January 2021 and (b) ACAS conciliation on 15 January 2021 and bringing claims against the respondent for disability discrimination. We find that both of these matters are protected acts within section 27(2) EQA. We note that the respondent does not dispute this.

16. Was the claimant subjected to detriment? The detriment relied upon by the claimant is the alleged failure to uphold her appeal against her sickness absence warning (on 10 February 2021) and the alleged delay in dealing with the claimant's grievance.

<u>Alleged failure to uphold the grievance against the claimant's sickness absence warning on 10 February 2021</u>

590. The claimant explained to the Tribunal that by failing to uphold the claimant's grievance against the sickness absence warning on 10 February 2021 meant that the warning remained on her record. The letter sent to Mr Uddin by the claimant on 28 September 2020 stated that the respondent has given her a first written Attendance Warning. The letter stated,

"I will monitor your attendance for 12 months from 24 September 2020. The first 3 months is called the Improvement Period during which any sickness absences should not go above 25% of the agreed 12-month trigger consideration point. If your attendance is unsatisfactory at any time in the 3-month Improvement Period, your case will be considered again, and I may give you a final Written Attendance Warning.

If your attendance is satisfactory during the 3-month Improvement Period, your attendance will be monitored for a further 9 months. This is called the 9 month Sustained Improvement Period during which the warning is not live. If your attendance becomes unsatisfactory again during the 9 month Sustained Improvement Period, you may be given a final Written Attendance Warning…..

For the purposes of job applications on CS Jobs and other relevant departmental policies, you are now the subject of Formal Attendance Action. This will end when you satisfactorily complete the 3-month Improvement Period. When applying for posts on CS Jobs, you should use this definition unless you are advised to do otherwise in the job description."

591. Whilst by 10 February 2021 the 3-month Improvement period had passed and this would not need to be referred to when applying for jobs on CS Jobs or for other departmental opportunities, there still remained a period between 10 February 2021 and 24 September 2021 when her attendance would continue to be monitored and if her attendance became unsatisfactory again she could be issued with a final Written warning.

592. The Tribunal therefore find that the claimant was subjected to a detriment.

Alleged delay in dealing with the claimant's grievance.

593. Ms Grace referred the Tribunal to an email from the claimant to Mr Stephenson on 25 March 2022 at paragraph 257 above.

594. The Tribunal accept that a delay in dealing with the issues the claimant has raised could have a detrimental effect on her mental health and in addition the uncertainty of when a final decision would be reached could affect her also.

595. The Tribunal therefore find that the claimant was subjected to a detriment.

17. Was any such detriment as may be found done because the claimant did a protected act?

596. The critical question is whether the reason that Mr Stephenson failed to uphold the grievance against the claimant's sickness absence warning on 10 February 2021 and or there was a delay in dealing with the claimant's grievance was because of the protected act (the fact that the claimant had made a grievance on 4 January 2021 and / or that she commenced ACAS conciliation on 15 January 2021 and a claim against the respondent). It is not necessary for the protected act to be the cause or the main cause of the conduct by Mr Stephenson or those that carried out the claimant's grievance, it is sufficient if the protected act had more than a trivial influence on that conduct.

(a) alleged failure to uphold the grievance against the claimant's sickness absence warning on 10 February 2021

597. The appeal against the sickness absence warning was carried out by Mr Stephenson and he received the claimant's Notification to appeal against the issuing of a first written warning together with additional information outlining her case and grounds for appeal on 30 October 2020. This is before the grievance was lodged or ACAS conciliation commenced.

598. Mr Stephenson's evidence is prior to his appointment he was not aware that the claimant had raised a grievance or commenced ACAS early conciliation or brought an ET claim. This Tribunal accept that this must be correct as they had not occurred at that time. However, Mr Stephenson believes this may have become apparent during the appeal process, but he cannot recall any specific details. His evidence is that he did not know of the nature of the claimant's grievance. He did not have any contact with Mr Uddin other than the correspondence in the bundle. There is no correspondence in the bundle referring to the grievance, ACAS conciliation or ET claim involving Mr Stephenson to assist the Tribunal to establish what he knew and on what date.

599. The Tribunal refer to their conclusions in allegation 5(i) above which are relevant here. The Tribunal have made a finding of fact above that Mr Stephenson's failure to uphold the grievance against the claimant's sickness absence warning on 10 February 2021 was because of flawed reasoning and focusing his factual enquiries on the claimant's return to work in January 2020 rather than what reasonable adjustments had been considered or made before the claimant went on sickness absence leave in October 2019.

600. The Tribunal accept Mr Stephenson's evidence and the reasons for the delay he has given for the delay in January and February 2021 were not caused or influenced by the protected acts. The Tribunal have found that Mr Stephenson produced his outcome letter at a time when he was under pressure with a high workload and little time to complete the outcome letter and this is reflected in the lack of detail in his conclusions. We find that there are no primary facts upon which we can infer that the Mr Stephenson's flawed analysis was because the claimant had done a protected act.

601. We find that Mr Stephenson in rejecting the claimant's grievance appeal was not motivated by a desire to punish the claimant for making her original grievance on 4 January 2021 and/or bringing early conciliation through ACAS on 15 January 2021. Mr Stephenson cannot have known about the claim in the Employment Tribunal at the time of his decision as this was not made by the claimant until 26 March 2021 and his decision was given on 10 February 2021.

602. For the above reasons the Tribunal find that the sickness absence appeal outcome decision was wholly unconnected with the bringing of the grievance 4 January 2021 and early conciliation through ACAS on 15 January 2021

603. Accordingly the claimant's claims are dismissed.

b) <u>alleged delay in dealing with the claimant's grievance.</u>

<u>The initial grievance hearing by Ms Bailey</u>

621. The Tribunal have set out a chronology in the findings of fact at paragraphs 236-245 above and from their review of the documents in the bundle have seen no evidence that

any delay up until the outcome decision was given to the claimant on 11 June 2021 was caused by the commencement of early conciliation though ACAS on 15 January 2021.

622. The claimant did not raise any issues with the timescales in which the grievance was conducted, save that the grievance policy states that,

"If the decision is not to be made on the same day or within 5 working days of the hearing, for example, because further investigation is needed, the complainant, and the respondent (if there is one), must be given a reason for the delay and told when to expect a decision. (Page 184)"

623. This suggests based on the date of the hearing on 28 May 2021 that the decision should have been given to the claimant on 8 June 2021 (due to the intervening bank holiday on 31 May 2021) but was not given to her until 11 June 2021, 3 days late. The Tribunal have seen no evidence to suggest that this delay was influenced or caused by the claimant commencing early conciliation through ACAS and in any event accept that this is a very short delay in communicating the decision outcome and is reasonable in all the circumstances.

624. The Tribunal find that there was correspondence between HR case manager, Ms Bailey and Mr Campbell on 28 April 2021 (set out at paragraph 241) resulted in the claimant being asked by Mr Campbell to provide her final amendments to the interview transcript notes within 5 days, i.e., by 7 May 2021. The Tribunal find that this provides evidence that whilst the Investigating Manager and Decision manager were aware of the parallel ET claim, this did not result in a delay in progressing matters but rather resulted in them setting a deadline with the claimant so that the grievance could be progressed.

<u>The grievance appeal by Mr Ralph, grievance appeal manager</u>

625. Ms Grace submits that the delay in Mr. Ralph's appeal, was caused largely by Ms. Bailey's failure in the first place to deliver a reasoned decision but also to co-operate by providing her rationale to Mr Ralph resulted in a rehearing which she submits was because Ms Bailey was preoccupied with the ET proceedings. Ms Grace therefore invites the Tribunal to find that the delay in this part of the procedure was related to the ET proceedings.

626. The Tribunal refer to the findings of fact in paragraphs 246-255 and find that Ms Bailey and Mr Ralph were aware of the ET proceedings as this is referred to in their correspondence on 2 July 2021. The Tribunal find that from the date of the claimant's interview on 23 July 2021, there is a delay by the claimant in returning her amendments to the interview notes until 16 August 2021 and a delay until 31 August 2021 as Mr Ralph is on leave. These delays are unconnected with the ET proceedings.

627. The Tribunal find that Ms Bailey's request for more specific questions to be put to her about her decision to Mr Ralph is the reason that he decides that the grievance needs to be reheard and that this is the reason for the delay in September and October 2021 for not progressing the grievance appeal. The critical question for the Tribunal is whether Ms Baileys response to Mr Ralph was because of the protected act (ET proceedings) or more than a trivial influence on that conduct.

628. Ms Bailey was not produced as a witness by the respondent. The Tribunal were referred to correspondence of 5 March 2021 from Mr Campbell which references that she was

leaving the respondent's employment. Ms Grace invited the Tribunal to draw appropriate inferences where the respondent's explanation for the treatment is lacking.

629. The Tribunal find that whilst Ms Bailey referenced the fact that ET proceedings are in parallel to the grievance appeal, the Tribunal read her email of 2 July 2021 to say that due to the ET proceedings, she should not speak to Mr Ralph so as to ensure a fair process and so that she cannot be accused of influencing his decision which she describes as a clear gap between her decision and his consideration. She effectively stated that he should review the appeal on the papers he had. Then when Ms Bailey is asked to respond to the claimant's issues on her decision, the Tribunal find in her response on 15 September 2021 to Mr Ralph she takes issue to her decision being called flawed. She does not refuse to provide Mr Ralph with a response but seeks him to ask specific questions rather than putting the claimant's accusations to her which she takes as the claimant not liking her decision.

630. Mr Ralph decides not to seek further information from Ms Bailey. The Tribunal do not find that there is any evidence to suggest that Ms Bailey's conduct was influenced by the ET proceedings but rather her rational was that specific questions should be put to her and that a "conversation" should not take place to ensure a fair and documented process. The Tribunal have seen no evidence and it was not put to the Tribunal that Mr Ralph's decision that the grievance should be heard again was connected to the protected act of ACAS conciliation being commenced or that an ET claim was being pursued by the claimant.

631. The Tribunal find that the reason Mr Ralph made this decision is set out in his email to the HR case manager on 8 September 2021 set out at paragraph 252.

632. Finally, the Tribunal have seen no evidence that Ms Bailey's alleged failure to deliver a reasoned decision in the first place was because of or influenced by the ET proceedings. The Tribunal find the reason for this is set out in an email from an HR case manager, dated 13 July 2021 (set out at paragraph 249) which states that Ms Bailey did not believe that there was enough evidence to support the grievance.

Rehearing of the grievance by Mr Smith

633. The Tribunal refer to the findings of fact made at paragraphs 256-263 above.

634. The Tribunal accept Mr Smith's oral explanation for the reason of the 5 week delay from the claimant's interview on 10 February 2022 until the end of March 2022 was because Mr Smith's day job was frantic due to the invasion of Ukraine by Russia which the Tribunal note occurred on 24 February 2022 and note that this is consistent with his contemporaneous emails set out at paragraph 258.

635. The Tribunal find that when Mr Smith then turns his mind to the grievance again on 6 April 2022, he seeks further queries from the claimant. Mr Smith then writes to the claimant on 20 April 2022 that he was unwell in Holy Week (10-16 April 2022) and then his sister was in ITU. In oral evidence Mr Smith explained the medical issues his sister faced and that these were life threatening. He was visibly upset when giving evidence and it was clear that this was a really difficult time for him. He sent the claimant a draft note of their meeting which he accepts he should have sent earlier but that his evidence was he did not have time to prepare this any earlier and he could not ask HR for

assistance with this as he had to prepare this from his notes. The Tribunal accept Mr Smith's explanation for the reasons for the delay from 6 April to 20 April 2022.

636. There is then a delay in the claimant providing the amendments to the notes of the meeting from 20 April 2022 to 17 May 2022. On 15 May 2022, Mr Smith explains that he was flying out as someone close to him had been taken to hospital, which he explained in oral evidence was his sister. He provides the outcome of the grievance on 24 May 2022. The Tribunal find the delay from 15 May 2022 – 24 May 2022 is for the reasons Mr Smith has given which is for personal reasons.

637. Mr Smith in his witness statement states that, "*I do not recall being aware at the time of my appointment that Miss Moore had commenced ACAS early conciliation in respect of an employment tribunal claim against Home Office. This became apparent during the grievance process and shortly before I issued a decision."* Mr Smith was cross examined as to his knowledge of the ET claim that the claimant had made. Mr Smith confirmed that he did not speak to Ms Bailey (who originally heard the grievance). He accepted that he read Mr Campbell's Investigation report and that this stated at paragraph 54,

"It should be noted that ACAS are aware of this case, and I believe we have not engaged with them around mediation. I am not confident given all of the above that the department would fair well at an ET."

638. Mr Smith's evidence was that this report was dated May 2021 and as he was looking at the case a year later, he believed that there was no mediation ongoing. He stated that it was only at the time of issuing his decision that he realised there was what he described as "active conciliation / litigation".

639. The Tribunal are persuaded by Mr Smith's evidence. Considering all the evidence, the Tribunal find that any delays in Mr Smith's handling of the grievance and in particular the delay in so doing was not influenced by the ACAS conciliation being commenced or the ET claim. Ms Grace invited the Tribunal that the respondent had sought to minimise litigation risk by advising Mr Smith to disregard Mr. Campbell's findings, and that this was part and parcel of the delay. The Tribunal were provided no evidence to draw such a conclusion and found Mr Smith to be a credible witness. The Tribunal accept his evidence that he took his independence seriously and would not make a decision simply to please his superiors. The Tribunal do not find that any delays that occurred were influenced by the protected Act.

640. For the reasons given above, the complaint of victimisation therefore fails and is dismissed.

Time limits

1. Were the Claimant's complaints presented in time pursuant to s123 EqA? Taking account of the ACAS Early Conciliation process initiated on 15 January 2021, any acts occurring before 16 October 2020 are potentially out of time.

2. Do any acts amount to conduct extending over a period within the meaning of section 123(3)(a) EqA?

641. Both parties did not make oral submissions on the issues relating to time, however written submissions were put to the Tribunal by both Counsel.

642. Based on the Tribunal's finding of fact and reasons given above, the claimant's claims fail for all the complaints she has made including those of direct disability discrimination, failure to make reasonable adjustments, discrimination arising from disability and victimisation. However for the sake of completeness, the Tribunal set out their views on the time issues raised by the respondent.

643. It is not in dispute that any acts occurring before 16 October 2020 are potentially out of time as agreed by the parties in the List of Issues, although the Tribunal note that Ms Grace's submissions refers to a date of 26 October 2020 which the Tribunal have presumed to be a typing error based on the timing that ACAS conciliation was commenced on 15 January 2021.

644. Whilst not prescriptively laid out in either Counsel's submissions, the Tribunal therefore find that prima facie all the allegations in the List of Issues were not presented in time **save for: -**
    - In relation to direct disability discrimination 5 (g), 5(h) and 5(i)
    - In relation to Reasonable adjustments claim, allegation part of 10 (c), 10 (d), 10(e)
    - In relation to Discrimination arising from disability claim, allegation 11(c)
    - In relation to Victimisation claim, allegation 16

645. In respect of allegation 5(b) and reasonable adjustments claims, neither party has set out to the Tribunal the date it is they allege that time should be calculated for these allegations. Time will start to run when an employer decides not to make reasonable adjustments relied upon however where an employer has not actively refused the reasonable adjustment, then time starts to run on the date which the employer might reasonably have been expected to do the omitted act. This should be determined having regard to the facts as they would reasonably have appeared to the employee, including what the employees was told by his or her employer.

646. The Tribunal find no correspondence / texts or suggestion by the claimant that Mr Uddin or Mr Griffiths in his absence have ever refused to make the reasonable adjustments set out in 5 (b). The Tribunal find the claimant wrote to her union representative on 4 June 2019 stating that the OHS recommendations had not been put in place and stated and confirmed this again in her email dated 11 July 2019 (paragraphs 128, 133 above). There are no similar emails to Mr Uddin or Mr Griffiths save for that the claimant told Mr Griffiths in her email of 7 May 2019,

    "The OHS referral therefore made a number of recommendations which we felt would help which unfortunately for various reasons haven't been implemented."

647. The Tribunal find that it would have reasonable for the claimant to have taken a view on 16 July 2019 at the time she had an SRA with Mr Uddin as the date when she would have expected the respondent to have made all the reasonable adjustments from the March 2019 report.

648. Mr Crawford submits that at the return-to-work meeting on 13 January 2020, there is no reason why the claimant could not have taken a view on the treatment which she believed amounted to a failure in the duty to make reasonable adjustments in respect of the Attendance policy at that stage. The Tribunal note that this is later in time that they have stated above that would have been reasonable but accept this submission because it is the claimant's case that had the reasonable adjustments been in place in 2019 then she

would not have taken sickness absence leave in October 2019. Further the Tribunal note that the claimant was unwell from October 2019 to January 2020. The Tribunal note that had the claimant done so then she should have brought her claim on all the allegations in 5(b) and reasonable adjustments claims in early 2020.

649. Further, the Tribunal find that the claimant has set out to her union representative in her email dated 28 May 2020 that in her view that allegations 5(a), 5(b), 5(c), 5(d), 10(a), 10(b) had occurred and that she felt as of 28 May 2020 that she should submit a grievance and sought advice on making a claim for work related stress based on these issues. The claimant had identified that this had caused her to take time off work due to stress in October 2019. The Tribunal find that the letter of 28 May 2020 further supports the Tribunal's conclusions that by this date it had crystallised in the claimant's mind that she had a claim against the respondent and that the reasonable adjustments should have been put in place by the respondent.

650. Ms Grace submits that it is the claimant's case that there were continuing acts in respect of the out of time allegations as the thread that runs through them is Mr Uddin's failure to support the claimant and the failure to implement adjustments. The Tribunal do not consider that as all the allegations involve Mr Uddin that this factor alone suggests that the acts were continuing.

651. The Tribunal have dismissed the allegations that have been bought in time (set out in paragraph 644 above) and have set out the reasons for this above. The Tribunal therefore find that even if the earlier claims which have not been bought in time were continuing acts to these allegations they would also fail. The Tribunal therefore do not make a finding on whether the allegations that have not been bought in time were a continuing state of affairs.

3. If any of the claims was not presented in time, is it just and equitable to extend time?

652. The Tribunal do not have jurisdiction to consider complaints that were bought out of time unless we consider it just and equitable to do so in all the circumstances.

653. The claimant submits that her reasons for not bringing these claims were due to the impact of her disability which was exacerbated by the respondent's failures. She submits that she could not cope with multiple stressful matters at once and her focus was on trying to successfully return to work with her reasonable adjustments having been implemented. The claimant also states that she suffered from side effects of her medication and the impact this had on her, but she has failed to provide the Tribunal with dates when this was the case.

654. The respondent submits that the claimant had the mental vigour to undertake research on her claim as she did so in her email dated 28 May 2020. She had access to advice from her trade union representative throughout 2019 and 2020 as evidenced by her emails in the bundle.

655. The Tribunal have carefully considered the submissions by both parties and accept that when the claimant returned to work on 13 January 2020, there is documentation that she had a number of ongoing personal issues including caring for her husband after surgery and there is a reference to medication issues and the Tribunal note that in her letter of

28 May 2020, the claimant stated, *"I was planning to submit a grievance however my mental health was such as not to be up to doing this."*

656. However, the claimant was able to articulate a very clear letter on the issues to her union representative on 28 May 2020 which would have been sufficient to submit as an ET1. She was seeking advice on making a claim and had researched a claim for work related stress and referenced time limits which may have related to the grievance process but provides evidence that she was aware of time issues when considering escalating her claim. The Tribunal have not seen a response from the union representative to the claimant to her letter dated 28 May 2020 and the claimant has not told the Tribunal what she was advised.

657. The claimant has not provided the Tribunal with any specific information of why she delayed bringing a claim to the Employment Tribunal. The Tribunal find that on 28 May 2020, she was able to do so and had access to advice to make an informed decision, some 8 months earlier. Further, the Tribunal also note that the claimant was well enough to return to work full time from 18 May 2020.

658. The claimant submits that the cogency of the evidence has not been affected. The Tribunal do not agree. The claimant has submitted that the Tribunal should draw inferences for Mr Uddin's failure to provide notes of his meetings in 2019. Mr Uddin has told the Tribunal that he cannot find his notes from 2019. The Tribunal find had the claimant bought this claim in 2020, then it is more likely that the notes would have been available and if they were not, the Tribunal would be in a better position to draw such inferences as the claimant submits the Tribunal should do so. Further Mr Uddin would have been able to provide evidence nearer to the timing of events about discussions at meetings and his recollection and ability to respond to the allegations would have been improved.

659. The Tribunal find that the claimant's motivating factor for making a claim to the Employment Tribunal was when her job was advertised by Mr Uddin before speaking to her on 19 October 2020 and she was alive to the limitation period in respect of this allegation. In the meeting with Mr Campbell for her grievance on 4 March 2021, the claimant told him,

"She explained that she had lodged an application to ACAS about the job advert. Joni lodged it on 15 January 2020 as the 3-month window was closing, Doug asked what her thinking was behind it. Joni said it was just to protect her position, the information was the same as what was in the grievance."

660. For the reasons given above, the Tribunal do not find that it is just and equitable to extend the time for the claimant to bring allegations that are out of time, namely any other allegations than those set out at paragraph 644 above. In any event, for the reasons given above, the Tribunal dismiss all the claims made by the claimant.

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Employment Judge Sekhon
Date: 31 March 2023

Sent to the parties on
Date: 5 April 2023

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