EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Ali**

Respondent: **Home Office (Border Force (UK))**

Heard at: **East London Hearing Centre**

On: **20, 21, 22, 23, 27 and 28 September 2022**

Before: **Employment Judge Jones**
Members: **Ms P Alford**
Ms G McLaughlin

Representation
Claimant: in person
Respondent: Ms L Harris (Counsel)

JUDGMENT

The Claimant's complaints fail and are dismissed.

REASONS

1. The claimant's complaints were of unfair dismissal, direct sex and disability discrimination, failure to make reasonable adjustments, indirect disability discrimination, and discrimination arising from disability. The list of issues we considered were as set out in writing in by EJ Burgher on 20 May 2022 and began 1135 of the hearing bundle. The Tribunal will set out the detailed list of issues below, in the section entitled '*Applying Law to Facts'.*

Evidence

2. The Tribunal heard live evidence from the Claimant in support of her claim.

3. For the Respondent the Tribunal heard from: -

4. Richard Fisk, Border Force Senior Officer (BFSO), who was the decision manager in the 1st incident;

5. Maseeh Naeem, Assistant Director, Stanstead Airport Command, who heard the claimant's appeal against the sanction given in relation to the 1st incident;

6. Paul Barker, Border Force Higher Officer, (BFHO) at Stanstead, who conducted the investigation into the 2nd incident;

7. Cris Ashworth, BFSO at Stanstead Airport, who was the decision manager in the 2nd incident;

8. Taylor Wilson, Assistant Director, Stanstead Airport, who conducted the appeal hearing against the sanction given in relation to the 2nd incident;

9. Mark Guntrip, BFSO at Stanstead Airport, who conducted an investigation into the 3rd incident;

10. Steve Wilmer, BFSO at Stanstead Airport, who dismissed the Claimant;

11. Matthew Davis, BFSO at Stanstead Airport, who heard the Claimant's appeal her dismissal; and

12. Roderick Inglis, BFHO at Stanstead Airport who was the Claimant's line manager during the relevant period.

13. The Tribunal had signed witness statements from all the above witnesses. Mr Fisk, Mr Naeem, Mr Ashworth and Mr Steve Wilmer all provided supplementary witness statements to deal with points made in the Claimant's witness statement. We also had an agreed bundle of documents and the respondent provided us with a draft chronology.

14. The Tribunal apologises for the delay in producing this judgment and reasons. This delay was due to the Judge's ill-health and to pressure of work on the judge.

Findings of Fact

Disability

15. By letter to the Tribunal dated 23 December 2021, the Respondent conceded that at all material times the Claimant had a disability caused by the impairment of depression. During the 3rd disciplinary process, the Claimant was diagnosed with Fibromyalgia. At a Tribunal hearing on 1 February 2022, EJ Crosfill's judgment was that the Claimant was also disabled by reason of the impairment of fibromyalgia or an undiagnosed impairment which caused symptoms normally associated with fibromyalgia.

16. The Respondent disputed that it had been aware at the relevant time that the Claimant was a disabled person.

The Respondent's Awareness of the Claimant's conditions

17. Before taking over the Claimant's line management in August 2019, Mr Roderick Inglis had been told by her previous manager, Chris Evans that she had been previously diagnosed with Vertigo and mental health issues.

18. On 23 April 2019, the Claimant wrote to management to ask whether she could use some of her annual leave on 7 days during May 2019, as it was Ramadan and due to health reasons, she did not feel that she could do the full shift. She stated that she was having headaches and that they were likely to get worse. The Claimant asked for annual leave for the whole day on 3 days and to leave 1 hour early on 3 of the other days and 3 hours early on one day. On 3 May, management replied to the Claimant. The Respondent informed her that she could have leave on two days in May, one of which she had asked for, but that the remaining days could not be agreed as they coincided with a period of expected high demand. The Claimant was advised that she could try to get swaps with colleagues to alternative times that suited her. Most importantly, the Respondent told the Claimant in this letter that

> *"if you are physically unable to undertake your rostered duties on health grounds (at any point in time even aside from these dates) then I would encourage you to discuss this further with Chris to explore other support options and adjustments. If you are unwell or unfit for duty during a shift please notify the HO so that they can support and direct accordingly."*

19. The Claimant had been fasting during May 2019 and around the date of the second incident. She had also stopped taking her anti-depressant medication a few days before Ramadan as they made her sleepy and she wanted to stay up to do her prayers. The Respondent was unaware that the Claimant had stopped taking her medication.

20. Mr Inglis became the Claimant's line manager from August 2019. His evidence was that he had been aware that the Claimant had a diagnosis of anxiety and depression. He had not been made aware that the Claimant suffered mood swings and forgetfulness around the time of her monthly cycle. This was not a matter that she ever raised with him.

21. During his discussions with the Claimant, she told him that she had bouts of anxiety, Raynaud's syndrome and what she suspected was fibromyalgia but which at that time was undiagnosed. He suggested to the Claimant that she should see her GP and get a formal diagnosis as he would then be able to address any adjustments that she needed. In August 2019, he referred the Claimant to the Occupational Health Service (OHS) and the report was in the bundle.

22. The OHS report (385) confirmed that the Claimant had been assessed on 28 August 2019 and that she was fit to continue in her current role with adjustments. OHS had been asked to assess her (1) *her recurrent absences* (2) *her fitness for the role*; and 3) *'whether poor performance at work is affected by her illhealth'.*

23. At the time that the report was prepared, the Claimant was in the middle of the disciplinary process relating to the 2nd incident. The OH report concluded that the Claimant reported with the following:

> *"1. Anxiety and depression – treated with daily prescription medication. Symptoms appear to be much improved and stable. However, she continues to experience anxiety at work. She described feeling*

embarrassed because of the segregated working due to the ongoing investigation at work. She told me she feels she was unfairly treated and would prefer to be allowed to work inclusively with her colleagues.

2. Vertigo – risk of recurrence in the future which may trigger absences when symptoms are active. Symptom free at the moment.

3. Weakness – GP feels the symptoms may be Fibromyalgia like symptoms – no formal diagnosis has been made as yet. These symptoms may affect her wellbeing and may contribute to reduced wellbeing and may affect her attendance at work.

4. Raynaud's Syndrome affecting her legs – triggering painful and uncomfortable leg symptoms. To avoid prolonged standing and to be as active as possible."

24. The Claimant also described to the OH adviser some issues with her personal/domestic life which could also have contributed to some absences in the past.

25. The OH adviser noted that the Claimant had recently been put on a new daily medication which has had a very positive affect on her mental health and that she was hopeful that once that current investigation was resolved, she would be able to return to a regular pattern of attendance at work. The adviser made the following recommendations:

Please consider allowing her to return to her usual working pattern, as it appears the current restrictions at work may be exacerbating her anxiety.

Please consider adjustments to absence trigger points for her known conditions

Please allow her to attend scheduled medical appointments if she is unable to make these appointments on her non-working days – she may be able to make up any lost hours. Please discuss this with her.

Please consider regular management meetings.

26. The Respondent was also advised that it was likely that the Claimant's conditions would be considered as meeting the definition of disability under the Equality Act 2010.

27. In response, Mr Inglis spoke to the Chief of Staff, Gail Crouchman who agreed that they could look at the absence trigger points with a view to revising this. When he approached HR about that he was told that the Respondent would only adjust trigger points for conditions that had been diagnosed. That meant that the Claimant would need to have her other conditions diagnosed before the trigger points could be adjusted.

28. On 4 October 2019, Mr Inglis held an attendance review meeting with the Claimant. The purpose of the meeting was to discuss the OH report and review the Claimant's attendance at work. At the meeting Mr Inglis told the Claimant that

she had reached consideration trigger 2, due to her recent absences from work. They discussed the recent OH report, as set out above. The recommendation that she should be returned to the PCP had been complied with, once she completed her refresh training. Also, the Respondent was in compliance with the recommendations that she should have regular management meetings and this meeting was an example of that. The Claimant talked about her vertigo, her Fibromyalgia and a connective tissue disorder in her legs which had not yet been diagnosed but could be related to the Raynauds Syndrome.

29. On 6 May 2020, the OH advisers produced a second OH report based on a request from Mr Inglis, the Claimant's line manager. The report was based on a telephone review consultation with the Claimant.

30. The OH adviser stated that the Claimant was fit to continue her current role, with adjustments. She confirmed that the Claimant had anxiety and depression, vertigo, Fibromyalgia and Reynaud's Syndrome, which affected her legs. OH stated that the symptoms of the Fibromyalgia could affect her attendance at work and that the Reynaud's Syndrome meant that she should avoid prolonged standing and to be as active as possible. This assessment was the first occasion that the Claimant mentioned confirmed a diagnosis of Fibromyalgia to the Respondent, the symptoms of which had been mentioned in the earlier report. The advice from OH was that regular breaks and/or a change of work activity every hour or so might be beneficial. Also, the Respondent was advised to meet with the Claimant on a weekly basis to give her positive feedback/support, which should address the perceived work stressors. The Respondent also should complete/update a stress at work risk assessment every few months. The OH advisor confirmed that the Claimant was likely to fall within the ambit of the Equality Act 2010.

31. The Claimant obtained a medical report from her GP dated 18 June 2020 which confirmed that she had been suffering from both anxiety and depression, which had been present for at least 6 years. The GP advised that her condition was characterised by panic attacks, sleep disturbance, low mood and poor appetite which was contributing to some weight loss. She was taking an antidepressant called Sertraline. The GP stated that the Claimant had informed them of what she described as *'stressful circumstances currently going on at work'* and that she feels her work situation is currently exacerbating her mental state.

32. The Claimant obtained this report and the attached documents to support her case. The attached documents were copies of a result of a transvaginal scan conducted on 27 November 2019, which confirmed that she told the nurse that her last menstrual period started that day. She sent these documents to the Respondent and the Tribunal on 27 November 2021. She did not produce these during the disciplinary process.

1st Incident

33. The Claimant was initially employed in 2003 as an administrative officer in Croydon. She transferred to Stanstead Airport in 2006. As an administrative officer at the airport, the Claimant assisted in the processing of passengers by Border Force whether by doing things like fingerprinting or issuing them with documents. This was therefore a customer facing role.

34. The Claimant was appointed to the post of Border Force Officer (BFO) in October 2017. This was a promotion for her. She continued to work at Stanstead Airport. As a Border Force Officer, the Claimant's job was to process passengers arriving to the UK, by interviewing them at the PCP (primary care point) desk and conducting a range of checks on them and their documents. She agreed in the hearing that when she was conducting those checks she was representing the UK government and that she had a duty to act professionally at all times.

35. Before taking up the role of BFO, the Claimant had to undergo a 3-week course on core skills which is now known as a BFO Foundation. The course covered, amongst other things, the respondent's Operating Mandate as well as the Warning Index. We had the training development record in the bundle of documents. That document showed the Claimant was tested at the end of each week of the course and that she passed the course overall. However, comments recorded on the course documents show that at the end of the course, there were some gaps in the Claimant's knowledge. The evidence was that the senior managers at her place of work, Stansted Airport were to be responsible for ensuring that she closed those gaps in her knowledge through training and mentoring on the job. The Claimant confirmed that she was mentored at work (pg 252).

36. The Claimant worked part-time, 17.5 hours per week, and mostly did the shift between 2:30 PM and 1 AM. Those were busy shifts. The Respondent was continuing to employ part-time staff, up to the date of the hearing. Mr Naeem's evidence was that during his time at Stansted he was unaware of any drop in the numbers of part-time workers employed by Border Force. He stated that in September 2022, the Respondent was specifically focused on recruiting part-time workers. They are fewer part-time staff at Stanstead and the statistics provided by the Respondent showed 28 part-time staff and over 100 full-time staff. There are part-time staff and staff who work flexible hours, which are different arrangements. There is a cap on the number of officers who can work flexibly, as this includes existing staff as well as new recruits. There were no such restrictions on those who can work part-time. At the Tribunal hearing, Mr Naeem confirmed that he had recently recruited part-time workers and that the Respondent had not stopped recruiting people who wanted to work part-time. Statistics produced by the Respondent showed that in 2018, 23% of staff were part-time and 60% of staff were female. The number of part-time staff increased in 2019 to 26% being part-time. In 2020, the total number of staff reduced from 242 to 233. This may have been caused by a reduction in recruitment during the pandemic when the airport was less busy. The percentage of staff who worked part-time in 2020 was 25%, with 62% of officers being female.

37. The Claimant produced an undated text message exchange between her and one of her former colleagues in which she asked whether the recent recruitment campaigns were only for full-time work. She was told that they were for full-time positions and for apprenticeship. Also, that the business requires full-time but may be able to accommodate some part-time.

38. We also had copies of correspondence between various senior officers within the Respondent's Gender Equality Network around improving the opportunities for part-time and flexible working within Border Force. There is clearly a desire among management to do this.

39. Border Force is an operational command within the Home Office and has a critical role in securing the border and protecting the public against terrorism, crime, revenue fraud and immigration abuse. To carry out its security function, Border Force Officers (BFOs) conduct a range of checks at the border on people and commodities travelling to and from the UK. The Claimant's role as BFO at Stansted Airport required her to conduct a range of mandatory checks on passengers as they sought to cross the border into the UK.

40. Mr Wilson's evidence was that BFOs would be moved from the PCP desk and assigned to other duties when they have not followed procedure. This would be while an investigation is conducted into why an incident occurred and then a decision is made as to whether or not to return them to the desk or place them somewhere else. Depending on the outcome of the investigation, they could remain on other duties and not returned to their original post.

41. From the respondent's Operating Mandate, we find the following:

> *Border Force works to deliver effective intervention in all cases of known threats; maximise the detection of unknown threats; and facilitate border processes for legitimate travellers, goods and freight.*
>
> *In carrying out a range of checks at the border, BFO's use their skills and professional judgment, passenger and freight data, intelligence analysis technology based watch listing, targeting, screening and knowledge, to inform decisions on whether action is required and if so, the course of action to be taken. The checks conducted by BFO's at the physical UK border are an essential part of the wider end-to-end checks process through which the UK controls migration and secures its borders.*
>
> *Border Force must work with other UK and international enforcement and transport security partners to deliver its objectives, including the UK visas and immigration departments, immigration enforcement, the office was security and counterterrorism the National Crime Agency, HMCTS Foreign & Commonwealth Office and other similar bodies.*

42. The Operating Mandate contains a detailed Absconder Policy. Although the content of that policy is a matter of national security and cannot be repeated here, the tribunal is satisfied that the Claimant was aware of the policy, and that she knew the definition of absconder and the actions to take in relation to an absconder. She had successfully carried out checks on passengers entering the UK since 2017.

43. As a BFO at Stansted, when working at the PCP, the Claimant would be behind a desk as passengers come through and she would be behind a desk and beckon passengers to approach her desk. The Claimant would then conduct a manual passport check, using a computer terminal on the desk. There were 22 desks at Stansted Airport, most of which were manned at busy times. The desks were not enclosed which meant that a BFO could easily come out from behind the desk, if required. Once the passport check is complete, the passenger would be allowed to continue to the baggage hall.

44. Mr Naeem, who conducted the Claimant's appeal in the first incident, confirmed that it was not unusual for a passenger to misplace their passport but when that happens, there is procedure for the BFO to follow. That would include arranging an escort to accompany the passenger to go and retrieve their passport.

45. Allowing a passenger to cross the border without them having first undergone these checks would amount to a failure to fulfil the role of a BFO. In the event that a passenger successfully absconds from the care point, the BFO should take immediate steps to notify the duty manager of the absconder, in line with the Absconder Action Plan, detain the absconder and return them securely to the control/handing area.

46. When there is an incident of possible misconduct, the Respondent's procedure is that a decision maker is appointed and that person commissions an investigation from another officer. The investigation officer's job is to conduct an investigation into the allegation/s of misconduct, write a report and recommend if there is/is not a case to answer and send the report to the decision maker who would then hold the disciplinary hearing, if relevant or if not, dismiss the allegations.

47. In relation to the first incident, Mr Richard Fisk was the decision maker who commissioned an investigation report from Anthony O'Riordan, a Border Force Higher Officer. It was also Mr Fisk's decision to put the Claimant on e-Gates while the investigation was conducted. He was unaware of the Claimant's disabilities at the time. He considered that the incident had been a serious one and that putting her on e-Gates would protect her and the Respondent while the disciplinary process ran its course.

48. According to the investigation report prepared by Mr O'Riordan, on 16 November 2018, the Claimant failed to deal correctly with a passenger who was not in possession of their passport. Mr O'Riordan interviewed the Claimant on 14 December, following a short delay due to scheduling issues. The meeting was re-arranged at least once. The Claimant was interviewed without her union representative but confirmed that she was fit to continue. She also had some time to consult with her union representative, once she received the minutes. The Claimant was able to make written representations. From his investigation, Mr O'Riordan concluded that there was substantial evidence to show that the Claimant had allowed the passenger to walk through unattended, to retrieve his passport. Also, she failed to take immediate steps to notify the on-duty manager of an absconder. In coming to that conclusion, the investigator had looked at the CCTV images and considered the statements provided by the Claimant, BFO Sharp, BFO Asmin-Saeed, who was the Higher Officer the Claimant spoke to when she telephoned the watchhouse to report the matter, Acting Senior Officer Hildrew, and the passenger.

49. At the end of the investigation, the investigator considered that that there was a case to answer in relation to two serious allegations, as follows:

a. failure to apply procedures in dealing with the passenger not in possession of their passport; and

b. failure to notify the duty manager of an absconder, in line with local and national absconder recovery processes.

50. A 3rd allegation relating to discrepancies between the written account the Claimant provided and the verbal account she gave to another officer when she returned to duty, was not allowed to proceed to the disciplinary hearing as Mr O'Riordan found no evidence that a false statement had been made or any discrepancy in her accounts.

51. The Claimant received Personal Safety Training, Level I as part of her training for the job. This did not give her the skills to physically tackle members of the public, which would require level III training. The Respondent did not expect the Claimant to physically tackle an absconder. The expectation was that that she would notify the duty manager and other managers in the watchhouse, which was an office/cubicle situated on the same floor as passengers come through. We find it highly likely that there was a telephone on desk in front of the Claimant which she could have used to notify the watchhouse of anything that happened at her desk, including a passenger going through the gates without having completed the necessary checks.

52. As part of her training, we find it highly likely that the Claimant would have known how to use the panic alarms and the telephone on the desk to raise the alarm, when necessary.

53. Following Mr O'Riordan's report on 8 January, Mr Fisk wrote to the Claimant on the following day to invite her to the disciplinary hearing and to send her a copy of the investigation report and statements. In the letter he advised her of her right to be accompanied to the hearing by a workplace colleague or a trade union representative. She was advised of the allegations that would be discussed at the hearing and that if they were found proven, it may constitute gross misconduct under the Respondent's Disciplinary Policy, which may lead to a written warning/final written warning/downgrading as an alternative to dismissal or to dismissal. The Claimant had a week's notice as the hearing was due to take place on 18 January.

54. The letter advised her where she could find copies of the disciplinary policy and procedures. She was advised to read these documents carefully before she attended the hearing.

55. In the letter Mr Fisk also stated the following:

> *'Please let please let me know as soon as possible if you, or the person accompanying you, if applicable, require any special arrangements/reasonable adjustments (for example if you have a hearing or sight impairment) to enable you to fully participate in the hearing.'*

56. The Claimant was advised that if she failed to attend after she had received appropriate notification, it was likely that the hearing would proceed in her absence. She was also advised that she could produce any further evidence for Mr Fisk to consider. She did not do so.

57. Prior to conducting the hearing, Mr Fisk enquired of the HR department whether the Claimant had any live warnings on her record, which she did not. He read the investigation report and supporting documentation. He also sought advice

on the appropriate sanction for the allegations that the Claimant faced, if he came to the conclusion in the hearing that the allegations were proven. It was appropriate for him to make these enquiries before conducting the disciplinary hearing. We had a copy of the HR advice note in the file. It stated that if, at the end of the disciplinary hearing, the decision maker concludes that the investigation had been thorough and reasonable and that this was gross misconduct, then a penalty of dismissal could be imposed. This would be appropriate if Mr Fisk considered that there had been an irretrievable breakdown of trust between the Claimant and the Home Office. HR also advised Mr Fisk that if, at the end of the disciplinary process, he considered that the Claimant's actions did not amount to gross misconduct, and that a lesser sanction was warranted, he could consider a final written warning or something else. He would need to be satisfied that the Claimant would learn from her conduct and understood the serious consequences of her actions.

58. On 18 January 2019, the Claimant attended the disciplinary hearing with her trade union representative. At the start of the hearing, she confirmed that she was fit to be interviewed. The Claimant had not notified Mr Fisk of any adjustments that she required to the procedure in order for her to participate in the disciplinary hearing. During the hearing, the Claimant admitted that she had failed to clearly communicate to the passenger that he could not leave the area to go and retrieve his passport from his friend. She admitted to Mr Fisk that she had not been assertive or clear enough when she spoke to the passenger, when he asked if it was okay for him to go and retrieve his passport from his friend. Mr Fisk confirmed that the expectation was that she should have used whatever wording was required to clearly communicate to the passenger that he was not allowed to go and collect his passport. The minutes record that she stated that she *'shouldn't have let him go….I should have told him to stop and if he didn't I should have told the HO….I should have closed the gate first.'*

59. The Claimant's evidence in the Tribunal hearing was that when the passenger asked whether he could go and get his passport from his friend, she said *'not really, have you got anything else on you?'* to him. We find that she did not say '*no'* to the passenger. She left it open for him to conclude that he was allowed to go and get the passport. In the disciplinary hearing, the Claimant agreed that once the passenger left her desk and proceeded to the gates, she failed to immediately notify the duty manager of an absconder and that this failure was a breach of the relevant local and national absconder recovery procedures. She had also not closed the gate, as she should have. She said that she kept an eye on the passenger once he left her desk and that she looked around for another officer to assist but they were all busy. She thought that he would return to the desk, and it would not be a serious breach. The Claimant agreed that the way in which she dealt with this was not professional. In the meeting minutes she was recorded as having said *'I admit I made an error of judgment. I have never let anyone through before. I need to be more clear in future.'* She stated that she should have said *'no'* rather than *'not really',* which is what she recalled saying. The Claimant is seen on the CCTV footage in the baggage hall, apparently looking for the passenger.

60. The Claimant told Mr Fisk that she was not aware at the time of the Respondent's procedures for handling absconders. She confirmed that she had read the local guidelines but stated that she did not remember it. She confirmed

that she was aware of the mandatory check required by the Border Force Operating Mandate – *"Always ask for the passport. Ask questions; make enquiries where they are coming from. Complete the manual checks."*

61. The Claimant agreed that the passenger went past the PCP (primary care point) when he did not have his passport and she had not completed the necessary checks. She told Mr Fisk that at the time, she had been stressed. In her witness statement the Claimant confirmed that the CCTV shows that she was sitting at her desk when the passenger walked to the baggage area and this *'clearly supports the respondents claim that I allowed the passenger to go'*.

62. The Claimant also admitted that it was after about 5 minutes that she telephoned the watchhouse from the phone on her desk and spoke to a Higher Officer and reported the incident.

63. We find that the Claimant was given an opportunity to correct the minutes after she stated that they were not accurate but even after she was given the opportunity, she did not provide Mr Fisk with any corrections. It is likely that the minutes are an accurate record of the disciplinary hearing.

64. Mr O'Riordan had attached stills from the CCTV cameras situated in the baggage handling area and the passport hall, as well as statements taken from the passenger and from officer Sharp, who was sat next to her at the time of the incident, to the investigation report. Mr Fisk considered all that evidence.

65. Mr Fisk's decision was set out in a letter dated 22 January 2019. Mr Fisk consulted with HR in coming to his decision and there were emails in the bundle demonstrating that consultation process. Mr Fisk's decision was that the allegations against the Claimant had been substantiated in that she firstly, failed to apply correct procedures in dealing with a passenger who was not in possession of their passport and secondly, that she failed to immediately notify the duty manager of an absconder in line with local and national absconder recovery processes. He decided that the allegations constituted gross misconduct that and that the appropriate sanction was a final written warning, imposed for period of two years, clearly beginning from the date of the letter as it stated that it was due to expire on 22 January 2021. The letter also stated:

> *"if during the period of the warning you commit further acts of misconduct or another act of misconduct is proven, you may receive a higher sanction than would otherwise be imposed, which could result in your dismissal. It is therefore important that you improve your standard of conduct and behaviour to the (sic) expected of all employees and act professionally at all times."*

66. As part of the sanction imposed on her, Mr Fisk decided that she was to carry out and pass the Border Force Operating Mandate and Personal Safety Training (Level 1), e-Learning before being able to return to her full range of duties as a frontline Border Force Officer. Mr Fisk was concerned that the Claimant was not yet confident in the correct procedures for managing similar circumstances. He was also concerned that she did not appreciate the gravity of her error. It was for these reasons that he added the training to the sanctions imposed on her.

67. The Claimant was also advised of her right of appeal.

68. The Claimant completed the training on 25 January and returned to the PCP that day. The Claimant declined the offer of an opportunity to sit with an experienced officer for the remainder of the shift, as a further training opportunity and the chance to ask questions about anything that she remained unsure about.

69. The Claimant did not appeal until 3 February 2019. Although it was outside of the time limit set out in the dismissal letter, the Respondent accepted it. It was prepared by the Claimant's trade union representative. In it, the representative wrote that whilst he appreciated that the nature of the incident would warrant a Final Written Warning, he wanted the Respondent to reconsider the duration of the sanction because it was the Claimant's first disciplinary matter and because she was keen to move on from the incident. At the appeal hearing on 14 March, the Claimant added that having a warning on her record for such a long period of time was causing her added stress. She was worried that it would make her distracted. The trade union representative also added that it was his belief that if the period of the sanction was reduced to between 6 – 12 months and the Respondent established had a structured plan of mentoring and training for the Claimant, this would enable her to be better able and equipped to carry out her duties in the future.

70. Assistant Director, Maseeh Naeem conducted the Claimant's appeal. The Claimant agreed that what she did on 16 November 2018 had been serious and she stated that she hoped never to do that again. She attended the appeal meeting unaccompanied but declined when she was offered the opportunity to have the meeting rearranged to enable a union representative to attend with her. The Claimant did not refer to any health issues or disabilities at that meeting. The Claimant was clear that she wished to have the period of time of the warning reduced. She told Mr Naeem that the Final Written Warning would be hanging over her head for 24 months, which would cause her stress. She did not say that it should not have been imposed on her. Although the Claimant says that she was going through a cancer diagnosis at the time of this appeal hearing, the Respondent did not know about it and she did not tell Mr Naeem.

71. In his decision, which was sent to the Claimant on 20 March, Mr Naeem confirmed that he considered Mr O'Riordan's investigation report and supporting documents as well as the Claimant's representations at the appeal hearing. He was satisfied that the sanction imposed had been proportionate to the seriousness of the incident and that the disciplinary process had been followed correctly. However, he decided to backdate the start of the Final Written Warning to 16 November 2018, which was the date of the incident rather than from 22 January 2019, which was the date on which it was imposed. This meant that the warning would expire on 16 November 2020. This decision brought that process to an end.

72. The Claimant alleged that other officers had committed similar offences and had not been disciplined over them. Mr Naeem was clear in his evidence that the Claimant's incidents were unusual. He confirmed that every incident is investigated. He also confirmed that other officers had been disciplined for similar offences where a passenger had got through before they realised. There is at least one person during each shift who presents themselves to the PCP without their passport. It happens regularly. However, as far as he was aware, there had never

been an incident at Stansted where a Border Force Officer let a passenger go through the gates without completing the checks and also failed to notify the watchhouse, as required. The Claimant could have alerted the watchhouse by telephone, she could have used a radio or shouted out to colleagues in the watchhouse; none of which she did at the time. There were panic alarms situated on every desk and she failed to use this. She would not have required training on how to use a panic alarm.

2nd incident

73. On 25 May 2019, the Claimant was on duty. While conducting checks on a passenger, she swiped their passport. The information that flagged up on screen was that the passenger was the subject of a customs alert. As the Border Force Officer dealing with the passenger, this alerted the Claimant to take action by reporting it on the back officer computer. In respect of this passenger, the hit was a Warning Index Stopping Action (WI). It was called a WI hit and referred to as a hit in the Tribunal Hearing. We had the Warning Index Policy in the bundle. There are some warning index hits that require the passenger to be stopped and others that do not, but they all need to be reported on the system. As she was the officer who processed the passenger, the Claimant was supposed to report the WI hit within two hours, or exceptionally, by the end of her shift. If that does not happen, there would need to be an explanation. In that case a record must be kept of the reasons why the WI hit could not be reported within two hours, including the name of the officer who identified the WI hit. It was therefore not a trivial matter.

74. The Claimant failed to report the hit within the stipulated 2 hours. The Claimant's explanation was that she informed the higher officer on duty, HO Pathirana about the hit and that officer told her that the passenger needed to go to Customs and that she should '*wait'* for the outcome of that process before confirming the hit on the system. In that instance, she asked HO Pathirana three times to allow her to report the hit, but she was told *'no'.* Customs returned the passenger shortly after her conversation with HO Pathirana but by then, according to the Claimant, she had forgotten to do it. By the end of the shift the Claimant had still not reported the hit. She remembered it on her way home. She called the watchhouse on the following day and informed HO Pybus that she had forgotten to report an alert. HO Pybus asked the Claimant to write down what had happened and send it to her by email, which the Claimant did.

75. The Respondent also investigated a complaint from HO Pathirana that the Claimant spoke to her in an aggressive and threatening manner when she was next in work on 30 May, blaming her for the incident that had occurred on 25 May 2019.

76. On 30 May, SO Coombes informed the Claimant that the incident would be investigated and that in the interim, she would be placed on the e-Gates pending the outcome of the investigation. The Claimant was clearly stressed and unhappy about being placed on e-Gates as she considered that it was a punishment. While on e-Gates the officer is considered to be on restricted duties. They are still conducting border control and checks, except that most of the work is automated. Putting the Claimant on e-Gates meant that she was unlikely to make the same error or any further mistakes and also meant that there were unlikely to be any issues with protecting the UK border. There was nothing to indicate that the

Clamant was unfit to perform her role and that is why she was assigned to the e-Gates and able to continue working.

77. We find that it was standard procedure to redeploy staff under investigation, depending on their individual circumstances. The e-Gates were not the only duty that she could have been given while she was being investigated but we find that it was one of the duties available.

78. BFSO Ashworth wrote to the Claimant on 14 June to inform her that there would be an investigation into the allegations that she:

(a) failed to adhere to correct procedures when reporting the subject of a HOWI STOP HIT;

(b) behaved in an aggressive and threatening manner towards a BFHO (Ms Pathirana); and

(c) there was a discrepancy between her account of events which if proven, could constitute making a false statement.

79. The Claimant was informed that HO Paul Barker had been appointed to investigate the allegations. She was also informed that any information emerging from the investigation, could be used in disciplinary proceedings against her and that if that happened, the Respondent would follow the procedures outlined in its Discipline Policy and Procedure.

80. Mr Barker wrote to her on 21 June confirming that he would be conducting the investigation and inviting her to a meeting on 30 June so that she could provide her evidence.

81. He met with HO Pathirana on 29 June. HO Pathirana told him that she did not refuse the Claimant time to report the HIT and that the Claimant did not request time to do so. She denied that the Claimant had asked to be released from the PCP to report a hit and confirmed that she did not refuse on three occasions. She confirmed that she asked the Claimant to wait for the outcome of the Customs Team activity and she confirmed that this was normal practice as the Claimant had by then already delayed in reporting it and so waiting for that outcome would not lead to it being delayed for that much longer. The Customs examination took about 20 minutes after which the passenger was returned to the watchhouse, as they required a landing stamp. The Customs Officer returned the passenger and was supposed to find the Claimant so she could complete the passenger's landing process. She confirmed that on 30 May, she and the Claimant spoke about the incident and the Claimant shouted aggressively at her and accused her of being at fault on 25 May. She stated that although she was annoyed at how the Claimant spoke to her, she had acted calmly at all times.

82. The Claimant met with Mr Barker on 30 June 2019. She informed Mr Barker that on 25 May, after the HIT came up, she asked HO Pathirana on three occasions whether she could confirm the hit and that HO Pathirana told her '*no'* and told her that she should wait. She also stated that after that, she went for a break and forgot about the HIT and customs came and took the passenger.

83. The Claimant confirmed in the meeting that she was aware of the Border Force Operating Mandate for reporting a WI stop and that it should be confirmed immediately but that she had two hours to do so. She stated that HO Pathirana was an experienced senior officer and if she told her to wait, she must have had a reason for doing so.

84. The Claimant confirmed that she was aware that the Operating Mandate had been breached and that she appreciated the severity of not completing the report as *'anything could have happened*'. The Claimant confirmed that she remembered about the hit on the way home but that she had not telephoned to notify the watchhouse of the matter until the following morning. HO Pybus had advised her to forward all the details to her, which is why she sent her an email, and that she should report the incident when she was next at work. The Claimant was not in again until 30 May. When she tried to report it at the start of her shift on 30 May, it had already been removed from the system and she was advised to speak to another BFHO. It is important to report a WI hit within the two- hour window because the Respondent connects to government departments with which it has to share the information, which could be time critical.

85. The Claimant denied behaving in an aggressive and threatening manner towards BFHO Pathirana. The Claimant was unhappy that this incident had not been addressed informally and with mediation arranged between her and BFHO Pathirana. She did not believe that it should have been the subject of an investigation. In her witness statement, she alleges that the failure to report a stop is easily covered up *'like I have known many others to do, namely they forget to report alerts and do not inform higher officers."*

86. The Claimant explained to HO Barker that later on 30th May, she had not been feeling well as she had been fasting and had asked if she could leave early. She went to the watchhouse and asked the BFHOs if she could be early. She felt that BFHO Pathirana make fun of her request and that she had previously humiliated her in front of passengers.

87. The Claimant denied making a false statement about what happened on 25th or 30th May and stated that there may have been some details left out as some time had passed since the incident. The Claimant confirmed that she had failed to report a WI hit and that after BFPO Pathirana told her to wait, she forgot to report it at the next opportunity. She denied behaving in an aggressive and threatening manner, and she denied making a false statement.

88. The Claimant also questioned why she had been restricted to e-Gates. She complained that it was causing her embarrassment and anxiety as people had noticed and they were asking questions. Mr Barker told her that this was a matter from Mr Coombes as he was the officer who had made the decision to restrict her to e-Gates.

89. Mr Barker told the Claimant that he would send her a copy of the minutes and that he would then take the next steps.

90. Mr Barker met with Ms Pybus on 4 July 2019. Ms Pybus confirmed that she took a telephone call from the Claimant on the morning of 26 May and the Claimant advised her that she had forgotten to report a hit on 25 May. Ms Pybus confirmed

that she also told the Claimant to send an email and to report the hit on her next shift, as she could not do it for her.

91. After he conducted the investigation, Mr Paul Barker considered all the statements that he had taken as well as the emails that the Claimant sent on 26 May. He decided that the Claimant had admitted that she forgot to report the alert/HIT and only remembered on her way home. She confirmed that she was aware of the Operating Mandate and that her actions had breached it. Mr Barker decided that there was a case here for the Claimant to answer. He included in the investigation report, that once the Claimant remembered the hit, she made every effort to attempt to resolve the situation by calling the Higher Officer on the following morning and by reporting it on her next scheduled shift.

92. As far as the second allegation was concerned, HO Barker decided after considering the statements provided by both the Claimant and HO Pathirana, that without any additional evidence, there was no evidence that the Claimant behaved in the manner alleged. In his letter he recommended that there was no case to answer in relation to that allegation. There was also no evidence to support the allegation that the Claimant had made a false statement as the information that was given to SO Coombes was consistent with the evidence the Claimant provided.

93. BFSO Cris Ashworth was assigned to conduct the disciplinary hearing. He wrote to the Claimant on 8 August 2019 to invite her to a disciplinary hearing scheduled for 14 August. He informed her that having considered the investigation report, he decided that there was sufficient evidence to justify holding a disciplinary hearing. The allegation to be considered at the hearing was that she had "*failed to apply correct procedures in reporting the subject of Home Office records."* He told her that the other allegations were not going to be considered as in relation to them, there was no case to answer.

94. It was not possible for this matter to get addressed using the Respondent's Fast-track procedure within the Respondent's HR Guidance. That would only be appropriate, if dismissal was not a possible outcome at the end of the process. As dismissal was an option for the decision maker in this case, given the existence of the final written warning, the Fast-track procedure was not appropriate.

95. The Claimant was advised of her right to be accompanied to the disciplinary hearing by a trade union representative or a workplace colleague. Mr Ashworth told her that if the person she wished to represent her could not make the specified date, it would be possible to re-arrange the hearing. He also asked her to inform him if she or her representative required any special arrangements or reasonable adjustments to enable her to fully participate at the hearing. The Respondent reserved the right to continue with the hearing if Mr Ashworth decided that the claimant had received the appropriate notice and had chosen not to attend.

96. Most importantly, the letter stated that if the allegations were proven, this may constitute gross misconduct under the Respondent's Discipline Policy, which may lead to her being given a written warning/final written warning/downgrading as an alternative to dismissal or to dismissal. The letter also stated that if she had a live disciplinary warning on her records, the hearing may result in a more serious penalty than would have otherwise been the case.

97. Mr Barker's investigation report and the statements he took were attached to the letter. The Claimant did not get a copy of Ms Pathirana's statement at that time. She was also directed to where she could find the Respondent's Discipline Policy and Procedures on the Respondent's intranet resources.

98. The disciplinary hearing was held on 14 August 2019. An HR officer, Richard Burton was in attendance to support Mr Ashworth. The Claimant attended with Mark Griggs, her trade union representative.

99. In the hearing the Claimant confirmed that she had forgotten to report the HIT. She stated that initially, she had spoken to Ms Pathirana who did not allow her to report it. She stated that she had asked her three times to allow her to report and that on each occasion, Ms Pathirana refused to let her. The Claimant was told the contents of Ms Pathirana's statement and that she had denied that this had happened. The Claimant was adamant that it had. She also confirmed that later, when she could have reported it, she forgot and did not remember until she was home, after her shift had ended.

100. In mitigation, the Claimant told BFSO Ashworth that on the day of the incident, she had been fasting and was tired. She had stopped taking her medication for depression and anxiety, about a month before the day of the incident. She referred to having a temporary lapse of memory when she forgot to report the hit before the end of her shift.

101. The Claimant confirmed that she knew the procedure and she had previously confirmed all previous stops and reports and had every intention of reporting this one, but had not been allowed to do so when she asked. The Claimant confirmed that she made the decision to stop taking the medication on her own and had not sought advice from her GP before doing so. She wanted to be off the medication during Ramadan as it made her sleepy and sluggish and she wanted to stay up late and take part in prayers and other aspects of religious observance. She thought that the medication may have impact her concentration on the day. She also confirmed that she had not any absence related to her decision to stop the medication. She had had absences related to domestic issues. She also confirmed that although they had not yet met, her new line manager was aware of her depression and that her previous line manager, Chris Evans had been aware.

102. The Claimant complained about being on the e-Gates during this disciplinary process. She found it embarrassing because colleagues would ask her why she was there. Mr Ashworth told her that it was Mr Coombes' decision to reduce the risk to the employer and that she should not feel embarrassed about it.

103. After the hearing, the Claimant sent Mr Ashworth copies of the emails she had sent to the Respondent in April, seeking leave in May on some days during Ramadan, which we have already referred to above.

104. Mr Ashworth consulted with HR before coming to a decision. There was an email from HR on 19 August advising him that he needed to consider the Claimant's mitigation, whether her health issues were serious enough to support her failing to report the hit, whether the Respondent was aware at the time of her condition and that she had stopped her medication and if they had been aware,

whether they had put reasonable adjustments in place to support her. At the time he was considering his decision, Mr Ashworth was aware that the Claimant was suffering from anxiety and depression and he knew about the OH report. However, he concluded that the Claimant had been fit for work at the time of the incident. He did not accept that any conversation which the Claimant had with Ms Pathirana or the effect of her health conditions meant that she had no opportunity during the course of her entire shift to report the hit.

105. On 31st August 2019, he wrote to the Claimant to notify her of the decision. Mr Ashworth decided that the allegation was substantiated, and that the Claimant's conduct had been unacceptable. He concluded that on 25 May 2019, the Claimant had failed to apply correct procedures in reporting the subject of a HOWI STOP HIT within a 2-hour period, in line with the Operating Mandate and standing HOWI instructions.

106. He formally confirmed that the other two allegations were unsubstantiated due to lack of independent witnesses.

107. Mr Ashworth concluded that the Claimant was not confident in the correct procedures for managing similar circumstances and that she had not grasped the seriousness of her oversight, concerning this matter. He had considered her mitigation but concluded that her medication had been keeping her condition stable and her decision to stop taking this during Ramadan was her personal choice rather than on the advice of a medical practitioner. In addition, she had not made her managers aware on the day that she was suffering any effects on her ability to concentrate or do her job as a result of her decision not to take her medication. She also had not told her managers that she was tired because of fasting for Ramadan and therefore deprived the business of the opportunity to make adjustments to support her.

108. Mr Ashworth confirmed to us in the hearing that it was likely that she had asked Ms Pathirana a few times to be allowed to report the WI hit and had been told to wait but that she had time afterwards to do so and failed to do it. She had only been told to wait until the referral to Customs was addressed. The referral to Customs was concluded quite quickly. He considered that that did not explain why she had not reported it when on a break or at any time up to the end of her shift.

109. Mr Ashworth considered the Claimant's existing Final Written Warning and concluded that there was a pattern of failure to follow correct procedures when dealing with passengers under the Border Force Operating Mandate. He considered that the usual penalty for failing to follow the Operating Procedures again, for a second time would be dismissal. However, given the Claimant's mitigation and all the other factors, he decided that the appropriate sanction was to extend the Final Written Warning to 36 months, backdated to the date of the first incident. The Final Written Warning was now extended to 16 November 2021.

110. The Claimant was advised in the letter that if, during the existence of the warning, she committed further acts of misconduct or another act of misconduct is proven, she will receive a higher sanction than with otherwise be imposed, which could result in her dismissal. The Claimant was told that she should improve her standard of conduct and behaviour to that expected of all employees, and act professionally at all times. Mr Ashworth also decided that before she could be

restored to full PCP duties, the Claimant would be required to undertake full HOWI Refresh Training.

111. She was also advised of her right to appeal. The Claimant submitted her appeal outside of the time limit. The essence of her appeal was that this was not a serious breach of procedures or a security breach and therefore the sanction was too harsh. She stated that the first Final Written Warning imposed by Mr Fisk had also not been warranted and was also harsh. She stated that these sanctions had exacerbated the stress she was already under from work and that in imposing them the Respondent had failed to act compatibly with her Human Rights and within the parameters of law. She referred to her mental health disability, stress and anxiety and that the Respondent had a duty to protect her in keeping with the UN Convention on Disability Rights.

112. On 12 September Mr Ashworth was notified that the Claimant had completed the WICU refresher training. He emailed Stansted on the same day to advise that the Claimant no longer needed to be restricted to the e-Gates monitoring role and could be deployed to all PCP duties.

113. Although the Claimant stated that she did not know of any other BFOs who had been issued with written warnings as she had when they missed reporting an alert; she did not tell us of any officers who she knew had done this and had been treated differently to how she had been treated.

114. The appeal hearing was held on 11 October 2019. Mr Taylor Wilson, the Assistant Director for Border Force at Stansted, conducted the appeal. He wrote to the Claimant on 26 September to invite her to the hearing. She was advised of her right to be accompanied and that if she failed to attend the hearing without good reason, he would proceed in her absence. He told her that the appeal hearing was her opportunity to set out the reasons why she considered that the findings and sanctions imposed on her were unreasonable. He told her that his decision would be the final stage of the internal process.

115. Mr Wilson had HR advice before conducting the appeal. There was an advice note from HR in the bundle. In particular, the HR advisor referred to the OH report produced on 28 August and that it indicated that the Claimant's anxiety and depression was being treated with daily prescription medication and that her symptoms appeared to be much improved and stable. Her embarrassment at work was because of what she described to OH as the *'segregated working'* arrangements. She told OH that she felt unfairly treated and would prefer to work with her colleagues on the PCP rather than on the e-Gates. Mr Wilson was advised that his options were to uphold the original decision or replace it with a Final Written Warning of a reduced period or uphold the appeal. He was advised that there was no provision in the Discipline Policy for issuing or extending a warning for longer than 24 months. If he was satisfied that there were significant mitigating circumstances which directly contributed to or explained the misconduct, then those circumstances could render the issuing of a Final Written Warning an unreasonable or unjust outcome.

116. However, he was also advised that this was not a re-hearing, although he could conduct a re-hearing if he considered that there was insufficient evidence to uphold the charges against the Claimant. In deciding what to do about the

sanction, Mr Wilson was advised that he would need to balance any mitigation put forward by the Claimant against the risk to the department of her continuing in the job, with her current conduct.

117. The Claimant was represented by her trade union representative at the appeal hearing. Mr Wilson was accompanied by an HR adviser. At the start of the hearing Mr Wilson made it clear that the meeting was not going to look into the first Final Written Warning imposed by Mr Fisk, in relation to the first incident. The Respondent considered that matter to be closed. This appeal meeting was only going to look at the sanction imposed by Mr Ashworth.

118. As part of her appeal the Claimant stated that the matter of her failure to record the hit could have been dealt with informally as she felt that it was a trivial matter. Although this was something that the Claimant repeated in the hearing, she did not bring any evidence to support her position. Mr Wilson firmly refuted that and it was his evidence that the Respondent would investigate all missed HITs that it was aware of. In the Claimant's case, the hit had not been missed. Instead, the Claimant had been aware of it but failed to report it, which the Respondent considered to be more serious. The Claimant confirmed that she had failed to record the hit and that she did not do so until the next morning.

119. They discussed her allegation that she had not been given Ms Pathirana's statement before Mr Ashworth's hearing. The Claimant confirmed that after Customs came back with the passenger, she went on her break and then there were 7 more hours before she left port i.e., before her shift ended. She explained that she failed to report the hit because she forgot. She mentioned that she had been fasting on the day of this incident but did not say that it happened because she had been fasting.

120. Her appeal was also that the period of the Final Written Warning was too long. Her trade union representative agreed that she should have reported the HOWI hit before she left for the day. Mr Wilson agreed that the Claimant had been honest in reporting the matter on her next time on shift as by that time the matter was no longer on the computer.

121. Taking all factors into consideration, Mr Wilson had some sympathy for the Claimant and did consider her mitigating factors, i.e., that she had anxiety and depression and had chosen to come off her medication during Ramadan, had been fasting and was worried with the existence of the Final Written Warning. He felt that it was right to reduce the period of the Final Written Warning and to give her further training to carry out her role. However, the fact remained that she had failed to report the hit even though she knew that she had to. She had ample time in which to do so during the shift, once Customs finished with the passenger and they were brought back to her to complete her part of the landing process.

122. Mr Wilson decided that he would reduce the Final Written Warning period for the 2nd incident to 6 months. This would mean that both periods would run concurrently, and everything would expire on 22 July 2021 as opposed to 16 November 2021. The Claimant's trade union representative said that he considered this to be a fair outcome.

123. Mr Wilson expressed concerns about the Claimant's confidence on the PCP and that in failing to record the hit, she had not insisted on doing her job. She also told him that she had a lack of confidence in doing her job and that she believed that her colleagues were talking about her. He advised her to focus on her job and not concern herself with what her colleagues were saying. They were bound to see her getting retrained and being mentored and supported by other senior officers but that was the Respondent keeping to its commitment to give her the best training and skills to support her and to build up her confidence in the job.

124. Mr Wilson wrote to the Claimant on 23 October to explain and confirm his decision. He was clear that Mr Ashworth had imposed a proportionate sanction and had come to the correct conclusions. He accepted that the Claimant had not been allowed to update the WI STOP hit and that if she had had the confidence to do it even if she was told not to do so by a senior officer, she would have kept within the Operating Mandate. He decided that the Claimant was a risk to Border Security because in addition to the incident, as she confirmed in the hearing, after 4.5 months on e-Gates, she felt anxious about returning to the PCP area and concerned that she might make a mistake. To address that, Mr Wilson decided that she would have scrutiny from a Senior Officer who would go through the training with her and assess how much time and support she needed in order to get her confidence back. He reassured her that she would not be on the desks alone, until the training was completed. The Respondent was going to ensure, over the following 6 months, that it paid close attention to her performance levels, her personal development and to supporting her to become a better officer.

125. The letter reminded the Claimant that if she found herself on any other misconduct matter and there was a case to answer with the matter proven, it could result in her dismissal or voluntary re-grading. Mr Wilson also confirmed that the Respondent's written procedures stated that these types of investigations should take up to 40 days. The investigation conducted by Mr Barker took 44 days. Mr Wilson decided that this was unfortunate but that it was not serious enough delay to make the process fundamentally flawed. Also, most of what was contained in Ms Pathirana's statement related to her allegation that the Claimant had been aggressive toward her. As that allegation was not progressed to the hearing, it did not amount to a serious flaw if the Claimant did not see the statement beforehand. It did also cover the issue as to whether the Claimant asked her three times if she could record the STOP and she refused. The Respondent preferred to believe the Claimant about this.

126. Mr Wilson also reported his decision to Mr Inglis as he would need to know about the additional training and mentoring that he had set up for the Claimant. A mentor called Michelle was assigned to support the Claimant and assess her training needs and formulate a plan to address them. The Claimant would only be signed off to return to the PCP when she is capable of working as a sole worker on the desk, without supervision. There would also be 6 months development monitoring through the 1:1 process, conducted monthly and recorded on her development record. Mr Inglis was responsible for the 1:1 process, with support from Mr Ashworth.

127. On 28 October, Mr Inglis and the Claimant had a 1:1 meeting, the record of which was in the bundle. The form notes that the Claimant had begun mentoring as there were some performance issues and gaps in her knowledge that had arisen

since her return to the PCP desk. Although the Claimant was keen to learn new skills her manager wanted her to focus on getting all her core responsibilities up to the mandated standard that it should be for her as a BFO. They discussed specific areas of work that the Claimant was having difficulties with. The intention was that her mentoring should be completed sometime in November 2019.

128. It is likely that the Claimant was clearly still unhappy with how the 2nd incident had been addressed in October because on 29 November 2019 the Claimant wrote to the Respondent about Ms Pathirana. The Claimant complained that Ms Pathirana prevented her from confirming the HIT, 3 times and that she also made false complaints that the Claimant had been aggressive and threatening towards her. The Claimant complained about Mr Coombes placing her on the e-Gates for a few months and what she described as '*bullying'* by colleagues making comments about her, since her return to the PCP desk. A senior officer, Mr Beaufond responded to the Claimant on the same day.

129. He told her that he was sorry that her experiences at work had left her feeling this way. He went through her letter and addressed all the points raised in it. As far as the Respondent was concerned, issues with Ms Pathirana that related to the 2nd incident, had already been addressed. She had a further 3 months to raise any grievances arising out if it and as she had not done so, it could not be addressed as a grievance. Mr Beaufond advised her that the Respondent would be prepared to try to address the matter informally through some type of mediation. If that was not successful, she could raise it as a formal grievance.

130. The Respondent also advised the Claimant how to progress a complaint about bullying, if she wanted to. The first stage would be to raise this with her line manager, which she had not done as Mr Inglis told Mr Beaufond that he was not aware that the Claimant felt that she was being bullied by colleagues. Mr Beaufond reassured her that the Respondent would not tolerate any form of bullying, harassment or discrimination from members of staff and so she could feel safe reporting it and that it would be addressed.

131. At her next 1:1 on 2 December, the Claimant did not raise with Mr Inglis any issues around bullying from colleagues. She also did not raise a formal or informal grievance about Ms Pathirana or indicate that she wanted to take it further, as advised by Mr Beaufond. She discussed with Mr Inglis her mentoring that was still going on and reported that she had had some vertigo related issues in the past few days. The Claimant was still not fully confident on the PCP as it was recorded that when on shift, she was telephoning the watchhouse for every decision. She was advised to learn to make the decisions that she has authority to make as a BFO and to have that confidence in her ability. She also had to learn to evaluate credibility of documents and not go through every possible check for passengers that are clearly low risk. The Claimant was not where she needed to be in terms of her confidence and her ability, so it was noted that her mentoring was now set to complete within the month of December.

3rd incident

132. In March 2020, the Claimant was invited to an investigatory meeting to be conducted by Mr Guntrip to consider allegations of misconduct made against her. The Claimant was invited to a meeting scheduled for 23 March 2020. The

allegation to be investigated was that on 31 December 2019, the Claimant's behaviour fell short of the conduct expected of a Border Force Officer while on duty, as defined by the Civil Service Codes of Conduct.

133. The Claimant was advised of her right to be accompanied and told that if either she or the person accompanying needed special arrangements or reasonable adjustments to enable her to fully participate in the meeting, she should let Mr Guntrip know so that he could make the arrangements. She was advised that she could familiarise herself with the Respondent's Discipline Policy on the Respondent's intranet and that a hard copy could be provided for her if she wanted.

134. Before meeting with the Claimant, Mr Guntrip interviewed Mr Beaufond on 9 March and Mr Donaldson on 16 March as they were involved in the incident. Both officers stated that the Claimant had shouted and yelled at both Mr Donaldson and Mr Beaufond. Mr Guntrip also approached Mr White, another officer who had been present and who the Claimant mentioned in her statement, but he told him that he had not witnessed the incident and Mr Guntrip did not take a statement from him.

135. In her investigation meeting the Claimant confirmed that she was fit and well and able to proceed. From her interview and from the interviews with Mr Donaldson and Mr Beaufond, we find that it is likely that this is what happened: - On 31 December, the Claimant stayed behind in the general office after her break to finish sending an email to her line manager, BFHO Inglis. She was not pleased about being put back on mentoring and wanted to complain about it. She was also unhappy about Mr Beaufond's response to her letter of complaint in November. She Mr Inglis earlier, at the start of his shift, to try to speak to him. Mr Inglis was receiving handover from another officer. The shift was very busy. He asked her to come back and see him on break. The Claimant did not return.

136. Instead, at the end of her break, the Claimant called the watchhouse and spoke to Karl White to say that she was not coming back to the desk straightaway as she wanted to send an email. Karl White was not senior to Mr Donaldson or Mr Beaufond, which meant that anything he said to her could be overridden by the more senior officers. When Mr Donaldson was told that the Claimant was not returning to the desk, he tannoyed for her to call him at the watchhouse. When they spoke, he told her to return to the PCP immediately. Her mentor was back from the break, but she was not. At the time, the arrivals hall was very busy, and the queue times were unacceptable. Mr Donaldson told her that they were '*breaching'*, which meant that they urgently needed her to come out from the office and get back to work. The Claimant came to the watchhouse and spoke to Mr Donaldson. He had told her that he could give her some time later. The Claimant was still unhappy. She confirmed to Mr Guntrip that she had been emotional and tearful and may have come across as angry when she spoke to Mr Donaldson. According to Mr Donaldson, she shouted that she had waited 6 weeks for a response to her problem, that the queues were not her problem and that she did not care if it was busy. The Claimant was clearly upset with the managers. Mr Donaldson tried to tell her that she would most likely get a break at around 8.30 when the queues had reduced but she did not listen and walked off towards the PCP.

137. The Claimant also confirmed that after her exchange with Mr Donaldson, Mr Paul Beaufond asked her why she was speaking to his staff like that. She did not agree that he called her aside and spoke to her behind the watchhouse. She complained that he spoke to her where they could be overheard by members of the public. It is likely that her conversation with Mr Donaldson had been loud enough for Mr Beaufond to overhear and for him to conclude that her tone was inappropriate. Her recollection was that she answered by saying *"Your staff? What about me? I'm going back on the desk, I really don't want to talk right now!"* He replied by telling her that she did not have a choice as she was speaking to a Senior Officer. The Claimant continued to be upset as she and the managers greed that she continued to complain and stated that this was all their fault as they had not done anything about the complaints that she had raised weeks earlier about Ms Pathirana. She also complained that there was a conspiracy against her. At that point, the Claimant had not yet raised a formal complaint about Ms Pathirana, as Mr Beaufond advised her in November. She had also not responded to Mr Beaufond.

138. Mr Beaufond asked her whether she had raised the issue she had with BFHO Pathirana with her line manager. She stated that she had tried but he been busy. It is likely that as they talked, the Claimant was showing her frustration in the way that she was speaking because Mr Beaufond then told her not to be rude to the passengers. The Claimant's response was that passengers had never been a problem as they were always nice to her and that *"its colleagues and managers who upset me all the time".* He told her that she had a responsibility to be professional and courteous to passengers and her managers. We find it likely that she replied to say that she did not need to be professional with him or her managers and started to walk away. It is likely that Mr Beaufond told her that if there was any repeat of the conduct that she had displayed that evening, he would send her home as being unfit for duty.

139. The Respondent did not give the Claimant a break at that time as she had just come off a break. She was given a break later on in the shift, at the appropriate time.

140. After the incident, Mr Beaufond spoke to Mr Inglis and told him that it was likely that the matter would be the subject of an investigation. Mr Inglis asked the Claimant to step into an interview room to discuss what had happened. She told him her version and he impressed on her that this was a serious matter. He advised her that there would be an investigation. She told him that this was why she tried to see him earlier and he apologised that he had been too busy to talk at the time. Mr Inglis then advised her to write down her account of what happened.

141. The Claimant told him that she had tried to speak to him about her wellbeing and that she was frustrated at being mentored. Mr Inglis advised her that there were elements of her PCP work that were still of concern and that until her mentor was happy to sign her off, she would remain on it. She confirmed that she was fit and well, they ended their discussion, and went back to work.

142. In his statement, Mr Beaufond agreed that it was likely that the Claimant was stressed that evening, but nevertheless, he found her behaviour to be an inappropriate response to a reasonable request from Mr Donaldson. At the time, he was unaware that the Claimant was on a Final Written Warning. Neither

Mr Donaldson nor Mr Beaufond noticed her crying on the desk. If they had, it is likely that they would have said so in their statements.

143. The Claimant confirmed with Mr Guntrip that the immigration hall was busy and that it was *'potentially breaching'*. However, she felt that as her mentor, Michelle, was at the PCP, it would not have mattered if she had stayed in the office to complete her email as when they worked together, it was not two officers working as she would be either observing Michelle or Michelle would be observing her. It is likely that the Claimant was angry and that this showed in the way she spoke to Mr Donaldson and Mr Beaufond. When she spoke to Mr Guntrip she described it as being frustrated. She said that she might have sounded angry but that she had not been shouting. She also felt that Mr Beaufond knew about the issue that she had with Ms Pathirana and that may have contributed to the way she spoke to him.

144. The Claimant did not refer to her disabilities at any point to Mr Guntrip. She referred to her monthly cycle in relation to the previous shift, on 30 December. She told Mr Guntrip that on that day she had gone home in tears when she found out that she was back on mentoring. It was two days before her period which she stated was time when she is intensely depressed and irritable, and she had been tearful and emotional. Although the Claimant told us in the Tribunal hearing that she felt embarrassed telling Mr Guntrip in the investigation and Mr Wilmer in the disciplinary hearing that she had been dealing with pre-menstrual tension on 31 December, we find that unlikely as she was able to talk about it affecting her mood on the previous shift, 30 December.

145. Mr Guntrip gave the Claimant the opportunity to read and amend the minutes of their meeting and it is her version we have looked at in making these findings. Mr Guntrip considered all the statements that he had taken during his investigation. He decided that there was a case to answer. He referred the statements and his report to Steve Wilmer as the Decision Manager. He considered that it was up to Mr Wilmer to decide what bearing her monthly cycle had in the matter. Mr Wilmer agreed with the Claimant that he would not conduct the disciplinary hearing until after Ramadan, which ended on 23 May 2020.

146. On 26 May, Mr Wilmer wrote to the Claimant to invite her to a disciplinary hearing scheduled for 9 June 2020. The letter outlined the allegation against her, which was that during conversations with Mr Beaufond and Mr Donaldson on 31 December 2019, her behaviour fell short of the conduct expected of a Border Forces Officer while on duty, as defined within the Civil Service Codes of Conduct. She was informed that if the allegation was proven, it could constitute minor or serious misconduct, which could result in a more serious penalty if she is under a live discipline warning.

147. Copies of the investigation report and all other relevant documents were attached to the letter. The Claimant was invited to submit any documents that she intended to rely on by 5 June.

148. The Claimant was advised of her right to be accompanied by a trade union representative or a work colleague. Due to the social distancing restrictions that existed at the time, the disciplinary hearing was to be conducted by Skype and the

Claimant was provided with the log in details. She was also informed that someone from HR would be in attendance as well as a notetaker.

149. The Respondent's *"The Code of Ethics 'Living the Border Force Values"* document was in the Tribunal hearing bundle. It confirmed that Border Force is a law enforcement organisation and is responsible for securing the UK's border. This means working in a difficult and pressurised environment. The Code stated that Border Force employees, are responsible for their own professional behaviour and, to ensure that they are able to deliver to the highest standards possible. Border Force employees are expected to have a sound understanding of the contents of the Code. As civil servants, Border Force officers are expected to carry out their role with dedication and with a commitment to the Civil Service and its core values of integrity, honesty, objectivity and impartiality. Some of the skills referred to in the Code are honesty and respect for others, valuing different individual strengths and being loyal to their team and the wider Border Force. Officers are required to show commitment, discipline and respect for colleagues and for members of the public.

150. Before the hearing, the Claimant sent Mr Wilmer copies of the email exchange she had with Mr Beaufond in November 2019. She also sent him a copy of the email that she sent to Mr Beaufond on 31 December, after the incident.

151. The Claimant was unwell around the 9 June so Mr Wilmer agreed with her that the hearing should be rescheduled. It was arranged for 16 June. Mr Wilmer wrote to the Claimant on 9 June to remind her of the new date and to inform her that the hearing can only be rearranged once. The letter also stated that if she unreasonably refused to attend or failed to attend on the first or re-arranged date and he was satisfied that she had been notified, it was likely that the disciplinary process would continue in her absence and a decision reached based on the evidence that the Respondent had.

152. On the same day he emailed her to offer her the option of submitting a statement about the incident, including any relevant mitigation. He reminded her that she had the option of asking her trade union representative to attend and read the statement on her behalf, if that was her preference. He also told her that if she was finding the idea of attending the meeting too stressful, he was happy for her to simply submit a statement.

153. On 14 June the Claimant wrote to Mr Wilmer to ask for the meeting to be re-scheduled again. She told him that she had recently sought legal advice and that she was waiting for them to get back to her, *'in a couple of weeks'*. She did not ask for a two week extension to prepare for the hearing, as she stated in her witness statement.

154. In his response on 15 June, Mr Wilmer refused the Claimant's request to postpone the meeting for an indefinite period as there was no right to be legally represented at the hearing. In the Tribunal hearing he confirmed that seeking legal advice was not a reason to delay the process, especially as she had from 26 May, when she was first invited to a disciplinary hearing, to obtain legal advice. He reminded her that there had already been one postponement. He indicated that he was going to proceed with the re-arranged hearing, and he encouraged her to dial into it. He reminded her again of the option of sending in a written statement.

155. The disciplinary hearing took place on 16 June 2020. The Claimant did not attend, and her trade union representative was also absent. Mr Wilmer chaired the hearing, with an HR adviser and the notetaker. Mr Wilmer's evidence was that he waited at the start of the meeting to give the Claimant an opportunity to attend. When neither the Claimant nor her trade union representative attended, he proceeded by looking at the documents and evidence before him, seeking advice from HR and then making a decision.

156. There is provision in the Respondent's Discipline Policy which allows for a disciplinary meeting to be re-arranged but it also states that *"Where there is a second failure to attend a formal hearing, a decision can be made, on the available evidence in the absence of the employee. The employee must be informed of the decision in writing within five working days."*

157. The minutes in the Tribunal hearing bundle show that Mr Wilmer considered the statements from the Claimant, Mr Donaldson and Mr Beaufond. The Claimant had not provided any additional evidence apart from copies of her email correspondence with Mr Beaufond, referred to above. He concluded that those did not explain why she had behaved in the way alleged towards Mr Beaufond and Mr Donaldson. He did not speak to the Claimant's line manager about this as he had not been involved in the incident.

158. After consideration of all the documents, Mr Wilmer concluded on the balance of probabilities that it was likely that the Claimant did behave towards her senior managers in the way alleged and that the conversation did take place as described by Mr Beaufond and Mr Donaldson, in their statements. His belief was reinforced by the Claimant's reference to being frustrated at the time and her agreement that it was likely that her tone of voice could have been construed as angry. He decided that the Claimant's behaviour of shouting at a Higher Officer and then at a Senior Officer was behaviour that fell short of that expected of an Officer while on duty. The request to the Claimant to return to the PCP during a busy period was a reasonable management request, which should not have elicited such a response from her. BFSO Wilmer's decision was that the allegation against the Claimant was proven.

159. Mr Wilmer consulted with HR on what would be the appropriate sanction to impose on the Claimant for this misconduct. He was informed that the Claimant was under a live warning for a previous incident and that the live warning had been extended further after another incident. HR looked at the Respondent's HR Discipline Policy and Guidance, including the sections on assessing the level of seriousness of the conduct and considering mitigation.

160. He considered that the Claimant may have been frustrated about her relationship with Ms Pathirana but she had not been on duty that day. Even if the Claimant felt frustrated with Mr Beaufond, it did not explain why she also behaved inappropriately toward Mr Donaldson. Mr Beaufond only became involved once he heard how she spoke to Mr Donaldson.

161. HR advised Mr Wilmer that he had three options as possible sanctions that he could impose on the Claimant. He could take no further action, downgrade the Claimant or dismiss her. He considered that as he found the allegation proven, it was not open to him to take no further action. This was a serious matter. He

considered downgrading her but felt that as there was a history of misdemeanours and as there was a breakdown of trust between the Claimant and managers of various grades, it was unlikely to be appropriate. Even at a lower grade there would still be the chance that this behaviour would be repeated. She had shown disregard and distrust of those in management grades and would likely do so again as she would still have managers that she had to obey, even at a lower grade. Border Force is a hierarchical organisation, with a strict chain of command, which officers are expected to follow and respect. Re-grading would not remove the risk that there would be further outbursts against managers or colleagues in future. She would also still have to follow policies and procedures correctly.

162. Mr Wilmer also considered that when the live Final Written Warning was imposed and again when it was extended, the Claimant had been warned that if she committed further acts of misconduct or another act of misconduct was proved against her, she could receive a high sanction than would otherwise be imposed, which could result in her dismissal. The allegations relating to 31 December were serious misconduct committed while under a live warning. Shouting and speaking angrily to senior managers who were giving her a reasonable management instruction was unacceptable. Also, she breached the Civil Service Code in that she did not conduct herself with integrity, professionalism and respect in her conversations with her managers. In those circumstances, Mr Wilmer made the decision to terminate the Claimant's employment on the grounds that her misconduct had rendered her unsuitable for continued employment.

163. In his evidence to the Tribunal, Mr Wilmer confirmed that he did consider the mitigating factor of the Claimant's menstrual cycle being close to the date of the incident. There was no medical evidence addressing how this affected the Claimant and he considered that her conduct towards her managers was still unacceptable.

164. Mr Wilmer wrote to the Claimant on 18 June to notify her of the outcome of the hearing. He referred to the evidence that he considered and set out his thought process in coming to the decision to terminate her contract. He also advised the Claimant about her right to appeal. She was given 10 working days to submit her appeal. As this was considered serious rather than gross misconduct, the Claimant was paid notice pay.

165. The Claimant submitted her appeal on 30 June, which was outside of the time limit set out in the dismissal letter. Her grounds of appeal were drafted by a legal representative and mostly concentrated on the Respondent's decisions to dismiss her and to proceed with the disciplinary hearing in her absence. The letter referred to her right to a fair trial. The appeal letter made no mention of the effects on her behaviour of her menstrual cycle or that the behaviour on 31st December had been out of character. It referred to the UN Convention of Disability Rights and that because of her disability of stress and depression, Mr Wilmer had a duty to protect her rights, in line with the principles of the convention.

166. The appeal was conducted by Matthew Davis, Assistant Director, who did not work in Stansted and who was therefore far removed from the process and the people involved. He was based at Tilbury port. He confirmed that he ran a full shift with a mixture of full-time and part-time staff, who work all ranges of shifts and that part-time staff work alongside their full-time colleagues. It is likely that there

were female officers in his team. He wrote to the Claimant on 30 June 2020 to invite her to the appeal hearing. The hearing was scheduled for 9 July. The Claimant was informed that the hearing will be conducted by Skype and that she had the right to be accompanied by a workplace colleague or a trade union representative. She was reminded that she had no right to be accompanied by a legal representative.

167. In preparation for the hearing, Mr Davis read the investigation report, Disciplinary outcome and letter, the Respondent's policies on performance management, especially around final warnings and dismissals. He also consulted with and sought advice from the Respondent's HR caseworkers around the process.

168. The Claimant attended the appeal hearing by Skype, with her trade union representative and Mr Davis was accompanied by a note taker and an HR caseworker. The Claimant confirmed that she was fit and well and able to continue the appeal hearing.

169. The Claimant's grounds of appeal were summarised under two headings: that the process had not been applied correctly in terms of delay and the decision to go ahead with the disciplinary hearing in her absence; and that her dismissal had been an unreasonable decision. Mr Davis gave the Claimant and her trade union representative the opportunity to expand on those points, in addition to the Claimant's written representations.

170. The Claimant explained that she was unhappy with the length of time taken to complete the disciplinary process. The incident happened on 31 December and the investigation was not commissioned until 19 February. The Claimant believed that the Respondent's policy was that an investigation should be commissioned as soon as managers become aware of an incident. She made it clear that she was unhappy with the length of time that the disciplinary process took and the fact that the disciplinary hearing went ahead in her absence.

171. During the meeting the Claimant said to Mr Davis *"the day before my monthly cycle I get outbursts. Things will mount up and then come out. I can prove I get emotional."* She also told him that she had told Mr Guntrip about this and he enquired whether she had made it clear to Mr Guntrip how her depression could be affected by her monthly cycle. She was not clear that she had. She said that she might have. In the Tribunal hearing she stated that she did not feel that she needed to mention her menstrual cycle to a man as she felt that they did not like to discuss it. However, Mr Davis understood what she meant because the effect of the Claimant's cycle on her conduct on 31 December was one of the things Mr Davis spoke about with the HR adviser.

172. In the Tribunal hearing she agreed that she did not tell her managers about her disabilities, apart from Mr Inglis. She felt that she did not need to keep repeating it. However, as stated above, she did tell Mr Ashworth and Mr Wilson that she had depression and anxiety and they had the benefit of the OH report.

173. The Claimant and her trade union rep and Mr Davis discussed the Claimant's live Final Written warning and the 1st and 2nd incidents that led to it being imposed and extended. The Claimant continued to refer to the WI hit notice

as a trivial matter and submitted that Mr Fisk's decision to impose a 2-year Final Written Warning was for something that people would normally only get an informal warning for. The Claimant's attitude towards the previous incidents was concerning to Mr Davis.

174. The Claimant did not deny that she had behaved in the way that the Senior Officers described. She said -

> *"It was out of character for me to act like that and I apologise. I didn't think I was shouting. It could be that I was stressed an on my monthly cycle and I've got underlying depression."*

175. She confirmed that it was likely that she was on medication for depression on 31 December. Mr Wilmer was not aware that the Claimant was suffering from Fibromyalgia, and this was not something that she raised in the appeal hearing either. Mr Davis' evidence to the Tribunal in relation to all the Claimant's conditions was that if any member of staff feels that they are unable to do their duty and/or are experiencing symptoms that means that they are not fit for duty, whether because of illness or otherwise, he would expect them to inform their manager so that other arrangements can be made.

176. Prior to the incident on 31 December, the Claimant had not told the Respondent that she suffered from issues concerning her monthly cycle and that she needed adjustments made for that. This was not something that she mentioned to the occupational health advisor, and it was not a matter that she had raised with her manager beforehand. She felt that the Respondent should have helped her and given her a break at the time of the incident rather than treating it as a disciplinary matter.

177. Mr Davis promised to let her know the outcome of the appeal hearing within 5 days.

178. Mr Davis considered all the documents again and the points that the Claimant and her representative made in the hearing. Firstly, in relation to the Claimant's point about delay, he traced the timeline of the investigation as follows: -

a. He noted that it was on 7 January that a BFSO, who was likely to be Mr Beafond, made a complaint about the incident on 31 December. It was on 19 January that a caseworker was appointed to address the complaint. There was a couple of weeks during which emails were sent between senior officers to decide who would be allocated to conduct the investigation and who would be the decision manager for the case, if needed.

b. On 7 February Mr Wilson commissioned the investigation and appointed Mr Guntrip to conduct it. Mr Guntrip was then on annual leave until the end of February. The Claimant was then unwell until 17 March. There were delays due to staff being on reduced attendance due to Health & Safety issues and the effects of Covid-19 safety procedures. Mr Guntrip delayed the investigation meeting with

the Clamant while she observed Ramadan, between 23 April and 23 May 2020.

c. This meant that even though the Respondent's Discipline Policy is clear that the investigation report should normally be completed no later than 20 working days from the date the investigation was commissioned; there were extenuating circumstances in this case, as set out above. It was therefore necessary to extend the investigation to allow Mr Guntrip to still conduct a thorough process. Mr Guntrip kept HR informed and got extensions along the way.

d. When the hearing was arranged for 16 June, the Claimant did not attend. She also did not provide the Respondent with a statement or give her trade union rep a statement to present on her behalf. Her trade union rep stated in the appeal hearing that he did not know that she was not intending to attend the appeal hearing and that he would have attended on her behalf and read out any statement that she prepared. The Claimant confirmed that she had not read the Respondent's Discipline Policy which sets out all of this and which she had been referred to in every invitation letter sent to her.

179. Secondly, when considering whether the decision to dismiss was unreasonable, Mr Davis was aware that Mr Wilmer had not considered the incident of 31 December on its own. As she was under a live Final Written Warning at the time of the incident, he also had to take that into account. On its own the incident on 31 December would be considered as serious misconduct but would be unlikely to warrant her dismissal. But it was not on its own. The Respondent's Discipline Policy states:

> *"For repeated misconduct, penalties will normally follow in the above order. However, the process is not sequential and, depending on the seriousness of the misconduct, a final written warning or dismissal may be an appropriate first penalty"*

180. Also, in relation to dismissal, the Policy states:

> *"Dismissal – for gross misconduct or when another incident of misconduct occurs during the currency of a final written warning. In cases of proven misconduct, summary dismissal i.e. dismissal without notice may be imposed. If the employee commits any further misconduct whilst subject to a live discipline warning, they may be issued with a final written warning or dismissed. In the case of a 'live' final written warning, further misconduct may lead to dismissal regardless of the severity of the subsequent misconduct."*

181. Mr Davis considered the Claimant's mitigation and concluded that although the Claimant may be susceptible to emotion around the time of her monthly cycle, that did not excuse her behaviour or justify the way she spoke to two senior managers. If on the day the Claimant felt that she was not fit for duty, that was something she could have raised with her line manager but had not. He decided that although there had been delays in the investigation, extensions had been sought from HR and the Respondent had communicated with the Claimant

throughout the time. He took into account that the investigation occurred during the Covid-19 pandemic, which meant that most staff were on reduced attendance; the Claimant had been absent due to ill-health and that it had been agreed that it would be stopped during Ramadan. All of this contributed to delay. He concluded that although there had been some delay, there had been no breach of policy or fairness.

182. He also concluded that there had been no breach of policy in relation to the Respondent's decision to proceed with the disciplinary hearing rather than postpone the hearing again and give the Claimant a two week extension. The invitation letter told her that the second hearing date had to be attended otherwise a decision would be made in her absence, in line with the Respondent's policy. She did not attend and did not take up the offer of the alternative of providing a written statement.

183. Lastly, it was his conclusion that while the incident on 31 December on its own might not by itself, have led to dismissal; the fact that the Claimant was subject to a live Final Written Warning changed the balance of the outcome.

184. On 15 July, Mr Davis set all of this out in his decision document entitled *Appeal Manager decision* which was sent to the Claimant and was in the bundle at pages 549 – 552.

Law

185. The Tribunal applied the following law in coming to its decision on the merits of this case.

Unfair Dismissal

186. In this case, the Claimant complained of unfair dismissal.

187. In a complaint of unfair dismissal, the first question for the Tribunal is to decide the reason for the Claimant's dismissal and whether it is one of the reasons set out in section 98(2) of the Employment Rights Act 1996 (ERA). The burden is on the Respondent to show the reason for dismissal and that it is a potentially fair reason i.e., that it relates to the Claimant's conduct or capability.

188. A dismissal that falls within that category can be fair. In order to decide whether it is fair or unfair, the Tribunal needs to look at the processes employed by the Respondent leading up to and including the decision to dismiss. In cases concerning the employee's conduct, a three-stage test must be applied by the Respondent in reaching a decision that the employee has committed the alleged act/s of misconduct. This was most clearly stated in the case of *British Homes Stores Ltd v Burchell [1980] ICR 303*, as follows. The employer must show that: -

(a) he believed the employee was guilty of misconduct,

(b) he had in his mind reasonable grounds which could sustain that belief, and

(c) at the stage at which he formed that belief on those grounds, he had

carried out as much investigation into the matter as was reasonable in the circumstances.

189. The means that the employer does not need to have conclusive direct proof of the employee's misconduct but only a genuine and reasonable belief of it which has been reasonably tested through an investigation.

190. Where an employee has admitted the misconduct, the employer will be acting reasonably in believing that the misconduct has been committed without needing to carry out any further investigation (*Royal Society for the Protection of Birds v Croucher* [1984] ICR 604 EAT).

191. If the tribunal concludes from all the evidence that the claimant was dismissed for misconduct; then the next step for the tribunal is to decide whether, taking into account all the relevant circumstances, including the size of the employer's undertaking and the substantial merits of the case, the employer has acted reasonably in treating it as a sufficient reason to dismiss the employee. In determining this, the tribunal has to be mindful not to substitute its own views for that of the employer. Whereas the onus is on the employer to establish that there is a fair reason, the burden in this second stage is a neutral one. The *Burchell* test applies here again. The tribunal must ask itself whether the employer's decision fell within "the range of reasonable responses" of a reasonable employer. The law was set out in the case of *Iceland Frozen Foods v Jones [1982] IRLR 439* where Mr Justice Browne-Wilkinson summarised the law concisely as follows:

> *"We consider that the authorities establish that in law the correct approach for the … tribunal to adopt in answering the question posed by [section 98(4)] is as follows:*
>
> *(1) the starting point should always be the words of section 98(4) themselves;*
>
> *(2) in apply the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (members of the tribunal) consider the dismissal to be fair;*
>
> *(3) in judging the reasonableness of the employer's conduct a tribunal must not substitute its decision as to what was the right course to adopt for that of employer;*
>
> *(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
>
> *(5) the function of the Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable response which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."*

192. The tribunal is therefore not allowed to substitute its view for that of the employer. Our task is not to decide whether we would have dismissed the employee for this misconduct. Instead, it should recognise that different employers

may reasonably act in different ways to a particular situation. The Respondent referred the Tribunal to the case of *Trust Houses Forte Leisure Ltd v Aquilar* [1976] IRLR 251 (EAT), in which Phillips J said:

> *"it has to be recognised that when the management is confronted with a decision to dismiss an employee in particular circumstances there may well be cases where reasonable management might take either or two decisions: to dismiss or not to dismiss. It does not necessarily mean that if they decide to dismiss that they have acted unfairly because there are plenty of situations in which more than one view is possible."*

193. In *Wincanton Group Plc v Stone & Others* [2013] IRLR 178 the EAT made it clear that where an employee is already on a live final written warning then *"the usual approach will be to regard any further misconduct as usually resulting in dismissal….whatever the nature of that later misconduct".* The misconduct for which the employee is dismissed therefore need not be of the same nature as the conduct which led to the warning being imposed. Also, *"…a final written warning always implies, subject only to the individual terms of contract, that any misconduct of whatever nature will often and usually by met with dismissal, and it is likely to be by way of exception that that will not occur."*

194. In *Davies v Sandwell Metropolitan Borough Council [2013] EWCA Civ. 135,* the Court of Appeal considered in detail the approach that employers and tribunals should take towards previous warnings in unfair dismissal cases. The Court of Appeal approved the principle that it is legitimate for an employer to rely on a final warning, as long as (1) it was made in good faith, (2) there were at least prima facie grounds for imposing it, and (3) it was not manifestly inappropriate to issue it.

195. In answering those questions, it is not the tribunal's job to re-open the warning and consider in detail whether it was accurate. Our function is *"to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance which a reasonable employer could reasonably take into account in the decisions to dismiss the claimant for subsequent misconduct."* There would need to be exceptional circumstances before a tribunal can go behind an earlier disciplinary process.

Part-time Worker Discrimination

196. Regulation 5(1) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 states that a part-time worker has the right not to be treated by his employer less favourably than a comparable full-time worker as regards the terms of his contract or by being subject to any other detriment by his employer.

197. The Claimant complained that the Respondent was seeking to phase out part-time workers and that was why she was dismissed. She believed that she was one of the last part-time workers at Stansted.

198. The burden would be on the Claimant to prove this.

Complaints under the Equality Act 2010
Time points

199. Before the Tribunal can assess the discrimination complaints it must consider whether it has jurisdiction to do so.

200. Section 123 of the Equality Act deals with time limits and states as follows:

> (1) Proceedings on a complaint within section 120 may not be brought after the end of—
>
> the period of 3 months starting with the date of the act to which the
>
> complaint relates, or
>
> such other period as the employment tribunal thinks just and equitable.
>
> (2)..
>
> (3) For the purposes of this section—
>
> > (b) conduct extending over a period is to be treated as done at the end of the period;
> > (c) failure to do something is to be treated as occurring when the person in question decided on it.

201. The Claimant contacted ACAS to begin the conciliation process on 12 August 2020. The ACAS certificate was issued on 20 August 2020 and the claim was brought 0n 24 September 2020. The Claimant was dismissed on 18 June 2020. The unfair dismissal complaint is in time.

202. In relation to the discrimination complaints, the Tribunal has to decide whether there was a continuing act?

203. Subsection (3) above refers to what is commonly known as a continuing act. The Tribunal has to decide whether any of the discrimination complaints are out of time. If they are, we have to determine whether the allegations are part of a continuing act as they Claimant submits or decisions each of which could be described as a 'one-off'. If the Tribunal decides that they are 'one-offs' then time would run from each separate allegation and some may be out of time.

204. The leading case for a tribunal to consider when analysing whether there was a continuing act or an act extending over a period is the Court of Appeal case of *Hendricks v Metropolitan Police Comr* [2003] IRLR 96. This case made clear that the focus of inquiry must be on whether there was an ongoing situation or continuing state of affairs in which the Claimant was treated less favourably. In deciding whether a particular situation gives rise to an act extending over time it will also be appropriate to have regard to (a) the nature of the discriminatory conduct about which complaint is made, and (b) the status or position of the person said to be responsible for it. The tribunal is also to be careful to distinguish between the ongoing effects of a one-off discriminatory act as opposed to an act that extends over a period of time.

205. If a discrimination complaint is out of time a tribunal can still consider it if it decides that it is just and equitable to extend time.

206. Section 123 (1)(b) of the Equality Act gives the tribunal the discretion to extend the time limit for a discrimination complaint by such periods as it considers just and equitable.

207. The presumption is that time limits are strictly applied in the employment tribunal. Time is only extended if the claimant persuades the tribunal that it would be just and equitable to do so. In the case of *Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] IRLR 434 the Court of Appeal held as follows:

> *"An employment tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However, time limits are exercised strictly in employment cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds, there is no presumption that they should do so unless they can justify failure to exercise the discretion. On the contrary, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. The exercise of discretion is thus the exception rather than the rule."*

208. The tribunal can consider how late is the claim, the reasons for delay in bringing it, whether the claimant had advice at the time, whether the claimant was aware that they could bring a claim and when they had that awareness and the strength of the claim.

What protected characteristics is the Claimant relying on?

209. During her employment and in this claim, the Claimant confirmed that she was relying on her disabilities of anxiety and depression and Fibromyalgia and the symptoms she experienced for years before her diagnosis. The Claimant relied on her sex in relation to her pre-menstrual syndrome or of her monthly cycle.

210. The Claimant's complaint was of discrimination because of the protected characteristics of sex and disability. The Claimant brings direct discrimination complaints in which she alleges that the Respondent treated her less favourably than a hypothetical comparator because of her sex and disability.

211. The Claimant is a woman who has monthly cycles and with depression and anxiety and fibromyalgia.

212. Direct sex and disability discrimination are prohibited by section 13 of the Equality Act 2010 (the Act).

213. As the Claimant brings disability discrimination complaints, it is necessary for the Tribunal to look at the law on the knowledge of disability.

Knowledge of disability

214. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the tribunal.

215. in *Gallop v Newport City Council* [2014] IRLR 211, the Court of Appeal approved the summary of the legal principles agreed between the parties, that before an employer can be answerable for direct disability discrimination against an employee, the employer need only have actual or constructive knowledge of the facts that make the employee a disabled person. The judgment stated that:

> *"For that purpose the required knowledge, whether actual or constructive, is of the* facts *constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a "disabled person" as defined in section 1(2)'.'*

216. In relation to the section 15 claim, it has been held that there need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment. (HHJ Eady QC in *A Ltd v Z* [2019] IRLR 952*).*

217. The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of s 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see *Donelien v Liberata UK Ltd* [2014] UKEAT/0297/14.

218. The approach adopted to answering the question posed by s 15(2) is to be informed by the Code of Practice which provides as follows:

> *"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.*
>
> *5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.""*
>
> *It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so*

> *Reasonableness, for the purposes of s 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code."*

Burden of proof for all discrimination complaints

219. The burden of proving a discrimination complaint rests on the employee bringing the complaint. However, it has been recognised that this may well be difficult for an employee who does not hold all the information and evidence that is in the possession of the employer and also because it relies on the drawing of inferences from evidence. This is addressed in section 136 of the Equality Act which states that:

> *"(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 it did not contravene the provision."*

220. There is a substantial volume of case law that seeks to provide guidance on the concept of the "shifting burden of proof".

221. In the case of *Laing v Manchester City Council* (EAT) ICR 1519 the EAT spelt out how the burden of proof provisions should work in practice:

> "First, the onus is on the complainant to prove facts from which a finding of discrimination, absent an explanation can be found. Second, by contrast, once the complainant lays that factual foundation, the burden shifts to the employer to give an explanation. The latter suggests that the employer must seek to rebut the inference of discrimination by showing why he has acted as he has. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with race."

222. In the same case tribunals were cautioned against taking a mechanistic approach to the proof of discrimination in following the guidance set out above. In essence, the claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. The tribunal can consider all evidence before it in coming to the conclusion as to whether or not a claimant has made a prima facie case of discrimination (see also *Madarassay v Nomura International Plc* [2007] IRLR 246).

223. In every case the tribunal has to determine the reason why the claimant was treated as she was. As Lord Nicholls put it in *Nagarajan v London Regional Transport* [1999] IRLR 572: "this is the crucial question". It was also his observation that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, then that is sufficient to establish discrimination. It need not be the only or even the

main reason. It is sufficient that it is significant in the sense of being more than trivial.

224. As Elias J stated in the case of *Laing* in some cases it is still appropriate to go right to the heart of the question of whether or not the protected characteristic was the reason for the treatment.

> *"The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'. Whilst ….it will usually be desirable for a tribunal to go through the two stages suggested in Igen, it is not necessarily an error in law to fail to do so."*

Indirect Disability Discrimination

225. The Claimant also complained of indirect discrimination on the grounds of her sex and disability.

226. Section 19(1) Equality Act 2010 provides as follows:

> "A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's".

227. A provision, criterion or practice is referred to as a PCP. A PCP is discriminatory in relation to a relevant protected characteristic of B's if:

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) It puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

228. The Claimant in this case alleges that the Respondent applied three PCPs – set out at pages 1043 and 1140 of the bundle as follows:

a. The Respondent had a PCP of its performance standards which was applied to the Claimant and to people without the Claimant's disability. She says that her disabilities made it harder for her to

achieve these standards because her disabilities made her tired and forgetful;

b. The Respondent had a PCP of delay in concluding its disciplinary policy which was applied to the Claimant and to men;

c. She says that being put on e-Gates for 4.5 months, whilst the disciplinary process was conducted was equivalent to a demotion and was bad for her anxiety and depression as it was boring and that a busy day on the PCP is better for her mental health. The PCP that was applied was removal from normal duties for an extended period while a disciplinary matter was investigated.

Discrimination arising from Disability

229. Under section 15(1) of the Equality Act 2010, discrimination arising from disability occurs where both –

(a) A treats B unfavourably because of something arising in consequences of B's disability; and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

230. The Respondent referred to two relevant authorities in their submissions. In *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14, in which the then President of the EAT, Langstaff J (as he then was), held that there were two distinct steps to the test to be applied by tribunals in determining whether discrimination arising from disability has occurred. Those are:

a. Did the Claimant's disability cause, have the consequence of, or result in "*something*"?

b. Did the employer treat the Claimant unfavourably because of that "*something*"?

231. In the case of *Pnaiser v NHS England and another* [2016] IRLR 170, the EAT summarised the proper approach to claims for discrimination arising from disability as follows:

a. The Tribunal must identify whether the Claimant was treated unfavourably and by whom;

b. It then has to determine what caused the treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or subconscious thought processes of that person, but keeping in mind that the motive of the alleged discriminator in acting as he or she did is irrelevant.

c. The Tribunal must then determine whether the reason was *"something arising in consequence of the Claimant's disability"* which could describe a range of causal links. That stage of the causation test involves an objective question and does not depend on the

thought processes of the alleged discriminator.

d. The knowledge required is of the disability, not knowledge that the "*something*" leading to the unfavourable treatment was a consequence of the disability.

232. Section 15(2) states that there will be no discrimination arising from disability if *"A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

233. Also, 15(1)(b) sets out that discrimination arising from disability can be justified where the unfavourable treatment is a *"proportionate means of achieving a legitimate aim"*. In order to be proportionate, the unfavourable treatment has to be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so. If any acts of discrimination are found, the Respondent pleads this defence.

234. In relation to knowledge of disability in the context of a complaint of a failure to make reasonable adjustments, the EAT held in the case of *Secretary of State for the Department of Work and Pensions v Alam* [2010] IRLR 283, that the correct statutory construction of s 4A(3)(*b*) (Disability Discrimination Act) involved asking two questions;

(1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: 'no' then there is a second question, namely,

(2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)?

235. If the answer to that question was also negative, then there is no duty to make reasonable adjustments.

236. The effect of this was spelt out clearly by Underhill P in *Wilcox Birmingham CAB Services Ltd* [2011] All ER (D) 73 (Aug). In that judgment he held, *'to spell it out, an employer is under no duty under section 4A unless he knows (actually or constructively)* both *(1) that the employee is disabled* and *(2) that he or she is disadvantaged by the disability in the way set out at in section 4A(1). As Lady Smith points out [in* Alam above*], element (2) will not come into play if the employer does not know element (1).*

Duty to make reasonable adjustments

237. Section 20 Equality Act 2010, sets out the duty to make adjustments as follows:

"(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…

(a) The duty comprises the following three requirements,

(b) 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.

238. Section 21 deals with the consequences of a failure to comply with the duty:

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

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

(b) A provision of an applicable Schedule which imposes a duty to comply with the first, second and third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of another provision of this Act or otherwise."

239. Schedule 8 deals with the employer's knowledge and sets out the following:

"20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –

(a) N/A to this case

(b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement

240. In the case of *Environment Agency v Rowan* [2008] IRLR 20 the EAT set out guidance on how an employment tribunal should approach a complaint of a failure to make reasonable adjustments under what was then section 3A(2) of the DDA by failing to comply with the Section 4A duty. The tribunal must identify the following (amended since the Equality Act 2010):-

a. the provision, criteria or practice (PCP) applied by or on behalf of an employer, or;

b. the physical feature of premises occupied by the employer;

c. the identity of non-disabled comparators (where appropriate); and

d. the nature and extent of the substantial disadvantage suffered by the claimant.

241. The EAT held that an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through this process. Unless it has identified the four matters as set out above the tribunal cannot go on to judge if the duty arises and if any proposed adjustment is reasonable.

242. In assessing discrimination complaints tribunals would be expected to go through a staged process to determine whether the claim was proven in relation to the burden of proof. In the case of *Project Management Institute v Latif* [2007] IRLR 579 Mr Justice Elias expressly approved guidance on the application of the burden of proof in reasonable adjustment cases as contained in the Disability Rights Commission Code of Practice. He stated that:

> *"The key point is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of duty. There must be evidence of some apparently reasonable adjustment which could be made …… we do think it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not".*

243. If the Tribunal concludes, following application of that process, and with the burden on the employee, that there were steps which it would have been reasonable for the employer to take in order to prevent the employee from suffering from the disadvantage in question; then the burden would shift to the employer to seek to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that another reasonable adjustment had been made or the adjustment identified by the employee was not a reasonable one to make.

Applying this Law to the Facts set out above

244. The Tribunal will now go through the list of issues at page 1135 and set out its judgment in relation to each issue, by applying the above law to the relevant facts set out above.

Unfair Dismissal

(1) What was the reason for the Claimant's dismissal?

245. The Claimant submitted in the hearing that the Respondent dismissed her because she was a part-time worker, because she was disabled and because of her sex.

246. The evidence was that the Respondent continued to recruit part-time workers and was conducting discussions within the Gender Equality Network to improve their recruitment of people to part-time positions. There was no evidence of the Claimant's part-time status being a factor in the decision to dismiss her.

247. The fact that the Respondent may have had periods of time when it recruited full-time workers, that does not mean that it was phasing out part-time workers. Also, there was no evidence of a connection between the Claimant's part-time worker status and the disciplinary proceedings that led to her dismissal, either in the mind of the person who dismissed her, Mr Wilmer, or in the mind of the Mr Beaufond, who was the senior officer most likely to have made the complaint arising out of the incident on 31 December.

248. The evidence was that the Claimant was dismissed because of her conduct towards senior officers on 31 December 2019, taking into account the existence of her Final Written Warnings.

249. It is therefore this Tribunal's judgment that the Respondent has proved that the Claimant was dismissed because of her conduct and not because of her disability or her sex or her part-time worker status. Conduct is a potentially fair reason for dismissal.

(2) Did the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Claimant? This can be broken down as follows -

Did the Respondent carry out a reasonable investigation?

250. In relation to all three incidents, the Respondent conducted a thorough investigation. As we heard detailed evidence on all three investigations, we can say the following. The Claimant was informed of all the allegations against her and was given the opportunity, each time, to participate in the investigation, to comment on the evidence and explain in her own words, what happened. The Respondent arranged for notes to be taken at every meeting and the Claimant was given the opportunity to comment on those notes and to amend them. The Claimant was told of the seriousness of each of the incidents and the possible sanctions that could be imposed, if she were found to have behaved as alleged. The Claimant had her trade union representative with her and would have been able to take advice on any aspect of procedure, if necessary. This also meant that she had someone to speak for her at the meetings.

251. The Claimant was given an opportunity to state her case at the disciplinary meetings and could have provided further evidence or suggested individuals that the Respondent should interview, if she wanted.

252. Initially, the Claimant did not see the statement that Ms Pathirana gave to BFHO Barker in the investigation on the 2nd incident. However, that did not make the investigation process less thorough or unfair. We say this because the contents of Ms Pathirana's statement was in the investigation report; the Respondent concluded that there was no case to answer in relation to the allegation that she had behaved in a threatening manner towards Ms Pathirana and so her evidence relating to that allegation was not needed and lastly, the decision maker, Mr Ashworth accepted that it was likely that the Claimant had asked Ms Pathirana three times to allow her to report the hit. His concern was that after the passenger was returned to the PCP, there were 7 more hours before the Claimant's shift ended. During that time there was no one stopping her from reporting the hit and she failed to do so. He was focussed on the whole of her shift

once she got the hit and not just the moment when she asked Ms Pathirana to let her record it. In those circumstances, the fact that she was not given the statement did not affect the fairness of that process.

253. In relation to the last incident, which was the basis for her dismissal, when considered with the final written warning; it is our judgment that Mr Guntrip carried out a reasonable investigation.

254. The Claimant submitted that Mr Guntrip did not carry out a reasonable investigation because he concluded from his investigation that the Claimant had shouted at her senior managers. It is our judgment that this was a reasonable conclusion that he could come to from the evidence produced in the investigation.

255. The Respondent was entitled to prefer the evidence given by Mr Beaufond and Mr Donaldson over that of the Claimant. Their accounts were consistent and plausible. The Claimant did not say to us that those officers had not told the truth and she did not put that to them in the hearing. Also, the Claimant admitted that she was frustrated and that she might have come across as angry. That corroborates the evidence given by the senior officers.

256. The Claimant complained in the Tribunal hearing that Mr Guntrip did not speak to Mr White. However, she did not tell him at the time that he should speak to Mr White as she was aware that he was in the watchhouse at the time. Also, if she felt that Mr White had information that could assist, she could have suggested to Mr Wilmer or Mr Davis during the disciplinary process that they should speak to him. Mr Guntrip confirmed that he did speak to Mr White, but he did not take a statement from him because he was unable to assist as he had not witnessed the incident.

257. It is this therefore this Tribunal's judgment that the Respondent conducted a reasonable investigation of the 3rd incident, which led to the Claimant's dismissal.

258. The Claimant did not attend the last disciplinary hearing conducted by Mr Wilmer in relation to the 3rd incident. The Claimant had been given sufficient notice of the disciplinary hearing. It was initially scheduled for 9 June and the invitation letter was sent on 27 May. This was rearranged on the Claimant's request due to her ill-health. The re-arranged date was 16 June. She also had sufficient notice of that date.

259. The Claimant had the period from the day she received the letter dated 27 May to 16 June, to seek legal advice. It was not unreasonable of the Respondent to proceed with the disciplinary hearing. Also, the Claimant was given the option of sending in a statement and communicating with her trade union representative and asking him to attend on her behalf or to attend and read out her statement.

260. The Claimant chose to none of those things.

261. In those circumstances, it is our judgment that the Respondent's choice to proceed with the disciplinary hearing in her absence, was not outside the band of reasonable responses.

262. The Claimant was also given the opportunity to attend the appeal hearing conducted by Mr Davis. She took that opportunity and attended with her trade union representative to appeal the decision to dismiss her. She had the opportunity to make all the representations that she would have made at the disciplinary hearing. She was able to make all her points and to challenge the evidence against her. The appeal was conducted fairly and thoroughly.

263. In those circumstances, it is this Tribunal's judgment that the procedure adopted by the Respondent fell within the band of reasonable responses. The process followed in the investigation and in the disciplinary process was detailed and fair to the Claimant.

Did the employer have a reasonable and genuine belief that the Claimant had committed serious misconduct?

264. It is this Tribunal's judgment that the Respondent had a genuine and reasonable belief, founded on reasonable evidence and following a reasonable investigation, that the Claimant was guilty of the misconduct alleged. The Respondent had a genuine and reasonable belief that the Claimant had engaged in behaviour towards her senior officers, that fell below the standards expected of a Border Force Officer.

265. It is our judgment that there was sufficient evidence from the investigation, in the statements produced by Mr Donaldson, Mr Beaufond and the Claimant for the Respondent to genuinely believe that she had behaved as alleged on 31 December 2019. This was a genuine and reasonable belief.

(3) Was dismissal within the band of reasonable responses?

266. At the time of her dismissal, the Claimant had two live warning warnings in respect of her conduct at work. The Claimant challenges those and says that they should not have been made. In respect of the first, she says that it was unfair to impose a Final Written Warning for such a long period of time and in respect of the second; she says that it was a trivial matter, and she should not have even been sanctioned for it but instead it should have been addressed by a conversation with her.

267. In our judgment, the Respondent has proved that that all three incidents were serious. In relation to the 1st incident. The Claimant effectively allowed the passenger to go past the PCP without raising the alarm by using the panic alarms, telephoning the watchhouse or saying a clear *'No!'* to him when he asked if he could go through. It was reasonable for the Respondent to come to that conclusion from the evidence. She did tell him to go but it was reasonable for the Respondent to conclude from the evidence that she tacitly gave him permission to go because she failed to do anything that would clearly signal to him that he did not have permission, which was her job.

268. In the appeal hearing, the basis of the appeal was that the sanction was too long. Her trade union representative and the Claimant did not submit that she should not have been sanctioned at all. The Claimant admitted that she had failed to do all she could to stop the passenger. She was not expected to physically stop him, and she was not disciplined for failing to physically stop him. The appeal was

successful as the term of the Final Written Warning was reduced. As the Respondent has submitted, even if it was reduced to the period of 12 months as her trade union representative asked; the third incident would still have occurred during its currency, and she would have been in exactly the same position.

269. In relation to the 2nd incident. It is likely, and the Respondent accepted that when the Claimant tried to report the WI hit, Ms Pathirana told her to wait. She was told that the passenger was required by Customs, and she should wait until their business with him was resolved. The passenger was returned soon after. However, the Claimant failed to report the WI hit in the 7 hours that she had, after the passenger was returned by Customs, before her shift ended. That had nothing to do with Ms Pathirana. Once again, the Claimant admitted that she had failed to report the hit and that she should have done so. Her trade union representative agreed that extending the final written warning by 6 months was a fair outcome.

270. In those circumstances, it is this Tribunal's judgment that the two final written warnings were given in good faith. There were grounds for imposing them and on each occasion, they were imposed after the Respondent had followed a thorough disciplinary process, involving the Claimant at every step. It was not inappropriate for the final written warnings to be imposed.

271. Applying the principles set out in the case of *Davies v Sandwell Metropolitan Borough Council* set out above, it is legitimate for the Respondent, to rely on a final warning, provided that it was issued in good faith, there were at least prima facie grounds for imposing it and it was not manifestly inappropriate to issue it. It is our judgment that the Final Written Warnings were circumstances that a reasonable employer could take into account in the decision to dismiss the Claimant for subsequent misconduct. They had been given in good faith, there were good grounds for imposing them and it was not manifestly inappropriate to issue them.

272. Once the Respondent took the previous Final Written Warning into account, its internal Discipline Policy and the law (the case of *Wincanton*, quoted in the law section above) state that when an employee is already on a live final written warning, then the usual approach will be to regard any further misconduct as usually resulting in dismissal, whatever the nature of that later misconduct. It does not need to be the same type of misconduct.

273. The Claimant frequently pointed out in the hearing that the Respondent did not need to treat these acts of misconduct in the way that they did. That is not a question for the employment tribunal. In determining whether a dismissal is fair, it is not the Tribunal's job to look at all the other alternative actions that the Respondent could have taken. Our job is to determine whether the Respondent's decisions were fair, reasonable and within the band of reasonable responses.

274. She also submitted that she was being diagnosed for cancer at the time of the disciplinary hearing into one of the incidents and that she had long service. She did not tell the Respondent about the cancer issue at the time so it could not have been taken into account. The Claimant had been employed since 2006 and a Border Force Officer since 2017. There is an expectation that which such a long period of service she would know how to address her senior officers and that there would not be conduct such as the Respondent found that she displayed on 31 December. Even with her long service it was within the band of reasonable

responses for her to be dismissed for this incident, with the two Final Written Warnings in existence.

275. It is our judgment that, taking all factors into consideration and given the existence of the Final Written Warnings for the Claimant's conduct and a third incident of inappropriate conduct within a year of the 1st warning; it was within the band of reasonable responses to dismiss her.

276. It is this Tribunal's judgment that the Respondent's decision to dismiss the Claimant was fair and within the band of reasonable responses.

277. The complaint of unfair dismissal fails and is dismissed.

Discrimination complaints

Part-time worker discrimination

At paragraph 55 of the list of issues the Claimant alleges that she was targeted for removal because the Respondent was phasing out part-time workers and that this was a pretext to remove her.

278. The Claimant failed to prove facts from which we could infer that her status as a part-time worker was an issue or concern for the Respondent or was in Mr Wilmer's mind at the time of dismissal.

279. The Respondent proved that at the time of the Claimant's dismissal, it employed part-time staff and that it was working to increase that number. Mr Naeem's evidence was that the Respondent was continuing to recruit part-time workers.

280. There was no evidence that the Respondent was concerned about the Claimant's part-time status. The Claimant was dismissed because of her conduct on 31 December and because she already had a Final Written Warning against her, which had been extended. The Claimant was told repeatedly in letters from the managers when the Final Written Warning was imposed and when it was extended that if there was another incident of misconduct, it would likely warrant a more serious sanction, if found proved. This was the reason for the Claimant's dismissal.

281. There was no evidence that the Claimant's part-time status was in any way related to the decision to terminate her contract of employment or was in Mr Wilmer's mind.

282. The allegation at paragraphs 55 and 56, at page 1144, fail and are dismissed.

Direct discrimination

Knowledge of disability

283. The Respondent's case has been that the individual officers who conducted the various disciplinary process relating to the Claimant did not know that she was disabled.

284. Before becoming the Claimant's line manager, Mr Inglis knew that she had mental health issues but were not clear what those were. Once he became her line manager in August 2019, he requested an OH report.

285. When the Respondent received the OH report in August 2019, it had all 3 of the factors described in the case of *Gallop v Newport City Council.* The OH adviser described each of the Claimant's conditions and set them out in detail. The Respondent was informed that her symptoms had lasted more than 12 months and that recurrence was possible. Even though Mr Inglis was aware of some of her conditions before then, it is our judgment that from the date on which this OH Report was received, the Respondent would have known that (a) the Claimant had physical or mental impairments of anxiety and depression, Reynaud's Syndrome, Vertigo and Fibromyalgia-like symptoms, and (b) that they had a substantial and long-term adverse effect on (c) her ability to carry out normal day-to-day duties. The Respondent was advised that it was likely that her conditions would bring her under the Equality Act 2010.

286. It is our judgment that the Respondent was aware that the Claimant was disabled from 28 August 2019. That means that the Respondent did not have constructive or actual knowledge of disability before that date.

287. In addition, Mr Ashworth and Mr Wilson were told about the Claimant's anxiety and depression the disabilities.

288. The Claimant was not always forthcoming with details of her disabilities at the time of the internal investigation and disciplinary hearings. Nevertheless, given the guidance that employers are to do all they can reasonably be expected to do to find out if a worker has a disability and given the correct action by all the managers in the disciplinary processes of seeking advice from HR before deciding on the sanction to be imposed, it is our judgment that it is reasonable to expect the managers to have been aware that the Claimant was a disabled person for the purposes of the Equality Act 2010. The managers had constructive knowledge that the Claimant was a disabled person from 28 August 2019.

289. It is our judgment that Mr Fisk and Mr Naeem did not have constructive or actual knowledge of the Claimant's disabilities.

Time limits

290. The claim was issued on 24 September 2020. The period of ACAS conciliation was 8 days between the 12 and 20 August 2020.

291. The Claimant complains at paragraphs 14 and 17 of the list of issues at page 1138 of the bundle, that placing her on e-Gates for 4.5 months between May

2019 and September 2019 was an act of direct sex and disability discrimination. This was in relation to the 2nd incident. The claim was issued 1 year after the Claimant was removed from e-Gates. This complaint is therefore out of time as the claim should have been brought within 3 months of the incident.

Was it part of a continuing act?

292. The decision to place the Claimant on e-Gates on that occasion was taken by Mr Coombes who was a different manager to the person who commissioned the investigation into the allegations. Mr Cris Ashworth was the manager who commissioned Paul Barker to undertake the investigation and who conducted the disciplinary hearing.

293. There was no evidence that he or Paul Barker liaised with, spoke to or worked on the Claimant's case with SO Coombes. The disciplinary process was separate from the decision to put her on the e-Gates. Mr Coombes had nothing further to do with it.

294. It is therefore this Tribunal's judgment that the complaint regarding being placed on the e-Gates was not part of a continuing act. A complaint about the decision to place the Claimant on the e-Gates should have been brought at the latest, three months after she was taken off the e-Gates, i.e., by the end of December 2019.

Is it just and equitable to extend time to enable this complaint to be considered?

295. The Tribunal was given no reason for the failure to make a complaint to the employment tribunal about something that the Claimant was clearly unhappy about. She had advice and assistance from her trade union representative at every step of the process. She failed to bring a complaint in time.

296. We also considered the strength of the complaint. It is this Tribunal's judgment that the decision to place the Claimant on e-Gates while the 2nd incident was being investigated, was not a punishment for the failure to report the WI hit. It was one way to allow her to continue to work, while at the same time, protecting her from making any other mistakes and protecting the UK border. Mr Ashworth told her this when she complained about it during the disciplinary hearing.

297. Once the disciplinary proceedings were completed, the Claimant was removed from e-Gates, either to training and/or mentoring, with a view to returning her to the PCP as soon as possible. The Claimant has failed to prove any facts from which we could infer that her disability or her sex were any part of the consideration in Mr Coombes putting her on e-Gates.

298. For those reasons, the Tribunal refuses to exercise its discretion to extend time to allow us to consider the Claimant's complaints about being put on e-Gates while the 2nd incident was investigated.

299. The Tribunal has no jurisdiction to hear the complaint at 14.1 and 17.1 of the list of issues as they were issued outside of the statutory time limits.

Discriminatory Dismissal complaint

The Claimant alleges at paragraphs 14.2 and 17.2 of the list of issues that the decision to dismiss her was an act of direct sex and disability discrimination.

300. These were complaints of direct discrimination. There were no findings of fact from which we could infer that the Claimant was treated less favourably because of her disability and her sex, by being dismissed.

301. There was no evidence that the Claimant was dismissed because she was disabled or because she was a woman.

The Claimant asserts that her dismissal was direct disability discrimination in part because she had Fibromyalgia and/or anxiety and depression and the Respondent was reluctant to have to manage her with her disabilities given the effect it had on operational delivery for them.

302. We had no evidence from which we could infer that the Respondent was reluctant to manage the Claimant with her disabilities. The Claimant was referred to OH twice within the relevant period. Her line manager met with her regularly, in accordance with the recommendations from OH. The Respondent considered the recommendations from OH and implemented those that it could, before the disciplinary proceedings were concluded.

303. There was no evidence that the Claimant's disabilities had any significant effect on the Respondent's operational delivery.

304. The Claimant was dismissed because her behaviour on 31 December was not of the standard required for a Border Force Officer. She already had a Final Written Warning, which had been extended after a 2nd incident, which made it appropriate for the Respondent to consider terminating her contract. The Respondent terminated the Claimant's contract because of her conduct. The decision to dismiss also reflected how seriously the Respondent took the 3rd incident.

The Claimant asserts that her dismissal was direct sex discrimination and compares herself to a hypothetical comparator and what she described as men whose conduct was 'loud and aggressive generally' within the Respondent who were not subject to disciplinary sanction.

305. She did not refer to a particular person or situation. She was not dismissed for being loud and aggressive. She was dismissed because it was determined after a reasonable investigation that she had shouted and behaved angrily towards senior officers who had simply requested that she return to the PCP after her break, during a busy period. Furthermore, it is our judgment that if a male Border Force officer spoke to the senior officers in the way that the Claimant did on 31 December, in the same circumstances, that that person would also have been

disciplined in the way that the Claimant was. If that person already had a Final Written warning on their record which had already been extended for further serious misconduct, it is highly likely that that person would also have been dismissed as the Claimant was. There was no evidence from which we could infer that a male Border Force officer in the same circumstances would have been treated differently.

306. In those circumstances, the Claimant's complaint of direct sex and disability discrimination fails.

307. The allegations at paragraphs 14.2 and 17.2 of the list of issues fail and are dismissed.

Discrimination arising from disability

308. *The Claimant's complaint at points 20.1 – 20.3 is that the Respondent failed to take into account the effects of Fibromyalgia and anxiety and depression when dealing with incidents 1, 2, and 3. She submitted that her disability affected the speed and manner in which she did things and that the Respondent moved too quickly in relation to incidents 1 and 2 and in disciplining her and compounded her anxiety by issuing her with a Final Written warning and then extending that warning.*

In relation to incident 1

309. The Claimant did not tell Mr O'Riordan or Mr Fisk about her disabilities. She did not inform them of the anxiety and depression or the symptoms that were later diagnosed as Fibromyalgia. They were not aware of her disabilities and neither was the Respondent.

310. The Claimant was disciplined for the 1st incident in January 2019, which was before the OH report was produced. It is our judgment that the Respondent was not have actual or constructive knowledge that the Claimant was a disabled person for the purposes of the Equality Act 2010 at the time that Mr O'Riordan conducted his investigation and when Mr Fisk imposed the Final Written Warning.

311. It is also our judgment that this complaint is out of time. The investigation report was produced on 9 January 2019. The Final Written Warning was imposed on 16 January 2019 by Mr Fisk. The Claimant has not given the Tribunal any reason why she had not brought this complaint before September 2020.

312. It is this Tribunal's judgment that this complaint is not part of any continuing act as the proceedings conducted by Mr Fisk was separate from the other disciplinary proceedings that came after. Mr O'Riordan and Mr Fisk were not involved in any of the following issues with the Claimant's performance and they were not involved in her dismissal

313. Is it just and equitable to extend time to consider this claim? The Claimant has not explained why she took no action at the time if she was believed that the Respondent had failed to take into account the effects of her Fibromyalgia at the

time that the Final Written Warning was imposed. In her appeal she simply asked for the period of the warning to be reduced. Her written appeal document was only about that. It is likely that the Claimant has taken a different view of what happened after some time.

314. In this Tribunal's judgment, it is not just and equitable to extend time and the Tribunal does not have jurisdiction to consider the complaint at paragraph 20.1 of the list of issues at page 1139.

In relation to incident 2

In relation to incident 2

315. The Claimant relies on a failure to take account of the effects of the Fibromyalgia and anxiety and depression when dealing with the incident which took place on 30 May 2019.

316. The Respondent was not aware of the Claimant's disability at the time of the 2nd incident but it was aware by the time this matter came before Mr Ashworth for the disciplinary hearing in August 2019.

317. This is another complaint that is out of time. It was issued in September 2020 and the discrimination allegedly occurred in August 2019. This was not part of a continuing act as Mr Baker, Mr Ashworth and Mr Wilson were not involved in any other matter concerning the Claimant. They do not feature in the case after this disciplinary process. The Claimant did not explain to us why she did not bring a complaint about this before September 2020, if she believed that she was being treated in a discriminatory fashion by the Respondent. The Claimant has had trade union representation and involvement all the way through the relevant period.

318. The Tribunal does not extend time to allow it to consider this complaint.

In relation to incident 3

319. Although the incident referred to here took place on 31 December, the disciplinary process began in March 2020 with the investigation meeting with Mr Guntrip, which is part of a continuing act with the disciplinary meeting with Mr Wilmer in June, which resulted in her dismissal. The Tribunal does have jurisdiction to consider this complaint.

In relation to incident 3 - the Claimant complains at paragraph 20.3 that the Respondent – failed to take account of the effects of her Fibromyalgia and anxiety and depression when dealing with the incident. Also, that her pre-menstrual tension compounded her depression resulting in the incident.

320. The OH report advised the Respondent that the Claimant's anxiety and depression were being treated with daily prescription medication and that her symptoms ere improved and stable. The only anxiety that was reported was due to her being placed on e-Gates after the incident. The symptoms that were discussed in the report were that the suspected Fibromyalgia might affect her

attendance at work and her general wellbeing and that the Reynaud's Syndrome may make it painful and uncomfortable for her to stand.

321. The Claimant did not produce any evidence to the Respondent at the time of the disciplinary hearing in June, at the appeal against dismissal or to the employment tribunal hearing that the incident that occurred on 31 December was caused or contributed to by the effects of her Fibromyalgia, anxiety and depression or pre-menstrual tension.

322. The Claimant produced a document for us that showed that it was possible that she was on her period at the time of the incident on 31 December but that does not show pre-menstrual tension. The GP's letter of 6 June does not refer to pre-menstrual tension or that she had difficulties with mood, behaviour and regulating her conduct during or before her period.

323. The Claimant confirmed in the disciplinary process that she had taken her anxiety and depression medication on 31 December. There was therefore nothing to give the Respondent an indication that her condition was not stable on the day.

324. The Respondent was aware of the Claimant's disabilities but they were not aware and the Claimant has provided no evidence to show that her conduct and the way she spoke to her senior managers on 31 December happened because of something arising from her disabilities.

325. The Claimant's case seems to be that the unfavourable treatment was the Respondent did not take into account the alleged effect of her disabilities when determining the appropriate sanction for these incidents of misconduct. She seems to be suggesting that the Respondent should have shown sympathy for her in deciding whether to dismiss her.

326. It is this Tribunal's judgment that the Claimant was sanctioned for three incidents of misconduct by the Respondent. She was given a Final Written Warning for the 1st incident. This was for a period of 2 years which was reduced on appeal. She was sanctioned for the 2nd incident with an additional 6 months of the Final Written Warning. She was dismissed for the 3rd incident. The Claimant was shown sympathy and the Respondent took her mitigation into account when deciding on the appropriate sanction.

327. However, the Claimant has failed to provide evidence from which the Tribunal could infer that the Claimant's conduct on 31 December, in incident 3 arose from her disabilities. There was no evidence from which we could make that inference. In answer to point 21.1 on page 1140, the Claimant has failed to provide evidence from which the Tribunal could conclude that the following things arose on 31 December in consequence of her disability – fatigue and irritability, inability to concentrate, difficulty in controlling her emotions, pain and distress. It is likely that she suffered pain and distress as a result of her Fibromyalgia. There was no evidence to prove that the pain and distress resulting from her Fibromayalgia caused her to speak to her managers in the way that she did on 31 December. When she was questioned by Mr Beaufond, she said that she was upset with her managers, that they upset her and that she did not want to talk to him. She said that it was her managers' fault that she was behaving this way

because they had not done anything about her complaints regarding Ms Pathirana. When Mr Beaufond told her not to be rude to passengers, she told him that it was her colleagues and managers who upset her and that the passengers were nice to her. She did not refer to pain or discomfort or difficulty in concentrating. She was upset about what she perceived as the Respondent's failure to address her complaint about Ms Pathirana. The evidence leads us to conclude that this was the reason for the way she spoke to Mr Donaldson and to Mr Beaufond on 31 December.

328. It is therefore our judgment that the unfavourable treatment of dismissal was not because of her disabilities or anything that arose in consequence of her disabilities.

329. The Claimant's conduct in relation to each incident is what was in Mr Wilmer's mind when he made the decision to dismiss her.

330. In this Tribunal's judgment, the Respondent did not treat the Claimant unfavourably because of something arising in consequence of her disability. The complaint of disability discrimination in breach of section 15 Equality Act 2010 set out at paragraphs 20 and 21 of the list of issues at pages 1139 and 1140 of the hearing bundle, fail and are dismissed.

Indirect Disability Discrimination

331. The Claimant complains of indirect sex and indirect disability discrimination.

332. The indirect disability discrimination issues are at paragraphs 23 – 32 of the list of issues at pages 1140 and 1141 of the trial bundle. APCP (provision, criterion or practice) needs to be applied to everyone before it can be considered here.

333. The Respondent did not have a PCP of a delay in conducting its disciplinary policy which was applied to all its employees. In this case, the Claimant experienced 3 separate disciplinary procedures. In her complaint of discrimination arising from disability, the Claimant complains that the Respondent moved too quickly in disciplining her. That belies the suggestion that the Respondent had a PCP of delay in conducting disciplinary processes. There was no evidence of a practice of delaying disciplinary proceedings.

334. The Respondent sought to adhere to the time limits set out in its Disciplinary Policy and Mr Guntrip and the other managers had to seek extensions in respect of each delay.

335. It is likely that the Claimant was upset about the time it took for the investigation and the disciplinary procedure relating to the 3rd incident to get going. The fact that she was upset about that is understandable. But there was no evidence that this was a practice of the Respondent. The evidence was that there was an unfortunate set of circumstances in the Claimant's case, including her ill-health, Ramadan, an HR official being off as well as Mr Guntrip, all of which resulted in her process being delayed. This was a one-off. It was not a PCP. We did not have evidence to show that the Respondent had a PCP of delaying

investigations and disciplinary procedures and the Claimant did not refer to anyone else's that had been similarly delayed.

The Respondent applied the following PCPs:

336. A PCP of expecting good performance standards, which was applied to the Claimant as well as everyone else;

337. A PCP of putting officers who were being investigated for misconduct on e-Gates which the disciplinary process was conducted;

Did these PCPs put the Claimant at a particular disadvantage?

338. The Claimant failed to prove facts from which we could conclude that the PCP of good performance standards was harder for her to achieve or that the requirement put her at a disadvantage.

339. The Claimant had worked many years with the Respondent, with anxiety and depression. She had been able to maintain good performance until the incident in November 2018. She began her employment in 2003 and had been a Border Force Officer since 2017. That shows that she was able to maintain good performance, with her disabilities. Even though her Fibromyalgia was not diagnosed for some time, the Claimant had been living with the pain and discomfort associated with it for a while. At the same time, the Claimant had been able to maintain good performance until November 2018. After that incident, she was able to do so for a few months until the incident on 25 May 2019. She was then able to maintain good performance until the incident on 31 December 2019.

340. It is our judgment that the Claimant has failed to prove that her disabilities mean that she is disadvantaged by the requirement to provide good performance.

341. In addition, the Claimant failed to prove group disadvantage. She has failed to prove facts from which we can infer that, persons with whom she shares her disabilities of anxiety and depression and Fibromyalgia, would be at a particular disadvantage when compared to persons with whom she does not share them. It is likely that some persons with those characteristics would be able to provide good performance to the Respondent.

342. The complaint about the e-Gates is out of time, as already stated above. She was on the e-Gates between May and November 2019 and there was no reason given to us why she failed to bring a complaint about that, when she was clearly unhappy about it. The decision to put her on the e-Gates in 2019 was made by Mr Coombes who took no other decisions in her case and was not her line manager. It was therefore not part of any continuing act.

343. The Tribunal does not have jurisdiction to determine the complaint about the e-Gates.

344. It was a legitimate aim for the Respondent to seek to maintain proper professional standards as well as to seek to protect the UK border and the public. Its treatment of the Claimant was fair and accorded with its policies.

345. Even though the 1st incident was quite serious, Mr Fisk decided to retain the Claimant in employment and organise training and support for her, to enable her to be a fully functioning Border Force Officer. He imposed a two-year written warning to impress on her how serious her misconduct had been and at the same time, he arranged for her to receive training and to be mentored. The Respondent wanted good performance from its staff, but it was prepared to support its officers to achieve that good performance and to put structures in place to enable them to give that level of performance.

346. In those circumstances, the complaint of indirect disability discrimination fails and is dismissed.

Indirect Sex Discrimination

The Respondent applied the following PCPs:

347. A PCP of expecting good performance standards, which was applied to the Claimant as well as everyone else;

348. The Claimant failed to establish that it was harder for her to achieve good performance because she sometimes felt irritable and intensely tearful during her monthly cycle. Or that the PCP of expecting good performance standards put her as a woman who sometimes feels irritable and tearful during her cycle at a particular disadvantage. It was not clear if she regularly suffered from a change in conduct during her cycle why she did not tell OH this or her manager, Mr Inglis or why it was not something that had caused her to behave inappropriately before 31 December 2019.

349. She also failed to establish facts from which the Tribunal could infer that persons with whom she shared this characteristic, i.e. other women who were not in menopause and had monthly cycles; would also be put at a particular disadvantage by the PCP of an expectation of good performance standards.

350. In those circumstances, the complaint of indirect sex discrimination fails and is dismissed.

Failure to make reasonable adjustments

351. This was a complaint under section 20 Equality Act. The allegations in this complaint were set out in paragraphs 33 – 39 of the list of issues at pages 1141 and 1142 of the hearing bundle.

352. Did the Respondent know of the Claimant's disabilities?

353. The Claimant's line manager, Mr Inglis knew of her mental health issues before the OH report was produced. The Claimant also raised the fact that she was suffering from anxiety and depression with Mr Ashworth and Mr Wilson and later, with Mr Davis.

354. It is this Tribunal's judgment that the Respondent knew or had constructive knowledge that the Claimant had anxiety and depression. They also knew that she had had this for some time. This was set out clearly in the OH report which HR advised the managers dealing with the 2nd incident about. They were not clear how that it had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities but they were advised by OH that it was likely that the Claimant would be covered by the Equality Act 2010.

355. It is this Tribunal's judgment that from receipt of the OH report in August 2019, that the Respondent was aware that the Claimant was a disabled person for the purposes of the Equality Act 2010 and the managers had constructive knowledge of this.

356. The Claimant relies on the following PCPs in this complaint. She alleges that the Respondent applied the following PCPs:-

(i) The delay in concluding disciplinary;

(ii) The performance and operational standards;

(iii) The dismissal.

Did the Respondent apply these PCPs and did they put the Claimant at a substantial disadvantage compared with someone without the Claimant's disability, in that allowance should have been made for her because her actions were in part a manifestation of the effects of her disability/ies?

357. It is this Tribunal's judgment that the delay in concluding the disciplinary process in relation to the 3rd incident was not a PCP. This was a one-off delay, that only applied to this particular situation. The Respondent was not in the habit of delaying disciplinary processes and we did not have evidence from which we could draw that conclusion. We did not have evidence from which we could conclude that the Respondent had a provision, criterion or practice of delaying disciplinary proceedings. There were particular circumstances that applied here.

358. The Respondent also did not have a PCP of dismissal. The Respondent as an employer, can fairly dismiss employees if particular factors, set out in the Employment Rights Act 1996 exist. Dismissal is not a PCP.

359. The only PCP relied by the Claimant which the Tribunal agrees was a PCP was the PCP of expecting Border Force Officers, such as the Claimant to give good performance and abide by its Operational standards. The Respondent did apply this PCP.

360. In order for the duty to make reasonable adjustments to exist, the Respondent has to be aware that the employee is a disabled person, it also has to know that the PCP which it applies, puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. In those circumstances, the employer would be required to take such steps as it is reasonable to have to take to avoid the disadvantage.

Did the Respondent know or could it reasonably have been expected to know that the requirement to give good performance and comply with the Operating Mandate put the Claimant at a substantial disadvantage?

361. The Claimant has failed to produce evidence that the requirement to perform her job well and to abide by the Operating Mandate put her at a disadvantage.

362. In the hearing the Claimant's evidence was that she had processed many passengers at the PCP and was experienced at carrying out the necessary checks. There was no evidence that she failed to do so on that occasion because of her disabilities.

363. She also confirmed that she had conducted the process of reporting the WI stop hit on many occasions and would have done so on 25 May, before she left, if she had not forgotten. We did not have evidence that these instances of unsatisfactory performance happened because the requirement to give good performance put her at a substantial disadvantage. We would say the same for the Operating Mandate.

364. The Claimant was dismissed for her behaviour towards HO Donaldson and SO Beaufond on 31 December 2019. HO Donaldson had asked her to return to the PCP after her break. That was a reasonable management request. The Respondent could not reasonably be expected to know that asking her to return to the PCP after her break, which she had done many times before, would put her at a substantial disadvantage.

365. Similarly, SO Beaufond told her to be careful how she spoke to senior officers. She responded in an inappropriate way during their conversation. The expectation that she should not be rude to senior officers was not a requirement that the Respondent could have known or could reasonably have been expected to know would have put the Claimant at a disadvantage.

366. HO Donaldson heard her when she said that she was trying to do some personal admin and he told her that he would try to find some time later in the shift to allow her to complete what she was doing. The Respondent therefore showed that it was listening to her and prepared to make arrangements to suit her. This was a demonstration to the Claimant that the Respondent was listening to her and was prepared to work with her.

367. The Claimant had worked in this job for many years with her disability. She had been a Border Force officer for at least a year before the first incident and before becoming a Border Force officer, she also carried out some of these procedures. She had been disabled throughout that time.

368. The Respondent was aware that she was disabled but it could not reasonably be expected to know that the Claimant was likely to be placed at a substantial disadvantage by being asked to do the normal duties of her job to a good standard and be professional and respectful to colleagues and members of the public during a busy shift. This was not her first busy shift and she had done those before without being put to a substantial disadvantage.

369. In the hearing the Claimant agreed that she was required to be professional and that she was responsible for securing the UK border. That was part of her job. It did not put her at a substantial disadvantage to do so.

370. The Respondent could not reasonably have been expected to know that in requiring her to give good performance and to abide by its Operating Manual that this would likely place her at a disadvantage because of her disabilities. The Claimant has also not established that the requirement to give good performance and to abide by the Operating Manual put her at a substantial disadvantage in comparison with persons who are not disabled.

371. In those circumstances, it is this Tribunal's judgment that the duty to make reasonable adjustments did not arise in this case.

372. The complaint of a failure to make reasonable adjustments fails and is dismissed.

373. The Claimant's complaints fail and are dismissed.

Employment Judge Jones
Dated: 1 June 2023