



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondents

Ms Mayoma Ekeruche

National Grid

Heard at: London Central Employment Tribunal

On: 20, 21, 22, 23, 24, 27, 28, 30 June 2022, 1, 4 July 2022
(5, 6 July 2022 in chambers)

Before: Employment Judge Adkin
Mr S. Soskin
Ms C. Brayson

Representations

For the Claimant: in person
For the Respondent: Mr M Salter, Counsel

JUDGMENT

- (1) The claim of **unfair dismissal** brought pursuant to section 94 & 98 of the Employment Rights Act 1996 (“ERA”) succeeds. Any compensation will be subject to deductions under ‘Polkey’ (*Polkey v AE Dayton Services Ltd* [1987] UKHL 8) to reflect the possibility that the Claimant might have been dismissed fairly in any event and under sections 122(2) and/or 123(6) of the ERA.
- (2) The claim of **victimisation** brought under section 39 of the Equality Act 2010 (“EqA”) succeeds in respect of allegation 80 only i.e. the Respondent’s decision to medically suspend the Claimant and the Respondent’s statement that we do not believe going forward you are capable of your role or potentially any Band D role within the organisation.
- (3) The following claims were dismissed upon withdrawal:
 - a. all allegations with only a female comparator or comparators were realistically withdrawn by the Claimant during cross examination on the

second day of the hearing. These allegations are: 3, 5, 7, 8, 9, 10, 12, 13, 14, 21, 22, 23, 24, 25, 32, 33 and are dismissed.

- (4) All allegations of discrimination and victimisation brought under the Equality Act 2010 which pre-dated the Claimant's return to work from sick absence in September 2019 were out of time and not part of a continuing act of discrimination. The Tribunal did not find it was just and equitable to extend time, specifically allegations 1-45.
- (5) The Claimant's renewed application to bring a claim of harassment within the meaning of section 26 EqA was refused. The Tribunal kept under review whether circumstances or facts might cause us to reconsider this. In the event this did not occur.
- (6) All other claims are not well founded and are dismissed:
 - a. Direct race discrimination (section 13 EqA);
 - b. Direct sex discrimination (section 13 EqA).
 - c. Direct disability discrimination (section 13 EqA).
 - d. Indirect discrimination because of disability (section 19 EqA).
 - e. Remaining allegations of victimisation (section 27 EqA).

REASONS

Procedural matters

1. This hearing was a remote hearing initially using video (CVP) technology but for the main part of the hearing using Microsoft Teams with subtitles as an adjustment for Ms Tracey Walker, one of the Respondent's witnesses.
2. The Claimant by a document which appears at page 104 – 105 of the bundle undated made an application to bring claims of harassment. According to Mr Salter who had attended earlier hearings and referred to his attendance note, this was essentially a re-run of an earlier application which had been dealt with by Employment Judge Khan. Judge Khan had considered the allegation and explained that the various allegations appeared to be allegations of direct race and sex discrimination rather than harassment.
3. The Claimant explained to us that she believed that any allegation of bullying should be a claim of harassment. We discussed the allegations with the Claimant and the Tribunal came to the view that Employment Judge Khan had been right and that these were more likely allegations of direct discrimination rather than harassment. The Tribunal explained to the Claimant that in the absence of something relating to a protected characteristic such as overt racist or sexist language or an allusion to sex or race such as to satisfy the statutory language "relating to", these allegations were probably better brought as direct discrimination. The Claimant is of the view that she was treated less favourably because of her sex and/or race. We decided to keep this point under review.

If the Tribunal panel felt that any of these allegations on the evidence were closer to being allegations of harassment we would re-visit this point. She and Mr Salter agreed to this approach. Ultimately, having kept the matter under review, we did not and do not consider that any of the allegations brought were better characterised as harassment.

4. The Claimant made two applications to rely on further documents during the course of the hearing. The first, made on the third day of the hearing, was granted in part with the result that the Claimant was permitted to produce a supplementary bundle of 50 pages in length.
5. The second application, made on the sixth day of the hearing and considered by us on the seventh day of the hearing was refused in short because the application was made at such a late stage and the Tribunal thought it unlikely that the documents, which were historic, would be likely to be determinative of the issues. Reasons for both decisions were given orally.

Evidence

6. We were originally presented with a bundle containing 2,471 pages. To this were added some documents, a further 50 pages of supplementary documents as described above.
7. We received a witness statement bundle, containing statements from the following:
 - 7.1. Claimant's Witness Statement
 - 7.2. Witness Statement of Tracey Walker
 - 7.3. Witness Statement of Janet Mather
 - 7.4. Witness Statement of Richard Phillips
 - 7.5. Witness Statement of Andrew Hibbitt
 - 7.6. Witness Statement of Hedd Roberts
 - 7.7. Witness Statement of Sarah Hall
 - 7.8. Witness Statement of Hannah Hopkin
 - 7.9. Witness Statement of Nicola Medalova
 - 7.10. Witness Statement of Terry McCormick
8. There were several other loose documents.

The Claim

9. The Claimant presented her claims on 18 September 2022 (direct sex and race discrimination, victimisation) and 20 January 2021 (unfair dismissal and discriminatory dismissal).
10. An agreed list of issues is attached as an appendix to this claim.

Findings of fact

Background & Claimant's role

11. In October 2006 the Claimant commenced working for the Respondent as a Market Analyst.
12. The Claimant worked in teams that forecasted and modelled future energy markets for other parts of the Respondent's organisation.
13. In 2015 the Claimant was appointed a Band D management grade following a competitive process and restructure. This represented a promotion. She had been a band E manager in 2014 – 2015.

Management changes

14. In 2016 Mr Terry McCormick took over responsibility for the Market Fundamentals team, in which the Claimant worked. He says that he would have regular management meetings with the band C managers including Katerina Stoyana, but not band D which was the Claimant. He said he did not deliberately exclude her.
15. We have considered the detail given by the Claimant at paragraph 27 of the grievance document submitted in May 2020. In that account the Claimant set out that Mr McCormick (the new Band B manager) said that he did not know or understand that the Claimant was involved with modelling and analysis. Based on that account the Claimant was invited to the meeting and Mr McCormick explained that he did not understand that she was involved in modelling and analysis.
16. The Analysis and Modelling teams were combined. The Claimant was unhappy about the division of responsibilities within this team and raised her concerns with Ms Katerina Stoyana.

Parallel role/parallel team

17. A number of the Claimant's allegations of discrimination are based on contention that a parallel role to her own was created and performed by Laura Langbridge. The Claimant has characterised the market insights team as a "parallel" team.
18. In respect of this alleged parallel team, the Tribunal has heard the evidence of Tracey Walker, that the Claimant's market analysis role was to focus on UK

and European electricity wholesale markets (which relates to large power stations feeding into high voltage power transmission networks), power generators and interconnectors in the UK and Europe. The interest in these markets is to help understand and forecast the revenues for the interconnectors businesses which link to the UK and other countries. By contrast, she explains the market insights team was far broader and included looking at new markets including electric vehicles charging opportunities (EVs), battery storage, solar power, providing electricity infrastructure to rail projects such as HS2 and also looking at gas markets. The intention was to review these markets, including market and competitor intelligence in the UK and elsewhere (including beyond Europe). The holder of the new role would also be responsible for producing a 'Market Context' report to the Board of National Grid plc. This was a significant new requirement looking at peers, markets and regulation and was completely separate from the work being done by anyone in the team. Some of these areas of responsibility had linkages and similarities to the electric wholesale markets that that the Claimant looked at, but the overlap was not significant.

19. The Tribunal substantially accepted Ms Walker's evidence on this point. There was some overlap but they were different roles and it was wrong to characterise the team as a parallel team.

Change of line management

20. In the Spring of 2017 Ms Katerina Stoyana ceased being the Claimant's line manager.
21. On 15 May 2017 Ms Walker took over as Manager in the Market Fundamentals Team. The Tribunal accepts that Ms Walker was told by the Claimant's previous manager that they would get on fine, but that the Claimant needed constant praise.

May 2017 incident

22. The Claimant prepared an initial draft briefing document and Mr McCormick provided feedback to her in an email dated 23 May 2017, saying that she needed to give the team's view in simple terms at the start of the brief and provide clear analysis and conclusions. He told her that Badar Khan, President of National Grid Ventures and Global Executive Vice President of Corporate Development might not want to read a long document all the way through and it was important to keep the document short and to the point, bringing out clearly the key conclusions around business impact. The Claimant accepted Mr McCormick's guidance, but seemed to believe that Mr Khan should read the whole document.
23. The Claimant sent a revised version in the early hours of the morning, around 4am, which Mr McCormick received when he viewed emails on the train from the Midlands to London at around 7am. Mr McCormick needed to get the document to Mr Khan before he got into the US office that day and decided to change it himself to incorporate the key conclusions approach, which the Claimant had not done. When he arrived in London at around 9am, the Claimant was not in yet. He therefore asked Penny Panagiota (one of the

Claimant's peers) to assist to ensure that the document reached Mr Khan by the noon deadline.

24. The Tribunal finds that Mr McCormick acted reasonably under some time pressure in circumstances where the Claimant had plainly been working until the early hours of the morning, had not implemented the changes he had requested and was not available to assist.

Credits

25. The Claimant complains that she was not given individual credit for some work in June/July 2017. We accept the evidence of Ms Walker at paragraphs 18 - 20 of her witness statement, that this was a team wide policy change to giving credit to the team rather than individuals which applied to all members of the team not just the Claimant. We also accept her evidence that Mr McCormick has not requested her to do this, which was the Claimant's contention.

Leadership for market assumptions presentation

26. August/September 2017 the Claimant says that Ms Walker stopped her from leading a market assumptions presentation relating to Great Britain and the Capacity Market. We do not find that the Claimant has proved that she was "stopped" from leading market assumptions and accept the evidence of Ms Walker at paragraphs 45 - 46 of her witness statement that the Claimant was responsible for bringing together the team's work, albeit that Ms Walker did encourage others to contribute.

October 2017

27. The Claimant says that Mr Walker unduly criticised her work on distributed energy project benefit, and put the Claimant down in the presence of stakeholder, Richard Cummings.
28. The Claimant contended in the internal grievance process that evidence in support of this contention was missing as a result of an IT hack. We do not have the evidence to accept this on the balance of probabilities. We have dealt with the alleged hack in more detail below.
29. The Tribunal received evidence from the Respondent's witnesses, which we accept, that the Respondent had a culture of challenging assumptions. From the evidence we have received about this particular occasion, it seems to us that Ms Walker found herself between a position adopted by the Claimant and a position adopted by the stakeholder Richard Cummings. This was an environment in which assumptions were apt to be challenged as part of the process. We do not accept that there was undue criticism of the Claimant's work.

Body language

30. The Claimant says that Tracey Walker constantly criticised her saying in the period 2017-2019 saying she had poor body language.

31. We have considered specific instances where references to the Claimant's body language were made by Ms Walker for example in the 2017/2018 performance review. In the section headed Overall Leadership Qualities Ms Walker made a reference to body language in a section which contained good and bad points.
- "Delivers good analysis - but need to work on time management to ensure we meet customer expectations. Consider body language and how the message is passed on. But does communicate well with stakeholders."
32. In the grievance [1495] the Claimant gave the example of a comment made by Ms Walker:
- "you have poor body language, you don't look excited about going to visit Grain on a field trip".
33. In the list of behaviour complaints, the log of things said to her by Ms Walker, the Claimant recorded:
- "Ensure positive behaviours and body language in the meetings (i.e. not on the phone texting for the meeting and if possible give positive body language where appropriate)."
34. It is difficult to see these written comments about body language as being particularly critical. Commenting about texting in a meeting is probably better characterised as appropriate guidance on professional courtesies rather than body language.
35. The Tribunal has taken account of the fact that Ms Walker is profoundly deaf. We made adjustments in the Tribunal hearing to assist with lipreading and arrange the provision of subtitles to help her understand questions and evidence. We consider it likely that body language is something that Ms Walker is quite naturally and reasonably more attuned to than many other managers without a hearing disability.
36. We accept Ms Walker's evidence about this point which is that the Claimant had asked her why others were not respecting her opinion. In response Ms Walker had explained to the Claimant that she was delivering an important message and the content of the analysis was good but her body language was poor and aggressive when others were giving their viewpoint.
37. In circumstances in which the Claimant was concerned about how her contribution was being received and, based on the evidence we have received, it seems that the Claimant had some challenges in her relationships with certain colleagues, it seems to the Tribunal legitimate for Ms Walker to have offered guidance to the Claimant.

22 November 2017

38. The Claimant alleges that Terry McCormick failed to recognise the Claimant's achievement on the carbon price trajectory being in line with the government budget announcement, attributing it to luck.
39. We find that Mr McCormick's email dated 22 November 2017 was positive [1369]. It is plain from the content of the email viewed as a whole that he was extremely happy with the outcome. We do not see the reference to being lucky as being anything other than a good natured quip or light hearted remark.
40. It is the nature of forecasting that there is likely to be an element of good judgement and an element of luck in forecasts being accurate. This email seems to reflect that point. The fact that he referred to building internal credibility suggests that he believed that it was going to be interpreted by the wider organisation in a positive way. That could only be a good thing. In the context of the email the quip about luck was no more than that and was not being directed at anyone in particular.
41. We do not see that this is less favourable treatment or in any way derogatory towards the Claimant.
42. We found that this allegation, the fact that the Claimant interpreted this comment in this way and the fact that she described this as discriminatory suggests to the Tribunal either that the Claimant struggled to understand her colleagues or that she has wrongly re-evaluated these events in a negative light because of subsequent events.

December 2017

43. The Claimant alleges that Ms Walker excluded her from a senior management meeting to discuss the Viking project revenues where the Claimant was joint lead while including the other colleague who was joint lead.
44. The Tribunal has concluded from the evidence received that this is not indicative of systematic exclusion of the Claimant, but is rather suggestive of occasional meetings which she was not invited to.
45. We accept in particular the evidence of Tracey Walker at paragraphs 48 – 50 of her witness statement, i.e. that she choose the most appropriate people to attend meetings.

January to September 2018

46. The Claimant alleges that Ms Walker excluded her from all US work areas. Other team members were given US responsibilities.
47. We accept Ms Walker's evidence that she chose the two most appropriate people for the task in hand. She explained that Peny Panagiota had seven years' experience in modelling and that Laura Langbridge was incredibly effective at creating PowerPoint presentations. We accept her evidence that,

contrary to the Claimant's assertion Qasam Sultan was not given responsibilities in respect to this US work.

NGV reorganisation – April 2018

48. There was a reorganisation of National Grid Ventures in April 2018. A team called Market Fundamentals was created and moved to be part of Group Strategy – and out of NGV. At that point a team run by Laura Langbridge and Ms Walker's team (Market Intelligence and Market Modelling) were merged (they were both reporting to Terry McCormick) and Ms Langbridge starting reporting to Ms Walker. The changes were decided as part of the reorganisation, following a decision of Badar Khan that the Market Fundamentals team should be independent of NGV; still supporting NGV but able to give an independent view of the market. The move of Ms Langbridge's team into Ms Walker's was agreed between Mr McCormick, Ms Langridge and Ms Walker.
49. One of the effect of the changes was that Ms Walker's team now had a broader scope to cover the whole of National Grid and had to cover areas in more depth and detail than they had done previously. All roles were adjusted to cover a smaller range of topics but in more depth. New role profiles were issued.
50. The Claimant alleges that Ms Walker proposed to diminish her role to policy, carbon and demand, and to elevate the role of other colleagues.
51. It was clear at the time that Claimant raised that she was unhappy with the new role profile and felt it undermined her and did not recognise her ability level. There were discussions about this. The evidence does not lead us to the conclude on the balance of probabilities that the Claimant raised that this was because of her race or sex in April 2018.
52. Ms Walker explained all the team's role profiles had been amended, that everyone had the right to request changes or raise it formerly through the grievance process.
53. This is dealt with at paragraph 58 of Ms Walker's witness statement. We find that it may with the benefit of hindsight have been unwise for Ms Walker to mention the possibility that the Claimant's role could have been regraded at a level 7, which is than lower band D. We accept that this had been mentioned to Ms Walker as a possibility by HR due to differences in the ways that roles were graded in Warwick and in the office based on the Strand. The original role profile was based on being located in Warwick. The Claimant was based in the Strand.
54. This was however bound to cause the Claimant concern. From her perspective it would seem that she was being threatened with a demotion. This would certainly have undermined what the Respondent had been trying to communicate to the Claimant which was that there was no significant change to her role. We do not find however that this was maliciously done by Ms Walker nor done with the goal of deliberately upsetting the Claimant.

55. In fact the Claimant's role remained at Band D.
56. Jan Mather's investigation of the Claimant's grievance in 2020 concluded that the restructure in 2016 coupled with the subsequent change in 2018 appears to be the root cause of the grievance as from this point, the Claimant felt unfairly treated.

Mistreatment email

57. In an email sent on 22 June 2018 the Claimant referred in an email to Ms Walker to constant mistreatment. She objected to "redefining" her role. She complains about being dropped from engagements where market assumptions play a key role. She wrote that it was time to get HR involved with determining the scope of her responsibilities and expressed concern about "a parallel team".

Annual review 2018

58. In 2018 the Claimant had an annual performance review. The format of this review was feedback from different sources – including by the Claimant herself, from others, e.g. a stakeholder (in effect a "client"), from a colleague and from a manager. The feedback suggested that she was consistently able to demonstrate strong knowledge of her domain of expertise. She had intellectual ability and curiosity, commitment to self-improvement.
59. A stakeholder commented that she had excellent analytical skills and knowledge of the market and that she had commercial insight and was thoughtful, and knew her subject.
60. At this stage the Claimant's manager commented "Market knowledge is fantastic and really understands the key market drivers".
61. Some concerns were raised. Timekeeping and communication appeared to be issues. Ms Walker included the following documents:
- "timekeeping – tell stakeholders a realistic delivery date and if you can't achieve that [they know] as much in advance as possible. Keep stakeholders and team informed of progress. Turn up on time for meetings and if going to be late inform others. Communicate and share more with the team"
62. There was a reference to difficulties with "ambiguity and change", a concern which took on a greater significance 2020.

27 September 2018 complaint

63. On 27 September 2018 the Claimant complained in an email to Ms Walker that she had been treated differently to other team members in the restructure. She reiterated a concern about Ms Walker suggesting that the Claimant's role profile would be regraded as level 7. The Claimant said that this was demeaning and unfair.

64. The Claimant did not complain in terms that treatment was because of her sex or race.

Involvement of HR

65. In October 2018 the Claimant met with to Lisa Thomas, Human Resources Business Partner. The Claimant followed up this meeting by email on 10 October as follows:

“Thank you very much for your time last Friday. As you advised, I have tried to discuss my concerns with Tracey. However I do not believe some critical issues have been addressed. I believe there is a significant change to role outlines across the team. And I believe it is being done in a way that treats me unfairly relative to other team members. Not also minding the negative experience I have had over the last two years. I would like to explore other options of addressing this issue and would like to also say that this experience has had a damaging impact on my health and well being.”

66. In short this was a complaint about unfairness but the Tribunal did not read this as a protected act falling within the meaning of section 27 of the Equality Act 2010.

67. Also on 10 October 2018 the Claimant wrote to Ms Walker expressing concern about her role.

68. On 11 October 2018 the Claimant wrote to Ms Walker under “Subject: Thank you” –

Putting every other think aside, I want to say thank you for being the bigger person and for having a frank and supportive discussion around my delivery and what I can do better. Thank you for also honouring your word with me.

And thank you for the many training opportunities you have made possible

And I will be conscious to use more of your guidance and support going forward.

I really mean this.

69. On 16 October 2018 the Claimant evidently spent some more time with Lisa Thomas, HR. The Claimant followed up the next day with the following email:

“Thank you for your time yesterday. There is something I would like to clarify which I explained yesterday. I am not stressed out because of the changes but because of the cause of the changes, mainly the creation of a parallel team that duplicated my responsibilities. And Tracey’s belief that the only skill and experience I offer to the team is policy. The creation of the parallel

role is the key source of my concern. I don't believe I am poor at managing change and uncertainty in the external environment - that has been the main purpose of my role since I joined BD.

This was change to internal structure that was not advertised. And I raised the implication for my role and never got any response. I would like to understand if there are any example situations where employees have coped better under similar circumstances. It has taken great courage for me to speak out.

Yesterday, I concluded that I will no longer discuss the issue. And I will keep to that and continue to deliver within the confines of the new profile. We are adults and human beings. It is up to everyone to decide for themselves how to treat other people.

I will consider using the resources you suggest. And like I said yesterday, thank you for your support. I really appreciate it."

Performance concerns – January 2019

70. In January 2019 Ms Walker organised a meeting with the Claimant to informally highlight concerns about the Claimant's performance and behaviours.

71. On 16 January 2019 Ms Walker sent the Claimant an email about lateness. She mentioned that "Demand" work was delivered 9 months late, and still needed further work. There had been a lack of communication in the view of Ms Walker. She provided various other feedback in this email, including that:

"during the year you repeatedly had turned up late at meetings and courses. We need to improve on the time keeping and being available in the office at the same time as the rest of the team. It will help foster relationships between you and the team. Also agreed that you could have say one day fortnight where you work from home in order to focus on topics..."

"Since we had the discussion on Monday the engagement and participation from you has been great. I am hoping that we can keep this up and work towards meeting all the key objectives and deliverables over the rest of the year"

72. On 16 January 2019 the Claimant wrote to Ms Walker as follows:

"I expressed to you my concern that you are and have been treating me in a discriminatory manner"

"I use this email to notify you that I will be making formal complaints for discrimination and unfair treatment. I will find out from HR what the process is."

73. Notwithstanding the reference to discrimination, the Claimant did not reference her sex or race or some other protected characteristic. We have considered from the contact whether this was obvious. We have not found that it was. This was not a protected act.

“Hacking”

74. On 20 January 2019 at 1519 Claimant the Claimant telephoned ISO an IT helpdesk for help. She referred to being scared because emails got deleted and receiving “fishing” (sic) emails.
75. On 8 February 2019 the Claimant raised with Ms Walker in an email that an email had disappeared from her inbox without her deleting it and the fact that she had raised a query with ISO security about her email account being “hacked”.
76. The Tribunal finds that the Claimant genuinely believed that there had been a hack of some sort and that she was rather frightened by this belief. It is possible that documents or emails were misplaced electronically. We have considered the investigation carried out at a later stage on behalf of the Respondent by someone with some technical expertise and in particular their conclusion that there was an innocent explanation for events which the Claimant believed had been caused by a hacker. We have considered the lack of evidence that crucial documents or emails have been modified and the lack of evidence suggesting that there was someone with a motivation to carry out such “hack”.
77. Taking account of all of these matters we find on the balance of probabilities that the Claimant’s perception in this regard was not based on an actual hack.

February 2019 objective meeting

78. On 11 February 2019 the Claimant attended a meeting with Ms Walker. The Claimant was accompanied by Johnny Gallagher. The purpose of this meeting was to set key objectives for the year. The meeting contained a fairly robust exchange. The Tribunal has been provided with a note of this meeting which is substantially annotated by the Claimant in red text – she has disputed in various places that the phrase PIP (Performance Improvement Plan) was used.
79. Ms Walker during the course of this meeting complained that the Claimant had suggested that the work on “demand” was ready when it was not, and then refuse to answer her subsequent emails for over one week. The Claimant argued that there was no evidence for various matters that Ms Walker was raising.
80. On 12 February 2019 the Claimant attended a residential training event staying at a hotel, and suffered a frightening belief that important documents on her iPad were blurred, her car bonnet was slightly open, her navigation device was “jammed”. She reacted by not attending the training course on the following day. She called 999 and a friend, and requested CCTV footage from the hotel, which she did not ever receive. She did not return to work after this experience for some 6 ½ months on 3 September 2019.

Case numbers 2206083/2020 & 2200281/2021

81. On 13 February 2019 the Claimant sent an email suggesting that her emails, files on her computer and pictures on her phone have been altered and edited and had been “doctored”. Her email suggest that this issue had been going on for about a month.
82. On 22 March 2019 a referral was made occupational health. Very little detail was given other than that the Claimant had been “traumatised by recent experiences in her life including experiences at work” which she would rather discuss with occupational health rather than her manager Tracey Walker.
83. On 8 March 2019 the Claimant was referred to the Bromley Early Intervention Service for assessment and treatment of psychosis. She was assessed as having a first episode of psychosis with symptoms of paranoia and suspiciousness generalised to her home environment. It went on to say that she had been started on an antipsychotic medication, but she was stopped due to adverse side effects.
84. On 3 April 2019 an occupational health report by Sithandiwe Ncube Occupational Health Advisor concluded that the Claimant was temporarily not fit to work and that the ill health caused by both work and personal issues. A work stress risk assessment was recommended. This report contained a reference to “discrimination, security and performance issues in the workplace” and noted that the Claimant was currently having counselling. The Claimant reported feeling anxious afraid and not sleeping well. The advisor reported that it was the Claimant’s perception that the stress is mostly associated with discrimination and security issues at work.

Andrew Deeley

85. The Claimant says that in April 2019 Andrew Deeley said that he had been told by Lisa Thomas that the Claimant was off sick because she was struggling to cope with change in her work environment [C4.14]. Andrew Deeley was a Business Development Manager based in Belgium, who had been appointed as a “neutral” contact with the Claimant during her absence. He managed her absence under the Respondent’s multi stage absence procedure.
86. It seems to Tribunal, based on the contemporaneous documents, for example Mr Deeley’s letter dated 24 May 2019, that he managed this process in a professional and appropriate way, albeit that the stage one of the procedure was reached relatively late. This delay does not seem to have been a particular detriment to the Claimant.

Further occupational health referral

87. On 8 July 2019 a further referral to OH was made. In a report dated 15 July 2019, occupational health advisor Mary Galbraith reported that the Claimant had been absent from work since the 14 February 2019 due to a common psychological condition and noted that she was currently receiving appropriate treatment and anticipated timeframe for her to be able to set a return to work date would be within the next 4 weeks. She wrote:

“I consider that it is not only important that she receive appropriate treatment from the primary healthcare team, but that adjustments and modifications are considered in the working environment to try and reduce the likelihood of this problem recurring.”

Meetings in Summer 2019

88. On 25 July 2019 the Claimant met with Ms Walker and Andrew Deeley at a Stage 2 absence meeting. At that meeting Ms Walker reported that the Claimant seemed agitated and upset. The Claimant said that the things that caused her to be off were not addressed. She said that there were still outstanding issues and that she did not feel safe nor could she return until the hacking issue could be resolved
89. On 12 August 2019 the Claimant attended her GP and who advised "you may be fit for work taking account of the following advice", indicating a phased return to work "work part-time, two days per week" for the period 12 - 26 August 2019.
90. On 15 August 2019 there was a catch up meeting at which Ms Walker and the Claimant attended in preparation for the Claimant returning to work. It was agreed that the Claimant was to ensure that the “hacking” of her laptop was fully investigated. An action plan (informal performance improvement plan or PIP) would be put in place. Ms Walker told her that if she disagreed with the informal PIP she needed to raise it through the grievance procedure. The Claimant requested “more fair and frank conversations.

OH report

91. On 19 August 2019 there was an Occupational Health report by Dr Reynolds, Occupational Health Physician (800) who wrote as follows:

“The medical history in this case is already known to you but essentially Mayoma told me that she had commenced her sickness absence after becoming quite acutely concerned about her own health and safety, related she says, to feelings that her IT equipment had been hacked and that this had made her feel generally unsafe. She developed symptoms of reduced mood and increased levels of anxiety. She has subsequently been under the care of both her GP and the community and mental health services. She had been prescribed a mood stabilising medication but was unable to tolerate this and has chosen instead to pursue a course of CBT. Thus far, she told me that she had had eleven sessions of this treatment. The current situation is that Mayoma feels that she is very much better than she was at the start of her sickness absence. It is clear from talking to her that she still has concerns regarding her perceptions of how her own IT has been interfered with and still expects management to take action to investigate this further. It would appear that her GP and the psychologist looking after her have agreed that she is well enough

to return to work. ... In my opinion, it would appear that this lady is fit to continue in her current post.

92. Dr Reynolds disagreed with the GP and psychologist about the phased return to work and suggested a phased return to work on 50% of normal working hours, then gradually increase over a space of 4 weeks. He also opined:

“I think that it is very likely that the onset of this illness was in some way work related.”

93. As to the question as to whether the Claimant stated that she felt generally unsafe in relation to the hacking of the IT equipment:

“I am afraid that I really cannot provide you with any clear guidance on whether Mayoma feels that she is safe to return to work.”

Return to work

94. On 3 September 2019 the Claimant returned to work after she had been absent since 14 February 2019.

OH report September 2019

95. A further report from Dr Reynolds dated 3 September 2019 of occupational health contained the following advice:

“first episode of psychosis with symptoms of paranoia and suspiciousness generalised to her home environment”

“The psychologist has strongly recommended that Mrs Onwochei [the Claimant] has regular supervision at work, and that the notes from such meetings are transparent to avoid miscommunications and lack of clarity around expectations.”

96. It seems that this report was produced shortly after the report in August because the occupational health service had received further information.

97. Ms Walker was sent an email notifying her that there was a report available for downloading on 4 September 2019. She forwarded this to the Claimant. Her evidence, which we accept, is that she thought that this related to the August 2019 report which she had already read. Because she had not made a further referral she was not expecting a further report.

98. Ms Walker believed the email of 4 September 2019 was a link to report dated 19 August 2019. She did not realise that there was a new report. She explained that there had not been a further referral and accordingly she was not expecting a further report. She only became aware that there was such a report in the meeting on 6 December 2019.

99. While this course of events is unfortunate, and we certainly understand why it caused the Claimant particular upset in 6 December (below), ultimately we accept Ms Walker's version of events. There is not evidence which calls it into question. We found Ms Walker generally was doing her best as a witness to assist the tribunal and honestly recall events. It explains why on 6 December Ms Walker did not know what the Claimant would naturally assume that she should know about her diagnosis.

Meeting 6 December 2019

100. On 6 December 2019 there was a meeting scheduled for the Claimant, Hannah Hopkin, HRBP and Tracey Walker. The Claimant initially did not turn up to this meeting, with the result that Ms Hopkin had to go to her desk and fetch her.
101. The purpose of the meeting, as Ms Walker explained at the outset was to catch up on work but also to discuss concerns with the Claimant's behaviour. The Claimant complains that she felt ambushed, in that she had not been given prior notice of this part of the meeting.
102. Ms Hopkin accepts that she did ask the Claimant whether she should be back at work. She says that this was said out of concern given the nature of the Claimant's medical condition.
103. During this meeting the Claimant mentioned that she had been given a diagnosis of psychosis. Ms Walker and Ms Hopkin told the Claimant that this report had not been received by them so they were not aware of it. In fact what had happened is that Ms Walker had received a notification of the report by email that she had not downloaded it because it had arrived so soon after an earlier report. That is not a justification, as this should not have happened, but it is an explanation.
104. The Claimant left the meeting confused, upset and in tears and did not then go to the Christmas party.
105. The Tribunal understands why the Claimant would have felt like this, given that this was a significant health matter which she was grappling with and she would reasonably have understood that her line manager would have been aware of this diagnosis since at least 4 September 2019, i.e. three months earlier.

OH report

106. On 24 December 2019 Dr Paul Obi, Occupational Health Physician provided a further occupational health report, following an assessment in the clinic on 18 December. The Claimant raised in that assessment her concern that her managers had not seen the report dated 3 September 2019.
107. By way of an update on her medical condition, she was currently at work employed full-time. There is a reference to a 3 hour commute to work. It was confirmed that she had a diagnosis of psychosis and specifically paranoid symptoms which started for the first time in March 2019 relating to the perceived email hacking. Various medications have been stopped as a result

of side-effects. She reported good mood and variable levels of anxiety, particularly triggered by her perceived work situation which remained largely unresolved. The Doctor emphasised that this was a management rather than a medical issue, and accordingly was beyond the remit of occupational health.

108. Dr Obi concluded that the Claimant was “medically fit for work with a number of adjustments previously recommended”, albeit that her underlying health condition would meet the disability threshold under the Equality Act 2010. He highlighted the following proposed adjustments:

108.1. a restriction on working away from home. Meetings to be held by teleconference or alternative means;

108.2. flexibility to attend medical appointments;

108.3. carry out a stress risk assessment;

108.4. account taken of the fact that new medication might take three months to bed in, although there should be an improvement over the next couple of weeks to months.

109. As to future attendance he offered the following opinion:

“Provided she remains on and is maintained on a stable dose of medication, and with the above recommendations in place, there is a good chance that her attendance at work would improve going forward, and likewise her performance at work.”

January 2020 meeting

110. On 6 January 2020 there was an informal meeting at which the Claimant attended with Ms Walker her line manager and Ms Hopkin from HR. The content of that meeting is documented in an email from Ms Hopkin dated 10 January 2020, which is described as her “high level notes”.

111. It seems that Ms Hopkin had become involved to try to facilitate better communication between the Claimant and Ms Walker.

112. Ms Hopkin explained to the Tribunal that the description “catch up” was used (as an alternative to a specific reference to performance) to describe meetings on the calendar system given that the condeco system would display this outside the room which anyone could see.

113. Ten specific requests were given about the Claimant’s ongoing conduct, including the following:

113.1. the Claimant should either agree that the IT hacking issue had been adequately investigated or propose a (non-external) way forward;

- 113.2. turn up on time to all meetings, or at least let people know if she was going to be late;
 - 113.3. actively contribute to meetings and discussions;
 - 113.4. make emails commenting on others constructive;
 - 113.5. remove references to perceived unfair treatment unless she is actually going to pursue a formal complaint;
 - 113.6. participate and respond to email debate and treat challenge from others as not personal;
 - 113.7. pick up new tasks as required and re-prioritise as necessary.
114. The Claimant provided her comments on Ms Hopkin's email, sent at 11 January 2020 00:02. In her response the Claimant tried to adopt a conciliatory tone, expressing gratitude for the efforts to make adjustment provided notes. The Claimant however took issue with many of the points raised with her. She did not accept that they were behavioural concerns and essentially pushed back on the matters that had been raised with her.
115. On 15 January 2020 the Claimant emailed Ms Walker saying that she was unable to come into work due to being unwell, a combination of being overwhelmed, a headache and feeling weak. This developed the following day into an email chain about the length of a Q3 review, which Ms Walker had originally scheduled for 30 minutes which the Claimant believed was inadequate. The Claimant complained that she felt that there was a lot of pressure on her and that she was being set up to fail:
- "It was not until I deleted the occurrence of the bi-weekly catch up that you decided to send a meeting invitation that captures the purpose of the meeting. It makes me feel like I am being set up to fail. It does not feel transparent to me and it puts a lot of pressure on me to look out for danger and scrutinize things because I do not know what will be sprung on me in the next moment."

Last-minute cancellation

116. On 27 January 2020 there was a meeting scheduled with the Claimant Ms Walker and Ms Hopkin in the office in London. The Claimant communicated that she was unable to attend this meeting at the last minute, because her proposed colleague to attend the meeting with her was not available on that day. The other two participants had already travelled substantial distances to attend it.
117. On 7 February 2020 the Claimant raised the hacking incident with the Forensic Security Team, who then investigated the matter.

February 2020 meeting

118. On 13 February 2020 there was a further meeting to discuss an informal action plan. At this meeting the Claimant and Ms Walker were joined by Wayne Du Preez who accompanied the Claimant. There was a discussion of “poor behaviours”, namely rude communications, failing to apologise and upsetting team members by email and arguing over incidents in the past rather than moving on. Ms Walker’s perspective was that as soon as one of the Claimant’s behavioural issues were resolved another one would arise. The Claimant disagreed with all of the points raised.
119. Ms Walker concluded that the informal PIP had not been satisfactorily concluded and that there was a need to move to a formal PIP.

List of needs

120. On 22 February 2020 the Claimant’s shared a list of “needs” with Ms Walker, which were principally a request that communication/information from her manager be consistent, direct and responsive. She gave some examples where she found communication or information to be inconsistent.
121. There is a version of the Claimant’s list of needs which appears at page 1110 in the agreed bundle. The Claimant contends that paragraph 6 of this six point list has been “hacked”. This paragraph referred to the Claimant needing another person present for discussion of “subjective matters” or for the meeting to be recorded.
122. For similar reasons to those given elsewhere in this written reasons in relation to the January/February 2019 “hack” and the alleged hacked witness statement, on the balance of probabilities we do not find that this document has been hacked. There is no cogent evidence as to who hacked it, when they hacked it and no plausible explanation as to why that has happened.
123. The list of needs was ultimately treated by the Respondent as a request for reasonable adjustments in the light of the Claimant’s disability. The Claimant did not accept that this was a request for reasonable adjustments, either during internal processes or in a hearing before us.

Kevin Brooks

124. On 18 March 2020, an IPS Employment Specialist Kevin Brooks wrote to Ms Walker on behalf of the Claimant. He described himself as an Employment Specialist with Mind. He wrote using an NHS email address. He said that he had been working with the Claimant for a couple of months and that he had been made aware that she had a health condition which was aggravated by severe stress. He emphasised that he was not a trade union representative, but said that he would be happy to attend a meeting scheduled for 19 March if Ms Walker was happy with that.

Formal PIP

125. A formal Performance Improvement Plan (PIP) commenced on 19 March 2020.

126. Specific targets were given, for example distribution of an agenda in a timely manner before discussions and catch ups; regular communication about progress of projects; maintaining good timekeeping and communication; taking responsibility to remove “blockers” that prevented the Claimant from carrying out her work; continually demonstrating leadership behaviours expected of a band D; providing direct clear and concise communication.
127. Ms Walker gave evidence to the Tribunal about her prior experiences of using PIPs. She explained that she had used a PIP for other employees on three previous occasions. In the case of the first employee they were dismissed due to wrongdoing within role, by implication not a termination for performance. She told us that the other two examples the employees did successfully complete the PIP and the performance improved. One completed the PIP and then moved. The other stayed and became a valued member.

Unison suggestion of reasonable adjustments

128. The day after the meeting on 19 March 2020 Jay Williams, a trade union representative working for Unison wrote to Ms Walker as follows:

Thank you for agreeing to allow both Mayoma and myself to discuss and agree potential reasonable adjustments. I spoke with Mayoma yesterday after reflection, and requested that Mayoma compile a list that will benefit her at National Grid.

Please find a list of reasonable adjustments that we provide to you under the Equality Act 2010 - Disability.

I realise that some of the information contained, may be the first time that you have been informed.

Mayoma suffers with Psychosis . It is recognised as a mental impairment and it affects Mayoma ability to carry out normal day to day activities. You may or may not be aware that MO is required on a daily basis to manage and deal with her symptoms with powerful medication. This often takes a period of time to settle.

As a result of the condition, and the requirements at this stage to take strong medication, we would like to suggest the following reasonable adjustments.

1.) The ability to work from home, is we understand already an option, but MO would like to work from home 2 -3 times /per week, this will allow MO to ingest and settle after medication. This would also allow MO have the ability to manage her condition more effectively During an episode.

2.) For colleagues to be made aware and learn about behaviours associated with the condition and Disability Awareness overall. This would assist colleagues knowing how MO's condition may affect her on a daily basis, and reduce misunderstandings / confusion.

3.) We would hope that the above, may assist the business in reducing incidents, and understand where MO seeks additional clarification.

4.) A requirement for additional verbal communication, which can be followed up by email to ensure clear understanding of expectations or requirements.

5) Consider the option of a line manager based in London

6.) Flexibility in the office and in work schedules to take time out for medication to settle or for occasions where Mayoma is overwhelmed.

7.) Recognition that on occasion, for colleagues not to be offended if Mayoma requires additional clarification.

Additional patience to be provided to MO.

8) Encourage soft, respectful tone and openness in communication to minimise the risk of misunderstanding and make Mayoma feel more safe.

Mayoma is prone to assuming multiple scenarios and clarifying helps to calm her fears/suspiciousness. It is not intended to cause offence. This is an element of her condition. Further information can be provided by MIND.

I trust that you will welcome the adjustments and see this as an acceptance that had these been raised previously, the issues may not have reached the current position.

It should also be noted for the record, that if MO and her actions have caused you distress personally, then Mayoma would like to apologise to you personally Tracey. I trust that you will accept the apology, as it is offered in good faith

Respondent's response to the request for reasonable adjustments

129. On 23 March 2020, in an email entitled "MO Reasonable Adjustments Proposal" Ms Walker responded to Mr Williams (and Sarah Hall) commenting on the proposed list of reasonable adjustments. By various comments in red some additional clarity was sought on the adjustments that were being requested.
130. No substantive response appears to have been provided to these at the time by the Claimant.
131. Ms Walker chased this on 16 July 2020. In July the Claimant responded within a few minutes saying that she did not recall receiving this back in March and put this down to "all the other incidents that I continue to experience with my

email". She asked Ms Walker to disregard the request reasonable adjustments and instead use the "Mayoma's needs" document.

Claimant parts company with Unison representative

132. On 21 April 2020 the Claimant notified Ms Walker that she and Mr Williams of Unison have different views on the best way forward with the result that Unison was no longer supporting her. She requested therefore that he not be included in future correspondence.

Grievance (first protected act)

133. On 28 April 2020 the Claimant raised a grievance alleging bullying & discrimination by Ms Walker. She complained in particular about an unjustified PIP; that her computer had been "hacked" on 20 January 2019; that there had been creation of a parallel role. She said that the experience had made her ill.
134. On 30 April 2020 Ms Walker confirmed that on advice she would not be concluding the Stage one PIP review until the conclusion of the grievance.
135. Further detail of the Claimant's grievance was provided by email on 11 May 2020, which the Tribunal finds **was a protected act** within the meaning of section 27 of the Equality Act 2010. The Claimant raised experience of female and BAME colleagues who have had a similar experience who moved away citing a negative culture.
136. She alleged that the email and IT hack had continued since her return back to work.

Grievance hearing

137. On 18 May 2020 the Claimant attended a Grievance hearing heard by Janet Mather, a Safety Performance Team Manager. During this meeting the Claimant emphasised that she felt that she had experienced a negative environment, bullying and discrimination at work and being put through an unfair performance improvement process. She was asked about discrimination and said "I just know that I am treated differently to others in the team". She was not asked in this meeting about the complaint raised in the grievance about a wider concern about discrimination relating to female BAME colleagues.
138. The Claimant mentioned her contention that her email was hacked. She said that she did not think this was an accident and appeared to relate the onset of hacking to a meeting that she had had with her manager Ms Walker.
139. During May 2020 Ms Mather held meetings with various people as part of her investigation of the grievance.
140. As part of the investigation of the grievance on 20 May 2020 Ms Walker emailed Ms Mather with some detail on why the Claimant had been subject to a performance process.
141. On 21 May 2020 there was a PIP meeting.

Grievance outcome

142. Ms Mather concluded the grievance on 4 June 2020. The grievance was not upheld. Ms Mather concluded that placing the Claimant on an informal PIP was appropriate given that the Claimant's behaviours not compatible with the expectations that the Respondent had of a Band D manager.

143. Ms Mather concluded as part of her report:

"2. There does seem to be differential treatment of the Claimant from her peers within the team by Ms Walker. This is driven by an acceptance of the Claimant's diagnosis and an understanding that the Claimant requires more clarity in all correspondence. This has led to more time being devoted to the Claimant, with Ms Walker having attended several external courses to improve her knowledge of supporting colleagues with mental health issues."

144. It was acknowledged that the original complaint about computer hacking was not comprehensively investigated at the time back in 2019, but they were engaged since February 2020 such that Ms Mather concluded:

"I find that the Forensic Security Team have proved beyond all reasonable doubt that there is no evidence of tampering on the Claimant's laptop or account. Examples on which this finding is based include:

- RH [Ryan Hill, Forensic Cyber Security Team] put both the accounts of the Claimant and Ms Walker under Legal Hold which preserves the activities of the mailbox along with any amendments. This would highlight any changes made to any correspondence.
- the Claimant has raised several examples of tampering since RH and the Claimant spoke on 17th February.

These have included:

1) Screenshots of popup messages. RH has reassured the Claimant that these are not a cause for concern and not evidence of tampering / hacking. They occur on many people's devices across National Grid.

2) When the Claimant raised concerns about emails and calendar invitations that she claimed had been changed, RH was able to prove through the Legal Hold that there was no tampering of these documents and their integrity was intact.

3) the Claimant raised that a document had been deleted. RH was able to find the email and guide the Claimant to find the email within her account.

145. The Claimant's allegations at paragraph 3 of her grievance document dated 11 May 2020, i.e. that female colleagues, and in particular those from the BAME groups had left the organisation under extreme stress circumstances, or others have moved away citing a negative culture, seems not to have been investigated.

Grievance appeal

146. On 16 June 2020 the Claimant submitted an appeal against the grievance outcome. This was a protected act, since, read together with the original grievance it would be reasonably understood to relate to sex, race and disability.

147. The Claimant complained as follows:

"a. The grievance did not investigate the list of bullying and discriminatory incidents provided by MO in the grievance note.

b. The chronology in the grievance report which informed the grievance findings contains factual inaccuracies.

c. MO was not given the opportunity to raise points about the information provided by interviewees/witnesses. And the information provided by interviewees/witnesses contains factual inaccuracies.

d. The reason offered for the discriminatory treatment on objectives is inconsistent with TW and HH account of not being aware of MO's diagnosis until December 2019.

e. The review of the informal action was inaccurate because it reviewed the proposal, and not the actions agreed by MO.

f. The review of the informal action plan did not include the points of clarification raised by MO, which HH and TW failed to respond to.

g. There are inconsistencies in the reasons given for failing the action plan during the action plan review meeting and during the grievance interview.

148. Richard Phillips, at that time Network Investment Manager, Gas Transmission, was appointed as an independent manager to hear the grievance appeal.

149. There was a grievance appeal meeting on 29 June, held by Mr Phillips together with the Claimant, Employment Relations Specialist Helen Dolloway and the Claimant's mental-health support worker Kevin Brooks (for part of the meeting).

Grievance appeal outcome

150. There was an outcome to the grievance appeal on 17 July 2020. The appeal was not upheld.

151. As to the alleged failure to investigate bullying and discriminatory incidents, Mr Phillips stated that he had reviewed a portion of the specific allegations considered in the grievance and from this did not identify a theme of bullying and discrimination.
152. There was no consideration of the Claimant's wider concern about female employees and BAME employees which was not addressed in the grievance. In fairness to Mr Phillips it seems the Claimant's grounds of appeal focussed more on the incidents provided by the Claimant relating to her own treatment.
153. Mr Phillips concluded that although Ms Walker was not aware of the Claimant's diagnosis (of psychosis) until December 2019, she had previously been aware that the Claimant required greater clarity in correspondence than other members of the team.
154. Mr Phillips concluded that the informal action plan could have been documented and assessed more clearly by Tracey Walker. He said that he would feed this back to her so that she could learn improve. He expressed concern about the working relationship with Ms Walker and other team members, although felt that mediation was not the answer. He wrote by way of suggested next steps:

"It may be beneficial for your support worker to liaise with Tracey to identify how best to support you and your mental wellbeing at work."

Claimant abandons reasonable adjustments request

155. On 16 July 2020 the Claimant said that she had not received Ms Walker's response to the reasonable adjustment request and asked her to disregard it and focus instead on the list of needs.

"Too proactive" allegation – July/August 2020

156. The Claimant alleges that she was criticised by Ms Walker for being in effect too proactive in a performance review on 4 September 2022.
157. The background was that the Claimant's team had produced presentation slides on the carbon market in July 2020. Iain Shephard was responsible for engaging with certain stakeholders/teams within National Grid in respect of this area. The Claimant shared the presentation slides with these internal stakeholders without informing Mr Shephard about this on 28 July 2020.
158. Ms Walker says that there was nothing inherently wrong with the Claimant doing this, but she felt that the Claimant should have engaged with Mr Shephard in the first instance because it had the potential to undermine his position with the external stakeholders and he was upset by the fact that the Claimant had done this without reference to him.

159. Ms Walker had a concern that while the Claimant was writing this work up and sending it, she was struggling to find time to carry out work on another task that she had been allocated. This was something that Mr Shephard specifically raised.

Meeting 10.8.20

160. There was a meeting on 10 August 2020, attended by the Claimant, Tracey Walker, Kevin Brooks and Sarah Hall. This scope of this meeting went broader than simply reasonable adjustments to discussing ways in which the Claimant could fulfil her duties at work.
161. The Claimant requested that meetings were in some way recorded.
162. The Claimant followed up the meeting on 10 August with an email on 12 August 2020 in which she registered disappointment that there was no recording that had taken place of the meeting and concerned that Ms Walker had objected to a transcript on the basis that she may be responding to a question or conversation she has misheard.
163. The Claimant said
- “I have done all previous transcripts in my own time and am happy to do so because of the safety it provides to me.”

Teams Meeting 20.8.2020

164. On 20 August 2020 Ms Walker sent an invitation to a meeting to be held by Microsoft Teams on 26 August to the Claimant and two other members of the team. She sent some commentary about the content of the meeting explaining that the Claimant was still working on the market designed for a base case which would be discussed at that meeting.
165. In response to the invitation, on the following day the Claimant wrote to Ms Walker as follows:
- “Since this meeting will clarify expectations on market design, please can it be recorded so that it can be referred to at a later stage for guidance on this work?”
166. Ms Walker responded a little later:
- “I don’t think we should record the call. It is not how we normally work and recording the call may not help with a free flow of ideas from everyone. Also if we have any debate at a later stage other thoughts may have changed by then so we would have a fresh debate. Rather than referring back to an out of date transcript. But we can make any actions from the meeting very clear.”
167. The Claimant responded:

“...refer to the clarification meeting that was held on Tuesday at the beginning of the note. I will not feel safe attending the meeting without having a record of what is discussed and agreed, so as to have a reference to refer to.”

[emphasis added]

168. Ms Walker forwarded this response to Sarah Hall of HR, seeking advice. She clarified that what had been agreed was recording the meeting for meetings on performance. She emphasised her reasoning, that it was a brainstorming meeting in which people should be free to make “stupid suggestions”. She added “this is not normal behaviour and we should not recall what people say in this type of meeting the purpose referring back to them - if things change it doesn’t matter what was said”. She continued:

“I know Mayoma has repeatedly told me she does not feel safe in conversations with me, but she is now saying she does not feel safe in conversations with the team.

I am slightly worried about having the meeting now as it may impact her health. The meeting is being held because Mayomas project work has indicated one view of the future. Ronny is working on a linked project but is modelling a different view. I need them both to have the same view – I don’t care which view as long as it is robust and challenged. However as part of the meeting they will need to challenge each others views and make sure we can justify the one view the agree on. Previously Mayoma has expressed when we have meetings or discussions like these she feels it is personal. How can I make sure that I can have the discussion but at the same time don’t put Mayomas health at risk. Did Mayoma ask for any reasonable adjustments in this – I didn’t think so but want to make sure I have checked this?”

169. Ms Hall responded to Ms Walker on 24 August, confirming her agreement that there was not a agreement with the Claimant to tape all meetings. She wrote:

“As Mayoma states she feels unsafe, then we do have a duty of care for her (and you), and we cannot put her under the stress of ambiguity and therefore I believe due to medical reasons she is incapable of doing her role, and we need to tell her we will support her in finding another role within the Business. I have spoken to the HRBP and there is only one role currently available in the Strand which is in Finance, but we can help her look for another role within the Business, it is unlikely to be a Banded role due to her inability to cope with ambiguity and change.

The change of role will be a reasonable adjustment and will also be part of our duty of care.”

4 September 2020 PIP review

170. On 4 September 2020 there was a PIP review meeting at which Ms Walker and Ms Hall attended with the Claimant.

171. In this meeting, the Claimant described this question of recording initially in terms of a danger to her health. When clarification was sought on this she explained that the danger was a concern of being set up to fail, which in the circumstances related to the ongoing question of her performance and the way that she was being performance managed. This can be seen from the following exchange:

“the Claimant So if the scenario is easy clarification meeting with you Tracey and me then that’s fine, the reasonable adjustment you have provided covers me but where Tracey organises meetings to include others and I can’t get security from what is recorded, what is said in the meeting, will it be accurately reported then, **I am exposed and being in a very dangerous position for my health.**

SH: Do you believe it is a dangerous position when there are other people involved.

the Claimant: Not when other people are involved, there is a **dangerous position where im exposed.**

Unclear

SH: Sorry you broke up

the Claimant: I said its dangerous to me when I am set up in meetings where the **inaccurate reporting of the discussion** and the agreement that goes on during the meeting.

SH: In what way do you feel in danger

the Claimant: I feel that I am in danger because I am being set up to fail

[emphasis added]

Medical suspension

172. On 7 September 2020 there was a meeting at which the Claimant, Ms Hall and Terry McCormick were present.

173. Mr McComick said:

“You have said that you don’t feel safe in the work environment unless you can tape or record meetings and you believe that the working environment isn’t fair for you. Your health is really important, it is paramount to us as a company.

So given that we can not accommodate the taping as an adjustment for the medical condition and you believe that not taping will have a negative impact on your health and well being and also that the ambiguity and change are an important part of your role. I regret to say that we as a company don't believe that going forward you are capable of doing this role or possibly any other Band D role within the organisation. The duty of care which extends to you, your peers [peers?] and other colleagues in both the physical and mental health environment.

I know it is a difficult message, it is not a message that anyone wants to get to, but its unfortunately where we have got to. So we will support you in finding an alternative position over the next four weeks, but if you are unable to find another role in that time, the company will consider exiting you from the business on the grounds of capability.

Letter confirming dismissal

174. Mr McCormick denied in his oral evidence that the Claimant's difficulty with change and ambiguity was a factor in the decision to dismiss.
175. This did however form part of the reasons set out in the letter of suspension dated 8 September 2020 confirming the outcome of the meeting on 7 September.
176. The content of the letter of suspension was in substantially similar terms to those discussed in the meeting, and included the following:

"Your role is one which involves ambiguity and change, and changes happen all the time. During discussions with you and your Mind support worker, the taping was mentioned as a reasonable adjustment for your medical condition.

Feedback from your peers, which has been requested to be anonymous, is that they fear challenging you during meetings or on pieces of work due to how you challenge back, they do not feel able to give you face to face feedback, and are uncomfortable working with you.

Given that we can not accommodate recording as an adjustment for your medical condition, and that you believe that not recording will have a negative impact on your health and well being and ambiguity and change is an important part of your role, we do not believe going forward you are capable of your role or potentially any Band D role within the organisation.

We have a duty of care for both you, your peers / colleagues and stakeholders in both the physical and mental environment.

We will support you in trying to find an alternative position over the next 4 weeks, if you are unable to find a suitable role, the Company will consider exiting you from the Business on the grounds of Capability.”

OH referral

177. On the same day as the suspension letter, i.e. 8 September 2020 a referral was made to occupational health. This referral said “she has stated she feels unsafe in her current role”.

Second Grievance

178. The Claimant submitted a second grievance on 9 September 2020 in which she complained about an unfair medical suspension.

OH report

179. On 18 September 2020 Sally Morgan, an Occupational Health Advisor provided a report to Ms Walker headed “fitness for work” which contained the following:

“In my clinical opinion Mrs Onwochei is fit to continue in her current role. I recommend that there is an open and honest discussion to facilitate a prompt return”

“During my assessment Mrs Onwochei was coherent, calm and rational. She is under the care of a psychologist who reviews her every 2 weeks, she no longer takes medication and feels very well.

She explained that she has been under pressure in work due to perceptions of bullying discrimination and misconception about her mental health condition.

I discussed the word document and Mrs Onwochei explained that her MIND support worker had suggested that she should record meeting with management to avoid any ambiguity and disputes the fact that she struggles with change

Occupational Health has a limited role to play in work-related issues, since problems that arise are essentially organisational and not medical. Any symptoms that arise as a consequence of work stress are likely to settle once the original work stressors are resolved. Please note that the information of work-related issues are from the history given by the individual and therefore reflect her own perceptions and what is on the referral form.

Second grievance meeting

180. The hearing of the second grievance took place on 28 September 2020, heard by Andrew Hibbitt, Head of Contract and Commercial, Electricity Transmission. The Claimant said she did not want to be suspended or considered unfit because of medical needs.
181. Mr Hibbert held an outcome meeting on 16 October 2020 with the Claimant. Helen Holloway was present. The Claimant chose not to be accompanied or represented.
182. Terry McCormick was interviewed as part of the grievance process. In that meeting he confirmed that although there were other issues with the Claimant her requirement for recording in meetings was “effectively the straw that broke the camel’s back”. He gave some more background about bending over backwards to try to accommodate the Claimant and her getting into disputes with colleagues by email. He said that some of the work she did was “wonderful”, but gave some specific examples of other reasons made her very difficult to manage.
183. Ultimately in conclusion Mr Hibbitt accepted the management view that the adjustments requested by the Claimant beyond those that are already been granted and were not reasonable practicable. He concluded that the decision to medically suspend Claimant was correct and that her grievance was not upheld. This was confirmed by letter of 16 October 2020.

Capability Review Meeting 20 October 2020 (dismissal)

184. On 20 October 2020 Capability Review Meeting took place, held by Mr McCormick, with Sarah Hall in attendance. The Claimant chose not to be accompanied.
185. In this meeting there was a discussion of the fact that Mr McCormick believed that the Respondent could not support the level of adjustments being requested by the Claimant in respect of the recording of meetings. He explained that she had been placed on medical suspension due to her stated concerns about being at risk and to ensure that she was not being placed at risk.
186. The Claimant countered and later in the meeting reiterated more than once that it was not a medical situation it was because of bullying and harassment in the workplace.
187. The Claimant said that she had not asked for any adjustments for her health condition, but rather it was about her experiences of work not medical condition. She was asking for recordings so that there was evidence in relation to the alleged performance claims that were being brought against her. Mr McCormick’s position in response was that if these were not adjustments for a health condition the Respondent would not have considered them. They were considering the potential adjustments because there was a medical condition.

188. Mr McCormick stated that the Claimant had asked for recordings or detailed notes and when she did not agree with Tracey Walker to be able to escalate things up the hierarchy.
189. Mr McCormick said that he did not consider that this was the expected behaviour of a Band D manager in the Company's view and the time spend agreeing notes was not sustainable. Mr McCormick said that Tracey Walker had allowed the Claimant to record any meetings with her (alone) or with HR, but when she had asked to record when other employees were involved, the other employees have to agree, and Tracey Walker had declined this.
190. The Claimant replied that she was fit for her current role, adding that her medical team says she was fit for her role, and she did not agree with the Company assessment of her capability.
191. After an adjournment Mr McCormick said that he was going to terminate the Claimant's employment and that this would be the last day.

Letter of dismissal

192. By a letter dated 20 October 2020 Mr McCormick confirmed dismissal on the grounds of capability, summarising some of the matters discussed in meeting and the adjustments that the Respondent could not accommodate.
193. In the letter informing the dismissal Mr McCormick explained that reviews were held on 21 September, 6 October and 13 October and that the Claimant was offered support to try to find another role. He explained that the grievance process was concluded before hearing this meeting.

Appeal against dismissal

194. On 22 October 2020 the Claimant appealed against her medical suspension, setting out the appeal grounds in full on 27 October 2020, namely:
 - 194.1. that she had not asked for adjustments;
 - 194.2. that occupational health assessment that she was fit to work in her current role;
 - 194.3. no capability review had been carried out prior to the medical pension;
 - 194.4. the grievance process did not look at all the issues she raised, in particular where Ms Walker been inconsistent;
 - 194.5. that there was a continued practice of providing "on contextual incomplete statements" and a different meaning to what she conveyed through discussions and texts;
 - 194.6. that she had been faced with transfer when she was the victim of bullying and harassment, then placed on medical suspension in breach of ACAS guidance and the spirit of the ACAS guidance;

194.7. that the complaints raised in the May 2020 grievance related to working practices that affected more than just her which went against recommendations on whistleblowing;

194.8. that alleged anonymous reports made by co-workers against her had not been investigated through disciplinary procedures or backed up by detailed information as recommended by ACAS;

194.9. that the Respondent portraying the dismissal as protection rather than penalising her was unreasonable.

Second grievance appeal

195. On 8 December 2020 as second grievance appeal meeting took place, held by Hedd Roberts, then Head of Customer Relations.

196. On 21 December 2020 Mr Roberts gave an outcome to the second grievance appeal. He dealt with 16 points raised by the Claimant, focusing on the medical suspension rather than the subsequent capability review. He did not uphold her appeal.

Appeal against dismissal

197. The Claimant appealed the decision to dismiss her in writing on 27 October 2020.

198. The Claimant's appeal against her dismissal was dealt with by Nicola Medalova, who is Managing Director of National Grid Interconnector.

199. There was an appeal meeting on 28 January 2021. Much of the focus was on the decision to suspend her. The Claimant continued to maintain that she did not require reasonable adjustments and that her "needs" were something other than reasonable adjustments.

200. On 25 May 2021 Ms Medalova provided an outcome dismissing the appeal.

201. In her evidence to tribunal she confirmed that she had not seen the content of the earlier grievance and grievance appeal processes, although she was aware that they had taken place.

202. As to the question of whether health concern whether this was reality simply about performance, her evidence was that she felt that it broader than purely a concern about performance.

Claims

203. On 10 July 2020 the Claimant notified ACAS of a dispute. ACAS issued a certificate on 24 August 2020.

204. The Claimant presented the first of two claims to the Employment Tribunal on 18 September 2020. This alleged race, disability and sex discrimination.

205. The second claim, that of unfair dismissal was presented on 21 January 2021. In the second claim the dismissal was described as “a continuation of the discriminatory issues raised in my original claim”.
206. At a Preliminary Hearing for case management on 7 May 2021 Employment Judge Khan directed that the parties should agree a list of issues by 25 June 2021. Unfortunately no final and definitive list of issues was provided to the Tribunal at the final hearing. The list of issues in the bundle (123 – 125) simply referred to numbers of allegations in a schedule and did not for example articulate the elements of the claim of unfair dismissal.
207. At a Preliminary Hearing on 29 September 2021 Employment Judge Russell found that the claim for unfair dismissal and discriminatory dismissal, which had been presented one day late nevertheless could proceed on the basis that it had not been reasonably practicable for the Claimant to present the claim a day earlier and in the circumstances it was just and equitable to extend time in relation to the claim of discrimination. Time was extended therefore in respect of both the claim of unfair dismissal and the “discriminatory” dismissal claim.

“Hacked” witness statement

208. In the Tribunal hearing before us the Claimant alleged her witness statement for the Tribunal hearing had been “hacked”, to delete a particular phrase at paragraph 4.26. The statement was electronic and in pdf format. It was an implication of the Claimant’s allegation that someone had deliberately modified her statement. She did not identify someone who she believed had done this, nor did she produce any evidence to substantiate this allegation.
209. The modification alleged by the Claimant was minor and would be highly unlikely to change the outcome of these Tribunal proceedings. The Tribunal has struggled to identify anyone who would have the motive to modify the Claimant’s witness statement in this specific but minor way. We have reminded ourselves that cogent evidence is usually required to establish a forgery or something of that nature. The Claimant has not produced any evidence at all to suggest that this statement has been modified. We infer that she believes that the phrase was modified was in some way detrimental to her case, although it does not appear to us to be particularly important.
210. For these reasons, on the balance of probabilities the Tribunal found that this witness statement had not been “hacked”.
211. Any tribunal should be cautious in drawing parallels between the content of events during the course of litigation or hearing and preceding events which are the substance of a claim. For example, it may not be safe to assume that a witness who is aggressive in cross examination was necessarily aggressive at the time of material events. The pressure of the hearing may cause people to behave in a way that they would not ordinarily. This is by way of example. We did not find the Claimant to be aggressive at all.
212. In this case however the making of a very specific allegation by her about the Claimant’s witness statement being modified bears a striking similarity to her

allegation that her laptop had been hacked and documents modified. The similarities are first, that she believed that there had been a deliberate hack, second an implication that this was somehow sinister and third is the absence of any cogent evidence to support the allegation that there had been a hack.

213. Even absent of the Claimant alleging that her witness statement had been hacked, we would have concluded that no hack of her laptop in January 2019 had occurred. The allegation about her witness statement being hacked which we find to be unsubstantiated however provides further support in our view that the Claimant was simply mistaken in January 2019.

LAW

214. We are grateful to both parties written submissions on the law which each supplemented orally very briefly with just a few remarks and answers to Tribunal questions.

Direct discrimination

215. The Equality Act 2010 contains the following provisions:

13 Direct discrimination

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

136 Burden of proof

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

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

216. We have considered the guidance set out in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, EAT, as approved and revised by the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* [2005] ICR 931, CA as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of

the SDA is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no

discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

217. We have also considered *Nagarajan v London Regional Transport* [1999] IRLR 572, *Madarassy v Nomura International plc* [2007] IRLR 246 CA, *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. In *Hewage v Grampian Health Board* [2012] ICR 1054, SC in which Lord Hope endorsed the following guidance given by Underhill P in *Martin v Devonshires Solicitors* 2011 ICR 352, EAT:

“the burden of proof provisions in discrimination cases... are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent’s motivation... they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent’s motivation and what is in issue is its correct characterisation in law’.

218. In *Madarassy v Nomura International plc* 2007 ICR 867 CA Lord Justice Mummery held as follows:

“The court in *Igen v. Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.” (para 56)

219. In *Glasgow City Council v Zafar* 1998 ICR 120, HL, Lord Browne-Wilkinson said that in the context of a discrimination claim ‘the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant “less favourably”.’ He approved the words of Lord Morison, who

delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'. It follows that mere unreasonableness may not be enough to found an inference of discrimination.

Continuing act

220. The leading case of whether an act is 'continuing' for the purposes of discrimination is *Hendricks v Commissioner of the Police for the Metropolis* [2003] IRLR 96, CA *per* Mummery LJ at paragraphs 48-49 & 52:

48... the burden is on [the Claimant] to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'. I regard this as a legally more precise way of characterising her case than the use of expressions such as 'institutionalised racism', 'a prevailing way of life', a 'generalised policy of discrimination', or 'climate' or 'culture' of unlawful discrimination.

49... [the Claimant] may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and that there was no 'act extending over a period' for which the Commissioner can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the Service in matters of race and sex discrimination.

52 The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'... the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a 'policy' could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an on-going situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.

Time limits

221. In *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, the Court of Appeal held that when employment tribunals consider exercising the

discretion under [what is now] S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.'

222. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 EqA ('such other period as the employment tribunal thinks just and equitable') that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision. At paragraph 18-19 Leggatt LJ said:

"it is plain from the language used (such other period as the employment tribunal thinks just and equitable) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in s 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see [2003] EWCA Civ 15, [2003] IRLR 220, para [33]. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see *Dunn v Parole Board* [2008] EWCA Civ 374, [2009] 1 WLR 728, paras [30] [32], [43], [48]; and *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 All ER 381, para [75].

That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

223. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, [2021] ICR D5, Underhill LJ said:

"The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) the length of, and the reasons for, the delay. If it

checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

Unfair dismissal

224. The Employment Rights Act 1996 contains the following provisions:

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

...

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality

225. The burden on whether or not a dismissal is unfair is neutral. As to the test for cases of capability, the IDS Handbook on Unfair Dismissal provides the following commentary:

"4.32

Where an employer seeks to rely on incapability or lack of qualifications as the ground for dismissal, the onus is on it to show that this was the actual reason or principal reason for dismissal. But this should not be mistaken as meaning that an employer must objectively establish that a dismissed employee lacked capability. As Lord Denning MR put it in *Alidair Ltd v Taylor* 1978 ICR 445, CA: 'Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent.'

Put another way by Lord Justice Geoffrey Lane in the same case, the Court of Appeal's test of a fair capability dismissal (aside from procedure) has two elements:

- does the employer honestly believe this employee is incompetent or unsuitable for the job?
- are the grounds for that belief reasonable?"

Indirect discrimination

226. As to indirect discrimination, the Equality Act 2010 provides

19 Indirect discrimination

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

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

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

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

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

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

227. In *Ishola v Transport for London* [2020] EWCA Civ 112, the Court of Appeal confirmed that one off events are not necessarily provisions criteria or practices (i.e. PCPs) and must be examined carefully to see whether it could be said that they are likely to be continuing.

CONCLUSIONS

TIME/JURISDICTION

Relevant dates

228. As to the claims contained in the first claim form the Relevant dates are:

Case numbers 2206083/2020 & 2200281/2021

- | | | |
|--------|------------------------------------|---------------------------------|
| 228.1. | ACAS Date A: | 10 th July 2020 |
| 228.2. | ACAS Date B: | 24 th August 2020 |
| 228.3. | Presentation of ET1 (first claim): | 18 th September 2020 |
| 228.4. | Date of dismissal: | 20 th October 2020 |
229. Time was extended for the claims contained within the second claim form of unfair dismissal and discriminatory dismissal.
230. It follows from the dates above that any act occurring before the 11th April 2020 would appear to have been presented out of time, subject to consideration of whether there was a continuing act and the Tribunal's just and equitable discretion to extend time.

Continuing act/acts of discrimination

231. The Claimant was absent from the workplace between 12 February 2019 and 3 September 2019. By the time that she returned to work in September 2019 the Claimant was on the face of it out of time to bring claims about events in the period April 2016 – 14 February 2019, which is the period which the allegations numbered 1– 41 in the Claimant's schedule of further information allegedly occurred.
232. The Tribunal has considered carefully whether there was conduct extending over a period within the meaning of section 123 of the EqA between 14 February 2019 and the Claimant's return to work on 3 September 2019.
233. There cannot have been an act of victimisation during this period, given that the first protected act on our finding is the submission of the grievance on 11 May 2020.
234. We find that the date on which the Respondent became aware that the claimant was disabled (the date of knowledge) was 3 September 2019. Accordingly there cannot have been an act of direct disability discrimination before that point.
235. Allegation 42 which is said to relate to the period February – August 2019 is insufficiently detailed to enable the Tribunal to make a clear finding as to the date on which Lisa Thomas made the comment that the Claimant was unable to cope with changes in the team. In any event the Tribunal is unable to identify any connection between this alleged treatment and the Claimant's race or sex, nor any facts from which we would draw an inference that the Claimant's race or sex were the reason for this treatment. It predates the first protected act and therefore cannot succeed as a claim of victimisation.
236. Allegation 43 (June 2019) is said to have been caused by a hacker or a perpetrator unknown to the Claimant. This allegation has not been proven, and has been addressed earlier in these written reasons. This is said to be an act of victimisation, but it predates the first protected act and cannot succeed.
237. Allegations 44 & 45 (July 2019) of direct disability discrimination and victimisation both predate the Respondent's knowledge of the Claimant's

disability and also predate the first protected act relevant to the claim of victimisation and cannot therefore succeed.

238. There is therefore a gap between allegation 41 (14 February 2019) and allegation 46 (3 September 2019) of 6 ½ months during which we find the Claimant is not established any continuing discriminatory act or discriminatory state of affairs such as to amount to conduct extending over a period.
239. It follows that allegations 1 – 41 are out of time and are not part of a continuing act.

Just & equitable to extend

240. Is it just and equitable to extend time?
241. The Claimant has not herself put forward reasons why we should extend time.
242. She is a litigant in person and in our attempt to do justice between the parties, we have considered factors or arguments that might support the exercise of the discretion to extend time.
243. We have borne in mind that the Claimant was unwell in the period February – September 2019 and, although she was improving and under treatment, still struggling to some extent thereafter. If that had explained the entire delay before the presentation of the claim in September 2020, that might be a stronger argument. We take account of the fact however that the Claimant was sufficiently well and clear in her thoughts to be able to subsequently pursue both two separate grievance and grievance appeals and also attend the capability review leading to her dismissal. It is not fair to say therefore that the Claimant was incapable of dealing with matters relating to her employment during this period. On contrary, she was actively engaging.
244. We have borne in mind that the Claimant had access to advisers e.g. the trade union representative Mr Williams.
245. Time limits in discrimination claims are short. Claimants are required to present a claim within three months unless there is a continuing act. One of the reasons for these short time limits are that memories fade and the evidence becomes less cogent. A Respondent is inevitably prejudiced by having to deal with matters raised four years after they occurred. So it is with this case. The Tribunal accepted the evidence of Mr McCormick for example when he said of events in 2016 that he simply could not remember.
246. Finally, we have considered that it would be just and equitable to extend time had the Claimant demonstrated that she had an otherwise meritorious claim which was out of time. We do not consider that she has done so in respect of events before September 2019. Indeed, based on the evidence we have received, we would not have found that the Claimant had made out a *prima facie* case of sex or race discrimination in relation to allegations 1 – 41. I.e. we do not find that the Claimant had satisfied the initial burden on her to get these claims of discrimination off the ground.

247. We accept that the Claimant felt at times marginalised and was highly sensitive to criticisms made of her by her manager Ms Walker. That is not the same thing as a *prima facie* case of discrimination. It seems to the Tribunal that the Claimant had communication difficulties generally with some members of the team and was prone to placing a negative interpretation on things said to her, including interpreting what were plainly light-hearted comments as being a serious criticism of her. For example Mr McCormick quipped about luck being a factor in the team's accurate forecast.
248. In conclusion therefore we do not find that it is just and equitable to extend time for allegations 1 – 45.

EQUALITY ACT 2010 CLAIMS

Protected Characteristic:

249. The Claimant relies upon the protected characteristics of:
- 249.1. Race: the Claimant describes herself as Black African;
 - 249.2. Sex: the Claimant is female;
 - 249.3. Disability.

Disability

250. It is accepted the Claimant is a disabled person in accordance with the Equality Act 2010 at all relevant times because of the following condition of psychosis.

SECTION 13: DIRECT DISCRIMINATION

251. **[Issue 6]** Has the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act 2010.

Allegations 1-42

252. For reasons given above, the Tribunal found that these allegations were out of time and did not form part of a continuing act of discrimination, and that it was not just and equitable to extend time.
253. If we were wrong in the exercise of our discretion, we did not find that the Claimant had established a *prima facie* case in respect of any of these allegations.

Allegations 43 – 45

254. The Tribunal considered these allegations in the context of trying to establish whether there was a continuing act of discrimination, as set out above.

255. We did not find that there was a continuing act of discrimination nor any act of discrimination at all in respect of these allegations.

Allegations 47 – 62

256. These allegations relate to the period from 6 September 2019 onward during which time the Claimant had returned from her period of sick leave in 2019.
257. We did not find that the Claimant had established a *prima facie* case of sex or race discrimination in respect of any of these allegations. There are no features of this case which have lead us to the conclusion that a Tribunal could reasonably conclude that the Claimant's sex or race was a reason for her treatment.
258. These allegations pre-date the first protected act, and accordingly cannot be acts of victimisation.
259. Ms Walker did not read the report dated 3 September 2019 until the meeting on 6 December 2019. The Tribunal finds that Ms Walker was not aware that the Claimant was disabled until 6 December 2019. Given the absence of knowledge we concluded that the claim of direct disability discrimination cannot succeed in respect of any of these allegations.

Allegations 46 & 63 - 83

260. These allegations run from 6 December 2019 to January 2021. There are events leading to and beyond the Claimant's dismissal
261. The parts in *italics* below are the descriptions of the allegations taken from the of allegations of discrimination. Names given at the beginning of each allegation of the alleged discriminator or discriminator in each case.

Allegation 46 – 6 December 2019

262. Allegation 46 appears in the Schedule against 3 September 2019, but in fact relates to events on 6 December 2019.
263. *Tracey Walker received an occupational health report from health management that discussed MO's diagnosis, and TW forwarded the report notification to the claimant. Tracey Walker During a meeting on 06 December 2019 Tracey Walker denied any awareness of the OH report insisting that the report was in the system, but because she did not receive the notification, she did not log in to access the report.*
264. The explanation for these events is inadvertence and carelessness on the part of Ms Walker, but we do not find that this amounted to discriminatory treatment. Had Ms Walker realised that she had received an updating report, she would have read it.

Allegation 63 - 6 December 2019

265. *Tracey Walker set up a catch up meeting not informing the claimant of her intention to raise performance issues. Tracey Walker had cancelled the regular catch up meeting with the claimant the preceding week and the claimant felt that this was a replacement for the cancelled meeting. Shortly before the meeting was due to begin, Tracey Walker informed the claimant that she had invited Hannah Hopkin from HR to attend the meeting.*
266. *The meeting turned out to be a performance management meeting. Tracey Walker listed several complaints about the claimant's behaviour. It was a harrowing experience because the claimant was not informed ahead of time that it will be a performance meeting. Tracey Walker prepared a list of points which she read from. At the end, Tracey said that the claimant will be put on an informal performance improvement plan. She said she was not sure if queries she listed against the claimant were due to conduct or capability. She then asked the claimant if there was any health diagnosis that the company should be aware of. The claimant responded that the company had been notified of the claimant's diagnosis through the occupational health report in September. Tracey and Hannah both denied any knowledge of the occupational health report. Hannah asked the claimant to forward the occupational health report to her.*
267. *The claimant also forwarded evidence to Hannah Hopkin to show capability/performance in the areas that Tracey Walker had complained about. When Tracey Walker became aware of the evidence, she changed the list of complaints in the informal action plan. Hannah Hopkin, as a HR personnel, did not question Tracey's act of withdrawing complaints in the face of evidence and listing new complaints.*
268. *The experience on this day, reduced the claimant to tears. The claimant felt like she had walked into a pre-arranged line of fire without being warned; The episode was also designed to insinuate concerns around the claimant's health-related capability. After this incident, Hannah Hopkin requested a physical, in-person occupational health assessment. Hannah Hopkin expressed the view to the claimant that perhaps she was not fully recovered. She said to the claimant: **'should you really be at work?'**. Hannah Hopkin repeated this view in May 2020 as part of the grievance investigation, that she felt the claimant was not well enough to return back to work.*
269. *Additionally, it was the day of the department/directorate Christmas party and I had planned to attend. The claimant decided not to attend the Christmas party as planned because of the distressing encounter with Tracey and Hannah. The claimant is not based at the Solihull office, so not attending the Christmas party denied the claimant the opportunity to interact and bond with colleagues in the department.*
270. *The lengthy narrative above contains a number of different elements. The Tribunal accept the evidence of Ms Walker as to what occurred. We accept that there was a reason to describe this as a "catch up meeting", namely that this would show on the meeting room system. We accept Ms Walker's*

explanation that she did not want to inform the Claimant by email about moving onto an informal performance improvement plan. This news would be unwelcome irrespective of whichever format it was transmitted. We take the view that Ms Walker was attempting to be sympathetic and appropriate in the way that she delivered this difficult message. It follows that we consider that it is not fair to characterise this as an ambush, although we do not doubt that it may have felt that way to the Claimant.

271. As to the failure on the part of Ms Walker to read the occupational health report dated 3 September 2019, that was plainly unfortunate, but we accept her evidence as to how this occurred. It seems that there was a lack of care, and we understand why the Claimant found this extremely upset. However we find that this was genuine inadvertence, caused by the fact that there had been so recently before in August 2019 another report and that Ms Walker was not expecting a new report.
272. As to the comment “should you really be at work?”, Ms Hopkin accepts that she said something similar to this and explained that this was out of concern for her well-being. She said that the Claimant had returned to work the same day that her enhanced sick pay had ended, which raised a concern in her mind that she was simply returning to work for financial reasons rather than because she was well enough to work. She commented upon this in the investigation (1587). We accept Ms Hopkin’s evidence on this allegation. She had been taken by surprise as to the Claimant’s diagnosis and was trying to understand if she was well enough to work.
273. Given our findings we do not find that this was less favourable or detrimental treatment.

Allegation 64 - 06 December 2019 - May 2020

274. Tracey Walker & Hannah Hopkin & Grievance investigation manager - *Tracey Walker mandated that the claimant should agree not to speak about her experience of discrimination and unfair treatment, and her experience of email hack as part of a performance improvement plan. This was a direct penalisation of the claimant for speaking up. The claimant asked Hannah Hopkin about how those actions were related to performance issues on behaviour, and got no response. As part of the grievance, the investigating manager agreed that complaints about the email hack and complaints about the discriminatory and unfair treatment were behavioural problems exhibited by the claimant.*
275. *The claimant is still being penalized for speaking up about being treated unfairly - it was cited by Tracey Walker as part of the grounds for progressing the claimant from an informal performance plan to a formal performance plan which continued until the claimant's suspension and dismissal.*
276. In her witness statement the Claimant at paragraph 5.14 only substantiate the email hack element of this rather than a broader point about discrimination.

277. Ms Walker's evidence, which we accept, was that she agreed with the Claimant that she should not make continual reference to her perception of previous unfair treatment unless she was seeking to make a formal complaint about it.
278. The Tribunal does not accept on balance of probabilities that there had been any email hack. It may have been in the view of the Tribunal a better management approach to have a quiet word with the Claimant about drawing to an end her concerns about the hack rather than making this a performance matter. This was a difficult matter to deal with however, since the Claimant strongly held a view that was not substantiated by the investigations carried out by the Respondent.
279. As to the suggestion by Ms Walker that the Claimant either bring a formal complaint or desist complaining about previous unfair treatment, ultimately we find that this was a legitimate management approach. As a manager Ms Walker could not simply allow this question to go round in circles without resolution.
280. We do not find that there was less favourable/detrimental treatment in respect of this allegation.

Allegation 65 - December 2019

281. *Tracey Walker raised an underperformance query saying that the claimant did not participate in meetings. She went on further to say that sometimes the claimant participated, and other times she didn't, and that perhaps it was connected with the claimant's mood.*
282. We find that Ms Walker did say that the Claimant did not participate in meetings and that sometimes she did and sometimes she did not and that was perhaps connected with her mood. A similar comment was made on page 1004.
283. It was Ms Walker's job to try to encourage a good working relationship to the Claimant and herself and other members of the team. We find it was legitimate for her to point out to the Claimant if there was variable participation by her.
284. We do not find that the Claimant has established circumstances so as to conclude that a reference to the Claimant's mood in the circumstances was less favourable treatment (or harassment relating to disability had we examined it from that point of view).

Allegation 66 - January 2020

285. *Tracey Walker - In order to fulfil a simple request from an external party on suitable dates to meet, Tracey Walker proposed to discuss options in person with the claimant because she also got a request from someone she knew at the same organisation (Energy Catapult). The claimant scheduled in-person meetings, and Tracey Walker declined twice (after initially accepting). Tracey turned the situation around to find fault with the claimant, saying that an in-person meeting was not required to schedule meetings.*

286. The Tribunal has considered the email exchange at pages 1119-1121 in the period 13 – 20 January 2020. We do not find anything sinister in this email exchange.
287. We do not find that this amounted to less favourable or detrimental treatment.

Allegation 67 - Jan 2020 - May 2020

288. Tracey Walker & Hannah Hopkin - *the claimant clearly informed Hannah Hopkin and Tracey Walker that she would be unable to attend a meeting without an independent party being present. Hannah Hopkin deceptively walked the claimant into a meeting room where Tracey Walker was waiting, and belittled the claimant with the following comment 'I would have thought that someone at your level would be able to have a meeting with your manager.'*
289. *It was a very humiliating and demoralising experience. The claimant had to plead to be excused and broke down in tears after leaving the meeting room.*
290. *This inconsistent account of meeting records is the reason why the claimant felt frightened of attending a meeting without an independent record. And the claimant's fears were proved right with Hannah's contradictory and derogatory account of the claimant's composure.*
291. *Hannah Hopkin subsequently gave a different account of what happened during this meeting. She said that the claimant was angry, and Tracey Walker was calm.*
292. *This approach of describing the claimant as 'angry' (and as listed previously) 'aggressive' and 'passive aggressive' are stereotypical and derogatory.*
293. *To crown it all, Tracey Walker raised this incident where the claimant was humiliated as a new underperformance claim against the claimant for failing to attend a meeting after HR personnel had travelled in for the meeting.*
294. The Tribunal found that Ms Hopkin did say something along the lines that the Claimant should be able to to have a meeting with her manager. She made a comment suggesting a similar but slightly different thought about the Claimant being able at a Band D level to sort out her objectives in an interview documented at page 1589.
295. The Tribunal finds that the Claimant was upset and Ms Hopkin comment that she was upset was a fair observation.
296. The Claimant's evidence is that in her belief Ms Walker or others describing her as aggressive or angry or passive-aggressive was stereotypical and discriminatory. The Tribunal understands the Claimant to be suggesting that there is a discriminatory stereotype or trope of an angry black woman.

Audio

297. The Tribunal listened to a short audio extract of one of the meetings attended by the Claimant, Ms Walker and Ms Hopkin. The Tribunal does not usually

listen to audio recordings. Our usual practice is to consider a transcript. The Claimant was keen for us to listen to an extract, which we did.

298. In this meeting Ms Hopkin requested that the Claimant be respectful. We accept the Claimant's observation that when Ms Hopkin requested that she be respectful, this was not in response to a disrespectful comment made by the Claimant. The comments made by the Claimant immediately before the request from Ms Hopkin were not angry or disrespectful.
299. The Claimant's argument is essentially that this was an unwarranted intervention which betrayed a stereotypical view that Ms Hopkin had of her as a black woman.

Conclusion on allegation 67

300. Had there been no history between the three people involved in this meeting, we would consider that this was a fair argument. The Claimant's tone was not angry or disrespectful but she was nevertheless being told to be respectful. That might call for an explanation, and it might in those circumstances suggest a particular stereotypical view was being held.
301. The Tribunal finds however that there was history here. Ms Hopkin had come into what seemed to be something of a embattled relationship between the Claimant and her manager, which had been ongoing for some time. The context of the relationship was not simply what been said in this particular meeting, but also history of other meetings and emails. There had been a history of Ms Walker raising performance concerns and the Claimant challenging (in some cases validly) the performance matters that have been raised. It was a difficult relationship. Ms Hopkin was attempting to mediate. We find it was the history rather than stereotype which informed her choice of words.
302. We do not find that this amounted to less favourable or detrimental treatment.

Allegation 68 - 13 February 20

303. *Tracey Walker raised an underperformance query against the claimant because she failed to tell a colleague (Qasam Sultan) that she was unable to attend a meeting. Tracey Walker did not levy a similar underperformance query against Qasam Sultan for the same act of also failing to inform the claimant of his inability to attend meetings. When this was pointed out to Tracey Walker, she said the claimant had multiple behaviour issues while Qasam did not have multiple behaviour issues and as such she was not going to raise a query against him for acting in a similar way as the claimant. She said the claimant's multiple behaviour issues justified Tracey Walker's different treatment of her.*
304. The Tribunal accepts the evidence of Ms Walker that she had raised with Mr Sultan minor matters such as dialling into meeting late and use of telephones during meetings. In the case of Mr Sultan, there were not reasons to treat this as a informal PIP since these were minor matters or merely a one off. She said she had also raised similar matters with the Claimant, but in the case of the

Claimant she was consistently late for meetings but it was sustained poor behaviours and disagreement with anything raised by Ms Walker which led her to initiate an informal action plan.

305. We note that Ms Walker had used PIPs on previous occasions, two out of three of which had been successful in improving performance.
306. We do not find that this amounted to less favourable or detrimental treatment.

Allegation 68 - 13 Feb 2020

307. *Tracey Walker justified her incessant identification of new underperformance claims by saying that the claimant has a pattern of developing new behaviour claims when other behaviours are resolved. In her words: "Its not about Qas, It's about sustained poor behaviour. There's more than just one issue. We need to change behaviours and work together to deliver Band D performance. We have no issues on work stuff - the what. It's purely behaviours - There's a general pattern, when one behaviour is resolved another crops up."*
308. *This lack of boundaries around objectives/targets/expectations frustrated the claimant's efforts to evidence performance. It was not in keeping with the company's guidance on performance management based on SMART objectives. When considered in conjunction with the threat from Lisa Thomas, it created an environment of fear and pressure for the claimant.*
309. We have considered the document entitled "list of behaviour complaints from Tracey – last updated 23 January 2020" which begins at page 1053 in the bundle. This is Claimant's record of the complaints and other comments made by Ms Walker.
310. Ms Walker started working in May 2017. The list begins in May 2018 i.e. a year after the two started working together. The list contains good points as well as bad points. The Claimant was complemented on good analysis. She was told she does communicate well with stakeholders. Some of the points documented are neither positive or negative, but pieces of advice on what Ms Walker wanted the Claimant to focus on in her role for example "coach, develop and motivate team members" or "ensure that stakeholders know what areas that you cover and that they know and are comfortable to approach you for those areas – for example country/topic." This appears to be advice or guidance rather than a criticism. There are gaps in time. There is no feedback recorded between June and October 2018 for example.
311. The performance matters accumulated over time. Matters such as persistent lateness or failing to attend meetings or failure to communicate with stakeholders about the progress of work in the view of the Tribunal were legitimate matters to be raised by a manager.
312. Ms Walker admits that she forms the view that a number of the Claimant's behaviours were not consistent with those of a band D employee. She plainly had higher expectations of someone at this level. She says that in discussions

about the Claimant's underperformance the latter would try to turn this into a conversation about the performance of other colleagues.

313. We take view that Ms Walkers had high expectations of someone at band D and perceived that the Claimant was falling down. She did not shy away from discussing these matters with the Claimant.
314. The Tribunal has considered this carefully but we do not find that sex, race or the Claimant's disability were the reason why Ms Walker managed the Claimant in the way that she did.

Allegation 69 - Feb - Dec 2020

315. Tracey Walker, Sarah Hall - Senior Mangers leading grievance investigation - *and other senior managers involved in the medical suspension investigation process re-phrased the claimant's request for fair and respectful management treatment as a request for reasonable adjustments on the basis of her health diagnosis.*
316. A trade union representative Mr Williams acting on behalf of the Claimant wrote in an email on 20 March 2022 request reasonable adjustments. A month later on 21 April 2020 the Claimant parted company with this approach and, we infer, with the advice of Mr Williams.
317. The right to have reasonable adjustments made is one set out in statute. The Claimant had a disability. The Respondent was under a duty to make reasonable adjustments if she was under a substantial disadvantage. This was whether she requested this or not. The Respondent would have been criticised for not making reasonable adjustments if they were merited. The fact that her representative requested reasonable adjustments on her behalf, suggested that this was something that the Respondent should at least consider.
318. At a later stage the Claimant requested "needs", which the Respondent treated as a request for reasonable adjustments.
319. We cannot see how considering reasonable adjustments was to the Claimant's detriment in the circumstances. The fact that the Claimant herself did not like the terminology of reasonable adjustments in our view does not mean that the actions of the Respondent amounted to a detriment or less favourable treatment.
320. We do not find that this amounted to less favourable or detrimental treatment.

Allegation 71 - 30 April 2020

321. *Tracey Walker asked a colleague to lead on a base case presentation and then criticized the claimant for not leading. The claimant felt she was set up to fail. If she did not allow the colleague to lead, Tracey Walker would accuse her of not supporting junior colleagues. By choosing to support the junior colleague, giving him the space to lead, Tracey Walker criticized the claimant for failing to lead.*

322. *The setting of contradictory and conflicting expectations frustrated the claimant's efforts to evidence performance. The claimant was bound to fall foul of one of the expectations. It was not in keeping with the company's guidance on performance management based on SMART objectives. When considered in conjunction with the threat from Lisa Thomas, it created an environment of fear and pressure for the claimant.*
323. This allegation is in reality no more than a continuation of or at least very similar to earlier allegations e.g. allegation 69.
324. We do not find that this amounted to less favourable or detrimental treatment.

Allegation 72 – May 2020

325. *HR personnel overseeing the grievance investigation - As part of the investigation into the claimant's grievance complaint, the investigator produced a chronology that mis-represented the changes to roles and portrayed the claimant as complaining about changes that never occurred. HR was part of the investigation process and should have accurate records of the role and restructure changes. Presenting false records and portraying the claimant in a negative way was unsupportive and prejudiced. When added to other incidents listed above where HR described or tried to describe the claimant as aggressive, passive aggressive and angry - it felt stereotypical.*
326. The Tribunal has dealt with the allegation about stereotyping above, specifically allegation 67. In her witness statement at paragraph 2.3.2 the Claimant recapitulates the allegations about there being a parallel team, which are dealt with above.
327. As to the contention that the HR personnel were presenting false records, the Claimant has failed to substantiate this.
328. We do not find that this amounted to less favourable or detrimental treatment.

Allegation 73 – May 2020

329. *Tracey Walker - as part of the investigation into the claimant's grievance, Tracey Walker justified discriminating against the claimant in favour of Qasam Sultan because of the claimant's health diagnosis. At the same time Tracey Walker denied knowing about the claimant's health diagnosis in September 2019 when this discriminatory treatment occurred.*
330. The comparison with Mr Sultan is dealt with above. We do not find that the Claimant has successfully made out less favourable treatment by comparison with Mr Sultan.

Allegation 74 - May 2020

331. *Tracey Walker HR - Sarah Hall – Ms Walker raised an underperformance query against the claimant for not being proactive and not showing leadership and identifying methods to carry out sensitivity analysis. When confronted with the evidence, Tracey withdrew the claim around being proactive and levied a new*

claim that the claimant's email writing was poor, difficult to understand and of a negative. These underperformance claims were made during a formal performance review meeting where HR - Sarah Hall - was present. Sarah Hall, as a HR personnel, did not question Tracey's act of withdrawing complaints in the face of evidence and listing new complaints.

332. *This lack of boundaries around objectives/targets/expectations frustrated the claimant's efforts to evidence performance. It was not in keeping with the company's guidance on performance management based on SMART objectives. When considered in conjunction with the threat from Lisa Thomas, it created an environment of fear and pressure for the claimant.*
333. This appears to be a recapitulation of allegations about Ms Walker nitpicking or micromanaging her. We have dealt with these above.
334. The Tribunal does not understand why Ms Walker withdrawing complaints in the face of the evidence was a detriment or less favourable treatment for the Claimant.

Allegation 75 - August - September 2020

335. *Tracey Walker denied the claimant's request for an independent record of a meeting where the claimant's market design project was being discussed. Tracey Walker went on to give an inconsistent account of events during the meeting to suggest that the claimant behaved poorly during the meeting. This was listed as an underperformance claim against MO during a formal performance review meeting.*
336. *This lack of objectivity in accounts of meetings frustrated the claimant's efforts to evidence performance. It was not in keeping with the company's guidance on performance management based on SMART objectives. When considered in conjunction with the threat from Lisa Thomas, it created an environment of fear and pressure for the claimant.*
337. There was a legitimate distinction to be drawn between meetings specifically set up to talk about the Claimant's performance with Ms Walker as her line manager and wider team meetings.
338. The Tribunal finds that Ms Walker was perfectly within the reasonable exercise of management discretion not to allow recording of a team meeting. She gave reasons for this. We have dealt with this above.

Allegation 76 - August 2020

339. *Tracey Walker - The claimant proactively shared insights with key stakeholders around possible market developments on carbon pricing. Tracey Walker criticized this as being too proactive and suggested that it was inappropriate behaviour to share directly with stakeholders. Tracey Walker had also recently criticized the claimant for not being proactive. This was listed as an underperformance claim against MO during a formal performance review meeting.*

340. *This conflicting direction on objectives/targets/expectations frustrated the claimant's efforts to evidence performance. It was not in keeping with the company's guidance on performance management based on SMART objectives. When considered in conjunction with the threat from Lisa Thomas, it created an environment of fear and pressure for the claimant.*
341. We accept the evidence of Ms Walker at paragraph 350 of her witness statement, which is that the Claimant had upset Ian Shephard by sharing slides with internal stakeholders without informing him, which potentially undermined him. Additionally both Ms Walker and Mr Shephard took the view that the Claimant had prioritise this over another task which she was struggling to find time to perform. We accept Ms Walker's evidence that raising with the Claimant that she should have engage with Mr Shephard first is no more than the sort of guidance that might be given to any employee by a manager.
342. We do not find that this is suggestive of less favourable or detrimental treatment and in any event we do not see race, sex disability or a protected act as being the cause.

Detriment 77 - August 2020

343. HR - Sarah Hall *Sarah Hall agreed to record a meeting between the claimant, her support worker, Kevin [Brooks] and Tracey Walker.*
344. *After the meeting, Sarah Hall stated that the recording failed. And not only had the recording failed, but she was not notified during the meeting that the recording had failed. And as such she did not reset the recording after the failure.*
345. *Sarah Hall misrepresented the discussion of the meeting to build false claims that the claimant's health diagnosis limited her capability to perform her role by:*
- 345.1. *Stating that Kevin said that the claimant's health condition required structure.*
- 345.2. *Stating that a request about understanding the rationale for changes to role responsibilities was a health-related request for reasonable adjustment.*
- 345.3. *Stating that the request for independent notes of meetings to provide objective/balanced/accurate representation of meetings in the face of Tracey Walker's incessant underperformance claims was a request for health-related reasonable adjustment.*
346. The Tribunal accepts the evidence of Ms Hall that there was a genuine technical problem which led to the meeting not being recorded.
347. We do not find that Ms Hall deliberately misrepresented the content of this meeting.

348. We accept that Ms Hall considered the request for independent notes as a request for a reasonable adjustment. For reasons given above we do not find that there was less favourable treatment.

Allegation 78 - August 2020

349. *Sarah Hall informed the claimant on a call that she received an anonymous report from a colleague who had spoken to the claimant and was concerned about the claimant's health. During the call, the claimant assured Sarah Hall that she was well health-wise.*
350. *Sarah Hall then proceeded to say that the same colleague had also said that the claimant bad-mouthed Tracey Walker. Sarah Hall said the claimant should report any concerns directly to HR, and that if concerns are not reported to HR, they are unable to do anything. Again, the claimant assured Sarah that she was open and had raised her concerns with HR. The claimant declined to respond on the other claims of the anonymous colleague because without naming the incident, it was impossible to comment on it.*
351. We do not find that this amounted to less favourable or detrimental treatment.

Allegation 79 - September 2020

352. *Tracey Walker, Sarah Hall informed the claimant that there was a view from anonymous colleagues that the claimant was not able to give or receive feedback. When the claimant suggested that without explaining the incident, occasion, she was not equipped to respond to the claim. Tracey Walker then forcefully suggested that the claimant should undergo a 360 feedback to see if there will be more anonymous comments to corroborate the anonymous comments she received directly.*
353. Ms Walker was seeking to assist the Claimant understand how she and her behaviour was perceived by other colleagues.
354. We do not find that this amounted to less favourable or detrimental treatment.

Allegation 80 - September 2020

355. *(Terry McCormick and HR personnel) Terry McCormick stated that as a result of the claimant's health diagnosis she was incapable of holding a leadership role in the organization with these words: "Given that we cannot accommodate recording as an adjustment for your medical condition, and that you believe that not recording will have a negative impact on your health and well being and ambiguity and change is an important part of your role, we do not believe going forward you are capable of your role or potentially any Band D role within the organisation."*
356. *A senior manager [we take this to be Ms Hall] also suggested the claimant's health condition was triggered by her inability to cope with change and ambiguity.*

357. *The request for recording was not related to a medical condition. The claimant perceives this as victimisation for speaking out about Bullying/Harassment. Because of her complaint, Terry McCormick proposed to move her to a different department, and to demote her.*

Comments re: role / Band D

358. The comments in quotes above about the Claimant not being able to do her role or potentially any Band D role were made to the Claimant. They were contained within the medical suspension letter dated 8 September 2020.

Medical suspension

359. To summarise the background, Ms Walker had indicated that she was prepared for her own discussions with the Claimant to be recorded, given that these might relate to performance matters and the Claimant had expressed concerns about consistency of the messages that she received in terms of how she was being assessed. The only “red line” from Ms Walker’s point of view was about recording team discussions, for the reasons she gave on 21 August 2020.
360. The Tribunal finds that Ms Walker’s reason for her position against recording the group was understandable. Ms Walker did not want to hinder the free flow of ideas amongst members of the team. It would not be normal to record team meetings in most typical employment contexts.
361. By suspending the Claimant on 7 September 2020, however, the Respondent did not give Claimant the opportunity to try the approach that Ms Walker said she was prepared to work with. The Claimant was not given the opportunity to try working an approach with meetings with Ms Walker recorded but with other team meetings not recorded. Rather, acting unilaterally, the Respondent started a process which drew the Claimant’s employment to an end.
362. Mr McCormick and Ms Hall seized on concerns raised by the Claimant and in particular the words used by the Claimant about not feeling “safe” as a justification for these actions. Although the Claimant’s comments about safety and her health were somewhat contradictory, we find that these concerns about safety originated in a concern primarily about how she was being performance managed and her concern that she was being set up to fail. She repeatedly stated that the adjustments did not relate to her health.
363. There was no formal medical evidence to support a conclusion that she was too unwell work in her role or that it was unsafe to do so.
364. We find that the Respondent in medically suspending the Claimant and making this statement about her unsuitability for the role and her unsuitability for any Band D role had all but made a decision that her employment was coming to an end. This was detrimental treatment.
365. We have gone on to consider the reason for this treatment under victimisation below.

Allegation 81 - September - December 2020

366. Terry McCormick and other senior managers say that the concerns the claimant raised around Bullying/Harassment and discrimination are less believable because of my health diagnosis.
367. The Claimant in her witness statement does not make it clear when and where these comments are alleged to be said. She also appears at paragraph 5.27 to run this together with allegation 82 which is dealt with below.
368. This allegation was not raised in the second grievance, nor the second appeal.
369. Mr McCormick says that it is simply untrue that he said that her allegations were less believable because of a health diagnosis. We do not have a basis not to accept this evidence, especially when the Claimant has not proved sufficient detail to make out this allegation.
370. We do not find that the Claimant has proven this detrimental treatment on balance of probabilities.

Allegation 82 - September - December 2020

371. Terry McCormick & HR personnel Terry said that interactions between Tracey Walker and the claimant are causing Tracey Walker to be ill. This was cited as one of the reasons for suspending the claimant to protect Tracey Walker's health. This claim had not been raised against the claimant. It had not been investigated. Yet, the claimant was immediately suspended. This is a stark contrast with how the claimant's evidenced claims about Tracey Walker's actions towards her were dealt with. When the claimant raised queries, the evidence was ignored, no action was taken. When Tracey Walker complained, no investigation was carried out and the claimant was suspended without any investigation.
372. The Claimant addressed this allegation in her witness statement with the following:
- “5.27 Terry said that interactions between Tracey and I causing Tracey to be ill. This was cited as one of the reasons for suspending me to protect Tracey's health. This claim was not raised against me. It was not investigated. Yet, I was immediately suspended. This is a stark contrast with how the my evidenced claims about Tracey's actions towards her were dealt with. When I raised queries, the evidence was ignored, no action was taken. When Tracey complained, no investigation was carried out and I was suspended without any investigation.”
373. Mr McCormick's position is that the suspension was to protect the Claimant's own health not Ms Walker's health.
374. The Tribunal does not doubt, based on the evidence we have received that Ms Walker found the confrontational dynamic which had evolved in her relationship with the Claimant stressful. We find it likely that the Claimant found it stressful

dealing with Ms Walker. Furthermore we find that Mr McCormick would have been aware of this as second line manager. Had he alluded to the effect on Ms Walker in conversation to the Claimant, we do not consider that this would have been entirely surprising. It was within his remit to be mindful of the health of both employees. We do not find that “investigation” of Ms Walker’s health was required in the circumstances.

375. We do not find that this allegation amounted to less favourable or detrimental treatment.

Allegation 83 - January 2021

376. HR personnel - *the HR manager asked the claimant if the queries she raised about Bullying/Harassment and discriminatory treatment could be down to her 'perception'. This corroborates earlier views from Terry McCormick and other senior managers that the claimant's queries around Bullying/Harassment and discrimination would be better believed if the claimant did not have a health diagnosis.*
377. The Claimant has not established this as a cogent allegation, i.e. who said it, when they said it, the context in which it was said. It also seems to be a repetition of an earlier allegation.
378. We do not find that this part of the claim was established.

Race Discrimination

379. Allegations 1-62 (save for allegation 46) are dealt with above.
380. Of the remaining allegations, only allegation 80 we have found to amount to less favourable treatment.
381. We considered the guidance that discrimination is frequently not overt. We have considered carefully whether there are facts proven from which we might draw inferences that the real reason for the treatment is the Claimant’s race.
382. We did not conclude that a Tribunal could, in the absence of an explanation, reasonably conclude that the Respondent had subjected the Claimant to race discrimination.
383. The Claimant did not discharge the initial burden of proof on her in respect of the remaining claims of direct race discrimination (section 13 of the Equality Act 2010).

Sex Discrimination

384. Allegations 1-62 (save for allegation 46) are dealt with above.
385. Of the remaining allegations, only allegation 80 we have found to amount to less favourable treatment.

386. We considered the guidance that discrimination is frequently not overt. We have considered carefully whether there are facts prove from which we might draw inferences that the real reason for treatment is the Claimant's sex.
387. The Tribunal noted that the Claimant did not voluntarily put to any of the Respondent's witnesses that her sex was a reason for her treatment. We certainly do not hold the Claimant to the same standard as a professional legal representative. We would not come to the conclusion that the Claimant should not be able to advance this part of her claim as a result of not having put it. It did leave us however with the feeling that the Claimant did not have much conviction in this part of the claim.
388. We did not conclude that a Tribunal could, in the absence of an explanation, reasonably conclude that the Respondent had subjected the Claimant to direct sex discrimination.

Direct disability discrimination

389. The only claim related to disability that the Tribunal considered was a claim of direct disability discrimination brought under section 13 of the Equality Act 2010. The Claimant was aware of the duty of the Respondent make reasonable adjustments, but chose not to bring such claim
390. Allegations 1-62 (save for allegation 46) are dealt with above.
391. Of the remaining allegations, only allegation 80 we have found to amount to less favourable treatment. Has the Claimant established that this treatment was because she was disabled, specifically because she had psychosis? The diagnosis of psychosis had been known since 6 December 2019. Focusing specifically on allegation 80 and events in September 2020, the Tribunal did not detect any *animus* on the part of Mr McCormick or Ms Hall on the basis of or because of the Claimant's disability. The Respondent generally had tried to engage with reasonable adjustments for the Claimant's disability. It was the Claimant herself who closed this down. This was not a claim brought under section 15 of the Equality Act 2010; we are not examining whether she had suffered treatment because of behaviours arising from disability for example.
392. We find that allegation 81 might have been the basis for a finding of direct disability discrimination (or potentially harassment relating to disability under section 26 EqA) had the factual basis for the claim been established. Given that it was not, the claim of direct disability discrimination does not succeed.

Section 19: Indirect Disability Discrimination (Allegation 80)

393. The factual basis for the claim of indirect disability discrimination brought under section 19 of the Equality Act 2010 is allegation 80. The Tribunal has found that this allegation was detrimental treatment amounting to victimisation under section 27 EqA. We have gone on to consider whether it is additionally indirect disability discrimination.

394. The provision criterion or practice ("PCP") of the claim of indirect disability discrimination alleged to be a combination of the safety and well-being policy, performance improvement procedure and the practice of relying excessively on anonymous feedback to the exclusion of other sources of information and assessment.
395. The Respondent accepts it applies safety and well-being policies and performance improvement policies to its staff, but denies it applies a PCP of "relying excessively on anonymous feedback to the exclusion of other sources of information and assessment".
396. Following the guidance in the case of **Ishola**, we find that the circumstances described in allegation 80, which we largely accept the Claimant has proved are best characterised as a one-off rather than a PCP. The circumstances of the Claimant's case are fairly unusual as is the Respondent's treatment of her. We do not feel that this could be characterised as a wider practice or anything like. These are circumstances specific to her case which are apt to be considered as less favourable treatment in a direct discrimination claim or alternatively detrimental treatment in a claim of victimisation. To reiterate that latter claim of victimisation has succeeded in respect of allegation 80.
397. It is not necessary or helpful to consider the Respondent's defence of justification.

SECTION 27: VICTIMISATION

Protected acts

398. Did the Claimant do a protected act?
399. There are two alleged protected acts which the Tribunal finds did fall within the statutory definition contained in section 27(2) EqA:
- 399.1. On 11 May 2020 submitted a grievance. This was a Protected Act. In fact the grievance was raised on 28 April 2020 and the detail followed on 11 May 2020.
- 399.2. On 16 June 2020 she submitted a grievance appeal. This was also a Protected Act.
400. There are three alleged protected acts which the Tribunal finds do not fall within the statutory definition contained in section 27:
- 400.1. In April, September, October 2018 complained to Tracey Walker that she'd been treated differently. The Tribunal did not find that this was a protected act. This did not refer in sufficiently clear terms to an allegation falling under the Equality Act.
- 400.2. In October 2018 she complained about this restructure to Lisa Thomas. The Tribunal did not find that this was a protected act. This did not refer in sufficiently clear terms to an allegation falling under the Equality Act.

400.3. On 26 April 2019 she complained of sex and race discrimination to Louise Farnworth. The Claimant has not established on the balance of probabilities that this occurred.

401. We did not find that either the grievance or the grievance appeal were made in bad faith. The Respondent did not pursue that as part of their case.

Detriment because of protected act

402. The Tribunal found that **allegation 80** (suspension and communication that the Claimant was not capable of performing her role or potentially any Band D role within the Respondent) was potentially detrimental treatment.

403. We do not find that any of the other allegations were detrimental treatment, either because they were out of time or because they predated the protected acts or because the Claimant failed to establish detrimental treatment on the facts.

Whether allegation 80 acts of victimisation

404. As to the reason for treatment at allegation 80, we have examined whether to more than a trivial extent the Claimant raising allegations of discrimination as she did on 11 May 2020 and 16 June 2020 caused this detrimental treatment.

405. The Tribunal concluded that there were several causes of the decision to medically suspend the Claimant and make the communication to her about suitability for role and suitability for Band D.

406. The Tribunal accepts that the Claimant's employment situation from 2018 onward and particularly 2019 and 2020 had become increasingly unhappy and difficult. Her relationship with Ms Walker was strained. The Claimant appears to have taken a negative view of the actions and comments of Ms Walker and other colleagues. This may have contributed to by her illness. Her approach to colleagues, and in particular Ms Walker and the performance management process was combative. She seems to have found it difficult to accept criticism. Requesting that all meetings be recorded caused difficulties.

407. These were all factors contributing something to the circumstances of the suspension and are probably better characterised as a relationship breakdown more than a genuine capability situation.

408. We have concluded however that the protected act more than trivially influenced the medical suspension on 7 September 2020. It is often the case that there is an absence of overt evidence for discrimination, and by extension victimisation (**Igen v Wong**).

409. Our reasons for this are, first that the decision to medically suspend was made on the basis of a few remarks by the Claimant, not medical evidence. We find that this was a flimsy pretext.

410. Second, the comments made in conjunction with the suspension that the Claimant was not only not fit to work in her existing role but in any Band D role

suggested that Mr McComick had decided that the Claimant was going to be removed from his team. This was not a pastoral approach, and it suggested that the possibility of an alternative role was unlikely. In short they wanted rid of her.

411. Third, is the timing. The somewhat unhappy manager relationship between the Claimant and Ms Walker had persisted for years, certainly since 2018. The Claimant made protected act in May and June 2020. By 7 September 2020 the Claimant was suspended. The timing point is not conclusive and would not be sufficient on its own, but looked at in the overall global picture of the relationship it adds something to our conclusion that the protected acts did precipitate the beginning of the end of the Claimant's employment.
412. Fourth, the team meeting went ahead with no recording and no difficulty arose. It is difficult to see why the suspension was necessary.
413. Looking at the matter in terms of the burden of proof provisions, we find that the Claimant has satisfied the burden of proof on her. In other words a Tribunal could looking at the circumstances conclude that the reason for the suspension and remarks about the Claimant's capability to do her role/Band D was in part the making of the protected acts.
414. Has the Respondent satisfied the burden of proof on it to show that the suspension and associated remarks were in no sense whatever because of the protected act? In this case the Tribunal does not accept that a concern about the Claimant's health was the whole reason for the suspension. We find the Claimant's comments were a pretext and the Respondent was looking for a reason to get rid of her. That was in part because of the protected act.

Dismissal

415. We have considered the Claimant's claim (claim 2) that the dismissal was a continuation of the discriminatory issues raised in her first claim. This part of the claim was not separately articulated in the list of issues. We have found that there was only one discriminatory matter which succeeded which was allegation 80 viewed as victimisation. This is the only discriminatory act that could be continuing.
416. The Tribunal will invite submissions at the remedy hearing as to
- 416.1. whether claim 2 includes a claim that the dismissal was victimisation;
- 416.2. if so whether the dismissal was a victimisation detriment;
- 416.3. whether decision to dismiss flowed directly and naturally from the allegation 80 detriment.

Statutory Defence

417. The Respondent is advancing the Statutory Defence.

418. Was the anything done by an alleged discriminator done in the course of their employment?
419. It is quite clear that the decisions which comprise allegation 80 (i.e. the medical suspension and the statement about the Claimant doing her role or roles at Band D) and then subsequently the dismissal were done by Mr McCormick, supported by Ms Hall in HR in the course of their employment.
420. If so, did the Respondent, take all reasonable steps to prevent that person from doing that thing, or from doing anything of that description in that it:
- 420.1. training: all staff are required to attend diversity and ethical behaviour training and refresher training;
 - 420.2. widely disseminated diversity and ethical code of conduct;
 - 420.3. display of posters throughout the establishments; and
 - 420.4. conducting investigations into allegations of discrimination.
421. Focussing specifically on the victimisation which occurred, the burden is on the Respondent to establish this defence, that all reasonable steps had been taken. We do not find in the case of Mr McCormick and Ms Hall that the Respondent has demonstrated that they had both received recent and relevant training in relation to victimisation. We not find that the statutory defence is established.

Harassment

422. The Tribunal, as discussed with the Claimant early in the hearing, kept under review the question of whether the allegations brought as direct discrimination or victimisation ought better to be considered as harassment. In the event we did not find that any of these allegations should have been properly considered as harassment whether relating to race, sex or disability.

UNFAIR DISMISSAL

Reason for dismissal

423. *What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?*
424. We accept the submission put forward on behalf of the Respondent that we must not substitute our view in respect of the decision to dismiss.
425. The relevant background is that the Claimant was being managed as a case of poor performance, but never reached the final stage of that process. There were various things that she did which were described as "behavioural" that might be thought to be conduct, but for which she did not ever any formal warning.

426. The submission of counsel for the Respondent that she was not dismissed because she was medically incapable is strictly speaking right. She was however dismissed for what was described as capability following a capability review. The Respondent relied upon a matter relating to the Claimant's health to dismiss her.
427. The suggestion that meetings be recorded was put forward by the Claimant, who was at pains to say that this was not a reasonable adjustment for a medical reason, but merely to ensure that there was clarity in the instructions that she had been given, given that there was a long-running dispute between herself and her manager as to matters relating to performance.
428. The Respondent placed great emphasis on the Claimant saying that she was "not safe" or "in danger". It is clear from the context in which the Claimant said that what she had in mind, at large part was the danger to her career with the Respondent represented by steps being taken against her under a performance process and/or by being set up to fail.
429. The final Occupational Health report dated 18 September 2020 explicitly stated "is fit to continue in her current role". That report did not suggest that it was necessary for there to be recordings of meetings for her to be safe.
430. The Respondent placed significant emphasis on the Claimant saying that she wanted recordings of meetings not only with her manager/HR but also general team meetings. The Claimant's rationale was that she was being criticised for her performance and that the only way that she could evidence that this was unfair was by recording the meetings to which reference might be made in those discussions about performance.
431. The Respondent took the view that this was inappropriate and would be likely to interfere with the free flow of ideas that, for example the market team meeting on 20 August 2020. The Tribunal finds that the Respondent was entitled to make that decision, and that it had good reasons to do so. There was no requirement on it to allow the Claimant to record every meeting which she attended.
432. Having made the decision that the Claimant could not record the team meeting on August 2020, in fact the Claimant attended this meeting and did not record it. Notwithstanding the fact that she had attended the meeting without recordings being made of it, the Respondent nevertheless went on to conclude that because she had made remarks about being unsafe that she could not continue to work for them in that role or indeed any other role as a Band D.

Fair procedure

433. It is a basic procedural requirement in our assessment for a fair capability dismissal for an employer to discuss with the employee the concern about capability as part of a review, so that the Claimant can comment upon it. In this case the concern about capability was not that the Claimant was unable to do her role, but rather that the decision of the employer not to allow recording in all meetings made her feel unsafe.

434. It seems to the Tribunal that a basic procedural safeguard in the circumstances would have been to allow the Claimant to comment on the Respondent's conclusion that she could no longer continue working at this role or any other at Band D.
435. This was particularly so given that the medical evidence suggested that she was capable of working and that she had recently on 20 August 2020 attended a meeting despite the fact that her request to record the meeting had been declined. There was no medical evidence in support of a conclusion that not recording all meetings would have been harmful to her health. The only evidence in support of this position were some comments made by the Claimant herself, which she clarified as a concern about being set up to fail.
436. In circumstances in which she was otherwise fit to work the Claimant ought to have been able to at least comment on the Respondent's position that it would not extend recording rights to wider team meetings. She may well have accepted this position. Given that she did attend a meeting which she had requested to record following that request being declined, there is a fairly good reason to believe that she would have accepted this position.
437. We find it fell outside of the range of responses procedurally not to allow the Claimant to answer whether she would be prepared to work without recording of all meetings, since this was apparently at the root of the Respondent's decision to dismiss her.

Reason for dismissal

438. The burden is on the employer to show the reason for dismissal. In this case we do not find that the Respondent has shown that capability was the reason for dismissal. The real reason we find was a breakdown in the relationship between the Claimant and Ms Walker. The Respondent used the Claimant's comments about being unsafe as a pretext to dismiss her.

Remedy Hearing

439. Employment Judge Adkin has requested that the judgment and written reasons in this case are not uploaded to the Tribunal's online register of decisions until after the remedy hearing in case either party wished to make any applications under rule 50 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules") or section 11 of the Employment Tribunals Act 1996 (Restriction of publicity in disability cases).
440. A one day remedy hearing has been listed on **Friday 4 November 2022**.
441. The Tribunal will retain the documents from the liability hearing.
442. The parties are ordered as follows:

- 442.1. The Claimant shall provide to the Respondent an updated schedule of loss and all documents upon which she relies relevant to remedy, including medical documents and evidence of attempts to find work by **23 September 2022**:
- 442.2. The Respondent shall provide to the Claimant a remedy bundle, including a counterschedule of loss, the Claimant's documents and any of its own which are relevant to remedy by **7 October 2022**:
- 442.3. The parties shall exchange witness statements by **21 October 2022**. The Claimant must address her attempts to find alternative employment since leaving the employment of the Respondent, or if she had been too unwell she must explain that in detail, by reference to medical evidence.
- 442.4. The parties shall inform the tribunal that they are ready for the remedy hearing or if not why not, and file all relevant documents by **28 October 2022**.

Employment Judge Adkin

Date 14 September 2022

WRITTEN REASONS SENT TO THE PARTIES ON

16/06/2023

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

APPENDIX: LIST OF ISSUES

Jurisdiction

1. The Relevant dates are:
 - (a) ACAS Date A: 10th July 2020
 - (b) ACAS Date B: 24th August 2020
 - (c) Presentation of ET1: 18th September 2020

2. On the assumption that the application for ACAS conciliation was presented on the last possible date, any act occurring before the 11th April 2020 would appear to have been presented out of time.

3. Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
 - (a) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
 - (b) If not, was there conduct extending over a period?
 - (c) If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
 - (d) If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - (i) Why were the complaints not made to the Tribunal in time?
 - (ii) In any event, is it just and equitable in all the circumstances to extend time?

Equality Act 2010 Claims

Protected Characteristic:

4. The Claimant relies upon the protected characteristics of:
 - (a) Race: the Claimant describes herself as Black African (Preliminary Hearing)
 - (b) sex: the Claimant is female; and
 - (c) Disability.

Disability

5. It is accepted the Claimant is a disabled person in accordance with the Equality Act 2010 at all relevant times because of the following condition of psychosis.

Section 13: Direct Discrimination

6. Has the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act 2010. Owing to the length of some of these allegations in the accompanying Scott Schedule the Respondent will set out the allegation number only:

Race and Sex Discrimination

- (a) 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 41, 42, 47, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67, 68, 69, 71, 72, 73, 74, 75, 76, 80, and 82.

Disability

- (b) 44, 45, 46, 55, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, and 83.

Case numbers 2206083/2020 & 2200281/2021

7. If so, and pursuant to s39(2)(d) of the Equality Act 2010, were any of these a detriment?
8. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators who are not in materially different circumstances? The Claimant relies on various comparators depending on the particular allegation.
9. For direct disability discrimination claims, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same skills or abilities as the disabled person (regardless of whether those skills or abilities arise from the disability itself).
10. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

Section 19: Indirect Disability Discrimination (Allegation 80)

11. The Respondent denies the claim, but:
 - (a) accepts it applies safety and well-being policies and performance improvement policies to its staff.
 - (b) denies it applies a PCP of "[relying excessively on anonymous feedback to the exclusion of other sources of information and assessment]" to persons with whom the Claimant does not share the protected characteristic of disability.
12. The Respondent does not admit that the PCP's relied upon by the Claimant would put those persons with the same disability as the Claimant at a particular disadvantage when compared to persons who do not have the same disability.
13. The Respondent contends that the treatment was a proportionate means of achieving a legitimate aim, namely the needs of ensuring its staff are safe and well whilst employed by it and that they achieve the requisite standards of performance as a result of appropriate feedback

Section 27: Victimisation

14. Did the Claimant do a protected act?
 - (a) In April, Sept Oct 2018 complained to Tracey Walker that she'd been treated differently
 - (b) In Oct 2010 she complained about this restructure to Lisa Thomas.
 - (c) On 26 April 2019 she complained of sex and race discrimination to Louise Farnworth.
 - (d) On 11 March 2020 submitted a grievance.
 - (e) On 16 June she submitted a grievance appeal.
15. If so, did the Respondent carry out any of the following because of the protected Act:

Case numbers 2206083/2020 & 2200281/2021

- (a) 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82 and 83.

16. If so, were any of these detriments?
17. Was the giving of evidence or information or the allegation made false?
18. If so, was it given or made in bad faith?
19. If so, then it is not a protected act.

Statutory Defence

20. The Respondent is advancing the Statutory Defence.
21. Was the anything done by an alleged discriminator done in the course of their employment?
22. If so, did the Respondent, take all reasonable steps to prevent that person from doing that thing, or from doing anything of that description in that it:
- (a) training: all staff are required to attend diversity and ethical behaviour training and refresher training;
 - (b) widely disseminated diversity and ethical code of conduct;
 - (c) display of posters throughout the establishments; and
 - (d) conducting investigations into allegations of discrimination.

Unfair dismissal

23. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?
24. As to the reasons why the dismissal was said to be unfair, the Claimant relies upon the reasons set out in her letter of appeal 27 October 2020 dated submitted following her dismissal, which set out nine grounds of appeal (summarised in a truncated form for brevity):
- (a) 1. I have not asked for any reasonable adjustments but rather shared a document titled 'list of Mayoma's needs' a request was not posed as a request for reasonable adjustments but linked to Tracey Walker's incessant identification of varied underperformance issues.
 - (b) 2. Past and recent occupational health assessments have confirmed that I am fit to work in my current role and have not qualified this fitness as subject to any reasonable adjustments.
 - (c) 3. During the 'Capability Review' meeting on the 20th of October 2020, during which I was dismissed, no capability review was carried out.
 - (d) 4. Since the medical suspension, several references have been made to the grievance I submitted in May 2020 but I have not received any notification that all issues raised in the grievance were looked at.
 - (e) 5. There has been a continued practice of providing non-contextual, incomplete statements, attributing a different meaning to what I conveyed through discussions and written texts. To the extent that the medical suspension and the subsequent dismissal relied on misconstrued statements and reports, it follows that the company will come to a different decision if the statements and reports are accurately considered.
 - (f) 6. The Claimant refers to ACAS guidance and says that she was dismissed for raising the grievance.
 - (g) 7. The complaints that I raised in the May 2020 grievance include complaints about working practices that affect more than one employee. The medical suspension and dismissal based on these complaints go against recommendations on 'whistleblowing' policies.

Case numbers 2206083/2020 & 2200281/2021

- (h) 8. The anonymous reports made by co-workers against me have not been investigated through the company's disciplinary procedures nor was C given the opportunity to respond to the claims
- (i) 9. Notwithstanding comments by Terry McCormick suggesting that R were worried about C's situation and the medical suspension C questions if the company's actions of medical suspension and dismissal was the most reasonable path to doing the right thing and protecting an employee's mental wellbeing.