



EMPLOYMENT TRIBUNALS

Claimant: Ms C Mambakasa

Respondent: Government Legal Department

Heard at: London Central (by CVP) **On:** 18, 19, 20, 23, 24 and 25
January 2023 and 22, 23
24 May 2023

Before: Employment Judge H Grewal
Ms D Keyms and Mr R Baber

Representation

Claimant: In person

Respondent: Mr J Feeny, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

- 1 The Tribunal does not have jurisdiction to consider the complaint about failure to make reasonable adjustments before 20 March 2020;
- 2 All the other complaints of failure to make reasonable adjustments are not well-founded;
- 3 The complaints of direct disability discrimination, harassment related to disability and victimisation are not well-founded; and
- 4 The complaint of indirect race discrimination is not well-founded.

REASONS

1 In a claim form presented on 4 June 2021 the Claimant complained of disability and race discrimination. Early Conciliation (“EC”) was commenced on 24 March 2021 and the EC certificate was granted on 5 May 2021. The hearing was adjourned part heard on 25 January due the ill health of the Claimant.

The Issues

2 It was agreed that the issues to be determined were as follows:

Disability

2.1 It was not in dispute that the Claimant was disabled by reason of sickle cell disease and that the Respondent knew that. Whether the Claimant was disabled by reason of vascular necrosis and situational anxiety.

Failure to make reasonable adjustments

2.2 Whether the Respondent knew or could reasonably have been expected to know that the Claimant was disabled by reason of vascular necrosis or situational anxiety.

2.3 Whether the Respondent had a provision, criterion or practice of:

- (a) embarking on the use poor performance procedures without examining underlying factors (relating to disability and impact on the Claimant) including use of the occupational health process;
- (b) proceeding automatically to formal poor performance measures, without first attempting the informal approach as provided for in the Respondent’s procedures;
- (c) repeatedly extending the Claimant’s fixed term contract even though she had completed her probation instead of making her contract permanent;
- (d) requiring the Claimant to work from the office until March 2020 despite the recommendation in the Occupational Health report of 17 May 2019.

2.4 Whether the PCP placed the Claimant at a substantial disadvantage when compared with persons who were not disabled in the following respects:

- (a) The Claimant was not able to perform on a level playing field by comparison (hypothetical) comparators in GLD due to her pre-existing conditions and due to the failure to use informal procedures to explore underlying factors;
- (b) The requirement to work at the office until March 2020 caused the Claimant fatigue;
- (c) The Claimant experienced anxiety as a result of the uncertainty regarding her contract.

2.5 Whether the Respondent knew or could reasonably have been expected to know that the Claimant was likely to be placed at a substantial disadvantage in the manner identified above.

2.6 Whether the Respondent failed to take such steps as it was reasonable to have to take to avoid the disadvantage.

Direct disability discrimination

2.7 Whether the Respondent did the following things:

- (a) Dismiss the Claimant on 9 February 2021 with dismissal taking effect on 3 March 2021 (this was admitted);
- (b) Deny development opportunities to the Claimant by:
 - (i) Not giving her opportunities to acquire wider legal knowledge through practical legal experience, including shadowing hearings, drafting statements and attending legal training;
 - (ii) Not putting in place a structured development plan following the meeting on 8 October 2020;
 - (iii) Withdrawing the Claimant from the “crossing thresholds” course in February 2021.
- (c) Subject the Claimant to negative and micro managing supervision:
 - (i) J Young monitored the Claimant’s start times;
 - (ii) J Young constantly questioned the time recorded by the Claimant;
 - (iii) J Young sent texts to the Claimant while she was in hospital in September 2020;
 - (iv) J Young and E Morris questioned the validity of the sick note issued to the Claimant by her hospital doctor on 26 August 2020;
 - (v) J Young questioned the Claimant about an appointment with Orthopedix regarding her shoulder around or after a one to one meeting with the Claimant, E Morris and J Young on 8 October 2020;
 - (vi) J Young placed particular emphasis on aspects of the Claimant’s performance, including recording chargeable time whilst subject to pain and drowsiness, arising from her conditions; also on some aspects of attention to detail, e.g. time recording and work on transcripts where increasing anxiety would have given rise to greater susceptibility to errors e.g. spelling mistakes in correspondence and in meetings, the last of these leading to the instigation of poor performance procedures and ultimately dismissal.
- (d) Place the Claimant on performance management procedures without first implementing reasonable adjustments or following informal processes or considering the reasons for any performance issues.

- (e) Continued performance management procedures despite the Claimant's ill health.

2.8 If it did any of the above acts, whether they amounted to direct disability discrimination.

Harassment related to disability

2.9 Whether the matters set out at paragraph 2.7(c)(i) – (vi) above, the institution of the poor performance management process and the dismissal of the Claimant amounted to harassment related to disability.

Victimsation

2.10 Whether the Respondent dismissed the Claimant on 9 February 2021 because she had submitted a grievance/appeal dated 18 December 2020 which it is admitted was a protected act.

Indirect race discrimination

2.11 Whether the Respondent applied to the Claimant a provision, criterion or practice ("PCP") when it subjected her to the formal performance management process.

2.12 Whether it applied, or would have applied, that PCP to others who were not black/of African origin.

2.13 Whether the PCP put persons of African origin at a particular disadvantage when compared with persons who were not of African origin. The Claimant's case was that sickle cell anaemia affects performance and it is a disease which disproportionately affects black people/persons of African origin.

2.14 Whether it put the Claimant at that disadvantage.

2.15 If it did, whether the Respondent could show it to be a proportionate means of achieving a legitimate aim.

Jurisdiction

2.16 Whether the Tribunal has jurisdiction to consider complaints about any acts or failures to act that occurred before 25 December 2020.

The Law

3 Section 6(1) of the Equality Act 2010 ("EA 2010") provides,

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

Schedule 1 para 2 EA 2010 provides,

- “(1) The effect of an impairment is long-term if –*
- (a) It has lasted at least for 12 months,*
 - (b) It is likely to last for at least 12 months, or*
 - (c) It is likely to last for the rest of the life of the person affected.”*

(2) If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if it is likely to recur...

5 Effect of medical treatment

- (1) An impairment is to be treated as having a substantial adverse effect on the ability of a person to carry out normal day-to-day activities if –*
- (a) Measures are being taken to treat or correct it, and*
 - (b) but for that, it would be likely to have that effect.*

(2) “Measures” include, in particular, medical treatment and the use of prosthesis or other aid.”

4 Section 13(1) EA 2010 provides,

“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.”

Disability is a protected characteristic (section 4 EA 2010). Section 23(1) EA 2010 provides that on a comparison for the purposes of section 13, 14 or 19 there must be no material differences between the circumstances relating to each case.

5 Section 19 EA 2010 provides,

“(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 legitimate aim.”*

Race is a relevant protected characteristic.

6 Section 20(3) EA 2010 provides that where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty to make reasonable adjustments does not arise if the employer does not know,

and could not reasonably have been expected to know that the disabled person has a disability and is likely to be placed at the disadvantage (Schedule 8 paragraph 20 EA 2010).

7 In Ishola v Transport for London [2020] ICR 1204 Simler LJ stated,

“35 The words “provision, criterion or practice” are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the objective of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the statutory code of practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define the claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words “act” or “decision” in addition or instead...

36 The function of the PCP in a reasonable adjustment context is to identify what it is about the employer’s management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer’s PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers ...but the practice, process or rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the PCP would also apply...

37 In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the true mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability-related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

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

8 Section 26 EA 2010 provides,

“(1) A person (A) harasses another (B) if –

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) The conduct has the purpose or effect of –
 - (i) violating B’s dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.”

9 Section 27(1) EA 2010 provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act. Making an allegation (whether or not express) that A or another person has contravened the Equality Act 2010 is a protected act (section 27(2)(d)).

10 Section 123(1) EA 2010 provides,

“Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of -

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.”

Section 123(3) provides,

“For the purposes of this section –

- (a) conduct extending over a period is to be treated as done at the end of that period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.”

Section 140B provides for extension of time to facilitate Early Conciliation. The effect of section 140B in this case is that complaints about any acts or failures to act that occurred before 25 December 2020 will not have been presented within the primary time limit.

11 Section 136 EA 2010 provides that 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 unless A shows that A did not contravene the provision.

The Evidence

12 The Claimant and Charlotte Goonan (Grade 7 Lawyer with the Respondent) gave evidence in support of the claim. The following witnesses gave evidence on behalf of the Respondent (the positions given in brackets are the positions that they held at the material time) – Jasvinder Young (Grade 7 Lawyer), Emma Morris (Grade 6 Lawyer), Fiona Montgomerie (Deputy Director, Team A1), Elizabeth Coleman (HR Business

Partner), Jonathan Longley (Head of Facilities Management) and Briony Goulden (Deputy Director, HSE and ONR Legal Advisors Team). The documentary evidence in the case comprised about 1700 pages. Having considered all the oral and documentary evidence the Tribunal made the following findings of fact. The fact that the Tribunal has not referred to a particular piece of evidence does not mean that it did not take that evidence into account.

Findings of fact

13 The Respondent is a non-ministerial government department which provides legal services to government departments and other public bodies. It is funded through charging fees to its clients for the legal services that it provides. In the litigation division the Respondent's clients are billed for work undertaken on an hourly basis. Where a piece of litigation is undertaken for a client a case file is opened and fees are charged for all the hours worked on the file. Time recording is undertaken using a system called CMS (case management system) and time spent working on each piece of work is recorded in 6 minute units along with a brief narrative explaining what work has been done.

14 The Claimant describes herself as Black African British. She was born with Sickle Cell Disease/Disorder ("SCD"). The condition causes the Claimant to have episodes of severe pain in different parts of her body which are called "sickle cell painful crises". A report produced by the Claimant in the course of these proceedings states people with SCD covers a spectrum from milder to severe forms of SCD and that premature destruction of red blood cells causes a person with SCD to be severely anaemic and chronically fatigued. The Claimant's medical record showed that she is prescribed co-codamol tablets to be taken when required.

15 At the relevant time the Respondent participated in the Civil Service Care Leavers Internship Scheme. This was a scheme whereby care leavers could be appointed to AO/EO level roles in the Civil Service for a fixed term of one or two years without having to go through the normal recruitment process, which involves fair and open competition and appointment on merit. At the end of that period, the appointment could in certain circumstances be made permanent.

16 The Claimant joined the Civil Service at EO level under the Care Leavers Internship scheme in January 2019. It was agreed that she would be placed in the administrative team in the Respondent's Private Law – Litigation team (known as the A1 team). The A1 team's main client was HM Prison Service and the team acted for it in private law damages cases brought against the Prison Service and also in inquests arising out of deaths in custody. Fiona Montgomerie was responsible for the overall management and leadership of the team. She had a number of Grade 6 lawyers who reported to her. Each of them managed smaller teams usually made up of Grade 7 lawyers, legal officers and trainees. Some of the Grade 7 lawyers also supervised members of the A1 team's administrative staff (known as the BLAST team). The administrative staff were generally EOs who were engaged in supporting the lawyers in the team (including the legal officers and trainees) with their litigation work.

17 Ms Montgomerie arranged for the Claimant to be managed by Jasvinder Young, who was a Grade 7 lawyer in the team and was supervised by Emma Morris. Ms Montgomerie was given permission to share the fact that the Claimant had joined as

part of the Care Leavers Internship scheme with Ms Young and Annie Buxton, who was in charge of the BLAST team. The Claimant would be working as part of the BLAST team. Although Ms Young was the Claimant's line manager, Ms Buxton was responsible for allocation work to the Claimant on a day-to-day basis.

18 Ms Young met with the Claimant before she started her employment. The Claimant told her that she was finishing a law degree and that she was interested in becoming a solicitor. The Claimant also told her that she had sickle cell disease. Ms Young asked her how it affected her, and the Claimant said that she sometimes had episodes when it was particularly bad but that generally she did not let it affect her. She did not provide any further information about it and did not say that she required any adjustments as a result of it.

19 The Claimant commenced employment with the Respondent on 4 March 2019. The Claimant's contract provided that her initial appointment as a fixed-term member of staff would last for one year from when she took up post and that she would be on probation for ten months. It also provided that she would normally work a five day week of 37 hours net (excluding one hour for lunch breaks) and that flexible working was available to all staff subject to the Respondent's business and management needs. If someone wished to work flexibly, a request had to be made to the line manager who would give it due consideration. There was flexibility about what time people started and finished work, but the expectation was that everyone would work during the core hours (10 a.m. to 4 p.m.). The Respondent's office at that time was at One Kemble Street, near Holborn.

20 The key tasks of the administrative staff in BLAST were to manage a broad range of casework support activities, including preparing instructions to counsel, booking counsel, arranging meetings/conferences for caseworkers, making travel and accommodation bookings for caseworkers, copying documents and preparing document bundles, closing and archiving files, processing invoices and preparing/submitted payment requests and liaising with clients, courts and other stakeholders. In addition, they were expected to comply with the Respondent's Time Recording Policy and to record support activities accurately, clearly and comprehensively on CMS. All of the Respondent's employees who do Litigation work (whether they are lawyers or administrators) are expected to record the time they spend on casework ("chargeable hours") and time spent on other activities such as attending training or team meetings ("non-chargeable activities"/"indirect time"). The expectation was that everyone would record 7.2/7.4 hours of work each day, some of it chargeable and some non-chargeable.

21 Ms Buxton arranged for an experienced EO to be the Claimant's "buddy" when she started and for other experienced EOs to provide her with on the job training. Like all new joiners, the Claimant was also given detailed training on CMS.

22 The Claimant completed a DSE/Workstation Assessment on 6 March 2019. The only concern that she raised was about the temperature. She said that it was cold. On 13 March Ms Young had a discussion with the Claimant about making a referral to Occupational Health ("OH") about the Claimant's sickle cell disease. The Claimant was happy for such a referral to be made. A referral was subsequently made.

23 Ms Young had formal one-to-one meetings with the Claimant once a month to discuss how she was getting on. However, they also spoke informally regularly about

work and other matters. At a formal monthly meeting on 8 April 2019 Ms Young shared with the Claimant the feedback that she had received from Ms Buxton which was that the Claimant was fitting in well and was learning quickly. The Claimant said that everything was going well and she was enjoying the work. Prior to the meeting the Claimant had had three consecutive days' sickness absence. Ms Young reminded the Claimant that she needed to let them know daily if she was absent due to sickness and the reason for the sickness as that had to be recorded on their system. They also discussed working hours and Ms Young explained to her that the expectation was that she should be in and ready for work by 10 a.m. They also discussed the Claimant undertaking training called Litigation for administrators.

24 On 24 April 2019 at 10.25 Ms Buxton sent Ms Young an email to inquire whether the Claimant was in. Ms Young responded that she had been expecting her but has just received a text saying that she would not be in that day. Ms Buxton said that as a result of that there were several tasks that needed to be reallocated. On 2 May at 11.11 a.m. a member of the BLAST team asked Ms Young whether the Claimant was away from work that day. Ms Young responded that the Claimant was meant to be in and she had not heard otherwise. On 1 May a caseworker complained to Ms Buxton about the Claimant having delayed in completing a task and there being nothing on the file to indicate what she had done. In her response Ms Buxton said that she had discussed with the Claimant *"at length the requirement of notes and time recording to prove that things have been done on a file."*

25 The Claimant was absent sick from 7 to 16 May 2019 because of sickle cell disease. The Claimant was seen by an OH Advisor on 17 May 2019 and a report was produced on the same date. The report confirmed that the Claimant had sickle cell anaemia which was a serious and lifelong health condition although treatment helped manage many of the symptoms. It referred to the Claimant's recent period of sickness absence and said that it had resulted in her being hospitalised for six days. The advice was that the Claimant was fit to continue in her role. The OH Advisor stated,

"In my opinion, there are no permanent/temporary restriction deemed necessary at this time. However, if operationally feasible you may wish to consider, flexible working pattern i.e. home working when symptoms flare up and time off work for hospital appointments..."

In my opinion with support and treatment on board, there is every chance that she may offer a reliable service into the future.

In regards to her health condition it could only lead to impaired performance when she has a flare up. But hopefully it will remain stable for her. She remains on appropriate treatment, continues to keep hydrated and she tries to keep herself warm at all times."

The OH Advisor also advised that the Claimant would be likely to benefit from micro-breaks throughout the day (1-2 minutes every 30-45 minutes) and suggested that they consider having regular one-to-one meetings with the Claimant to monitor her progress. She also suggested that they undertake a work station assessment to determine whether the Claimant required any adaptations to her work station following her return to work.

26 Ms Young had her next one-to-one with the Claimant on 29 May 2019. 1294 They discussed the OH report. Ms Young said that she would look into the options of the Claimant working from home when she had flare ups. In terms of her workstation the Claimant said that she had felt a breeze/draft in the place where she sat. They discussed repositioning the Claimant's desk and, if that did not work, a possible move. Ms Young discussed with the Claimant the need for her to record whatever work she did on a case. It was agreed that the Claimant would start an attendance note when she started a task to record what she did and to accurately record time. The Claimant asked about the possibility of doing more legal work such as instructions to counsel and legal research. Ms Young's view was that it was important at that stage to ensure that she was completing her key task properly before she moved on to something else.

27 Ms Young raised with Ms Montgomerie and Ms Buxton the possibility of the Claimant working from home when her symptoms flared up. She said that she thought that it would be on an as and when required basis rather than scheduled days working from home. Their view was that if the Claimant's symptoms flared up and she was not well the right thing to do was for her to take paid sick leave rather than feel pressured to work. The Claimant was advised of that and she took sick leave whenever her sickle cell symptoms got worse.

28 At a one-to-one meeting on 10 June 2019 Ms Young told the Claimant that she should arrive at the office between 9 and 10 a.m. and that she should notify them before 9 a.m. if she was not going to be in. The Claimant's explanation for being late was that she was trying to complete her dissertation and was often up late at night working on that which made it struggle for her to get in for 10 a.m. Ms Young suggested that could take annual leave if she needed time to concentrate on her dissertation. There was also a discussion about the Claimant's journey to work, which involved a few changes of transport. Ms Young noted that it appeared at that stage that travel was not the reason for the Claimant's absences but that they would keep it under review. She also noted that the Claimant said that she liked coming in, learning from others and being part of the team.

29 On 17 July (a Wednesday) Ibrahim Halil in the administrative team sent an email to Ms Buxton and one of the lawyers, Kate, that the Claimant had told him on her way out that afternoon that she had been unable to complete a task that she had allocated for Kate and that she was out of the office until the following week. Kate asked for the matter to be reallocated as a matter of urgency. She said that the matter was "*extremely sensitive*" and that a delay in the provision of the material "*reflects very badly on the GLD and our client.*" She concluded by saying, "*Charoufe has really let me down, and by the sounds of it will also now inconvenience her colleagues.*" On 25 July another lawyer drew to Ms Young and Ms Buxton's attention that the Claimant had saved the wrong person's medical records on a particular CMS file which had led to someone else in the administrative team copying those records and sending them to counsel. He said that he had spoken to the other person about the importance of checking that the documents on the file were correct, but felt that someone should also speak to the Claimant about the importance of saving medical records on the correct file. On 26 July a lawyer in the team complained about the Claimant having failed to lodge a bundle of documents with the court for a hearing that morning although she had been clearly instructed to do so.

30 On 22 July the Respondent moved to 102 Petty France.

31 The Claimant's mid-probation review was due to take place at the beginning of August. On 26 July 2019 Ms Young spoke to Ms Buxton to get an overview of the Claimant's performance. Ms Buxton said that the Claimant was enthusiastic, keen to learn and got on well with the team. There had, however, been a number of concerns raised. Ms Buxton raised the matters set out at paragraphs 24 and 28 (above) and also said that the Claimant sometimes came in late and she was not sure whether she was coming in or not, she made late requests for leave, she did not take ownership of tasks and that she listened to music and sang along to it on in the office which some people found distracting.

32 Ms Young also sought feedback from others who had worked closely with the Claimant. Some of it was positive, some of it was not. One of the lawyers in the team said that the Claimant had done some good work for her – she had copied discs and sent papers to counsel. She had done it well and without needing any help or support. She worked very quickly but accurately. She had also found counsel with good experience for her on another case. Another lawyer's response was,

“Good feedback generally for her. No complaints and gets any task I set done well.”

The third one was from Ibrahim Halil. He set out again what had happened on 17 July (see paragraph 28 above). He also said that if she could prioritise her work it would benefit her and that she would benefit from attending lunch time training sessions to understand the work of the team.

33 On 1 August 2019 Ms Young sent the Claimant an email about the mid-probation review meeting that was due to take place on 8 August. She asked the Claimant in preparation to think about the kind of tasks that she had completed, what she thought had gone well and what had not gone well, what steps she had put in place to address the things that had not gone well and what she had learnt. She also said that she had got some feedback from the team which she would discuss with her. She set out briefly the concerns that had been raised so that they could discuss them

34 The mid-probation review took place on 8 August and Ms Young set out what was discussed in the probation review form that was sent to the Claimant on 28 August. She said that the Claimant fitted in well with the team and had created good rapport with the team but had sometimes made it difficult for others to concentrate by listening to music loudly through headphones and occasionally singing along to it. Although she had been told that she needed to be in the office by 10 a.m. she often arrived between 10 and 11 a.m. The issue was not that she did not work a full working day but that Ms Young and Ms Buxton were not sure whether the Claimant would be in on any given day which had an impact on the tasks that had been allocated to the team. There had also been some late requests for leave, The Claimant had initially struggled to record accurately the time taken for tasks and they had had discussions about the importance of time recording. Since their discussions the Claimant's accuracy in time recording had improved. She had undertaken a variety of tasks within the past five months and she had received some positive feedback on the work that she had undertaken. However, a number of concerns had been raised in relation to other tasks. These suggested that the Claimant had not been consistent in demonstrating that she was paying attention to detail. They had also discussed the importance of organising her workload to ensure that she was

aware of the tasks that she had to do and the deadlines that she had to meet. Unfortunately there had been one occasion when the Claimant had not been able to complete a large task despite having been given two weeks to do so. She said that the Claimant was very keen to expand her knowledge and experience of more legal based tasks but she could only do that once the issues that had been identified in the report had been addressed. Ms Young's overall comment was that the Claimant was not at that time at the stage where she would meet the required standards at the end of the probation period but she was hopeful that with a bit of work and focus that she would be able to do so.

35 They agreed that the Claimant would focus on the following things:

- Attention to detail in relation to tasks;
- Ensuring that case holders were regularly updated on the progress of tasks and any potential problems;
- She would take ownership of her tasks and begin to think about the impact that her work had on the team and the cases with which she was dealing;
- She would aim to arrive at the office between 9 and 10 and would advise Ms Young by 9 if she was not going to be in the office for any reason;
- She would try and give as much notice as possible when requesting leave.

The agreed that in order to help the Claimant improve and progress she would attend the lunch-time learning sessions, Ms Young would seek weekly feedback from case holders and they would discuss the areas to focus on listed above at their monthly one-to-one meetings.

36 In order to assess whether the Claimant was meeting the objective of arriving at the office between 9 and 10, Ms Young asked the Claimant to email her every morning when she got into work. Ms Young sent the Claimant an email to remind her to do that and the Claimant said that she would set an alarm on her phone to remind her.

37 On 23 August the Claimant was allocated the task of doing redactions for one of the lawyers by 4 September. At the end of 4 September she informed the lawyer that they would be done by the following day. The lawyer complained about it and said when she had asked the Claimant why they had not been done, she had said that she had been busy with booking counsel. The lawyer sent Emma Morris an email on 10 September about the incident. She said that when she had received the redactions, she had noticed that many of them had been done by one of the Claimant's colleagues at 1 a.m. on 5 September. She said,

"I'm concerned that other members of the admin team are doing CM's work and that this is being done in unsociable hours."

38 At the one-to-one meeting on 5 September the Claimant said that since they had moved to Petty France the temperature in the office was better and the journey was slightly better.

39 On 11 September when Ms Young had not heard from the Claimant after 10 a.m. she sent the Claimant an email and the Claimant responded that she had forgotten on that day and the previous day to send her an email. Ms Young sent the Claimant an email in which she said,

"I am a little worried that there does not seem to be any real improvement in your timings. I really want to be able to tick this off as being achieved so please see if you can get your start times down towards the 10am mark."

The Claimant's response was,

"I have been coming in 10.30 and leaving later, however I am aiming to start reaching the 9-10 o'clock mark."

40 At a one-to-one meeting on 14 November there was a discussion about the Claimant not starting work on time. The Claimant said that she left work late because she arrived late in the morning, she then did her university work when she got home in the evening which meant that she went to bed late which made it difficult for her to get up early and arrived at work before 10. Ms Young suggested that it might help if she changed her routine to get into work earlier so that she could leave earlier, do her university work and get to bed earlier. The Claimant said that she would change her routine to see whether that would help. The Claimant said that if she worked one day a week from home that might help break the week. Ms Young said that they could review that once she had tried the new routine.

41 In November 2019 Paul Cairns replaced Anne Buxton as the head of the BLAST team. On 22 November Kate, a lawyer, asked for two teleconference to be booked for another lawyer. She said that it was urgent and needed to be done within the next 24 hours. She said that if there was significant difficulty and the administrative staff could not do it, they should let her know so that she could do it herself. Mr Cairns asked the Claimant at 9.53 to take on the task. The Claimant sent him and Kate an email at 3.52 that she did not have capacity to take it on as she had three outstanding tasks that she was trying to complete. Kate complained to Mr Cairns and Ms Young about it. Mr Cairns said to Ms Young that he wanted to talk to her about it. He continued,

"I would also like to talk about core condition hours. Starting work at 11 am, the time that Charoufe arrived into the office this morning, is not helpful with regard to the tasks that we have to take on. We are all aware that Admin have found it difficult this week with staff being on annual leave, but this task should have been made an immediate priority when Charoufe logged on this morning."

42 Concerns about the Claimant's performance were raised with Emma Morris at a Grade 6 meeting on 27 November.

43 On 27 November a lawyer in the team complained to Ms Young and Mr Cairns about the Claimant completing a task two weeks after it should have been completed.

44 On 5 December Ms Young sought advice from HR about the Claimant. She told them of the mid-probation review and the objectives that had been set. She said that the Claimant was still not arriving in the office before 10 am and that it had come to light recently that there were still concerns about the quality of her work. She said that it was clear that the Claimant was struggling to meet the objectives set for her to pass probation. On 6 December Ms Young had a meeting Frankie McPeanne, the Respondent's contact on the Care Leaver Internship Scheme. There was a discussion about putting in place a four week development plan to give the Claimant

an opportunity to improve. Ms McPeanne said that the Claimant not being at work during core hours was a serious issue and it rang alarm bells if she was not meeting such a basic requirement.

45 On 16 December Mr Cairns forwarded to Ms Young another complaint from a lawyer who said that the Claimant had done two tasks for him/her which had not been completed properly. In one instance the Claimant had been asked to instruct counsel and to draft instruction to send to counsel. She had done the former but not the latter. In the other instance the Claimant had muddled up the dates for a telephone hearing. In a note dated 16 December Mr Cairns summarised some of the concerns that he had. The Claimant was often on her phone during working hours. She arrived at work after 10.20/30 and sometimes left just before 4 pm. Lawyers found her communication difficult at times and were frustrated by her signing off on work which she believed had concluded but which was incorrect. He had had negative feedback on the Claimant failing to meet deadlines and there being mistakes in the work that she had done.

46 On 19 December Ms Young invited the Claimant to a formal probation meeting on 6 January 2020 to discuss concerns that she had about her conduct and performance. The Claimant was advised of her right to be accompanied. Ms Young set out the performance concerns. They were (i) the Claimant had advised the case holder and the admin inbox that a task had been completed when some elements of the task had not been done, (ii) work had been completed after the deadline given by case holders, (iii) case holders were not always updated on the progress of a task and whether it would be completed on time and (iv) work was completed with mistakes which meant that case holders or other administrative staff had to undertake additional work to complete the task. She gave several examples of those concerns. Under conduct she said that the Claimant was still consistently arriving at work after 10 a.m., she had taken annual leave without having agreed the dates with Mr Cairns and that she had been observed to be continually on her phone during working hours. Some of the performance concerns were repeated under the heading of conduct. She said that after being in the EO role for ten months the expectation was that the Claimant would be able to take on more complex work and manage her time effectively to ensure that tasks were completed on time. She said that at the end of the meeting the Claimant would be set a probation performance review period. At the end of that period a further meeting would be arranged to discuss her performance. If her performance did not approve to an acceptable standard during the review period, it could lead to her dismissal.

47 The probation review meeting took place on 6 January 2020. Ms Young asked the Claimant whether there was anything in the letter with which she disagreed. The Claimant said that she did not agree with the suggestion that she had left before 4 p.m. without saying anything to anyone. In respect of the rest of it the Claimant said that she was not there to make excuses and wanted to focus on how to build and develop. The Claimant said that she wanted exposure to the legal side of the work done by the team. Ms Young advised that that would be a development of her role as an EO but it could not happen until the Claimant was performing her EO role to the required standard. They discussed the various issue raised in Ms Young's letter and what could be done to improve the Claimant's performance in respect of those matters. They discussed the objectives that Ms Young proposed to set for the review period. There were eight objectives. The Claimant agreed the objectives and said that they were achievable and that she needed to buckle down. It was agreed that

they would have weekly meetings to review the Claimant's performance against the objectives.

48 Ms Young sent HR a copy of her notes. The HR advice was that that she should have issued a warning letter at the end of the meeting. In light of the fact that Ms Young's letter inviting the Claimant to the meeting had warned her that a probation review period would be set and that if her performance did not improve during that period it could lead to her dismissal, it is difficult to see why another warning letter was needed. Ms Young pointed out the above fact but was surprisingly advised by HR on 16 January that it was still necessary to give the Claimant a written warning letter.

49 The first review meeting took place on 13 January 2020. It was noted that the Claimant had had a good week but there were still areas in which improvement was requested. The Claimant was still not meeting the objective to arrive at work before 10. Although it was good that the Claimant had immediately told Mr Cairns that she could not complete a costs schedule when the task had been allocated to her, it was something that she should have been able to do. There had also been some inaccuracies in the work that she had done for Ms Young. Ms Young sent the Claimant the minutes of the meeting and asked her to let know if there were an inaccuracies. The Claimant did not point out any inaccuracies.

50 At the second review meeting on 20 January Ms Young gave the Claimant the written warning letter as advised by HR. The letter set out what Ms Young and the Claimant had told the Claimant at the meeting on 6 January. The Claimant had only been at work two days that week as she had been absent sick for two days (with sickle cell disease) and had taken one day's leave to attend a funeral. During the meeting Ms Young went through some of the concerns that had been raised with her about the Claimant's work.

51 On receiving the notes of the meeting the Claimant sent Ms Young an email in which she said that she was disappointed that in the past two weeks Ms Young had indicated that she felt that the Claimant was still not on board to pass probation. She felt that some of the matters raised had not been her fault. She then said,

"Also on illusive medication it hard to think that a disc needs collecting because when others are off ill we just have to step up and help out."

It was the first time that the Claimant had referred to medication causing difficulties. Ms Young said to her managers that she thought that it would be useful to get more information from the Claimant about it in order to decide whether a further referral to OH was necessary.

52 The third review meeting on 27 January was a positive meeting as the Claimant had met all her objective that week. She had arrived at work before 10 every day. There had been positive feedback from case holders about the Claimant's work. Mr Cairns' feedback had been that the Claimant had had a good week with no issues arising. He had advised that the Claimant seemed more confident in her role and had asked for more work as she had capacity. Tasks had been completed within specified deadlines. Ms Young confirmed that the Claimant had had a good week and said that she hoped that it would continue.

53 Following this meeting Ms Young sought advice from HR as to what the options would be if the Claimant successfully completed her probation review period on 3 February as she anticipated that she would. The Claimant's fixed-term contract was due to end on 3 March 2021. The Care Leavers Internship Scheme Guidance for Managers stated,

"30 Towards the end of the 12-month placement, you should review your Care Leaver's overall performance and experience and take on of the following actions, which will differ from placement to placement:

- *Convert to a permanent post (see Section 31);*
- *Extend placement for up to a maximum of a further 12 months;*
- *...*

31 The appointment can be made permanent if the individual meets the criteria for conversion to permanency, as agreed with the Civil Service Commission for this programme. This conversion is under Exception 10 in the Recruitment Principles. It is based on the following criteria and the individual must have been in post for at least 12 months:

- *Where end of year performance management processes are in place, the individual needs to have achieved at least 'met' or 'achieved' in their performance rating for the last 12 months.*
- *Where monthly performance management processes are in place the individual needs to have achieved at least a 'met' or 'achieved' in their performance ratings for each month in the last 12 months...*

33 Departments may extend a placement, however appropriate departmental authority must be obtained in advance. Managers must ensure the total length of a placement, including any extension, is less than two years in duration as this is the maximum time allowed under the Recruitment Principles.

34 If a Department wishes to extend a fixed-term appointment by exception beyond two years it must obtain the specific agreement of the Civil Service Commission.

34 Where placements are not extended or converted to permanency, they will end on completion of the Fixed Term Appointment (Insert Departmental Guidance) under Exception 2 in the Recruitment Principles. Managers must ensure that that contracts are properly ended in accordance with any departmental policies and procedures for Fixed Term Appointments.

35 As a minimum, and in order to ensure procedural fairness, you should:

- *Write to the Care Leaver in advance of their contract end date*
- *Specify in a notice letter, the date on which the placement is due to end, giving an explanation of the reason for use of a fixed-term contract, why the Department is not expecting to renew it and offering a meeting to discuss in more detail*
- *Issue a letter outlining the outcome from any meeting held to discuss the end of the placement."*

54 The HR advice was that as there had been concerns about the Claimant's performance over the preceding year she had not met the criterion to be made permanent. The options, therefore, were to terminate her employment at the end of the one year fixed-term contract or to extend for a period not exceeding one year. The advice was that they should only extend for one year if they were satisfied that the employee's performance would be maintained to the standard expected throughout the year. Ms Young discussed the options with Ms Morris and Ms Montgomerie and they decided that they would extend the Claimant's contract by three months to see whether the Claimant could maintain the improvement in her performance.

55 On 31 January Ms Young informed the Claimant that at the review meeting she would be told that she had passed probation. At the meeting Ms Young said that there had been no concerns about her performance over the previous week and that she had passed her probation. She said that she was pleased the Claimant's performance had improved and that she was now doing what they had asked her to do, but it had taken 10.5 months to get to that point. She explained what the three options were when her fixed-term contract ended, and said that they had chosen to extend her contract for three months. She said that they would not have weekly meetings but the objectives would remain in pace and it was important that the Claimant did not slip back into her old habits. The extension of the Claimant's contract to 28 May 2020 was confirmed in writing on 6 February. Ms Young's understanding was that the Claimant's one year fixed-term contract was due to expire on 28 February 2020.

56 By early March 2020 everyone was becoming increasingly aware of the emergence of Covid 19. On 5 March Ms Young spoke to the Claimant about it and any concerns that she had because of her sickle cell disease. The Claimant said that she was a little concerned as her immune system was not very strong. Ms Young advised her to keep up to date with the announcements and to follow any advice given by her doctors and to let her know if they needed to take any measures. She also began to make arrangements for the Claimant to acquire a laptop so that she could work from home if she was advised not to go to work. The Claimant collected a laptop from the office on 17 March 2020 and thereafter worked from home. Most of the administrative staff worked from home after that although some of them did come into the office occasionally. The Claimant was not required to do so because of her health concerns.

57 Ms Young had a one-to-one meeting over the telephone with the Claimant on 18 March 2022. Ms Young said that the Claimant was meeting all her objective except in relation to time-keeping. The Claimant said that she was aware of the problem but she had a more complicated commute as she had recently moved home. Ms Young said that that would not be an issue now that the Claimant was working from home. The Claimant said that she would email Ms Young when she had logged on.

58 At that time the BLAST team did not have an HEO in place managing the team (Mr Cairns had left). When the lockdown started the team's work declined for a short while. It was not clear at that stage how Covid would impact the work of the team in the coming months. Ms Young received very little feedback about the Claimant's work in the period between March and May 2020. At the one-to-one meeting on 16 April 2020 Ms Young said that she had not received any negative feedback, the

Claimant had generally been logged on at 9,30 and there was no feedback to suggest that the remaining objectives were not being met.

59 Towards the end of April Ms Young had discussion with Ms Morris and Ms Montgomerie about whether the Claimant's contract should be extended or made permanent at the end of May 2020. It was agreed that there was no justification to terminate it at the end of May. The concerns about making it permanent were that there was no HEO in place, they were working under unusual circumstances, the work had declined and for all those reasons there was limited feedback about the Claimant's performance. It was also not clear what their needs were going to be over the next few months. It was felt that the best thing to do was to extend her contract for a while until they were back in the office when they would be in a better position to monitor her performance and to assess whether they were confident that it had improved and that the improvement would be sustained over a long period of time. They realised that the Claimant would not be particularly happy with that decision.

60 Ms Young discussed the extension with HR and the person who had taken over from Ms McPeanne. Neither of them expressed any concern over the extension. On 7 May Ms Young informed the Claimant that her contract was extended to 28 August 2020.

61 At a one-to-one meeting with the Claimant on 5 June 2020 Ms Young discussed with the Claimant the importance of time recording. She said that she had noted there were some days when no time had been recorded and it looked like no work had been done on those days. On other days in excess of ten hours had been recorded. Ms Young expressed concern about her working excessive hours and the potential impact of that on her well-being. In addition there also seemed to be a lot of indirect time recorded. The Claimant said that she often lost work due to system failures with her laptop and she felt that she could not charge the client twice for the same work. Ms Young repeated that it was very important to report system issues to IT. It was agreed that recording would be a focus over the next month to make sure that accurate recording and a better balance of working hours was achieved. The Claimant said that she wanted to do more legal work as she felt that she was doing the same things. Ms Young said that she would look into what tasks were available in the administrative team to see whether there were any tasks that the Claimant was not doing and could do.

62 On 15 June a case handler raised some concerns with Ms Young about the Claimant's performance. She said that the Claimant had been asked to download 15 files from CMS and to create a bundle by 5 June 2020. She had completed the task on 8 June 2020 and had only downloaded 8 of the files. In another case an application had been returned from DWP because the application completed by the Claimant was missing some information and some information had been recorded in the wrong section. She also set out the units of time that the Claimant had charged for the work. She said, "*Both pieces of work are not to the usual standard I have come to expect from Charoufe and the time taken seems to be longer than I would anticipate for such work.*"

63 Ms Young raised these issues with the Claimant at their one-to-one meeting on 19 June. The Claimant said that some of the mistakes on the work might have been due to the difficulties she was having with her laptop. It was agreed that the Claimant would contact IT that afternoon and tell them that they had to either sort the issues

with her laptop or give her a new one. Ms Young said that if she had no success, Ms Young would request a new laptop for her on Monday. They also discussed the Claimant's time recording and it was agreed that the Claimant would be given further training on time recording. Her target for billed time for the year was 1065 hours. Ms Young explained that although Imran Jobber, who had replaced Mr Cairns, had asked for volunteers to come into the office once a week, that did not apply to the Claimant unless her consultant confirmed that she was not at increased risk if she came into the office.

64 The Claimant was absent sick with sickle cell disease from 23 to 29 June 2020. She had informed Ms Young that she had sickle cell pain in her arm and was in hospital for two days. Ms Young conducted a return to work interview with her on 1 July 2020. The Claimant said that the additional medication that she had had to take because of the pain made her feel queasy and hence she had not been able to meet with Ms Young at the time that they had arranged. Ms Young said that if she was not feeling well she should not be working. They discussed the Claimant's medication. The Claimant said that her regular medication did not have any side effects but when she was in pain she had to take additional medication and that sometimes had side effects, as it had that morning, but she was able to continue working. Ms Young asked the Claimant whether there was anything else that the Respondent could do to help her. The Claimant said that it would help her if she had a desk on which to work. Ms Young said that she would look into that as it was not on the list of equipment that one could request on the service desk.

65 On 6 July Ms Young sent the Claimant a link to guidance on working from home and the support that was available and asked the Claimant to use that in order to get a desk.

66 On 9 July Ms Young trained the Claimant on time recording.

67 The Claimant was on annual leave from 20 to 28 July 2020.

68 On 23 July Ms Young had a discussion with Ms Morris, Ms Mongomerie and Mr Jobber about what to do in respect of the Claimant's contract which was due to expire on 28 August. The general consensus was that there were still issues with the Claimant's performance which had been raised by a case holder and with the Claimant's time recording. Ms Young said that she had provided the Claimant with the training on it, there were things that she would have expected the Claimant to know which she did not. For instance, the Claimant had been recording issues with IT to the file. The general view was that they could not confirm the Claimant while those issues remained. It was also felt that if it had not been for the IT issues the Claimant's contract would not have been extended. There was some feeling that the Claimant had some responsibility for sorting out the IT problems but it was recognised that that might have contributed to her shortcomings. They decided to ask HR to extend her contract for six weeks to see whether her performance improved once the IT problems had been resolved. The Respondent had agreed to pay the Claimant to obtain broadband.

69 Ms Young spoke to the Claimant on 29 July. The Claimant said that broadband was up and running and the internet seemed fine. She said that she was getting the desk from IKEA and was waiting on that. Ms Young said that they had had a discussion about the drop in her performance but had also recognised that there had

been problems with IT. She said that they had decided to extend her contract to 9 October to sort out the IT issues and to give the Claimant an opportunity to show that she could perform to the level expected of her. She said that if her performance did not improve during that period then it was unlikely that they would extend her contract or make her permanent. They discussed how the Claimant could claim expenses for her desk and the broadband.

70 Following that meeting the Claimant sent Ms Young an email in which she said that it was very disappointing to come back from holiday to be told that her contract was being extended for one month to see if her performance improved. She said that she had had a lot of issues with her laptop and connections. She asked her to give her the details of the complaints that had been made by the case handler. Ms Young responded on 4 August. She said that she had raised the complaints made by the case handler with her in the meeting of 19 June and repeated what they were. She said that at the meetings on 5 and 19 June they had discussed the concerns that Ms Young had about her time recording. She said that the Claimant had not been available to attend scheduled meeting and had not contacted Ms Young to explain why she would not be able to attend and Ms Young had had to chase her when she had not attended. She said that in light of those issues they did not consider it appropriate to confirm her in post.

71 On 4 August HR advised Ms Young that if there was no improvement and the Claimant's contract was to be ended, best practice would be to have a meeting one month before the end of the contract to tell the Claimant that. Ms Young shared that advice with Ms Morris and Ms Montgomerie and told them that she would provisionally schedule a meeting with the Claimant on 9 September and suggested that they meet around 19 August to discuss the Claimant's progress.

72 Ms Young had a monthly meeting with the Claimant on 7 August 2020. In response to questions about well being the Claimant said that she had some pain in her shoulder and was waiting for a consultant referral to physiotherapy. She said that it was not affecting her work, it just affected her movement. In respect of her objectives, it was noted that all tasks had been completed on time and had generally been done as requested. There were, however, still concerns about the Claimant's time recording. Ms Young pointed out that the Claimant had not accurately recorded the activity on which she had been engaged. Ms Young also expressed concern that it appeared that on three days that week the Claimant had not recorded a full day's work, and on one of those days had only recorded 13 units of work. Ms Young emphasised the importance of recording time accurately. She also noted that the Claimant had joined some meetings later.

73 Ms Young met with Ms Morris, Ms Montgomerie and Imran Jobber on 17 August 2020 to discuss the Claimant's performance. Prior to the meeting she had sent them copies of the Claimant's time recording sheets. It appeared from them that the Claimant was recording excessive time for certain tasks. The Claimant had covered the post inbox in the absence of the person who normally covered it. Mr Jobber's feedback on how she had managed that was negative. The conclusion of the discussion was that unless there was a huge improvement in the next few weeks, it was unlikely that she would be confirmed in post.

74 On 17 August the Claimant informed Ms Young that she was having an x-ray for her shoulder pain that afternoon. The Claimant was due to meet with Ms Young and

Ms Morris on 19 August. At 9.17 that morning she sent Ms Young a message that she was not well and had a crisis on her shoulder and was not going to be able to work. Ms Young sad that she was going to be on leave for the rest of the months and asked the Claimant to keep Mr Jobber and Ms Morris informed about whether or not she was well enough to work. On 20 August Ms Morris did not hear from the Claimant and at 1.22 p.m. she sent the Claimant a message to ask her whether everything was alright. The Claimant responded that she had sent a message to the wrong Emma the previous night. On 23 August at 2.14 pm the Claimant sent Ms Morris a message that she had been admitted into hospital. Ms Morris exchanged a few messages with her to express her sympathy and to wish the Claimant well. The Claimant said that she had sickle cell crisis pain in her lower back, arm and leg. The Claimant sent her messages that she appreciated her support. On 1 September the Claimant said that she was out of the hospital.

75 Ms Young returned to work on 1 September. She sent the Claimant a message to ask her how she was and to ask her to send in a sick note when she had a moment. The Claimant sent a copy of her sick note on WhatsApp. It said that she was unfit to work from 26 August to 7 September because of "*sickle cell anaemia – an acute vaso-occlusive crisis.*" The entries on the certificate were handwritten and some of them (the number of days the Claimant was unfit to work and the dates) had been altered. On 8 September the Claimant said that she was still not well enough to return to work and Ms Young advised her that she would need to submit a further sick note. She also raised a query about the previous sick note – she said that they wanted to be clear about what the correct dates were and why they had been altered. The Claimant said that the doctor had changed the dates after she had signed the note on the basis of further information that she received. On 11 September Ms Young chased the Claimant for the sick note to cover the period from 8 September. The Claimant then sent in a sick note certifying her as unfit to work from 7 to 15 September because of "*recent admission for sickle cell crisis requiring analgesia post discharge.*"

76 The Claimant's GP notes submitted for the hearing record "*19 August 2020 – Avascular necrosis of bone.*" The details given are "*right shoulder early stages – humeral head.*" The date 11 November 2020 appears at the end of that line and it is not clear whether that episode ended on that date. The next entry for avascular necrosis of bone is on 24 September 2021.

77 The Claimant returned to work on 16 September 2020. The Claimant was due to have a return to work meeting with Ms Young and Ms Morris but she spoke to Ms Morris over the telephone before that meeting. The Claimant asked whether there was an issue with her fit note as Ms Young had queried it. Ms Morris said that there was no issue but that they had wanted to clarify the dates as there had been some crossing out. The Claimant said that she was beginning to feel anxious and stressed about the situation at work and that she felt that she was being micro- managed and that if she made a mistake it seemed to be a big issue. She had been working hard to adjust during the pandemic and had had a lot of problems with IT and had to look after her grandmother and wasn't sure that these matters were taken into account when discussing her performance. It sometimes felt that everything that she did was questioned and she felt uncomfortable and nervous about her work as a result of all that. Ms Morris said that she was sorry that the Claimant was feeling anxious and stressed. She said that certain discussions had been, and would continue to be, necessary given the nature of her contract and the feedback that they had received.

She suggested possible ways to help the Claimant feel less anxious in such discussions and said that in future she would attend all such discussions with Ms Young. Ms Morris set out the discussion in an email to the Claimant and the Claimant responded that she had “*captured everything*” that she had said.

78 Ms Young and Ms Morris conducted a return to work interview with the Claimant on the same day. The Claimant said that she had not had a crisis like that before, she was having issues with her shoulder and had been referred to a shoulder expert. She said that she was still in pain but was not taking as many pain killers as before. Ms Young expressed concern about whether the Claimant was in fact fit to return to work and asked the Claimant whether it might be helpful to have a phased return to work. The Claimant said that she would speak to her GP about that. Ms Young asked the Claimant whether there was anything the Respondent could do to support her. The Claimant said that physically there was nothing that the Respondent could do. She said that she felt that she was being micro-managed, that she was not performing and was not trusted and felt that she was constantly battling for her job. She said that all that made her feel anxious. Ms Young said that they would bear that in mind when they had conversations about her work, but that the conversations had to be held. That, however, was not the focus of the meeting that they were having at that time. The Claimant said that the shoulder pain started after the crisis and she had been told that that was common with sickle cell patients.

79 On 23 September the Claimant provided a medical certificate from her GP which said that for a period of one week (from 21 to 28 September) the Claimant was fit to work with amended duties and altered hours. The GP said that due to pain she could benefit from reduced tasks or tasks that could be done over a longer time frame/with less urgency. Ms Young asked Mr Jobber not to allocate to the Claimant that week any urgent tasks or those with short deadlines.

80 The Claimant’s managers decided to extend the Claimant’s contract to take into account the time that the Claimant had been absent sick. On 25 September the Claimant was sent a letter that her contract had been extended to 30 November 2020.

81 On 6 October 2020 Ms Young made another referral to the Occupational Health in respect of the Claimant. She sought advice on whether there was an underlying health problem causing frequent short-term absences and impacting on performance at work. She said that since her last assessment in May 2018 the Claimant had had a number of sickness absences as a result of her sickle cell disease and more recently had experienced a significant crisis resulting in hospitalisation. She said that in light of the Claimant’s recent crisis they wanted an updated assessment to determine whether any adjustments were required.

82 On 25 September Ms Young sent the Claimant the matters that would be discussed at the one-to-one meeting that was due to take place the following week. One of the matters to be discussed was time recording. She gave the Claimant details of five particular cases where there were concerns about her time recording. She also gave details of matters that she wanted to raise in relation to “attention to detail.” Ms Young also set out the time-table for the next two months in that letter. She said that they would have another one-to-one meeting in the week commencing 26 October, a decision would be made in the week commencing 2 November as to what would happen at the end of the Claimant’s fixed-term contract and she would

be advised of that decision by 9 November. Although there was no right to be accompanied at the one-to-one meetings, the managers acceded to the Claimant's request to be accompanied by a trade union representative.

83 For a variety of reasons the first one-to-one meeting did not take place until 8 October. On 7 October Ms Young sent the Claimant her time recording reports for the previous two weeks which she said would be discussed at the meeting. She noted that there were quite a few days when the amount of time recorded was three hours or less. **647** Ms Morris attended the meeting as had been agreed earlier. The Claimant was accompanied by Time Megone from PCS trade union. **653** They started the meeting by talking about the Claimant's health. The Claimant said that she still had problems with her shoulder, she was still in pain and having to take medication for the pain. She said that some days she had to log out earlier because she felt nauseous and sick as a result of taking the medication. Ms Young said that that was not an issue as long as she let her know that she was doing that. She also said that on occasions she had noticed that the Claimant was logged on late. She said that she did not want her to be working excessive hours or late into nights. The Claimant said that having a desk and chair had really helped and she did not finish work with aches and pain in her upper body. Ms Young said that that they were still applying the adjustments that her GP had recommended for her first week back. The Claimant said that she had been given one or two things with shorter deadlines but that she did not mind that. Ms Young said that they would continue with that but if it got too much they could look at it again. Ms Young noted that the Claimant had attended an induction session that she had run called "life of a civil claim." The Claimant said that that had been really good. She also said that she wanted to learn more about litigation and to do things like drafting witness statements. Ms Young said that she needed to get the basics right before she could progress to different things. Ms Young said that she had also explained to her that if she wanted to get into a legal role, there were other routes within the Respondent to do that. They then discussed the objectives. Ms Young said that there was positive feedback about her getting tasks done in time and accurately. There remained concerns, however, about the Claimant's time recording. The Claimant's reaction to that was that she felt that she was not being trusted and that they felt that her time recording was not truthful. She said that that made her feel anxious. The Claimant said that she did not know how to record time that was lost due to IT issues. Ms Young said that they had gone through all that when she had given her the training in July. Ms Young said that the Claimant had only recorded 45 units the previous weeks, which made it look like she had only worked 4.5 hours that week. The Claimant said that she was working slowly and had worked more hours than that but did not want to record them all and she had also not recorded systems failures. Ms Young said that she had stressed many times to the Claimant why it was important to record time accurately.

84 On 9 October Tim Stillman in the Respondent's HR department advised Ms Young that someone on a fixed term contract did not need to be put through a performance management process in order to end the fixed-term contract. Ms Young shared that advice with Katie Pryce, a Civil Service HR caseworker in the Ministry of Justice, and sought her view of it. Ms Pryce disagreed with that advice and said that the Claimant should be put through a poor performance management process in order to avoid the risk of the Claimant complaining of less favourable treatment as a fixed-term worker and of disability discrimination. The process she recommended was to have a formal meeting to discuss the Claimant's poor performance, a first stage warning could be given at the end of that meeting, there would then have to be

a period of about a month to review the Claimant's performance, then another meeting, if the performance was still not satisfactory a final warning could be given with a further review period of another month followed by a meeting at which dismissal could be considered. Under the Care Leavers Internship Scheme the Claimant's contract could not have been extended beyond two years unless an exception was made and the agreement of the Civil Service Commission was obtained and she could not have been made permanent unless she had achieved a "met" or "achieved" in her performance rating for the last twelve months. In those circumstances the Respondent had no alternative but to terminate her employment when the fixed-term contract ended. All that the Respondent was required to do was to comply with paragraphs 35 and 36 of the Care Leavers Internship Scheme Guidance to Managers.

85 Ms Young sent the Guidance to Ms Pryce and asked her whether that changed or impacted on her advice in any way. Ms Pryce responded on 22 October that it did not. Her view was that failure to follow the process for managing poor performance could lead to the Respondent being in breach of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2022. We have reservations as to whether that view was correct. The difficulty with the course recommended by Ms Pryce was that even if the Claimant's performance improved during the performance review periods her contract could not ordinarily be extended beyond two years and she could not be made permanent if she did not meet the criteria in paragraph 31. It was pointless to go through a process when, regardless of the outcome of the process, the Respondent would have no alternative but to terminate the Claimant's employment.

86 Occupational Health provided its advice on 16 October 2020. The OH report referred to the Claimant's shoulder problem and said that she had now been diagnosed with vascular necrosis/trapped nerves in her hands. It said that that was affecting her ability to manage her normal day-to-day activities and said that she was not sleeping well and her concentration was not as good as normal due to poor sleep and the pain relief medication. The advice that the Claimant was fit to remain in work and the advisor made certain recommendations. These were a break away from the workstation for five minutes every half hour, reducing her work to a more manageable level if sustainable, working from home and a DSE assessment. The OH advisor's opinion was that the Claimant's health concerns were not due to her work although she noted that the Claimant's perception was that it might have exacerbated her issues.

87 On 21 October Ms Young asked OH certain questions about the advice that been given. In particular, she asked whether the vascular necrosis was linked to the Claimant's sickle cell disease, whether the poor concentration was as a result of the sickle cell disease, whether it was short-term or long-term and how much longer the Claimant needed to be given to complete her tasks and whether the Claimant would be able to work the core hours between 10 am and 4 pm with the regular breaks. At a one-to-one meeting on 22 October Ms Young told the Claimant to take regular breaks and to request a workplace assessment.

88 At a one-to-one meeting on 11 November Ms Young informed the Claimant that they were likely to extend her contract, which was due to end at the end of that month, to follow the performance management procedure to deal with the

performance issues that they had raised with her on 8 October. She was following the advice that she had been given by Ms Pryce.

89 On 12 November Ms Young invited the Claimant to a formal meeting on 20 November to discuss the performance concerns that had been raised with her on 8 October. She set out in detail the concerns in her letter. There were concerns in four areas – time recording, accuracy and attention to detail, time keeping and keeping line manager involved and time management and task progression. She set out numerous examples of time not being recorded properly between 28 September 2020 and 4 November 2020. In relation to accuracy and attention to detail she said that the time recording descriptions were often not clear and contained numerous spelling mistakes and she referred to an audio transcript prepared by the Claimant which had been of poor quality. She highlighted the dates on which the Claimant had not been logged on by 10 a.m. She gave examples of two tasks that she had asked the Claimant to do which had not been completed by the deadline given and for which she had had to chase the Claimant. The Claimant was advised of her right to be accompanied.

90 The OH response to Ms Young's questions was dated 30 October but was received by Ms Young on 12 November. The OH response was that the advisor did not know at that stage whether the vascular necrosis was linked to the Claimant's sickle cell disease or not, the reduction in targets or extending the time given to the Claimant for tasks should be discussed with her and business needs would also have to be taken into account to determine what was sustainable, there was no indication that the Claimant would have any issues working between 10 am and 4 pm.

91 On 12 November the Claimant had a long telephone conversation with Ms Montgomerie. The Claimant was upset about the poor performance management process and felt that it was unfair. She said that they were development points and the poor performance process was unwarranted. She said that Ms Young focused on the things that she did not do well and did not take the positives into consideration. She said that the goalposts kept changing and there was always some reason why she could not be made permanent. She said that she felt that she was at breaking point.

92 Ms Young sought feedback from Mr Jobber on the Claimant's performance, He provided it on 17 November. He said that the Claimant frequently handed in work late. She was often asked to provide an update on the status of the work, after the initial deadline, either by him or the case handler. He said that there were some case holders who did not want their work allocated to the Claimant. He said that he had noticed on some tasks that no time had been recorded. The Claimant had not demonstrated that she was confident in more complex tasks such as transcripts, bulky redactions and complex and large bundles.

93 On 17 November the Claimant's fixed-term employment was extended until 3 March 2021.

94 The performance management meeting took place on 27 November and lasted two hours. The Claimant was accompanied by Mr Megone. Ms Young dealt first with the issue of time recording. She said that there were some entries that were appropriate and evidenced but there were other cases of either excessive time being recorded or none being recorded. The Claimant said that she felt that Ms Young was

implying dishonesty and the anxiety about time recording was putting additional pressure on her. She also said that it was due to IT problems. Ms Young said that she understood the health and IT issues but these did not explain why there were chunks of time when nothing was recorded. She said that it was not her intention to suggest dishonesty. She said that there were big chunks of time that had not been recorded or evidenced. They needed to be able to present the client with an evidenced note which would explain why a particular task had taken so long. They went through the various examples that Ms Young had given in her letter. The Claimant said that she felt that Ms Young was just focusing on the things that she had not done well and not acknowledging those that she had done well. Ms Young said that she did not doubt that there things that the Claimant did well but she could not ignore the problems and areas of concern. She said that they had tried informally to get the Claimant to improve but that had not worked. She also referred to the Claimant often not being logged on by 10 a.m. The Claimant's explanation was that that was due to IT issues or her not being well. Ms Young did not accept that it was always due to IT issues and she said that if the Claimant was not well enough she needed to let them know. She said that she had often had to chase the Claimant after 10 to find out whether she would be working that day. She had no difficulty with the Claimant not being able to work because of health conditions but said that there had to be communication so that the business knew that. Ms Young said that they would meet every week and agree certain areas on which the Claimant would focus. She made some suggestions about how the Claimant could improve her performance. The Claimant said that they were decent suggestions but she felt that she should not be in performance management.

95 On 1 December Ms Young sent the Claimant an email about the OH recommendations. She asked the Claimant whether she had requested a workstation assessment through the service desk and whether it had been done. She said that the OH advisor had not been able to say how much longer it took the Claimant to do tasks because of poor concentration and that the Claimant had asked for time to consider that at the meeting on 27 November. The Claimant had said that her concentration fluctuated and Ms Young had suggested that one way of dealing with might be for the Claimant to let them know in the morning whether she was having a good day or a bad day, and if it was the latter they would be aware that it would take her longer to complete tasks that day. She asked the Claimant for her thoughts on what other adjustments would assist her in respect of that.

96 On 10 December Ms Young sent the Claimant a letter to say that she was being given a first written warning because her performance was below the expected level for the reasons discussed at the performance review meeting on 27 November. She said that the Claimant's performance would be reviewed during a period of four weeks starting on 14 December 2020 and ending on 8 January 2021. She attached to the letter certain objectives against which the Claimant's performance would be reviewed. These related to time recording, accuracy and attention to detail, communication (which included letting Ms Young know by 10 am if the Claimant was not going to be working because of health issues or IT issues were preventing her from logging on), time keeping and management and IT (including liaising with some one in IT to get to the bottom of any IT issues and to keep Ms Young updated on the progress of it and to submit a service desk report whenever IT issues had an impact on her ability to work). She said that they would meet every week to discuss her progress and again at the end of the review period.

97 On 10 December Ms Young also forwarded to the Claimant an email that had been sent to various people about a development programme called Crossing Thresholds which was running courses aimed at those at AO and EO levels. In her email to the Claimant she said,

“I am sure you have seen this but may be something to look into.”

The Claimant tried to register for the course and raised with someone called Johura Hannan certain difficulties that she had. Ms Hannan was informed that the Claimant would need to have her line manager’s approval as the cost was quite significant. Ms Hannan forwarded that to the Claimant and said,

“Also, I think you’ve already got your LM approval? Remind me who this is again.”

In response the Claimant simply supplied her line manager’s name. She did not say anything about whether she had got her approval. Ms Hannan assumed from her response that she had.

98 The first review meeting took place on 18 December. The Claimant was accompanied by Mr Megone. Ms Young said that on most days the Claimant had been logged on by 10.15 and there had been one day when she had logged on later without letting Ms Young know that she would be doing that. She said that that was an improvement and she hoped that it would continue. Ms Young that there were still concerns about the lack of notes on the file confirming the time recorded and she went through those with the Claimant. She asked the Claimant whether she had contacted the person in IT since they had last spoken about it and the Claimant said that she had not had the chance. She said that she had not had any major freezes recently.

99 On 18 December the Claimant appealed against the poor performance management process and raised a grievance. **795** The grievance said that the Claimant was disabled by reason of sickle cell anaemia, vascular sclerosis (trapped nerves in hands) and situational anxiety. It said that the Respondent had failed to make reasonable adjustments and that placing the Claimant on the poor performance management plan was disability related harassment and direct disability discrimination. It also said that the style of management had worsened the Claimant’s anxiety as she felt that she was being judged against standards not applied to others and she was, therefore, seeking a change of line manager.

100 The Claimant was absent sick from 29 December to 5 January with flu. Ms Young had a one-to-one with the Claimant on 6 January and advised her that the review period might be extended as the Claimant had been absent sick. She said that she getting advice on it. The Claimant said that she had spoken to the contact that she had been given in IT and that he had switched something off which he had said might help. The next one-to-one was supposed to be on 13 January but the Claimant had a “do not disturb” sign on. Ms Young sent her emails and they arranged to have the one-to-one the following day. At the one-to-one on 14 January the Claimant said that her computer had been really slow and that it had taken her an hour to load up. She was advised that if it was that bad she needed to get in touch immediately with her contact in IT.

101 On 20 January the Claimant informed Ms Young that she had been given a place on the Crossings Threshold course. Ms Young said that it had not come to her to approve it. Ms Young discussed the matter with Ms Montgomerie. The cost of the course was around £1600. Having regard to the cost of the course, the fact that approval had not been sought from the Claimant's line manager and the fact that the Claimant was in the middle of a performance management process and that her employment might be terminated in the near future, they decided that they could not let the Claimant attend that course. Ms Young conveyed that decision to the Claimant at a one-to-one meeting on 27 January 2021. The Claimant was unhappy and said that Ms Young had forwarded the course to her and had encouraged her to apply for it. Ms Young explained that she did not see her email to the Claimant as approval for her to go on the course but for her to look into it and discuss it with her. The Claimant spoke to Ms Montgomerie about it and Ms Montgomerie explained to her why she could not go.

102 During January Ms Montgomerie and Ms Morris and the HR Business Partner, Liz Coleman, were considering extending the performance review period because of the Claimant's sickness absence and made inquiries as to whether the Claimant's contract could be extended beyond two years. On 27 January Ms Montgomerie and Ms Coleman met with a Civil Service HR caseworker. By that time it was clear to them that under the Care Leavers Internship Scheme the Claimant's employment could not be made permanent unless there had been satisfactory performance over the preceding 12 months and that it could not be extended past two years without obtaining the prior consent of the Civil Service Commissioners. As the Claimant's performance had not been satisfactory over the preceding 12 months, her employment could not be made permanent. At the meeting they decided that there was no point in approaching the Civil Service Commissioners to seek an extension as it was very unlikely that it would be given. As confirmation in post required satisfactory performance over a 12 month period they would need to ask for an extension of at least 12 months. The HR advice was that in 99% of cases, the request for an extension had been refused. In this case they had had two years to work out whether they could confirm the individual. That combined with the length of extension that would be required made it very unlikely that the extension would be granted.

103 Mr Megone had asked for the performance management process to be paused while the Claimant's appeal and grievance were dealt with and for a further OH referral to be made. Ms Montgomerie wrote to Mr Megone on 28 January. She said that she had been advised that it was not necessary to pause the performance management process until the appeal had been concluded. She said that they had already had a report from OH and were awaiting the Claimant's comments and any input from her medical advisors in relation to that. She also informed him that they were transferring the Claimant's line management to Charlotte Goonan.

104 On 9 February 2021 Ms Montgomerie wrote to the Claimant to inform her that her employment would end on 3 March 2021. She said,

"As you know you joined GLD under the Care Leavers Internship Scheme (the 'Scheme') in March 2019. The Scheme is a fixed-term appointment for a maximum of two years. Because candidates are not appointed on merit, on the basis of fair and open competition, the Scheme operates under the terms of Exceptions 2 and 10 in the Civil Service Commission's Recruitment Principles:

'Support for Government Employment Programmes.' This means there are specific rules governing the management of the fixed term contract.

Your contract was extended on 17 November 2020 to the maximum term of two years. The conditions governing conversion to a permanent contract operate under Exception 10 and are very narrow. They state that 'Where monthly performance management processes are in place the individual needs to have achieved at least 'met' or 'achieved' in their performance ratings for each month in the last 12 months.' You have not met the required standard for performance and therefore do not meet this condition.

Consequently, as your contract has previously been extended to the maximum term and it is not possible within the conditions of the Scheme to extend it further or convert your fixed term contract to a permanent contract, your employment with GLD will end on 3 March 2021."

105 On 10 February 2021 Mr Megone asked for the Claimant's grievance to be extended to include Ms Montgomerie's decision to dismiss the Claimant and a complaint of indirect race discrimination on the grounds that sickle cell anaemia disproportionately affects black staff. He also asked for a different person to investigate the grievance as the Grade 6 lawyer from immigration, who had been asked to investigate it, was at a lower level than Ms Montgomerie. Thereafter, there were some delays in progressing the grievance/appeal.

106 The Claimant's employment was terminated on 3 March 2021.

107 On 10 March 2021 the Claimant was referred for psychological therapy for anxiety and stress. In response to a question about what the main difficulty was and how long the Claimant had experienced it, the answer given was "*anxiety and poor sleep as ongoing employment issues and a legal case.*"

108 On 10 May 2021 Mr Megone repeated the request that he had made on 10 February. On 22 June Ms Coleman informed the Claimant and Mr Megone that Briony Goulden, Deputy Director of HSE, would hear the Claimant's grievance/appeal. The hearing took place on 4 August 2021. A note of the hearing was sent to the Claimant and Mr Megone on 10 August 2021. Mr Megone returned it with some amendments on 7 September. Following the hearing Ms Goulden sought further information from Ms Young and Ms Morris. She sent her decision to the Claimant and Mr Megone on 20 September. Ms Goulden rejected the Claimant's appeal against the decision to issue her with a warning for poor performance and concluded that there had been no discrimination against the Claimant, either on the grounds of disability or race. She set out in an Annex attached to the letter her reasons for coming to the conclusions that she did.

Conclusions

Disability

109 It was not in dispute that the Claimant was disabled by reason of sickle cell disease while employed by the Respondent. The Respondent accepted in closing submissions that the problems which the Claimant had with her shoulder (referred to as avascular/vascular necrosis of bone) were related to the sickle cell diseases and

the Claimant was, therefore, disabled as a result of it. We concluded that the Claimant first began to experience those difficulties in about August 2020. She first mentioned shoulder problems to her employer when she told Ms Young that she was having some pain in her shoulder on 7 August 2020. On 17 August she said that she was having an x-ray that afternoon for her shoulder pain and on 19 August she talked about a “crisis on her shoulder”. The only references to avascular necrosis of bone in the Claimant’s medical records are on 19 August 2020 and 29 September 2021 and the description given is “*right shoulder early stages – humeral head.*” We concluded that from about August 2020 onwards the Claimant’s disability in relation to her sickle cell disease included the problems with her shoulder as well.

110 There was no evidence before us that the Claimant had ever been diagnosed with a mental impairment that had a substantial and long-term adverse impact on her normal day to day activities. There was no reference in the Claimant’s GP notes to “depression” or “anxiety” or to any medication for those conditions. There was no reference to depression or anxiety in any of the sick notes submitted by the Claimant or in the OH reports of 17 May 2019 or 16 October 2020. The Claimant did not have any sickness absence for stress or anxiety. The only reference to stress and anxiety in any of the medical documents was the referral for therapy made after the termination of the Claimant’s employment. That referred to the cause of that as being the ongoing employment issues and a legal case – all related to the termination of the Claimant’s employment.

111 The first reference that the Claimant made to anxiety was on 16 September 2020 when she said to Ms Morris that she “was beginning to feel anxious and stressed about the situation at work because she felt that she was being micro-managed and that if she made a mistake it seemed to be a big issue.” There are two important points to make in respect of that. First, the Claimant started feeling anxious in mid-September 2020. Secondly, what made her anxious was the fact that her manager was raising concerns about her performance with her. By that stage the Claimant had been told that her contract had been extended to 9 October 2020 and that if her performance did not improve by then it was unlikely that the Respondent would extend her contract or make her permanent. At the return to work meeting on 16 September 2020 the Claimant again made the point that it was the fact that concerns were being raised about her work that made her feel anxious. The Claimant never said anything to her managers about suffering from depression.

112 We accept that the fact that concerns were being raised about the Claimant’s performance and her awareness that her employment could be terminated if her performance did not improve made her feel anxious and worried. Those are natural human reactions in a situation like that. Feeling anxious as a reaction to difficult and challenging events in one’s life is very different from having a medical condition of anxiety or a mental impairment which has substantial and long-term adverse effect on a person’s ability to carry out normal day to day activities. There was no evidence before us that the Claimant had any such mental impairment or medical condition and we concluded that she was not disabled by reason of anxiety.

Failure to make reasonable adjustments (paragraph 2.2 – 2.6 above)

113 There was no evidence before us that the Respondent applied a practice (my emphasis) of embarking on poor performance procedures without examining underlying factors relating to disability and the impact on the individual, including use

of the occupational health process. There was no evidence that that was what the Respondent generally did or that it was its normal way of operating or that it would do so in the future in similar circumstances. This is a classic case of the Claimant saying that that was what the Respondent did in her case and that it was unfair. The Claimant is not complaining about a practice that the Respondent applied but about the way it treated her. We do not accept that that amounts to a PCP. In any event, we concluded that the Respondent did not do that in the Claimant's case.

114 The Claimant was subjected to two performance procedures. The first was in January 2020 to determine whether the Claimant had satisfactorily completed her probation period. Before the Respondent started that process it had sought advice from OH about the Claimant's sickle cell disease and what impact, if any, that would have on her performance and what adjustments were necessary. The advice had been that it would only have an effect on her performance when she had a flare up. Nothing changed in her medical condition between May 2019 and January 2020 to warrant the need for another OH report. In the midst of that review the Claimant referred to the effects of medication and the Respondent decided that it would get more information from her about it to see whether a further referral to OH was necessary. However, as the Claimant's performance improved and she passed probation, it was not felt necessary to take the matter further.

115 The Respondent started the poor performance management process on 12 November 2020 when Ms Young sent the Claimant a letter inviting her to a formal meeting to discuss concerns about her performance. The meeting took place on 27 November. In addition to the OH report of May 2019, the Respondent had by then the OH report of 16 October 2020 which also dealt with the Claimant's recent shoulder problem and the effect on her of the pain medication. The Respondent sought further clarification from OH in respect of that report and that was received on 12 November. By the time the meeting on 27 November took place the Respondent had sought OH advice about the Claimant's disability and the impact that it might have on her performance. The Respondent had also encouraged the Claimant to get further advice from her GP about a phased return to work and it had received the GP's note of 23 September. Furthermore, the Respondent had had numerous discussions with the Claimant over a period of almost two years about the areas in which her performance was not satisfactory and there was nothing to indicate that the problems were due to her disability. There was no evidence that the Claimant's failure to record time properly had anything to do with her sickle cell disease. One of the objectives set in the performance management process was for the Claimant to let Ms Young know if changes to her health meant that it was going to take her longer to complete tasks. The fact that it might do was factored into the objectives. It is clear from the above that the Respondent did not embark on poor performance procedures without examining underlying factors relating to disability and impact on the Claimant.

116 There was no evidence that the Respondent applied a practice of proceeding to formal poor performance measures without first attempting the informal approach, nor did it do so in the Claimant's case. The Claimant's performance was discussed with her over a period of many months at informal one-to-ones, formal monthly meetings, at the mid-probation review, the probation review process at the end of the probationary period. The Respondent had tried to resolve the problems informally over a period of almost two years.

117 The Respondent did not apply a practice of extending fixed-term contact after the employee had successfully completed his/her probationary period. It did extend the Claimant's contract on a number of occasions after she had completed her probationary period. The Claimant's performance had not been consistently satisfactory throughout her probationary period. It had not been satisfactory between March and August 2019. It had improved between September and November 2019. Further concerns had been raised about the Claimant's performance in November and December 2019, as a result of which the Respondent was not able to say that the Claimant had satisfactorily completed the ten month probationary period. The Claimant was given a further four weeks to demonstrate improvement in her performance. As her performance improved in that four week period, it was confirmed that she had passed probation. However, she could not be made permanent under the Care Leavers Scheme because her performance had not been satisfactory over the preceding 12 months. The Respondent could have terminated her contract at the end of the one year fixed-term. It chose not to do that but to give her the opportunity to demonstrate that the improvement over the previous four weeks could be maintained over a longer period. On the basis of the Claimant's performance up to that time, it was not confident that it could be sustained, and it, therefore, extended the Claimant's contract for a short period. Further extensions were also for short periods for a variety of different reasons.

118 We accept that that would make anyone in that situation feel anxious about his/her long-term employment and that the Claimant felt anxious about it. Any care leaver in the same position as the Claimant would probably have felt the same way. We do not accept, however, that it placed someone with sickle cell disease at a substantial disadvantage in comparison with persons who did not have that disability. Even if it had, we would have concluded that extending the Claimant's contract for a period of one year would not have been a reasonable adjustment in light of the Claimant's poor performance during much of the preceding year and when the Respondent was not confident that the improvement over a short period could be sustained over a longer period.

119 The Occupational Health report of 17 May 2019 did not recommend that the Claimant should be allowed to work from home. It recommended that the Claimant should be allowed to work from home when her symptoms flared up. The Respondent's view on that was if the Claimant's symptoms flared up and she was not well she should take paid sick leave and not work at all. The Claimant did that between May 2019 and March 2020 and after that when she was in fact working from home. The Respondent did apply a practice until March 2020 that all the administrative staff had to work in the office. There was no evidence before us that that put the Claimant at a substantial disadvantage because travel to work was difficult for her because of her disability. That was not the advice given by Occupational Health. The Claimant did not tell the Respondent that travel to work was difficult because of her sickle cell disease and she did not request to work from home to accommodate that. The Claimant did say that her commute to work was not easy as it involved using different modes of transport.

120 The claim form in this case was presented on 4 June 2021. Any complaint in that claim form about a PCP that ceased to be applied in March 2020 would be one year out of time. The Tribunal could only consider the claim if it considered it just and equitable to do so. This particular PCP was first set out on 18 January 2022 when the Claimant was asked to clarify what PCPs she said had been applied. It was said by

the Claimant that the Respondent had failed to implement an OH recommendation in its report of May 2019 “*regarding home working two days a week.*” The report made no such recommendation. The Claimant never complained to her employers about any such recommendation and the failure to implement it. The Claimant never asked to work from home two days a week. It did not feature in the Claimant’s grievance of 18 December 2020. The Claimant has had the assistance of Mr Megone since October 2020. There was no explanation by the Claimant of why this complaint was not made earlier, either internally or in the Tribunal. We concluded that the Claimant did not raise it earlier because she did not think that OH had made any recommendation about working from home and because she did not believe that travelling to work put her at a disadvantage because of her disability. The complaint is considerably out of time, it was not presented earlier because the Claimant did not believe that it was a valid complaint and, in those circumstances, we considered that it would not be just and equitable to consider the complaint. If we did have jurisdiction to consider it, it would have failed for the reasons set out at paragraph 118 (above).

Indirect race discrimination (2.11 -2.15 above)

121 The Respondent has a Managing Poor Performance Policy which applies to all its employees, including fixed-term appointments, who are performing poorly and who have completed probation. The policy is applied when performance is still not at the required standard despite early measures having been taken to improve performance. It was applied to the Claimant in those circumstances.

122 The Claimant’s case was that that practice (the application of the policy) put persons of an African origin at a particular disadvantage because a larger proportion of people of African origin suffer from sickle cell disease/anaemia and sickle cell disease/anaemia affects performance. There was in evidence before us the 2019/20 Annual Data Report of the National Haemoglobinopathy Registry (“NHR”) which gave a breakdown of sickle cell patients by ethnicity. The number of patients of African origin far exceeded those of any other ethnic origin. The next two highest groups were those of any other black ethnic origin and Caribbean ethnic origin. The numbers of patients of white or Asian origin was negligible in comparison. On the basis of that evidence, we accept that a larger proportion of people of black/African origin have sickle cell disease than those of non-black/African origin.

123 There was, however, no evidence before us that sickle cell disease/anaemia affects performance or that it leads to poor performance in administrative roles such as the Claimant’s role. There was no evidence that the shortcomings identified in the Claimant’s performance were as a result of her having sickle cell disease. There was no evidence of any link between sickle cell and the Claimant’s failures to record time accurately and properly. There was no evidence that application of the Respondent’s Poor Performance Policy put persons of black/African origin at a particular disadvantage when compared with persons not of that ethnic origin. There was no evidence that a greater proportion of black/African employees were poor performers compared to those of other ethnic origins.

124 If we had concluded that the application of the policy put persons of black/African origin at a particular disadvantage when compared with persons not of that ethnic origin, we would have concluded that the Respondent had shown that it was a proportionate means of achieving the legitimate aims ensuring that employees met

the required standards of performance and providing the appropriate standards of service to clients.

Direct disability discrimination/harassment/victimisation (2.7 – 2.10 above)

Dismissal of the Claimant

125 The Claimant alleges this to be an act of direct disability discrimination disability-related harassment and victimisation. In order to establish direct disability discrimination the Claimant has to prove that she was treated less favourably than someone else whose circumstances were not materially different would have been treated and that the reason for the less favourable treatment was that she had sickle cell disease which was a disability. The material circumstances in the Claimant's case were that she had been appointed under the Care Leavers Internship Scheme and her performance over a period of almost two years. It was clear from all the evidence before us that for the greater part of that time the Claimant's performance was not of the standard that was required for someone in her role and that, despite training and support, the Claimant had not been able to demonstrate over a sustained period that she could perform to the expected level. We have found that the concerns about the Claimant's performance were genuine and justified. This was not a case where the concerns about performance had been fabricated as a pretext for getting rid of the Claimant because she had a disability. The Respondent dismissed the Claimant because it could not make her employment permanent under the Care Leavers Internship Scheme and it would need permission from the Civil Service Commissioners to extend it beyond two years and there was no likelihood that it would get that permission.

126 In order to establish that her dismissal was an act of direct disability discrimination in those circumstances, the Claimant would have to prove that someone else who had been appointed under the Care Leavers Internship Scheme and whose performance had been as poor as her performance, but who did not have a disability, would not have been dismissed. There was no evidence before us from which we could conclude that and the Claimant has failed to establish a prima facie case of direct disability discrimination.

127 The Claimant also argued that the dismissal was disability-related harassment. As we have said above the Claimant was dismissed because she could not be made a permanent employee under the Care Leavers Internship Scheme and her employment could not be extended beyond two years. That has nothing to do with her disability. The Claimant ended up being in that position because of her performance over the two year period. There was no evidence that the shortcomings in the Claimant's performance that had been identified were as a result of her disability. The Claimant's dismissal was not related to her disability. It is also difficult to see how it would be reasonable to view the Respondent's following the rules of the Care Leavers Internship Scheme as having the effect of creating a humiliating, offensive, hostile degrading, humiliating or offensive environment for the Claimant.

128 It was not in dispute that the Claimant's grievance/appeal on 18 December was a protected act. The issue for us was whether the Respondent dismissed her because she had done that protected act. We have found that the reasons for the dismissal are those that were set out in the note of the meeting on 27 January 2021 and which are summarised at the end of paragraph 125 (above). The Claimant's

contract could and would have been terminated for the same reasons at the end of November 2020 had it not been for the advice given by Ms Pryce that they could not terminate the contract without going through a poor performance management procedure. Her view was not shared by other HR professionals. The decision to dismiss the Claimant for those reasons was being contemplated before she did the protected act and it had nothing to do with the protected act.

Denying the Claimant development opportunities

129 This is a complaint of direct disability discrimination. The Claimant complains of three different things. The first is that she was not given opportunities to acquire wider legal knowledge through practical legal experience. The Claimant was appointed to an administrative role the duties of which are set out at paragraph 20 (above). The Claimant was not appointed to a legal role. The Claimant often expressed a desire to do work that was more akin to legal work and Ms Young made it clear to her that she had to demonstrate first that she was capable of doing the role to which she had been appointed to the required standard before she could contemplate giving her more complicated legal work. The second point that she made was that if the Claimant was interested in doing legal work, there were various entry routes to that such as legal internships and apprenticeships. There was no evidence that another EO in the administrative team who was not performing to the standard required was being given practical legal experience or a hypothetical person in similar circumstances would have been treated more favourably. There was no evidence from which we could conclude that the Claimant was not given more practical legal experience because she was disabled by reason of sickle cell disease.

130 The Claimant's second complaint is that she was not put on a structured development plan following the meeting on 8 October 2020. It was not clear what the Claimant meant by this. If it is referring to the same issue as at paragraph 129, our conclusions would be the same. If it is referring to something else, we are not clear what should have been included in such a plan and why the Claimant should have been put on it. At that stage the Claimant's contract had already been extended twice to give her an opportunity to show that she could perform to the level expected of her and it was due to end on 30 November. The Claimant had been told that a decision would be communicated to her by 9 November as to what would happen at the end of the fixed-term contract. In any event, there was no evidence from which we could conclude that there had been any less favourable treatment of the Claimant in respect of the failure to put her on structured development plan or that her disability had anything to do with it.

131 The final matter was the withdrawal of the Claimant from the "crossing thresholds" course in February 2021. It is not in dispute that that happened. It was an expensive course and the Claimant should have gotten approval from her managers to attend it and she had not. Had she done so, it would not have been granted because of the cost of the course, the fact that the Claimant was going through performance management procedures and the fact that her employment might have been terminated at the end of her fixed-term contract. There was no evidence that the Respondent would have acted any differently had the Claimant not been disabled by reason of sickle cell disease.

Subjecting the Claimant to negative and micro-managing supervision

132 This is said to be a complaint of direct disability discrimination and disability-related harassment. The Claimant complains of several different things under this heading. It is not in dispute that Ms Young raised with the Claimant the areas in which her performance was not to the required standard told her what she needed to do to improve it and monitored her performance to see whether it improved. That is a perfectly acceptable and reasonable way of managing poor performance. It is to her credit that she spent many hours of her time in getting feedback on the Claimant's performance, sharing that with the Claimant, making suggestions and giving training on how to improve it and making notes of the various meetings and sharing them with the Claimant.

133 It was not in dispute that Ms Young monitored the Claimant's start times and that she constantly questioned the time recorded by the Claimant. She monitored her start times because the Claimant often did not start work at 10 a.m. and did not inform Ms Young before 10 a.m. that she would either be late or not attending on a given day. That continued although Ms Young frequently told her that she had to do that. The Claimant started late both when she worked from the office and when she worked from home. Ms Young did not do that because the Claimant was disabled. There was no evidence that Ms Young would have treated another employee who frequently started work late but was not disabled any differently. There was no evidence that the Claimant's starting work late regularly was a result of her disability. It might well have been conduct that was unwanted by the Claimant but monitoring the start time of an employee who regularly starts work late cannot amount to harassment under section 26 of the Equality Act 2010.

134 It was not in dispute that Ms Young constantly questioned the time recorded by the Claimant. Time recording was important in the department in which the Claimant worked because it was what the Respondent used to justify the fees it charged its clients. It had been explained to the Claimant many times what she needed to do and it was not difficult. Despite that, the Claimant did not record time accurately and clearly – she either recorded too much time or too little time, she did not make proper attendance notes, she did not provide clear details of exactly what she had done. As her manager, Ms Young was entitled to raise with her the concerns that she had and to try to get the Claimant to do it properly. She did not question the Claimant's time recording because she was disabled, she questioned it because the Claimant did not do it correctly. There was no evidence that she would have treated a non-disabled employee who did not record time accurately any differently. There was no evidence that the Claimant's failure to record time properly was as a result of her disability. Ms Young managing the Claimant's performance in the way that she did does not amount to harassment.

135 Ms Young did not send text messages to the Claimant while she was in hospital in August 2020. Ms Morris did. She sent her messages to express her sympathy and wish her well after the Claimant sent her a message telling her that she was in hospital. The Claimant said that she appreciated her support. The sending of those messages in those circumstances cannot possibly amount to a detriment or to harassment.

136 Neither Ms Young nor Ms Morris questioned the "validity" of the sick note dated 26 August. Ms Young said to the Claimant they wanted to be clear as to what the

correct dates were and why they had been altered. The number of days for which the Claimant had been certified as unfit to work and the dates had been written by hand and then crossed out and changed. She raised that query because she wanted to be clear about what the correct dates were. When the Claimant gave an explanation, she did not pursue the matter any further. The Claimant complained to Ms Morris about it and Ms Morris explained why Ms Young had raised the query that she had. The query was raised because dates had been altered and there was lack of clarity. The fact that the Claimant was disabled had nothing to do with it. There was no evidence from which we could conclude that Ms Young would not have raised the same query had the Claimant not been disabled.

137 There was no evidence about Ms Young questioning the Claimant about an appointment with Orthopedix about her shoulder around 8 October 2020.

138 It was not in dispute that Ms Young raised concerns about the Claimant's time recordings, lack of attention to detail and her work on transcripts and her spelling mistakes. There was no evidence before us or Ms Young that these shortcomings were the result of the Claimant's disability. There was nothing in the Occupational Health reports to indicate that the Claimant's disability would affect her performance in that way. Ms Young raised those matters with the Claimant because those were the areas in which she had concerns about the Claimant's performance and not because the Claimant was disabled.

Placing the Claimant on performance management procedures and continuing them

139 For the reasons set out at paragraph 115 and 116 (above) we do not accept that the Respondent started the performance management procedure in November 2020 without following informal processes, considering the reasons for any performance issues and implementing reasonable adjustments. Informal processes were followed and Occupational Health advice was sought and that and the Claimant's GP's advice were followed. It is also important to bear in mind that under the rules of the Care Leavers Internship Scheme the Claimant's employment would have had to be terminated at the end of two years because of her not having performed to an acceptable level in the preceding 12 months and there was no likelihood of the Commissioners agreeing to an extension. The Respondent started the performance management procedure because Ms Pryce took the view that if the Claimant was dismissed without the procedure having been implemented it could be in breach of the Regulations protecting the rights of fixed-term workers. The Respondent placed the Claimant on the procedures because it was advised that any termination of her employment because poor performance had meant that her employment could not be confirmed under the Care Leavers Internship Scheme could leave it open to complaints under other Regulations. It did not place her on the performance management procedure because she was disabled. There was no evidence that it would have dealt any differently with a non-disabled employee in similar circumstances.

140 The allegation is that the Respondent continued with the procedure despite the Claimant's ill health. It is not clear to what ill health the Claimant is referring. The Claimant returned to work after a 3 week sickness absence on 16 September 2020. Her GP advised that she was fit to work and recommended amended duties and altered hours for one week from 21 to 28 September. The OH advice on 16 October was that the Claimant was fit to remain in work. When the performance management

process commenced in November 2020 there was no evidence that the Claimant was unable to work because of ill health. The OH recommendation to reduce her work to a manageable level was implemented and adjustments were made to give her longer time to complete task when she felt that her concentration was not good. After the process started the Claimant was absent sick with flu from 29 December to 5 January. On 6 January the Claimant was advised that the Respondent was looking to extend the review period because the Claimant had been absent sick for part of it. The Claimant was not subjected to the detriment of which she complains. If she was, there was no evidence that she was treated less favourably than a non-disabled person would have been in similar circumstances or that the reason for was that she was disabled.

141 The Claimant also argued that the institution of the poor performance management process was harassment related to disability. We have set out at paragraph 139 (above) the reason why the Respondent started the process in November 2020. It had nothing to do with the Claimant's disability. Furthermore, as we have already said before, there was no evidence that the performance concerns which led to the Claimant being in the position that her employment could not be made permanent or extended were a result of, or caused by, her disability.

Employment Judge - Grewal

Date: 13/07/2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

13/07/2023

FOR THE TRIBUNAL OFFICE