EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms Masawad Shaeen	V	**Practice Plus Group Health and Rehabilitation Service Ltd**

Heard at: Birmingham by CVP **On: 17, 18, 19, 20 and 21 October 2022**

Before: Employment Judge Dean

Members: Mr P Davis

Mrs I Fox

Representation:

For the Claimant: **in person**

For the Respondent: **Ms Rosie Kight, of counsel**

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The respondent subjected the claimant to unlawful discrimination in breach of sections 20 and 21 of the Equality Act 2010 in failing to comply with their duty to make reasonable adjustments in relation to the claimant's disability as it related to a failure to conduct a BAME risk assessment.

2. The claimant's complaints of victimisation in breach of section 27 Equality Act 2010 do not succeed and are dismissed.
3. The respondent terminated the claimant's employment fairly by reason of the claimant's capability in accordance with section 98(2)(a) and 98(4) of the Employment Rights Act 1996 and the claimant's complaint of unfair dismissal does not succeed and is dismissed.

REASONS

Background

1. The claimant in this case was employed by the respondent and their predecessors as a healthcare assistant since 22nd April 2002 and her employment ended on 26 November 2021 for reasons related to her capability following a health capability review meeting on that date. The respondent business is that of providing independent healthcare services in prisons and young offender establishments and provides a 24-hour health service within the prison community.

2. The claimant initially submitted a complaint to the employment tribunal on 25 April 2021 in respect of a complaint that the respondent failed to make reasonable adjustments to accommodate her disability. The claimant had engaged in early conciliation through the offices of ACAS which began on 2 March 2021 and concluded on 5 March 2021. Subsequently the following the termination of the claimant's employment on 25 November 2021 submitted an application to amend her complaint on 24 December 2021 to include further allegations in respect of failures to comply with the duty to make reasonable adjustments and of victimisation and the application was accepted on 2 February 2022. An amended response to all claims was presented by the respondent on 1 March 2022. The respondent resists all complaints.

List of Issues[63-66]

3. At a case management Preliminary Hearing before Employment Judge Algazy QC held on 7 July 2022 the issues to be determined at the final hearing of the complaints were identified to be as follows:

1. Whether the claims or any of them were submitted in time and if not in time in relation to the Equality Act 2010 complaints is it just and equitable to extend time.

   The timeline for the submission of the claim was identified as follows:
   ACAS Early Conciliation begins: 2 March 2021
   ACAS Early Conciliation concludes: 5 March 2021
   Claimant's submits her ET1: 25 April 2021
   Claimant's employment terminated 26 November 2021
   Claimant applied to add new claims 24 December 2021
   Claimant's application accepted 2 February 2022
   Respondent submits amended response 1 March 2022
   It is evident that acts occurring on or after 3 December 2020 are plainly in time.

   <u>Unfair Dismissal – s.98 Employment Rights Act 1996</u>

2. When the respondent dismissed the claimant on 26 November 2021, did it do so for the potentially fair reason of capability, as per s.98(2) Employment Rights Act 1996?

3. If so, did the respondent act reasonably in treating the claimant's capability as a sufficient reason for dismissing the claimant, as per s.98(3) Employment Rights Act 1996?

<u>Disability Discrimination – Equality Act 2010</u>

<u>Jurisdiction issues</u>

4. Were all of the claimant's claims for disability discrimination brought in time, such that the Tribunal has the jurisdiction to hear them? In considering this, the Tribunal may have to determine whether certain claims form part of an ongoing course of action.

5. If any claims were not brought in time, is it in any event just and equitable to extend the time limit for bringing the claims, so as to render the claims as being brought in time?

Disability Status – s.6 Equality Act 2010

6. For her claims of disability discrimination, the claimant is relying on the condition of Obsessive Compulsive Disorder ("OCD") as a disability for the purposes of s.6 Equality Act 2010, and it is understood that this incorporates anxiety and an eating disorder.

7. It is accepted that the claimant did have OCD and that this constituted a disability for the purposes of the Equality Act 2010 at all times relevant to the claim.

8. Further, the respondent accepts that it was aware that the claimant had the mental impairment of OCD at all times relevant to the claim, which is understood to be from August 2020 to May 2021 (inclusive).

9. It is also accepted that the claimant did have anxiety and an eating disorder and these conditions constituted disabilities for the purposes of the Equality Act 2010 at all times relevant to the claim. Further, the respondent accepts

that it was aware that the claimant had the impairments of anxiety and an eating disorder at all times relevant to the claim, which is understood to be from August 2020 to May 2021 (inclusive).

Failure to make reasonable adjustments – ss. 20 & 21 Equality Act

10. A "PCP" is a provision, criterion or practice. Did the respondent apply the following PCPs:

    1. Requiring the claimant to return to work from shielding in August in the absence of carrying out a risk assessment;

    b) Requiring the claimant to work without insufficient PPE namely insufficient bacterial wipes, ill-fitting/inadequate gloves; no or ill-fitting visors;

    c) From 23 November 2020 to January 2021 requiring the claimant to request annual leave via H.R. (failed to give an immediate response to her request so causing a delay);

    d) From February to May 2021 the managers failing to provide any email or regular support to the claimant whilst she was off sick (from 17 January 2021) to ensure she was coping;

    e) In March 2021 notifying the claimant about a required change in her rota from family friendly hours; and/or

    f) Requiring the claimant to work in the absence of a referral to Occupational Health until February 2021 (the claimant says her nurse had recommended this in November 2020)?

11. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that they aggravated and exacerbated the claimant mental health condition?

12. 10. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

13. What steps could have been taken to avoid the disadvantage? The claimant suggests that the respondent should have:
    a. Carried out a risk assessment and identify any risk the claimant may be subject to;
    b. Provided sufficient PPE;
    c. Granted the claimant annual leave without delay;
    d. Supported the claimant by contacting her and checking she was coping;
    e. Not have notified the claimant of a change to her rota; and/or
    f. Referred the claimant to Occupational health in November 2020.

14. Was it reasonable for the respondent to have to take those steps ?
15. Did the respondent fail to take those steps?

Victimisation – s.27 Equality Act 2010

16. The claimant carried out a protected act for the purpose of s.27 Equality Act 2010 when she submitted her claim form on 25 April 2021, which included claims of discrimination under the Equality Act 2010.

17. Did the respondent dismiss the claimant on 21 November 2021 because she carried out the protected act of submitting her claim form?

Issues of Remedy if Claimant successful

18. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
19. What financial losses has the discrimination caused the claimant?
20. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
21. If not, for what period of loss should the claimant be compensated?
22. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

23. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
24. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
25. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
26. Did the respondent or the claimant unreasonably fail to comply with it ?
27. If so is it just and equitable to increase or decrease any award payable to the

claimant?

By what proportion, up to 25%?

Should interest be awarded? How much?

3. Applicable Law

Unfair dismissal

4. The relevant legislation is found at s98(1), (2) and (4) **ERA**.

5. It is generally for the employer to show the reason for dismissal and that it is a potentially fair one, such as capability: this is not a high threshold for a respondent. In **Gilham and ors v Kent County Council (No2) 1985 ICR 233**, the Court of Appeal held as follows:

The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [s98(4)] and the question of reasonableness.

Unfair dismissal – fairness

Substantive fairness

6. Regarding capability cases, one of the potentially fair reasons to terminate employment falling within section 98(2)(a) the relevant factors to determine whether the dismissal was fair may include:
   a. Whether the employer has made inquiries often consulted with the employee about their own health including where relevant it impacts upon their ability to undertake their duties and to consider changes or adjustments that being met may be made or alternatives to those duties for the individual East Lindsey District Council v Daubney [1977] IRLS 181 EAT;
   b. The current state of the employees health and a prognosis for a return to health an suitable alternative employment.

7. In all aspects of such a case, including consideration of sanction, in deciding whether an employer has acted reasonably or unreasonably within s98(4) **ERA**, the tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances. Whether the tribunal would have dealt with the matter in the same way or otherwise is irrelevant, and the tribunal must not substitute its view for that of a reasonable employer – **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, London Ambulance Service NHS Trust v Small [2009] IRLR 563.**

Procedural fairness

8. Following the case of **Polkey v AE Dayton Services Ltd [1988] ICR 142**, it is well established that fairness in procedure is a vital part of the test for reasonableness under s98(4) **ERA**. It is not relevant at this (the liability) stage to consider whether any procedural unfairness would have

made a difference to the outcome: that is a matter for remedy (the issue in **Polkey** is set out below).

9. If there is a failure to adopt of fair procedure, whether by the ACAS Code's standards, or the employer's own internal standards, this will render a dismissal procedurally unfair.

10. Regarding dismissal for conduct issues, the reasonableness of the procedure rests fairly heavily on the reasonableness of the investigation, and the provision of opportunity for the employee to make his position, explanation and mitigation heard and understood.

11. Procedural and substantive fairness do not stand as separate tests to be dealt with in isolation – **Taylor v OCS Group Ltd [2006] ICR 1602**. It is, ultimately, a view to be taken by the tribunal as to whether, in all the circumstances, the employer was reasonable in treating the reason for dismissal as a sufficient reason to dismiss.

12. Ms Kight, Counsel for the respondent draws our attention to the case of McAdie v RBS [2007] EWCA Civ 806: incapability for performing work of the kind which an employee is employed by the employer to do which is caused or materially contributed to by the employer's conduct is only one factor in determining the fairness of a dismissal:

13. *paras 37-42 Wall LJ, quoted Underhill J in EAT paras 4 and 5, in particular "…It seems to us that there must be cases where the fact that the employer is in one sense or another responsible for an employee's incapacity is, in a matter of common sense and common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to 'go the extra mile' in finding alternative employment for such an employee, or to put up with a longer period of sickness absence than would*

otherwise be reasonable….However, we accept…that…it must be right that the fact that an employer has caused the incapacity in question, however culpably, cannot preclude him forever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work…Tribunals must resist the temptation of being led by sympathy for the employee into including granting by way of compensation for unfair dismissal what is in truth an award of compensation for injury…."

Jurisdiction – time limits and continuing acts

14. Section 123 of the EA10 concerns time limits. It provides:

"(1) 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.

(3) For the purposes of this section—

(c) conduct extending over a period is to be treated as done at the end of the period;

(d) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(e) when P does an act inconsistent with doing it, or

(f) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it*."

15. The statutory wording of section 123 of the EA10 is slightly different than in the Sex Discrimination Act and the Race Relations Act and, arguably, may be wider. However, for these purposes, we have assumed that the test is the same and that the well-established principles apply.

16. The law provides that in respect of discrimination claims and detriment claims, if there is a continuing course of conduct it is to be treated as an act extending over a period. Time runs from the end of that period. The focus of the Tribunal's enquiry must be on the substance of the complaint that the respondent was responsible for an ongoing state of affairs in which the claimant was less favourably treated. The burden of proof is on the claimant to prove, either by direct evidence or by inference from primary facts, that the alleged acts of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs see Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA.

17. If any of the complaints were not in time, the Employment Tribunal must consider whether there is nevertheless jurisdiction to hear them. In discrimination cases the test is whether it is just and equitable to allow the claims to be brought.

18. When deciding whether it is just and equitable for a claim to be brought, the Employment Tribunal's discretion is wide and any factor that appears to be relevant can be considered. However, time limits should be exercised strictly and the Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to do so. The exercise of discretion is therefore the exception rather than the rule Robertson v Bexley Community Centre [2003] IRLR 434 . The guidance provides:

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

19. Case law provides that consideration of the factors set out in section 33 of the Limitation Act 1980 may be of assistance, though its requirements are relevant in considering actions relating to personal injuries and death and while a useful check list should not inhibiting the wide discretion of the Employment Tribunal. The Employment Tribunal should have regard to all the circumstances of the case, and in particular to the following:
    c. the length and reasons for the delay;
    d. the extent to which the cogency of the evidence is likely to be affected by the delay;
    e. the steps taken by the claimant to obtain professional advice once he or she knew of the possibility of taking action.

20. Of particular import for an Employment Tribunal considering the exercise of it's discretion will be the length and reasons for any delay and whether delay prejudiced the respondent for example in preventing or inhibiting its investigation of the claim while matters are fresh.

21. In addition, when deciding whether to exercise its just and equitable discretion, the Employment Tribunal must consider the prejudice which each party would suffer as a result of the decision to be made (sometimes referred to as the balance of hardship test) British Coal Corporation v Keeble [1997] IRLR 336 EAT.

22. Failure to adopt a "checklist" approach carries the risk that a significant factor will be overlooked London Borough of Southwark v Afolabi [2003] IRLR 220 CA.

23. Mental ill health may be a reason to extend time DCA v Jones [2008] IRLR 128 CA .

24. A number of authorities have suggested that reliance on incorrect advice should not defeat a claimant's contention that their claim should be heard, depending on the source of that advice See for example Chohan v Derby Law Centre [2004] IRLR 685 EA.

25. Additionally, the authorities say that the pursuit of internal proceedings is one factor to be taken into account. However, the fact that a Claimant defers presenting a claim while awaiting the outcome of an internal appeal process does not normally constitute a sufficient ground for the delay see Apelogun-Gabriels v Lambeth London Borough [2002] ICR 713.

Unlawful Discrimination

26. Sections 39 and 40 of the Equality Act 2010 prohibit unlawful discrimination against employees in the field of work.

27. Section 39(2) provides that:

"*An employer (A) must not discriminate against an employee of A's (B)—*

(g) as to B's terms of employment;

(h) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(i) by dismissing B;

(j) by subjecting B to any other detriment."

28. Section 120 EA10 confers jurisdiction on an Employment Tribunal to determine complaints relating to the field of work.

29. Section 136 of the EA10 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".

30. This provision reverses the burden of proof if there is a prima facie case of discrimination, harassment, victimisation or failure to make reasonable adjustments. The courts have provided detailed guidance on the circumstances in which the burden reverses Barton v Investec [2003] IRlR 332 EAT as approved and modified by the Court of Appeal in Igen v Wong [2005] IRLR 258 CA but in most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two

stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred

Reasonable Adjustments

31. Section 20 provides where the duty to make reasonable adjustments is imposed on a person comprises three requirements:

"(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."

32. The respondent only has to make **reasonable** adjustments. Sometimes there is nothing that an employer can reasonably be expected to do to help an employee.

33. The bar is set fairly high in terms of what adjustments should be made. See comments of the House of Lords in Archibald v Fife Council:

"The duty to make adjustments may require the employer to treat a

disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination'

34. If necessary, the claimant should have been treated more favourably than other non-disabled employees.

35. Employers are under no duty to make reasonable adjustments if:

    f. They did not know and could not reasonably be expected to have known that the claimant had a disability, or

    g. They did not know and could not reasonably be expected to have known that the claimant was likely to be placed at a substantial disadvantage as a result.

36. In considering whether or not there is a PCP established we have had regard to the recent guidance provided in Ishola v Transport for London [2020] IRLR 368.

37. The Equality and Human Rights Commission Employment Code of Practice talks about the duty to make reasonable adjustments in chapter 6. Tribunals must take into account any part of the Code which appears relevant.

38. The Equality and Human Rights Commission: Code of Practice on Employment (2011) at Paragraph 6.23 the Code identifies what is meant by 'reasonable steps':

    "the duty to make reasonable adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The act does not specify any

particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case."

39. Paragraph 6.28 of the Code identifies factors which may be relevant to the reasonableness of a proposed step:

h. whether taking any particular steps would be effective in preventing the substantial disadvantage;
i. the practicability of the step;
j. the financial and other costs of making the adjustment and the extent of any disruption caused;
k. the extent of the employer's financial or other resources;
l. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
m. the type and size of the employer.

Victimisation

40. As to the necessary elements of victimisation under s.27 of the Equality Act 2010, the Tribunal is familiar with the three stage approach to be followed which is derived form the test in Chief Constable of West Yorkshire Police v Khan & Others [2001] ICR 1065 HL and Derbyshire & others v St Helens Metropolitan Borough Council [2007] ICR 841 HL. And the need to identify:

n. What is the Protected Act?
o. Was the claimant subjected to a detriment?
p. What was the reason for the detrimental treatment?

41. Finally, as to the "employers defence" of taking reasonable steps to protect its position, the case of *CC West Yorks v Khan [2001] ICR 1065* said (para 31):

> *"….. Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying*

> *themselves open to a charge of victimisation. This accords with the spirit and purpose of the Act. Moreover, the statute accommodates this approach without any straining of language. An employer who conducts himself in this way is not doing so because of the fact that the complainant has brought discrimination proceedings. He is doing so because, currently and temporarily, he needs to take steps to preserve his position in the outstanding proceedings. Protected act (a) ("by reason that the person victimised has—(a) brought proceedings against the discriminator … under this Act") cannot have been intended to prejudice an employer's proper conduct of his defence, so long as he acts honestly and reasonably. Acting within this limit, he cannot be regarded as discriminating by way of victimisation against the employee who brought the proceedings.*

42. This was approved in *BMA v Chaudhary [2007] IRLR 818*, at para 177, when it restated, "*the essential statement of law that a person does not discriminate if he takes the impugned decision in order to protect himself in litigation*". Chaudhary was on its facts about a respondent who acted "*to preserve its position in the litigation threatened by Mr Chaudhary".* The principle must surely apply equally in the present case.

Evidence

43. The parties have submitted a joint bundle 521 pages and addition supplemental documents – claimant c1-13, Respondent Rc1-9 and further documents from claimant a series of screen shot 1-18. Witnesses Claimant and Graham Reed both witnesses subject to examination and a statement from Ms Patricia Duxbury who did not attend the hearing held by CVP and whose evidence bears relatively light weight.

44. For the respondent we have heard from Michelle Thompson, deputy Head of Healthcare from Jan 2018 to December 2020 ; Sally-Ann Plant, Primary Care Team Leader the claimant's line manger from September 2020 to November 2021; Kelly Fisher, deputy Head of Healthcare from December 2020 to present; Mr Phil Griffiths, Head of Healthcare at HMP Hewell from December 2020, the dismissing manager and Ms Mandy

Gall, Regional Manager for West Midlands from October 2020 to present, who was the appeal officer.

45. We have been provided with a neutral chronology prepared by the respondent together with a list of key documents which have been read by the tribunal in addition to the documents referred to by the witnesses in their adopted statements and in examination before the tribunal.

46. We are grateful for the assistance provided to the tribunal by Ms Kight counsel for the respondent and in particular to the two sisters of the claimant who, have in equal measure acted as her advocates and supporters have presented the case with grace and objectivity.

Findings of fact

47. The respondent business is that of providing independent healthcare services in prisons and youth offender establishments. The respondent provides 24 hour health services within the prison community in which they are based including reception health checks on arrival and regular GP services, to help with substance misuse, mental health, chronic or long-term conditions, podiatry, physiotherapy and optometry. The claimant throughout her employment worked for the respondent and their predecessors at HMP Hewell a prison accommodating over 1000 male prisoners who live at HMP Hewell across 6 house blocks including the segregation unit.

48. The claimant has employed by the respondent since 1 April 2016, most recently as a Healthcare Assistant. The claimant transferred to the respondent via the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), so the claimant's start date for the purposes of continuity of service was 22 April 2002.

49. The job role the claimant undertook as a Healthcare assistant latterly was to be based in the reception area at which male prisoners were received into the prison whether on transfer from other prison estate or from court hearings or police stations.

The claimant's complaints

50. On 2 February 2018 Claimant began period of sickness absence due to a pregnancy-related condition. This absence continued until 1 August 2018, at which point the claimant took annual leave until the start of her subsequent maternity leave 11 September 2018 Claimant began. The Claimant's planned return to work date was 13 May 2019 however on 13 May 2019 the Claimant began a period of sickness absence for reasons related to, inter alia, Obsessive Compulsive Disorder ("OCD")

51. On 5 December 2019 Claimant attended a Stage 3 Ill Health Capability Review with Paul Ennis, Head of Healthcare. The report prepared for the meeting which outlines the claimant's sickness absence over the previous 2 years was considered [319- 320]. Claimant was informed by Mr Ennis that no action would be taken following the meeting [431-434], but the claimant was told her sickness absence would be monitored for a period of 12 months and the arrangements were confirmed in letter 13 December 2019 [435-436].

52. On 1 January 2020 the Claimant returned to work working 12.5 hours a week

53. In late March 2020 the Claimant began a period of shielding during the COVID-19 pandemic, due to her being classified as Clinically Extremely Vulnerable ("CEV") status. The end of shielding was due to be effective for those in the CEV class in August 2020 however the claimant's young

son was in nursery which was not open until September and the respondent agreed the claimant was able to take annual leave with a scheduled return to work on 1 September 2021.

54. The claimant expressed concern to Katie Kidd in HR about the effect of a possible local lockdown affecting Birmingham in September and claimant's manger Michelle Thompson spoke to the claimant on her return to reassure her that that the respondent would look at individual management arrangements which sought to allay any further fears the claimant had. Ms Shaheen was conscious that she had previously had a lengthy time off alongside shielding and was anxious of the impact if a local lockdown occurred requiring her to take more time off.

55. We have heard evidence from Ms Thompson that she completed a Risk assessment in June 2020 and another in August 2020 that were generic Risk Assessments for the claimant however the claimant asserts that she never received any competed risk assessment from the respondent. We have heard evidence from Ms Thompson that she did complete the generic risk assessment and assessed the claimant to be at low risk however the respondent as not been able to produce any copy risk assessment. We have been referred to generic risk assessment template and Ms Thompson suggests that the claimant would have been assessed to be at low risk and such risk was mitigated by the PPE put in place. It was suggested that the Risk assessment were submitted nationally and there was not a requirement for additional steps other than ordinary PPE. The respondent assert that they already observed stringent Covid measures in place on the site so the claimant's role was considered to be at low risk.

56. We find it is unsatisfactory that the respondent did not present to us copies of the risk assessments. Ms Thompson has given an account that she when did risk assessments, and two adjustments were made at Ms

Shaeen's request in relation to her hours to complete a single 13 hours a week working only one shift only to accommodate her childcare arrangements and also not to work with any inmates who required healthcare related to substance abuse. On balance we find that standard risk assessments were completed however no BAME risk assessment was completed. We reach this conclusion based on the fact that on 22 December 2020 an invitation was sent to the claimant to conduct a BAME risk assessment which refers to earlier risk assessments having been carried out. No follow up was made in respect of the BAME risk assessment while the claimant was at work, despite the claimant having confirmed on the same day as she was asked that she did wish to have a BAME risk assessment to be completed [276-275].

57. Notwithstanding the claimants BAME status we find that there is nothing to suggest to the Tribunal that the respondent would have been able to make any further adjustments to take any further steps to protect the claimant's BAME status over and above those which they already had in place. The claimant made it plain to the respondent that as a result of her OCD and related anxiety she wanted a BAME risk assessment to be undertaken.

58. On 15 October 2020 [170] the claimant's CPN Ms Blades wrote a letter supporting the claimant application for a Personal Independence Payment ("PIP") and summarised the claimant mental health impairment of OCD as a result of her response to Covid and shielding which she summarises as:

> *" Since the Covid 19 Pandemic Ms Shaeen's mental health has deteriorated with an increase OCD symptoms. This includes finding it difficult to cope with intrusive and negative thoughts, believing that "something bad is going to happen" , being "paranoid" about sharing things with others, for fear of*

contamination, checking behaviours and cleaning of her home, herself , her child and any items she has to use or has used."

59. On 4 November 2020 the claimant sent an email to Ms Thompson [171] its content is telling of the contemporaneous view the claimant had of Ms Thompson her then manager:

"Hi michelle I would just like to thank you for everything my few years have not Been great with my complicated pregnancy then being single mother and still struggling with my mental health (OCD) and physical issues i would like to thank you so much for being so caring and supporting me and reassuring me. I understand Being a manager you did have a service to provide but also helping me back in to work and Relocating me to work in reception to support my mental health and anxiety Has helped me. You have supported me and also me having a poorly child and unable to attend work due to him. I can't thank you enough for all your help and support sometimes working in a busy environment we dont get to say positive feedback but You have been so supporting and are Very professional not only helping me mentally but supporting me at my workplace you're a very caring and approachable person and I am so grateful to have you as a manager Thank you so much and I say this from the bottom of my heart your are asset in our work place and we would be lost without you thank you so much"

60. It is plain that the claimant was appreciative of the support that she received from the respondent and in particular when writing to Ms Thompson the Deputy Head of Healthcare on site left in December 2020 to relocate to HMP Stafford.

61. On 25 November 2020 Claimant emailed Sally-Ann Plant, Primary Care Team Leader [173], her direct line manager, to enquire about the possibility of booking annual leave to take new medication. The email was supported by a letter from her CPN[172] which indicated that as the claimant was recommended to commence taking fluoxetine:

> *"This letter is to request your support in supporting the above lady who is currently under care of Small Heath Community Mental Health team. Since the COVID-19 pandemic*
>
> *Ms Shaeen's mental health has deteriorated with an increase in OCD symptoms. She is supported by myself her care coordinator on a two weekly basis.*
>
> *Ms Shaeen has recently been prescribed new medication which will cause her unwanted side effects when first taking them. It is recommended that she take some annual leave during this time, in order to adjust the medication. I'm aware that Ms Shaeen is currently on sickness monitoring and hope that this will not affect it."*

62. The email from the claimant's CPN and the unusual request for annual leave rather than sickness absence was forwarded to HR by Sally Ann Plant the claimant's line manager on 25 November [175] and Katie Kidd an HR business partner responded on 2 December [175] to confirm the request could be agreed as a reasonable adjustment. Unfortunately, Ms Plant was herself unfit for work in December and did not return to work until 22 December 2020 to communicate that agreement to the claimant. We accept the account given by Ms Plant that she did not immediately open all her emails on her return to work but that when she did it was confirmed to the claimant that she was able to take leave on 12 January 2021. Ms Plant who has been disarmingly honest confirmed that, having returned to work on 22 December 2020, she was caught up with manging the day-to-day business and other staff, the 21 December was a snow day and staff were off sick. It is telling that during Ms Plant's

absence the claimant did not chase a response to her general response to the request for leave. We find that the respondent did not respond to the claimant's request as promptly as they ought to have done however they did respond in the affirmative. Although the respondent explains that the claimant had not herself requested annual leave on specific dates nor using the usual ESS procedure we find there is an unacceptable though explicable delay.

63. The claimant has explained that she did ask Ms Sally Anne Plant about her request for leave on 4 January as she had not heard anything about the request for annual leave in early January 2021 but she had told the claimant she was too busy. The tribunal accepts that Ms Plant was unable to discuss the claimants request with her due to other work commitments at that time. The delay was unacceptable and no doubt aggravated the claimant's anxiety. It was however surprising that the claimant made no mention if this in her email to Kelly Fisher on 6 January 2021 [181] raising concerns relating to the provision of PPE.

64. On 6 January 2021 the Claimant emailed Kelly Fisher, Deputy Head of Healthcare, about PPE provision [178] in relation to the lack of availability of small gloves, aprons, visors and wipes. In particular the claimant highlighted the reason for her concern:

> "*Due to my OCD and underlying health condition I'm attending work but I would like to be protected and feel safe at work as I'm at high risk with my health conditions and have vulnerable child and mother I would be grateful if you could look into the stock so we have the right PPE equipment as I feel we are more at risk in reception when prisoners are coming from the community and myself and other staff in reception are very anxious thanks M Shaeen*."

65. Kelly Fisher directed Sally Anne Plant to respond to the request and to action the request for small gloves. The Employment Tribunal find,

having heard evidence that the respondent were provided with NHS supplies face masks and visors and gloves and aprons, they were standard issue and were stored in the central stores area. Staff were responsible for collecting the stock from the stores where levels were recorded and centrally ordered. Staff were allowed to take small stocks to their work places and clinics on wings.

66. The claimant complained when stocks of small gloves were depleted she found wearing two pairs gloves to give added protection. While not an ideal situation the wearing of two pairs of gloves was sufficient to offer the claimant protection from touch contact with the virus until stockss of small size gloves were replemished.The respondent we find arranged for daily cleaning of the working environment and the respondent had no objection to the claimant wearing 2 aprons if she prefered nor did they object to her undertaking her own additional cleaning of her work space as it allayed her OCD concerns relating to hygene.

67. Mr Reed the claimant's witness confirmed that the respondent provided standard issue visors, a clear wrap around screen with a foam headband even though he chose not to wear it as steamed up. The claimant had found in the store a moulded form of visor which she considered unsuitable, and on 12 January 2021, she had gone to the office of Mr Phil Griffiths and Kelly Fisher to show them the moulded visor she had found in the stock room which was unsuitable. Mr Griffiths expressed surpise at the standard of the mask which was not regulation issue and he satisfied himself the moulded visor was donated stock from local well wishing businss and not the standard issue ordinarily worn by staff. The claimant takes issue that the moulded mask should not have been kept in the stock room, the respondent said that the stock though non-compliant with PPE standards was left in the storeroom out of inertia and that they were not in fact in genreal use. Mr Griffiths we find to be consistent with Mr Reed's evidence that the staff knew what was the

correct protection to be used and early issues relating to supply of PPE at the start of the pandemic in 2020 were soon resolved.

68. We have been referred to stock control records [501-521] which confirmed that the stock and order supplies for PPE at the relevant time dating back to April 2020 were adequate during the period and have heard evidence that there was a PPE stock cupboard within healthcare outpatients that was stocked. In addition there was an expectation that staff on site would restock the areas and ensure that they were following the correct Covid-19 guidance for maintaining services within health and care settings, infection prevention and control recommnedations. We conclude that the claimant ought reasonably to have been aware that the standard issue masks rather than the moulded masks were the appropriate ones to be used and they were in adequate supply.

69. The claimant has confirmed that on 12 January 2021 she was told that she would be allowed to take 2 days annual leave to take her medication. Coincidentally also on 12 January 2021 the claimant had to leave work early because she had to collect her son from his childcare which had had to close early as there was an outbreak of Covid-19 and we find the respondent was sympathetic with the claimant's circumstances and accomodating of them.

70. On 18 January 2021 the claimant had to leave work early because Claimant began a period of sickness absence that continued up to her termination date ultimately on 25 November 2021. The initial period of absence was under a 28 day certification being for OCD [183] and the next issued on 15 February for anxiety for a further 28 days [187]. On the claimant's absence HR informed the claimant that he manager Ms Plant was off work and Mr Steve Gilson would take over in her absence. When Ms Plant returned to work she resumed contact with the claimant

by text and telephone. We find that Ms Plant was supportive of the claimant and the messages evidence a supportive and informal relationship between the two women.

71. The respondent's sickness absence procedures [73-86] provide in respect of Long Term sickness absence:

> *"Long-Term Absence*
>
> *At Step 5 of this long term sickness absence procedure the employee has the right to be accompanied at meetings and the right to appeal, as set out in Appendix A. A different manager will carry out the appeal.*
>
> *For the purposes of this policy, long term sickness will be defined as 28 consecutive days for all conditions or absence likely to last 28 consecutive days or more.*
>
> *Early intervention is essential for such absences when they are notified. All referrals must be made to Occupational Health through their HR Team.*
>
> *Long term sickness due to a more serious illness or injury needs to be handled sensitively, consistently and on an individual basis. It is the intention of the Company to act fairly and consistently in cases of serious illness/long-term sickness and offer all reasonable support to colleagues. The company aims wherever possible to encourage the return of the employee to full duties.*
>
> *Managers must maintain regular contact with the employee in order to reduce feelings of isolation, to remain informed about the likely duration of the sickness absence and to keep them in touch with any major workplace developments. The employee has a responsibility to update their manager regularly on their likely date of return to work via telephone. Text messages are not acceptable methods unless agreed by the manager. Managers should keep a detailed record of all conversations.*

In all cases of long term sickness the following five step process will be implemented."

72. The next steps set out the procedure to be followed before an employee who is long term sick should be considered not to be capable of a timely return to work. There are five steps to the procedure [81-82]

73. During the initial weeks of the claimant's sickness absence by reason of the claiant OCD condition the claimant's manger Sally Anne Plant maintained telephone contact with the claimant. Occupational Health assessment by telephone [188-189] on 16 February was undertaken within 28 days of the claimant being certified unfit for work and the assessment which identified the concerns regarding the deterioration in the claimant's mental health as a result of Covid. The client spoke to Ms Plant on 16 February 2021 after her Occupational Health telephone consultation to tell her she would await the report.

74. Following the claimant absence there was ongoing contact between Ms Plant and the claimant by text on 9 Feb [186-184] and on 16 February. We find while telling the claimant she could contact her if she wanted at any time Ms Plant was of the view that having informed the claimant that there was to be a referral to Occupational Health that the claimant, like other employees who were unfit for work, was given space to recover as best she could and that support was available if it was wanted. We find the level of contact between the claimant and her manager during her absence was consistent with the standards identified in the long terms sickness absence policy and reasonable in the circumstances.

75. On receipt of the Occupational Health Report dated 18 February 2021 [188-189] Ms Plant was satisfied that there was nothing to be done until the claimant was fit to return to work and kept in touch with the claimant every few weeks. We accept the account of Ms Plant, that is not

challenged by the claimant, that when contacted Ms Plant discussed with the claimant how she was feeling and how her health and that of her son was and if there was anything that she could do to help the claimant she would do so.

76. Between 2 to 4 March 2021 [192-194] there was contact between the claimant and Sally Ann Plant by text, emails and messages passing between them. On 2 March 2021 the Claimant emailed Katie Kidd, HR Business Partner, to allege that her shift times had been changed and on 3 March Ms Kidd including an assurance given to the claimant on 3 March in which Ms Plant re-assured the claimant that her hours were not changing. In or around late February early March 2021 the clinical lead had decided that all employees working HMP Hewell would be changing shifts to try and improve efficiency of the prison. Although the claimant at the time was on sick leave on of her colleagues had informed the claimant of the proposed changes and that the claimant's name had been included for the provisional shift change without that having been communicated to the management team/ clinical lead. The respondent confirmed to the claimant that the arrangement that the claimant worked only every Tuesday in a fixed shift pattern to facilitate her looking after her son which had been an agreed adjustment accommodate the claimant's childcare needs was to continue unchanged. When Ms Plant was made aware of the proposed shift rotas we accept that she told the claimant she had a fixed shift arrangement. We find Ms Plant's reassurance to the claimant was reasonable in the circumstances.

77. On 23 March 2021 Ms Plant rang the claimant to enquire about her welfare and the claimant informed Ms Plant she had not been well due to an infection and that she required dental surgery, the claimant has indicated in her evidence that she had had sepsis as a result of a dental abscess. It was not put to Ms Plant that her account of the contact was not true however the text messages to which we have been referred evidence a supportive response to the claimant. Evidence before the

tribunal leads us to conclude that Ms Plant maintained regular contact with the claimant during her sickness absence. As well as contact with Ms Plant the claimant agrees in her evidence to the tribunal that she was also in contact with Ms Katie Kidd from HR.

78. We find the claimant's suggestion that the respondent did not maintain welfare contact with her while she was certified unfit is not correct. We have been referred to the exchange of various emails and text messages between the claimant and Ms Plant [218-230].
79. Against this background of contact with the claimant when she was unfit to work on 2 March 2021 the claimant commenced a period of early conciliation with ACAS in respect of which an early conciliation certificate was issued on 5 March 2021 and on 25 April 2021 Claimant submitted her first claim form.

80. On 27 April 2021 Claimant submitted a formal grievance to the respondent [323] whereupon Ms Plant was advised that she should stop emailing and calling the claimant in light of complaints in the grievance against her and that Kelly Fisher was to be the main point of contact with the claimant on sick leave.

81. The claimant's grievance identified her concerns to be that:

> "*Employer has failed to respect or even take into consideration my disability . I have had no support from the employer being of sick since January."*

82. The claimant's desired outcome was that:

> *"Changes to practice to be made also employer to be more supporting an more respectful and considerate or people with disability. Investigation to be completed with request from Occupational Health*."

83. On receipt of the grievance Ms Plant prepared a ‘Time Line’ for the claimant detailing the contacts that she had had with the claimant in 2021 [206-209] and the grievance was dealt with by Ms Kidd deputy Head of Healthcare who made an initial telephone contact with the claimant on 17 May [205] and again on 25 May 2021 [215-217]. We find the contact with the claimant before the grievance hearing which took place on 14 June 2021 was supportive of the claimant.

84. A grievance meeting took place on 14 June 2021 in respect of which meeting we have been referred to the notes though not verbatim [235-238]. The respondent provided an outcome to the claimant’s formal grievance (partially upheld) [243]. The letter confirming the outcome of the grievance was sent to the claimant on 30 June 2021 [242-245]. The outcome of the grievance hearing was to partially uphold parts of the grievance in respect of the support for the claimant’s mental health and no clear follow-up to the letter from the claimant’s CPN in November 2020 requesting annual leave to commence new medication. The grievance in relation to the failure to undertake a BAME risk assessment was upheld and the grievance in relation to the complaint about inadequate PPE was not upheld.

85. After the grievance the respondent put in place weekly contact arrangements at the claimant’s request, which at the claimant’s request were later reduced to once every two weeks, which we note were more frequently that would ordinarily be expected to be reasonable with an employee on long term sickness absence.

86. There were ongoing Occupational Health referrals on 23 June 2021 [239-241] and 17 Aug 2021 [254-255] confirming that the claimant remained unfit to return to work and the claimant throughout submitted certificates from her GP confirming that she was not fit to work for reasons related to her anxiousness.

87. On 26 September the claimant submitted a fit note from her GP [261] certifying that the claimant would be unfit to work for a further 6 weeks. On 28 September there was a conference call meeting between the claimant and her Unison representative Ms Overton-Jones and Ms Kelly Fisher Deputy Head of Healthcare and Ms Katie Kidd HR business partner to discuss the claimants health and her continued absence [262-265] the discussion was held with the purpose of discussing the Occupational Health report of 17 August and the claimant confirmed that she was not then fit to return to work. There was a discussion around the issues about which the claimant had raised a grievance in April 2021 and the response that the respondent had entered to the claimant's complaint to the Employment Tribunal. Understandably Ms Fisher sought to focus the claimant's attention on when she might be fit to return to work and the claimant confirmed that she did want to return to work when she was well enough and there was a discussion about the likelihood on any return being initially on a phased return. At the conclusion of the meeting it was agreed that the respondent would continued their bi-weekly discussions with the claimant to understand how she was feeling. As agreed there was a follow-up support discussion with the claimant on 12 October [266] and on 2 November the claimant's GP wrote a letter 'to whom it may concern' which confirmed that the claimant was very underweight and suffered from eating disorders, and due to her being so underweight she would be *"at risk of severe complications if she was to get unwell/contract infections*"

88. The claimant's GP supported her request for her employer to support Ms Shaeen with reasonable adjustments and a phased return to work when she returned to work after so long a period of absence.

89. In the circumstances an Absence Report was prepared to review the claimant's history of absence [268-271]. The review detailed the history of the claimant's absences since her return to work on 1 January 2020

and on 15 November 2021 [277] the claimant was invited to a sickness absence review meeting to be held on 25 November. The letter informed the claimant that:

> *"At this meeting we will review your ongoing sickness absence from work, you record a sickness during your employment and all information that has been presented to us including occupational health advice. I have enclosed a report which outlines the detail of your current period of sickness absence and your sickness absence record. We will be discussing the ongoing difficulties you have experienced in sustaining regular attendance at work and we will explore any support that can be provided to enable you to regularly attend at work. I must advise you but in view of your current long term sickness absence from work and previous discussions and your sickness absence reckoned more generally, termination of employment on the grounds of ill health capability will be considered as an option at the meeting.*
>
> *If there is any further information thought you would wish to provide in advance of the meeting, please send it to me by Wednesday 17th November 2021."*

90. On 16 November the respondent received a copy of the Occupational Health report [278-279] they had commissioned that had been undertaken with claimant earlier that day. The report confirmed that the claimant would be fit to "*try a phased return to work*." And it was recommended the return should be phased working only a few hours for the first two weeks and building up to normal hours b y week four. The report noted also that the claimant was seeking to negotiate with management a move permanently to a half day rather than 13 hours.

91. 25 November 2021 the claimant attended a Stage 3 Ill Health Capability Review with Phil Griffiths, Head of Healthcare [282-287]. The claimant

had been informed that the claimant would be accompanied by her Unison trade union representative. The notes of the meeting are extensive though not verbatim. The claimant and her representative confirmed that the reason that the claimant had not submitted a formal request for days of annual leave as was custom was because her request was to take leave to enable her to start a new medication regime and not as usual.

92. In addition the claimant and her union representative suggested that the reason that the claimant had been off sick for the extended period since becoming unwell on 18 January 2021 and had continued to be unwell was because the sickness absence policy and stress risk assessment and Occupational Health policies had not been followed and that it had taken 36 days for her to be referred to Occupational Health and that the extended sickness absence policy had not been followed.

93. At the end of the meeting the claimant was informed that the decsion would be given the next day after Mr Griffiths had considered all that had been said in the meeting.

94. On 26 November 2021 the decision to terminate the claimant's employment was confirmed to her in person. At the meeting Mr Griffiths read from the letter that he confirmed the Respondent would send to her after the meeting [289-291]. Mr Griffiths reflected the fact that while the respondent was in a position to put in place the reasonable adjustments that the claimant requested he was continued to have concerns regarding the claimant's ability to sustain her attendance at work and more specifically her extensive record of previous sickness absence. Mr Griffiths confirmed in his evidence that he had had regard to the claimant's absence record and to the accommodations and support that had been given to her in the past. The claimant general state of health as recorded by her GP [272-273] confirmed that the claimant still

reported poor sleep, frequent panic attacks anxiousness, feeling upset & distressed and vomiting due to her mental health and her BMI remained very low [272]. The claimant's GP noted that the claimant wanted to return to work however may be fit to return to work with adjustments and a phased return.

95. In addition the GP reported that the claimant remained very underweight and suffers from eating disorders and due to being underweight she would e at risk of severe complications if she was to become unwell or contract an infection. We find Mr Griffiths was not unreasonable in reaching the conclusion which he did objectively to conclude that he had no confidence in the claimant making a sustained return to service.

96. Mr Griffiths considered the mitigation which the claimant had offered at the meeting and that the claimant felt her current period of sickness absence had been triggered by work related events that had been the subject of a grievance that had been concluded at the end of June 2021 and the tribunal complaint that was ongoing. In particular Mr Griffiths had considered the representation made by the claimant's representative that the company should consider the whole picture of her attendance at work rather than focusing on the most recent long period of sickness absence. Mr Griffiths with that in mind had considered her entire attendance record including full sickness absence record dating back to 208 at which point the claimant had accepted employment at HMP Hewell. Mr Griffith had identified that the total period of her the claimant's absence over 13 years employment in her current position was that she had had almost 2.5 years absence excluding the pregnancy related absence that she had had and any COVID related absence. Mr Griffiths was of the view that a series of reasonable adjustments had been made during the course of the claimant's employment and he was of the view but he had no confidence that any sustained improvement would be made in terms of the claimant's ability to attend work on a regular and reliable basis. Mr Griffiths concluded that the claimant's employment

should be terminated on grounds of ill health capability. The reason for Mr Griffiths 's conclusion was due to the claimant 's extensive amount of absence since 2008 when she had been absent from work due to sickness and he concluded the position was not sustainable. The claimant had been at the stage 3 sickness absence review meeting for ill health capability is recently as 5 December 2019 following an earlier period of long term absence. The claimant was informed that any further period of absence during the next 12 months may lead to a further Stage 3 meeting to consider her continued employment. In the event 2020 was an unusual year. The claimant as absent from the start of the Covid-19 pandemic and remained away from work until she returned to work after shielding in September 2020. Sadly following her return to work following the hiatus of her unavoidable Covid-19 absence while shielding the claimant had not sustained attendance at work.

97. Although the claimant was certified by GP as unfit but fit to attend work subject to adjustments and Occupational Health recommended the possibility of return with adjustments it remained Mr Griffiths considered view that the respondent had objective reasons why the business was not able to trust the claimant’s ability to sustain attendance to work in the future based upon her pattern of attendance in the past sent.

98. The outcome letter from Mr Griffith on 26 November 2021 [289-291] detailed the objective reasons why the respondent was not able to trust ability to attend regularly in the future and the decsion was recorded to terminate the claimant’s employment because of her ill health related lack of capability.

99. The claimant sent an initial email appealing the dismissal decsion on 29 November and when asked for detail of the grounds on which she appealed the claimant wrote a more detailed account on 15 December 2021[293-295] to appeal the decsion to terminate her employment on 15 December 2021.

100. The claimant was invited to an appeal hearing with Ms M Gatt the Regional Manager who heard the appeal. The claimant attended the meeting accompanied by her trade union representative, Ms Overton-Jones. Notes of the appeal meeting held 20 December 2021 were taken which though not verbatim are not disputed [296-301].

101. At the meeting the first strand of the claimant's appeal was on the basis that the decision to terminate the claimant's employment was unduly harsh and that it had not taken sufficient account that the sickness started due to the mismanagement of the claimant's request for annual leave which the claimant asserted led to her believing that it led to the extended period of absence tht followed from January 2021 until the termination of her employment.

102. Ms Gatt confirmed that she would consider the representations and make her decsion. The written confirmation of the decsion to uphold the dismissal and to refuse the claimant's appeal was set out in the detailed reasons for her decision set out by Ms Gatt in her letter of 22 December 2021 to the claimant [302-303].

103. As a tribunal we note that at the time the claimant began her period of sickness absence on 18 January 2021 she had already then been informed on 12 January 2021 that she was to be allowed to take annual leave if she wished. We note that having commenced her period of sickness on 18 January 2021 the claimant was not fit to return to work until a prospective return to work on a proposed phased return and subject ot her request to reduce her hours to a half day. It is not immediately apparent when the claimant began to take the medicine that she and her CPN suggested she might begin if see did took two days leave effectively allowing her to have two weeks when she was not working to begin the medication. We find that the claimant worked one day each week and it was a matter for the claimant to determine when

she began her medication and presumably to commence it on 18 January when she began a period of sickness absence that continued until the end of her employment.

104. Following the outcome of the appeal on 24 December 2021 the Claimant applied to amend her claim to the tribunal to include claims of unfair dismissal (Employment Rights Act 1996) and discriminatory victimisation (Equality Act 2010). On 2 February 2022 the Tribunal accepted the claimant's application to amend her claim.

Argument and conclusions

105. Ms Kight on behalf of the respondent has provided written submissions and the claimant who has been ably assisted by her two sisters has provided a written summary of her arguments. In addition to the written submissions we have paid close attention to the oral representations made by the parties.

Unfair Dismissal – s.98 Employment Rights Act 1996

106. We are asked to determine whether when the respondent dismissed the claimant on 26 November 2021, did it do so for the potentially fair reason of capability, as per s.98(2) Employment Rights Act 1996? It is evident that the reason for the decision to dismiss the claimant was because of her long term sickness absence and the preceding stage 3 warning which had been given to the claimant.

107. We next consider if having a potentially fair reason to dismiss the claimant if the respondent acted reasonably in treating the claimant's capability as a sufficient reason for dismissing the claimant, as per s.98(3) Employment Rights Act 1996? We remind ourselves that in cases such as this it is not for the tribunal to substitute it's view for that

of the respondent. There remains a range of reasonable responses that a fair and reasonable employer may take to the same circumstances.

108. In this case the respondent considered not only the fact that the claimant may be fit to return to work on a phased return with adjustments and on reduced hours going forward but the likelihood of her rendering effective service. It is evident to the tribunal that notwithstanding the respondent having identified adjustments that had been made for her in the workplace before she became unwell and in the Stage 3 sickness absence review meeting and in the appeal meeting despite assurances being made about the supply of PPE the claimant was of the fixed view that the that the reason for her absence and its continuance was the fault of the respondent.

109. We have found Mr Griffiths, in the meeting when he communicated the reasons why he felt it necessary to terminate the claimant's employment, had good reason to consider that the claimant would be unable to maintain service to be capable to fulfil her role and render good service.

110. We conclude that the decision reached by Mr Griffiths was one within the range of reasonable response.

111. We are mindful that the claimant asserts that her sickness absence was caused by the respondent's actions in not promptly confirming that they would allow her to take two days annual leave to begin a new medication and that as a result she began a period of long term sickness absence. We have found that before the claimant began her sickness absence she had been told that she might take leave however that she had not identified the dates when she wanted to take leave. We find that there is not sufficient evidence before us to lead us to conclude that the claimant long term absence in 2021 was as a result of the respondent's actions. The claimant clearly suffered a deterioration in her mental health in her response to the Covid -19 pandemic and it

was clearly the claimant wish to take annual leave rather than sick leave if she had a reaction to the side effects of new medication to avoid triggering a sickness absence as her attendance was being monitored.

112. The evidence is that when the claimant did begin her medication in February she had chest pains and had to stop the medication there is nothing to suggest to the tribunal that a different result would have ensued had she taken the medication sooner. Moreover there is no objective evidence before us to establish that the reason for the claimant's sick leave was as a result of the respondent treatment of her or that if the claimant had begun the course of new medication sooner than she did that it would have prevented further absence.

113. The claimant has asserted that the respondent failed to follow their own sickness absence procedures in failing to made contact with the claimant while she was absent from work. Despite the conclusions partially upholding part of the claimants grievance in this regard we have found that the contact between the claimant and her manager was regular before the grievance was presented and such reduced contact that there may have been in March does not render the later decision to dismiss the claimant procedurally unfair.

114. The tribunal concludes that although another reasonable employer may have taken a different decision than that of the respondent the respondent in this case reached a conclusion which on the evidence before them was within the range of reasonable responses that a reasonable employer might make.

115. We find that the respondent took account of the claimant's arguments in mitigation and the decision was in any event fair. The claimant was not unfairly dismissed by the respondent.

Disability Discrimination complaints – Equality Act 2010

Jurisdiction issues

116. The Tribunal are asked to determine whether all of the claimant's claims for disability discrimination were brought in time, such that the Tribunal has the jurisdiction to hear them. In considering this, the Tribunal may have to determine whether certain claims form part of an ongoing course of action.

117. The claimant began a short period of early conciliation with ACAS on 2 March 2021 and an early conciliation certificate was issued on 5 March 2021. Somewhat surprisingly the claimant did not then present her complaint to the tribunal until 25 April 2021 and in those circumstances only those events occurring on or after 24 January 2021 are in time.

118. The tribunal have considered the circumstances of this case and we are led to conclude that although the claimant raised her request to be allowed to take 2 weeks annual leave on 23 November it was the respondent's failure to communicate that decsion until 12 January and the claimant's ongoing concern relating to the suitability of easily available PPE which caused the claimant to become unwell on 18 January 2021.

119. The claimant complaints in respect of failure to make reasonable adjustments in relation to events earlier than the 23 November request to take annual leave are out of time and the tribunal does not consider it to be just and equitable to extend time.

120. The tribunal considers that the circumstances of this case, including the fact that the claimant was unfit for work in the intervening period lead us to conclude that although out of time it is just and equitable that the complaints in so far as they relate to the claims in resect of the

request to take annual leave and the provision of PPE should be considered by the tribunal on their merits. The respondent was aware of the claimant's discontent and the balance of convenience falls for us to entertain the complaints.

Disability Status – s.6 Equality Act 2010

121. For her claims of disability discrimination, the claimant is relying on the condition of Obsessive Compulsive Disorder ("OCD") as a disability for the purposes of s.6 Equality Act 2010, and it is understood that this incorporates anxiety and an eating disorder. It is accepted that the claimant did have OCD and that this constituted a disability for the purposes of the Equality Act 2010 at all times relevant to the claim.

122. Further, the respondent accepts that it was aware that the claimant had the mental impairment of OCD at all times relevant to the claim, which is understood to be from August 2020 to May 2021 (inclusive).It is also accepted that the claimant did have anxiety and an eating disorder and these conditions constituted disabilities for the purposes of the Equality Act 2010 at all times relevant to the claim. Further, the respondent accepts that it was aware that the claimant had the impairments of anxiety and an eating disorder at all times relevant to the claim, which is understood to be from August 2020 to May 2021 (inclusive). We turn therefore to the complaints relating to disability discrimination.

Failure to make reasonable adjustments – ss. 20 & 21 Equality Act

123. We are referred to a number of PCPs to which the claimant was subject and it is asserted that as a result the respondent failed to make reasonable adjustments in the claimants case. We deal with each alleged PCP and consequent less favourable treatment mete to the claimant in turn.

124. *1.Requiring the claimant to return to work from shielding in August in the absence of carrying out a risk assessment*;

125. On balance of probabilities we have found that the respondent did conduct generic risk assessments for the claimant in June and August 2020. The respondent did not adopt a policy, criterion or practice of requiring employees to return to work following a period of shielding in the absence of a risk assessment. The respondent had agreed to vary the claimant's hours of work to 13 hours a week and to allow the claimant to return to work in reception and not to work with any inmates who required healthcare advice due to substance abuse. It was also agreed the claimant could defer her return by taking annual leave in August.

126. Furthermore, for the reasons outlined above the tribunal has determined that the claimant presented her complaints to the tribunal on 25 April 2021 and the complaint is time barred having been presented almost 8 months after the claimant return to work and the claimant has not established a reason why it is just and equitable in this regard to extend time in respect of a one off decision of the respondent.

127. As identified in our findings of fact the claimant's complaint in respect of the failure to conduct risk assessment on her return to work after shielding is more nuanced in respect of a risk assessment in respect of the claimant's BAME status and specific vulnerabilities to Covid-19. The respondent has acknowledged that no BAME risk assessment was ever carried out in respect of the claimant. On 20 December the respondent wrote to the claimant asking her if she wanted a BAME risk assessment to be carried out and by return the claimant confirmed that she did. No BAME risk assessment was ever carried out whether immediately following 20 December nor within any reasonable period thereafter. When the claimant raised a grievance in respect of a number of matters including the failure to undertake the BAME risk assessment her grievance was upheld.

128. The tribunal have considered the issue of whether the complaint presented by the claimant in respect of the failure to make a reasonable adjustments in respect of risk assessment in her return to work was in time. Insofar as the PCP referred to a generic risk assessment on the return to work on 1 September we have found such an assessment was undertaken, the claimant did not suffer a detriment and in any event the complaint is presented out of time . In respect of the PCP requiring the claimant to return to work from shielding in August in the absence of carrying out a risk assessment the PCP did apply insofar as it related only to a BAME risk assessment. The respondent acknowledged the failure when an invitation to conduct such a BAME risk assessment was made and accepted on 20 December and thereafter the respondent continued the act of failing to apply the PCP in so far as it referred to the claimants BAME status and vulnerability.

129. The tribunal consider that in respect of the failure which was confirmed on 20 December 2020 the circumstances are such that it is just and equitable to extend time to permit the claimant's complaint in that limited regard to be determined.

130. The claimant has asserted that she includes the failure to make a Risk Assessment in specific reference to her BAME status. The respondent acknowledges that there was no BAME risk assessment despite in December 2020 sending the claimant another risk assessment to be completed if she wished. there is no evidence that such a BAME risk assessment was ever carried out despite the claimant indicating that she wished one to be done.

131. The PCP placed the claimant at a substantial disadvantage. The complaint is in time – the claimant having asked for the Risk assessment to be carried out however on 18 January having become unfit to work it remained to be done. The tribunal determine that the claimant was

placed at at a substantial disadvantage in relation to her aggravated anxiety for want of a BAME risk assessment that had been offered and not actioned in December 2020.

132. *b) Requiring the claimant to work without insufficient PPE namely insufficient bacterial wipes, ill-fitting/inadequate gloves; no or ill-fitting visors*;

133. The findings of fact we have made led us to find that the respondent did not operate a PCP based on the requirement to require staff to work with suboptimal PPE. We found that there was no such PCP was in operation and that the respondent provided sufficient bacterial wipes and the claimant was allowed to undertake such additional cleaning of her working environment that she felt she needed to personally complete as a result of her OCD. The respondent provided sufficient gloves and when stocks were depleted of the small size the claimant wore the supply was replenished and likewise approved visors were always supplied for the use of staff, the claimant having in identified redundant and unused stock.

134. c*) From 23 November 2020 to 12 January 2021 requiring the claimant to request annual leave via H.R. (failed to give an immediate response to her request so causing a delay);*

135. The PCP was that the respondent required the claimant to take a/l in substitution for sick leave. Annual leave was applied for identifying dates for the requested leave through the respondent's ESS system. The claimant made a generic non specific application to take annual leave rather than sick leave to accommodate a period when the claimant might wish to commence taking medication to avoid triggering sickness absence stage 3 in respect of which the claimant was in November 2020 still under warning from December 2019.

136. To the extent there was a PCP the findings of the tribunal have reached lead us to conclude that the PCP such as it was did not cause

the claimant to be at a substantial disadvantage compared to someone without the claimant's disability who wished to avoid sickness absence. The claimants real complaint, though not covered by the PCP, is the delay from the date of request on 23 November being made for unspecified dates for annual leave and the HR confirmation of approval in principle of time as reasonable adjustment made promptly 2 December 2020 not being then communicated to the claimant. We find that consequence of the delay in communicating the decsion on the leave request was not itself capable of being a PCP it was one off circumstance due to Ms Plant's absence and it was not a policy criterion or practice. The claimant's complaint in that regard does not succeed.

137. *d) From February to May 2021 the managers failing to provide any email or regular support to the claimant whilst she was off sick (from 17 January 2021) to ensure she was coping;*

138. The findings of fact reached by the Tribunal have led us to conclude that there was sufficiently regular contact between the claimant and the respondent in the period February to May 2021 to provide the claimant with support while she was off work. When the claimant submitted a grievance the outcome was one which acknowledged that the contact between the claimant and her line manger Ms Plant had been relatively informal and more structured communications were put in place between the claimant and thereafter with Ms Kelly Fisher. The claimant's perception of the contact with the respondent during her absence was mistaken in light of the findings of facr we have made and the evidence before us. We find that the PCP as described to be 'failing' to provide support is not evidence and the reference to 'regular' support while the claimant was absent because of ill health is a rather more subjective assessment. Objectively the tribunal have found that there was regular contact with the claimant in the relevant period albeit not as regular as the claimant may have wished.

139. There was in any event no pattern of contact which we find placed the claimant at a substantial disadvantage and the claimant has not produced evidence to the tribunal that her poor mental health was exacerbated by absent or irregular contact.

140. *e) In March 2021 notifying the claimant about a required change in her rota from family friendly hours;*

141. The respondent denies that this PCP was applied to the claimant. Our findings of fact determined only that a work colleague of the claimant forwarded to the claimant information about the draft proposed new rota which had not been approved. Immediately upon the claimant raising the concern with Sally Ann Plant we have found she was immediately reassured that her Tuesday working was fixed and would not be required to work different shift. The Tribunal find that no PCP was applied and in any event the claimant suffered no substantial disadvantage as a result of a proposal that was not applicable to her employment.

142. f*) Requiring the claimant to work in the absence of a referral to Occupational Health until February 2021 (the claimant says her nurse had recommended this in November 2020)?*

143. Based on our findings of fact the policy [80] in respect of long term sickness absence suggests a referral to Occupational Health when there is an absence more than 28 days. The respondent made a referral to occupational health on 12 Feb 2021 on expiry of 28 days and when claimant was certified for further an absence of 28 days. There was not a requirement or reasonable expectation that the respondent make a referral to Occupational Health in respect of the claimant before that time. The PCP is misconceived and in any event the claimant has not been caused ot suffer a substantial disadvantage in this case. The claimant's CPN did not make a recommendation that the respondent should refer the claimant to Occupational Health rather only that the claimants request for annual leave might be allowed rather than her need

to take sickness absence should new medication cause her unwanted side effects.

144. The tribunal conclude that in respect the complaints of a failure to made reasonable adjustments the PCPs as described by the claimant do not in most part put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that they aggravated and exacerbated the claimant mental health condition.

145. The tribunal have concluded that only in respect of the failure to provide a BAME risk assessment has the respondent failed to comply with the statutory obligation and the claimant has suffered a substantial disadvantage.

Victimisation – s.27 Equality Act 2010

146. It is accepted by the respondent that the claimant carried out a protected act for the purpose of s.27 Equality Act 2010 when she submitted her claim form on 25 April 2021, which included claims of discrimination under the Equality Act 2010.

147. We turn to consider whether the respondent dismiss the claimant on 21 November 2021 because she carried out the protected act of submitting her claim form?

148. The findings of fact that we have made in respect of the decision to terminate the claimant's employment because of her ill health and incapability have led us to conclude that the reason for the claimant's dismissal was the honest belief reasonably held by the respondent the claimant would not be able to sustain reliable service in the future. We are unanimous in our view that the reason for the claimant's dismissal

was because of her unacceptable levels of absence and not because the claimant had done a protected act. that it was not considered.

149. In light of our conclusions this case will return to the tribunal to consider the issue of remedy in respect of the limited liability as it is found in relation to one occasion of failure to make reasonable adjustments in respect of completing a BAME risk assessment.

150. The tribunal at this stage will make an observation which may assist the parties in preparation for the remedy hearing. In light of our findings and the basis on which the claimant succeeds the remedy will be limited to injury to feelings only which, subject of course to persuasive representations to the contrary, the panel anticipate are likely to be within the lower band of Vento £900 - £9100 in respect of this one act of failure to make reasonable adjustments in one limited circumstance. In light of the respondents acknowledged failure to complete the BAME risk assessment, which at the date of termination of the claimant's employment had still not been completed we assess would be close to, if not at the top of, the lower band.

Employment Judge Dean
25 July 2023