EMPLOYMENT TRIBUNALS

Claimant: **Miss C Rodgers**

Respondent: **Ministry of Defence**

HELD in Leeds by CVP **ON: 8 to 19 June 2023 (7 days)**

BEFORE: Employment Judge Lancaster
Members: Miss J Noble
Mr PC Langman

Appearances
For the claimant: **In person**
For the respondent: **Mr T Wilkinson, Counsel**

JUDGMENT having been sent to the parties on 20th July 2023 and written reasons having been requested on 21st July 2023 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided from the transcript of the oral decision on liability delivered on 16th June 2023:

REASONS

Introduction

1. These are claims by Miss Rodgers against her former employer the Ministry of Defence. She had been a civilian employee and the claims were identified at an earlier preliminary hearing by Employment Judge Maidment in August of last year. That involved a lengthy and careful consideration of the claimant's two ET1 claim forms and we are dealing therefore with the issues identified on that occasion, and reproduced – with some modification – in the agreed list of

issues. A copy of the Case Summary from that preliminary hearing is now attached as an endnote to this decision[i].

2. Our findings therefore are only necessarily those that we need to make to decide those specific issues. We have to comment that there has been a large volume of material presented particularly by the claimant both in the form of her statement and other documents both within the bundle and also additional documents provided by email during the course of this Tribunal, but the vast majority of that material unfortunately is not relevant to the issues we have to decide.

The claims

3. In terms of the issues there are claims in respect of the claimant's disability. That disability has not been admitted by the respondents. It is that she suffers from asthma and there are complaints of failures to make reasonable adjustments and also a complaint under section 15 of the Equality Act, disability related discrimination, that is unfavourable treatment because of something arising in consequence of that disability. There is also a complaint of harassment in relation to an alleged comment made by the claimant's former line manager Mr Moore.

4. There are also further complaints of harassment but related to sex (alternatively direct sex discrimination). These are in respect of comments on the part of the former commanding office of the Defence School of Transport where she worked at Leconfield, that is Mr Watkins.

5. There is also a complaint of victimisation connected to the complaint of unfair dismissal. That is because the claimant issued her first set of proceedings alleging discrimination shortly before her employment was terminated on 14 January 2022, and that is of course admitted to be the doing of a protected act.

6. We have of course considered the definitions in the relevant statutory provisions but there is no real dispute about the law in this case[1].

7. It is most convenient therefore to deal with the allegations in chronological order, addressing the material legal and factual issues as they relate to each complaint.

Sexual harassment/direct discrimination

8. Firstly there is a complaint of harassment related to sex or alternatively direct sex discrimination. That is in respect of a statement made by Mr Watkins in the course of an internal investigation whereby the claimant had made allegations of bullying and harassment against Mr Moore and he had made a counter allegation against her and Mr Watkins' statement to the investigating officer was in an interview on 9 March 2021. That interview was recorded by the interviewing officer Mr English and is therefore expressed in the third person and it is Mr English's summary of what he was told. However Mr Watkins did sign to agree that statement on 22 March 2021.

9. Complaints of harassment and direct discrimination are mutely exclusive under section 212 of the Equality Act. If an act amounts to harassment it cannot also

[1] Section 98 of the Employment Rights Act 1996; Sections 13, 15, 20,26,27 and Schedule 8 of the Equality Act 2010 together with the burden of proof provisions in section 136

be a detriment for the purposes of the section 13 direct discrimination complaint. And in terms of a harassment complaint, we have to look at whether or not this is unwanted conduct, whether it has the purpose or the effect of creating a prescribed environment for the claimant or violating her dignity, and whether it is related in fact to the protected characteristic of sex. The methodology is clearly set out in the established case law, most principally Richmond Pharmacology v Dhaliwal [2009[ICR 724.

10. If we determine that the conduct was indeed unwanted and related to sex and if it had the purpose or intent of violating dignity or having the prescribed consequences, then of course the harassment claim is borne out. If we do not find that then we have to look at whether it nonetheless had that effect. We have regard then to the subjective perception of the claimant, but also to all the circumstances of the case and there is also an objective element as to whether it could reasonably be construed as having that prescribed effect. And in that context the Richmond Pharmacology case is relevant because although it enforces the importance of protecting those with protected characteristic against unwanted conduct, it also warns against hypersensitivity[2]. It is not every instance complained about that will meet the necessary threshold of harassment, which is a high threshold which must actually violate their dignity create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant not merely one where they feel uncomfortable or inconvenienced to any lesser degree.

11. The specific allegations identified at Judge Maidment's preliminary hearing are four specific comments the claimant has extracted from Mr Watkins' statement. We firstly make the observation that, of course, the context in which unwanted conduct is said to have occurred is important. The claimant has extracted specific instances where there is reference to her as a woman, but we have to have regard to the entire circumstances in which that statement was made.

12. Of these specific allegations, the first one we can effectively ignore. In front of Judge Maidment, when we look at the original terms of his case management order, it is quite clear that he was led to believe that the complaint was that Mr Watkins has said that he, that is Mr Watkins, "did not like working with women". That is not something that is recorded anywhere in the statement. We do not know why Judge Maidment was misled in that way. But subsequent to the issue of his written Order, the parties agreed that this comment was not in fact included within the statement and therefore it was substituted with the complaint that now appears in the agreed issues. That is that Mr Watkins had said that it was the claimant who "did not like working with younger females". However, no one at the time of this amendment to the issues appears to have

[2] At paragraph 21 "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

addressed their minds as to whether that comment could also possibly amount to harassment related to sex. Of course the earlier allegation that Mr Watkins had said that *he* did not like working with women, on the face of it could well amount to such unwanted conduct. The mere fact that there is also reference to "females" in the phrase "younger females" is however extraneous because this is not of course a complaint of age discrimination in any form. At Judge Maidment's hearing it was clearly identified that although the claimant had ticked the box to say age discrimination on her first ET1, there was nothing within the narrative of that claim and she did not identify anything before Judge Maidment to indicate that she was bringing such a complaint at that stage. Subsequently she did seek to introduce a complaint of age discrimination within her second claim, but Judge Maidment in a Reserved Decision, having received written representations, rejected any application to amend and struck out any such complaints.

13. What Mr Watkins said was, in fact, that in his opinion there was a common theme with Miss Rodgers' actions that "she resented being managed and held to account, particularly by younger female members of staff and males, and that she resented being asked to provide evidence of her health and would claim on numerous occasions that she felt upset, distressed and undermined, claiming that numerous people's actions were unprofessional towards her and used emotive language such as feeling betrayed, under attack from three sides, not being treated fairly and information being used as a weapon against her".

14. In its general context that is therefore his evaluation of the claimant's behaviour at work, particularly during the time preceding the pandemic when she was actually in the office. There is nothing on the face of it to indicate that that reference to "females", which was clearly a comment upon a strained relation with her then line manager Ms Rebecca Burrows – who was indeed junior to her in age- had anything to do with the claimant's sex or indeed with sex at all.

15. That leaves us with a further three allegations identified before Judge Maidment and which are readily identifiable within Mr Watkins' statement.

16. At first it alleged that he had said that the claimant did not like men. What he actually said, this is also related to the other complaint that he said the claimant had a problem with robust banter, is that he reported his initial contact with the claimant when she first arrived at Leconfield as it is recorded by Mr English, as: "She had also said to him that she didn't like males which raised alarms with him". He also reported that she also had some medical issues and asked for some working environment adjustments to be made. As the HQ was a military working environment sometimes "robust banter" could be overheard from other conversations, he was concerned about how this may be received and as a result mentioned in the interview that if she had concerns she should immediately raise them with her line manager. Additionally the warrant officers were instructed to watch their Ps and Qs when in the registry to avoid any offence.

17. So in its total context this records a conversation that Mr Watkins had with the claimant when she first arrived where he understood that there may be issues that she would be offended if she overhead what he refers to as "robust banter" and he therefore took steps to protect her within that environment by enforcing the view that she could report it to her line manager and also giving instructions

that those who might be prone to such inappropriate conduct should be more careful.

18. The fact that that conversation took place is indisputable because it is recorded in a contemporaneous email from Mr Watkins to Ms Burrows and he there records the claimant's reaction. He also records in that email that she described this as originating from her concern at her earlier place of work within the MOD which she described in Mr Watkins' words as "intolerable". Although the claimant disputes that she used that word we do note that it is in keeping with the somewhat emotive and perhaps hyperbolic form of language that she is prone to, and therefore we are in these circumstances quite happy to accept that she did use that phrase and that is why Mr Watkins took the action he did to seek to protect her within the new working environment.

19. So within that context, all that Mr Watkins is reporting in the course of his interview is an undisputed conversation that took place. He clearly on that basis did not intend his comment about the claimant's interaction with him on that occasion to either violate her dignity when she read it, or to create the prescribed offensive environment for her.

20. So the only issue would be whether the claimant perceived it to have that effect related to her sex and whether objectively that is reasonable. And in context we are quite satisfied that it is not objectively reasonable. This is an example of the claimant's hypersensitivity after the event in seeking to impute ill motives and extract any reference potentially made in relation to her sex from which she might construct a claim. No doubt she was upset at realising the unfavourable view that Mr Watkins had formed of her but it is not related to her protected characteristic but to her behaviours.

21. The remaining allegation in this context is that Mr Watkins has referred to the claimant as "a clever woman". There is no dispute that he did that. It is reported that he has called Miss Rodgers "a clever woman but that through her actions he felt that she could be manipulative" The word "woman" is of course unnecessary but we accept Mr Watkins' evidence that what he was referring to was his general perception of the claimant that she was an educated person, that she was well read, extensively travelled and clearly articulate. He need not have referred to her as a woman but in doing so again it is quite evident that he did not intend any adverse effect upon the claimant related to her sex. And equally, viewed objectively, it cannot reasonably be construed as creating an unwanted environment for her. This is entirely different to the case where the use of the word woman might be in a pejorative context, for instance if someone referred to somebody as a "stupid woman" or worse, but that is not what happened here.

22. So on the face of it those facts even though unchallengeably and entirely established on the face of Mr Watkins' interview do not amount to harassment.

23. In any event this is an allegation going back to March of 2020. The claim was not issued until 23rd December 2021, after a period of ACAS early conciliation which took place only between 15th and 21st December. It is on the face of it considerably out of time and we would not have held it just and equitable to extend time in those circumstances.

24. The claimant has experience of bringing Tribunal claims before. She knows how to contact advice sources or ACAS, and it is only very belatedly in this case that she advanced any reason whatsoever for the delay in bringing this claim to the Tribunal. And that is, although it is not mentioned in her lengthy witness statement, that she now alleges that she was informed by a Mr Ginn of the respondent's HR personnel department that she needed to exhaust internal processes before she could bring a Tribunal claim. That is the first time that she has actually made that statement and she has not given direct evidence that that was the reason why she delayed in this case or at what point she then decided to bring this charge. But in any event on its facts the claim of sexual harassment is not made out, even if time were to be extended.

25. We must also consider whether it therefore could amount to direct sex discrimination, that is, is it less favourable treatment of the claimant because she is a woman. We are quite satisfied that there is no evidence, absent any proof of the charge of harassment, from which we could possibly conclude that this could be less favourable treatment because of sex so as to establish that alternative basis of claim. We accept Mr Watkins' evidence that the reason he formed this opinion of the claimant was not because of her sex but because of the observed and reported behaviours while she was working under him.

Disability

26. The final allegation of harassment is in relation to disability. We pause, therefore, before we consider this and the other disability discrimination complaints to determine the disputed question of whether the claimant in fact met the definition of disability.

27. That of course must be a physical impairment which is long term, that is having lasted more than 12 months and which has a substantial adverse effect upon the claimant's ability to carry out normal day to day activities. There is no dispute in this case that the claimant does have a physical impairment that is asthma. Nor that it is long term. She was first diagnosed with asthma as a child and she has continued to suffer from that condition at various stages throughout her adult life as well.

28. The issue is whether or not that condition has a substantial adverse effect upon her ability to carry out day to day activities. On the evidence it is quite proper for the respondents to have made no admissions on that regard because it is not "severe asthma" on the claimant's own admission. The one occupational health report which address this matter also indicated that they did not think it was a disability, although the claimant properly points out that this had been a very short report and only carried out remotely.

29. Also the claimant has not helped herself by not providing us with substantial or any indeed medical evidence apart from the briefest note from her GP.

30. However on balance we do consider that the claimant does meet the definition of a disabled person. That is because the substantial adverse effect of her disability need only be more than minor or trivial. And although the claimant, we are also satisfied where it suits her, exaggerated the past effects of her asthma or the likely future effects and is therefore oversensitive about her susceptibilities, we accept from her impact statement that she was indeed prescribed a different inhaler from 2007 when she had experienced particular

episodes. She has remained upon that drug taken daily ever since and she also has a second inhaler to use in case of emergency. At paragraph 5 of her impact statement she identifies what she knows to be the triggers in her case that may exacerbate her asthma. We take that statement at face value as being an empirical observation of what has affected her. But although we properly been referred to the case of Primaz v Carl Room Restaurants Ltd. EA 2020-00110-JOJ, we are able to distinguish that case because in that case which involved a similar set of facts though different conditions, the matter was remitted to the Tribunal for consideration of whether or not there was properly any objective evidence of an adverse effect rather than the claimant's belief as to how certain situations will affect her physical condition.

31. But this is different. As we say we believe at paragraph 5 of the claimant's impact is empirical evidence of how it has actually affected her and we also in this context take account of the period of the pandemic from early 2020 onwards. We take note of the fact that the government advice at that stage was that those with any underlying condition, particularly of a respiratory nature which asthma is, should take particular caution. Even without any actual confirmation from her GP, it is reasonable in those circumstances that the claimant considered herself to be more clinically vulnerable than the average population. She had to protect herself because she certainly did have a diagnosed underlying asthmatic condition and that therefore would necessarily we find have had a greater impact upon her ability to carry out such normal activities as were permitted during the various periods of lockdown in the pandemic. So on balance we conclude that she does meet the definition for those reasons.

Disability harassment

32. In relation to the allegation of harassment related to that disability, this is in connection with an observation made by Mr Moore. It appears that he made that on a log (the date when he prepared that log is unknown) but it was submitted by him internally so almost certainly therefore within the course of the investigation into the claimant's grievance and his counter grievance. As of 20 May 2020, so shortly after the start of the pandemic and the lockdown on 23 March, he observed that the claimant was wishing to carry out work from home but notes - and of course she was at home at that point, as civilians were not required to attend the barracks- that although expressedly eager to work from home he observes that she nonetheless was complaining that she had insufficient data access or broadband width or connectivity to the internet at home to enable her to conduct training. So he is simply observing that the there is an incongruity between her saying she cannot conduct training, which would not require access to a secure network, but she would still wish to work from home where presumably the same restrictions on her access to the web would prevail.

33. That observation is repeated in Mr Moore's complaint against the claimant which he raised on 5 or 6 November of 2020. So the claimant was aware of it from the time she was notified of that complaint and subsequently she obtained access to the log which repeats that information. Any complaint in respect of this comment is also therefore out of time. But on the face of it, and in any event, neither iteration of this observation comment does what is alleged in the identified issues, which is that "Mr Moore expressed disappointment at the

claimant requesting to work remotely, despite her on his account that she did not have enough data to do so".

34. There is nothing to suggest that this is properly even unwanted conduct, nor that it is related to the condition of asthma, and certainly not that Mr Moore intended these observations to violate the claimant's dignity or create an offensive environment for her. And objectively it cannot be construed as doing so. Indeed in the course of the hearing it seemed unclear whether the claimant really understood that she was seeking to bring that complaint although it was identified by Judge Maidment as something that she had stated to him.

Disability related discrimination/failure to make reasonable adjustments

35. On the complaint of discrimination related to disability, the something arising in consequence of the asthma, is said to be the claimant needing to shield during the time of the pandemic. And the unfavourable treatment to which she says that she was subjected because of that "something arising" is being summoned to an informal misconduct interview to be held in person in July of 2020. This is also brought as a complaint of failure to make reasonable adjustments.

36. Very shortly the respondent did not "require" the claimant to attend an in person interview. That interview never took place. The reason it did not take place was because having been issued with that invitation on 16 July the claimant responded to Mr Moore on 18 July categorically refusing to attend stating that she had not committed any misconduct and she would not attend any interview. She did not at that stage give any indication that she would be prepared to attend the interview were it not to be held in person. The invitation to attend the barracks had still made it clear that appropriate safeguarding procedures would be in place with social distancing and arrangements made as appropriate, but because the claimant refused to attend Mr Moore then convened a formal misconduct meeting. That too was initially to be at the barracks and the claimant at that stage did not raise any objection to attending in person. And indeed subsequently she indicated that she would so attend, though ultimately it was postponed and not reconvened until some time later and certainly never held.

37. There is no indication that the respondents had any practice of insisting that the claimant attend if appropriate representations were made that that was unsuitable. That is clear because subsequent meetings were held with the claimant joining remotely by telecon whilst others attended physically. And Mr Moore himself was prepared to extend the claimant's time on special paid leave and not return to the barracks along with others on 3 August because she maintained her position that she was required to shield because of her underlying medical condition. As we have said there was no indication until after the event that the claimant considered that she would have attended had it not been in person but she would attend by video or by telephone.

38. Mr Moore has given evidence, which we accept, that in the context of the accusation that he was seeking to raise with the claimant - who was somebody he had only managed remotely since 9 April and therefore never met - it was more appropriate to see her in person. He had no indication that she could not come into the barracks. She had indeed attended for work purposes albeit at a quiet time at the end of June, and she was at that point intending to return on 3 August along with other civilian staff.

39. In terms of the section 15 claim, there is no indication whatsoever that the reason why the claimant was initially invited to an in person interview was *because* she was shielding. She was invited to that interview because there was an allegation of misconduct against her that was most appropriately dealt with in person and there was no indication that she would not in fact be able to attend the barracks.

40. In terms of the failure to make reasonable adjustments, there was no provision criterion or practice that the claimant should only attend an in person interview. Such an interview was never in fact pursued and the respondents could not reasonably have known, because no objection was made at the time, that the claimant would in fact be unable to attend such an interview at a point when she was then contemplating very soon afterwards coming back into work, perhaps on a phased return but coming back to work nonetheless.

41. The further allegation of a failure to make reasonable adjustments is hard to understand. In front of Judge Maidment the provision, criterion or practice relied upon was identified as "the requirement of an administrative support officer to fulfil his or her duties including as to the location of work". And that is an attempt to provide a legal framework in which the claimant can raise her concern that she was not provided with a Ministry of Defence enabled laptop until January 2021.

42. What happened is very simply that after the announcement of the first lockdown on 23 March 2020, civilian MOD staff working particularly where the claimant was with the School of Transport were not required physically to attend. This being the public sector there was no provision of the furlough scheme and the expectation was therefore that staff would work from home. But work from home in this context simply means they are not required to come in to the physical location of the barracks. Special provision was made for those who were in that sense working from home but were not for whatever reason physically able to do so because they did not have the appropriate equipment or appropriate connectivity and for them a special category was developed as special paid leave. So the claimant was not required to go into work but she was still employed and there was a concession that she would be paid in full even though she was unable to actually carry out any work remotely. In that sense she was in exactly the same position as every other civilian employee whether they were in fact certified by their doctor as being clinically vulnerable and having to shield, or whether they were those like the claimant who did have a genuine reason for believing that she was clinically vulnerable, or those who had no clinical vulnerability of any nature but still could not under the provisions of lockdown attend at work. It is quite clear that there was insufficient resource to enable all people in that position to be issued with an MOD laptop. The claimant makes much reference to the fact that it was advertised there were 5000 available across the whole of the Ministry of Defence but it is quite clear that they were not provided to the School of Transport and in particular there is internal memorandum from August, so around the point where civilians were starting to return, to indicate that only 2% of the workforce at home in fact had access to such equipment.

43. Applying the recommended schematic approach in The Environment Agency v Rowan [2008} ICR 218 [3] it is very hard, in fact impossible ,for us to construct out of that a proper provision, criterion or practice that places the claimant as a disabled person at a significant disadvantage compared to those who are not. If there was any "PCP" it was more precisely that those who were , for whatever reason, not required to attend the workplace during the pandemic, but who did not , for whatever, reason, have the necessary IT equipment to at that time to work substantively from home , were to remain on special leave at full pay. Of course it was a difficult situation. She would have preferred to be able to work had she access to an MOD laptop, but that was simply not possible and therefore there was no adjustment that would have alleviated the adverse effect of any properly identified provision, criterion or practice in relation to her disability. And as we have said the claimant remained on special paid leave even after the nominal return date for most employees of 3 August until an MOD lap top was sourced for her, at which point any conceivable failure to make adjustments will have ceased.

Victimisation

44. We turn to the circumstances of the dismissal. There is firstly another Equality Act complaint which is of victimisation. Chronologically the claimant issued her first Tribunal claim on 23 December of 2021 and she was notified of the decision to dismiss her on 14 January. However the dismissal meeting had taken place on 14 December before the claimant issued her claim, and we accept the evidence of the dismissing officer Mr McIlroy that although he was aware in the interim period that the claimant had brought the Tribunal complaint that had no bearing whatsoever upon his decision which had effectively already been made. All the surrounding circumstantial evidence supports that view. We shall come

[3] 27. In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to (sc now section 20 of the Equality Act 2010) must identify:

- (a) the provision, criterion or practice applied by or on behalf of an employer, or
- (b) the physical feature of premises occupied by the employer,
- (c) the identity of non-disabled comparators (where appropriate) and
- (d) the nature and extent of the substantial disadvantage suffered by the Claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments …without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.

to this in due course, but Mr McIlroy considered that he was only concerned not with establishing the facts of the alleged gross misconduct but with considering the appropriate sanction. He had determined that it did amount to gross misconduct so unless there was substantial mitigation his decision would have been likely to dismiss the claimant. So we accept his evidence that he had effectively taken that decision after the meeting on the 14th before he was aware of the issue of the claim and indeed the internal evidence that he then sought advice as to whether it was appropriate still to issue that decision given the pending Tribunal proceedings indicates very clearly that his view was not initially impacted by that matter. He was solely looking at the merits of the dismissal hearing which he had conducted.

Unfair dismissal

45. So that brings us to the unfair dismissal complaint. This is a somewhat unusual situation. As we have said the claimant was being managed remotely by Mr Moore from 9 April and the events that led to termination begin with an invitation by Mr Moore to the claimant on 16 July to attend the informal misconduct meeting on 27 July. The reason for that is clearly established in the chain of email communications between the claimant and Mr Moore immediately prior to that date.

46. Although they are not directly relevant to our consideration there are two matters we need to refer to as background. That is that the claimant was clearly finding it very difficult during the period of isolation at home during the pandemic and secondly that she wished to transfer to Northern Ireland to care for her sick mother. She had applied for a compassionate transfer and when the initial post of which she had applied was she was told filled she was again clearly aggravated and believed that was motivated by ill will towards and somebody blocking her transfer.

47. Throughout all those matters Mr Moore was her line manager though he had not met her. He was required to manage her remote absence from work and also to assist as the conduit for communications in approving her compassionate transfer and passing information back as to the progress of that. That the claimant was upset, particularly at the refusal of her transfer at that stage, is evident in the tone of her emails to Mr Moore. She has some justification for expressing herself in a way that she would perhaps not do in a purely professional capacity because Mr Moore had expressly stated that he was as far as possible be there to be a listening ear for her. But nonetheless her tone expresses extreme upset, anger and emotion.

48. In the course of that ongoing dispute the claimant, despite it appears having been advised not to do so on 18 June by Mr Moore, on 19 June wrote directly to the Brigadier in Northern Ireland. Communications then passed between Northern Ireland and England to inform the claimant that that direct approach was considered inappropriate and it was Mr Moore who was therefore designated to pass that information on to her. The claimant interpreted that as a reprimand and again clearly took offence.

49. So there was throughout this period already some concern as to the manner in which the claimant was communicating. The particular chain of events really begins on 1 July when Mr Moore seeks to make his regular contact with her but the claimant does not reply. So he follows up a week later on 8 July stating he

would like to have a telephone conversation with her and the claimant's response to that is an email where again her tone is expressing her emotions saying "I'm pretty damn angry and pissed off". She follows it again within another email on 9 July again writing in extreme terms how she considers that her life and her mother's life had been wrecked by the MOD in Northern Ireland accusing them of unfairness saying "I'm not going to shut up" .On 10 July in response to that Mr Moore writes stating he understands that the situation is difficult for her but stresses that this behaviour, the tone used in the email and other previous messages does not uphold or align with the Civil Service Standards of Conduct and Behaviour. The claimant's reply to that is again extremely emotively phrased criticising Mr Moore "if you wish to have a good working relationship with me your not going about it in the right way. Basically this is bullying and harassment which seems to be typically management style of DST". In response to that on 16 July Mr Moore states "I'm disappointed that you have not taken my advice or request in relation to the tone of your correspondence". And at that point is when he requires the claimant to attend a merely informal misconduct meeting specifically to address the tone of her communication. The claimant expresses the view that this is victimisation because she has made a complaint and an attempt on his part to prevent her applying to Northern Ireland and that is where she states "I will not be attending any misconduct meeting". She also states then she is forwarding that email to the permanent under secretary, and she follows that up with a further email on the 18th where she doesn't resile from that position. She says "further to my email I will not be attending any meeting at all until I have spoken to the equality advisor". But she does not within that email indicate that she will be prepared to attend when she has met with that person nor that she will consider any alternative form of a meeting. So having expressly stated that she will not be attending the meeting, it is then converted to a formal misconduct hearing. It was also at that stage the claimant was indicating that she would not communicate with Mr Moore regarding her continued absence from work.

50. In preparation for that formal meeting, Mr Moore then sent a copy of the relevant emails where he considered that the tone was inappropriate. There was also included, in addition to his own correspondence, some communication between the claimant and a civilian employee Mr Knowles regarding access to training that had been copied into Mr Moore and where the tone to Mr Knowles was equally unprofessional. The claimant is referring to the fact that she is "pretty damned pissed off" and she says to Mr Knowles "you're pretty damn quick to harass me in relation to training where you have given no support in relation to my own personal concerns".

51. In relation to training, although it is not directly relevant, we note that the claimant was still being fully paid whilst absent from the barracks. So, even if she could not access an MOD laptop to do any substantive work if possible there would still be the requirement she complete her mandatory training. Mr Knowles was a senior civil servant overviewing that process. It is perfectly proper that he should therefore have been provided with the claimant's personal email - which was the only means of contacting her whilst she was away from the barracks - to remind her of her obligations. The email states clearly that the record shows she is not up to date with training and that she should make steps as appropriate to do that. He is not necessarily stating that if she is unable for whatever reason to actually conduct that training because of the physical

constraints at home, that that will be held against her. And certainly the claimant was never disciplined for failure to keep up to date with her training. Mr Knowles said correctly, when later asked about this in the course of internal investigations, that he was entitled to do that so long as the claimant was not actually on leave and on holiday, special paid leave did not absolve her from a requirement where possible to keep up to date with her training. The relevant issue is not, however, whether she could or should have been contacted to pursue her carrying out of the training ,but how she inappropriately expressed herself to Mr Knowles.

52. The claimant responded, in our view, disproportionately to these accusations. The misconduct proceedings were in fact in abeyance. The claimant had indicated she would attend the formal meeting but she then asked for it to put back and it was ultimately postponed and not resurrected until later, but that postponement was at her request.

53. The claimant then raised a complaint against Mr Moore. Brigadier Caldecott assigned that to Colonel Johnson to deal with although Ms Johnson was of course Mr Moore's commanding officer as well as superior in the line management chain to the claimant. Having raised those complaints Mr Moore then raised his own complaint against the claimant and it was determined that both were to be heard together, and that is clearly a sensible conclusion and so Ms Johnson was assigned to deal with that.

54. The first meeting that Ms Johnson had with the claimant in relation to her complaint against Mr Moore was on 4 November 2020. Following a subsequent receipt of Mr Moore's own complaint on the 5th or 6th, there was a further interview with her as the respondent to that complaint on 26 November 2020. The procedure then was that an independent investigator was appointed but that did not then happen until January 2021 and that was Mr English. Mr English carried out interviews and compiled the information pack and the final version of that was provided by 7 April 2021. The investigating officer of course is not making any decision. The deciding officer was Ms Johnson, and having received the information pack she then took that decision on the papers. There was no further meeting with the claimant nor indeed with Mr Moore and she provided her outcome letter on 30 May. She then determined that the claimant's complaint was not upheld. And we have to observe that on our reading of the chain of communications between the claimant and Mr Moore that is a perfectly proper decision for her to have taken, and indeed a perfectly proper decision to have been upheld subsequently on appeal. We can see no valid criticism of Mr Moore's conduct and certainly the decision to invite the claimant to an informal misconduct meeting to discuss the inappropriate tone of her emails -which is apparent on the face of her communications - is a perfectly proper decision. And given her intransigence and refusal to attend such a meeting the decision then to convert to a formal misconduct is equally unimpeachable in our view.

55. That is an incidental matter because primarily we are concerned with the outcome of Mr Moore's own complaint against the claimant. And in that respect the difficulty for the respondents is that Ms Johnson made a broad finding that all the complaints were upheld, but it is a lengthy complaint by Mr Moore and it is unclear what within that complaint is actually alleged to be bullying. Although the complaints procedure relates to "bullying and harassment", harassment is

not relevant here because harassment within the procedures carried the same legal definition as under the Equality Act and it is not related to any protected characteristic of Mr Moore. Bullying of course is not legally defined nor clearly defined within the policy. Although some examples are given, they are very general.

56. It is unclear specifically what Ms Johnson found. Within the very brief outcome letter in this regard, she refers specifically to two parts of the correspondence. The email of 18 July and particularly the final paragraph where the claimant asserts "I am forwarding your email (that is the email inviting her to the informal misconduct meeting) to the assistant permanent under secretary as I raise my concerns about recent events regarding my compassionate transfer with the PUS Mr Stephen Lovegrove and it is being dealt with by his office. This is pure victimisation in an attempt to put me in the wrong after I made a complaint when it is yourself, your colleagues and the DST that are in the wrong." And also the email of 5 August, where the claimant says "I'm asking you politely please do not contact me again either by telephone or email. I will send an email once a week to DBS to inform them I'm still alive but if you persist in harassing me by contacting me against my will and threatening me with further action if I refuse to allow you to contact me I will go to the police and make a complaint of harassment."

57. Before coming to that decision on the papers Ms Johnson had not specifically informed the claimant of why the content of her emails would be deemed to meet the threshold of bullying or to allow her to comment upon that. The next stage as the claimant was advised that misconduct action may be taken. In actual fact Mr McIlroy was not appointed as the decision maker on any misconduct allegation until 25 October. That is some five months later. In the meantime the claimant had raised an appeal against the dismissal of her complaint against Mr Moore and that was eventually heard on 1 September. She had no rights to appeal as the respondent to his complaint, and the policy somewhat unclearly indicates that an appeal may be made under the misconduct procedure; whether that is an appeal against the decision to refer it as misconduct or only an appeal after such a hearing is held is imprecisely identified.

58. As well as dealing with the allegation of bullying as purportedly identified by the outcome letter of Ms Johnson, Mr McIlroy was also not only dealing with the still pending allegations of minor misconduct in relation to the tone of the earlier emails, but also two new matters that arose from the communications of 18 July and 5 August , an unreasonable failure to abide with an instruction to attend the informal meeting and also a failure to comply with the reporting requirements of keeping in touch with her line manager.

59. Again the matter did not proceed promptly. Mr McIlroy had hoped to hold the meeting with the claimant on 4 November 2021 but the information was not available to him from personnel to allow that to go ahead and the meeting was not then reconvened until after a letter of 3 December 2021, which was an invitation to a disciplinary meeting. At this point it was identified, and this appears for the very first time, that because it was an allegation of bullying and harassment it may result in dismissal. That meeting was held on 14 December.

60. Mr McElroy was very clear as to the prescription on his remit. That is that he was not reinvestigating the allegations that were said to amount to bullying but only concerned with deciding on the appropriate sanction. He did state that "you have no right to appeal the decision of this case" which we take to mean that it was correct under the policy that the claimant had no right to appeal Ms Johnson's finding on the complaint by Mr Moore. And he also stated that a proven bullying and harassment case is classified as gross misconduct.

61. So at this stage the claimant was not provided any opportunity to address the actual allegations against her and nor did Mr McElroy specifically identify what it was in the communications in question that was said to amount to bullying and why. What he did do, because this was a fresh matter, was to review the totality of other correspondence and identify that the tone of the claimant's communications was inappropriate, that she had unreasonably failed to comply with the instruction to attend the informal misconduct meeting and also that she had failed to comply with the requirements to stay in touch with her line manager during the period of special paid leave. And we are quite satisfied that those conclusions on the evidence we have seen are perfectly justified. While they were not of themselves sufficient to have warranted termination because they had always been classified as minor misconduct but they are part of the overall finding.

62. We must of course have regard to whether or not Mr McIlroy genuinely believed the claimant was committing misconduct. He did to the extent that he was working on the assumption that an already proven finding in the earlier proceedings by Ms Johnson did amount to misconduct,. We must also consider whether or not all satisfactory investigation had taken place. Although there had been a full investigation by Mr English there was no other examination within the context either of a bullying and harassment final hearing nor the disciplinary final hearing. But more particularly as to whether in all the circumstances the matter was fair and that must have regard to procedural fairness as well and to the delay. The ACAS Code of Practice prescribes that the notification of the disciplinary hearing should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case, and as we have said it was never identified significantly what the charge of bullying arose from the context of these communications. A meeting should be held without unreasonable delay and the employee should be allowed to set out their case after the employer had gone through the evidence that had been gathered and explained to the complaint, that the employee should be given a reasonable opportunity to ask questions to present their evidence and call relevant evidence.

63. Because this was not an investigation into the facts of the alleged misconduct but only sanction, that opportunity was never afforded to the claimant and also we are now considering a dismissal for the events that happened 18 months earlier and the delay is in our view inexcusable and of course delay may amount to procedural unfairness as has been long established in the case of RSPCA v Cruden [1986] ICR 205

64. Also on the question as to whether the sanction was appropriate, Mr McElroy does not seem to fully appreciate the fact that the claimant had actually been working for a year prior to his decision. Although still at home she had had access to a Ministry of Defence laptop from January 2021. Her line

management had temporarily transferred to Squadron Leader Clayton and she was now working - and as far as we can see working entirely satisfactorily. Yet significantly even within his witness statement to this Tribunal before he corrected at the last minute, Mr McElroy appears to have been under the misconception that he was entitled to consider whether it was appropriate to allow the claimant to return to work. And then when questioned about that matter he concluded that the fact that she had been successfully working for 12 months was irrelevant to his consideration. We considered that that clearly was a relevant factor and should have been taken into account.

65. For those reasons we are satisfied that the decision to dismiss because of the failure to identify the precise charge of bullying that arose from the claimant's communications with Mr Moore, the failure to provide her then the opportunity at any stage to actually address that concern, the delay and the failure to take into account all relevant considerations that were apparent on the face of the history mean that she has been unfairly dismissed.

Wrongful dismissal

66. It was a summary dismissal allegedly for gross misconduct. It is for the respondents to show that it does in fact meet the requisite threshold of conduct that is so serious it would justify immediate termination. Given that they rely, on the face of Ms Johnson's evidence and outcome letter only on those two reported paragraphs in the emails of 18 July and 5 August, we are not satisfied that the respondents have done that. The context of this is of course that the claimant was being invited quite properly in our view to face misconduct allegations which she may well possibly have been able to answer satisfactorily given the surrounding circumstances. But she was required to attend those meetings and her responses of 18 July and 5 August are within the context of defending her position. It may well be that had the matter been dealt with in good time it would nevertheless have been held to be sufficient misconduct to justify termination. It was not necessary that it should be gross misconduct to warrant dismissal, but in those circumstances it would necessarily have been termination upon notice. Although the claimant is a Crown servant and therefore not entitled to notice, the clear indications are that a reasonable period of notice would have been the five weeks which is ordinarily afforded to a departing Civil servant. In some of the documentation this period of notice is indeed regarded as an "entitlement" to those who are dismissed otherwise than for actual gross misconduct.

Adjourned remedy consideraions

67. So the claimant will be entitled to be paid five weeks in lieu of notice. She had, however, already taken all of her pro-rata leave entitlement for the current holiday year up to the actual date of termination, and there is no holiday pay outstanding. She will also be entitled to a maximum basic award for unfair dismissal based not on her alleged 16 years' service but only on two years' service. That is because quite clearly there was a break in continuity. So that would entitle her on the face of it to potentially three weeks' pay, two times one and a half weeks' pay given her age, but we say at this stage that that award will necessarily be reduced because of her contributory conduct. She is also entitled as appropriate to compensation for unfair dismissal but that is subject to a statutory maximum of 52 weeks' pay. That will include any award for a loss

of her statutory rights which is ordinarily only a nominal sum of some £450. Any loss of pension rights and any potential uplift for an unreasonable failure to comply with the ACAS Code of Practice is still subject to the statutory cap. And of course that compensatory award will also be liable to be reduced because of the contributory conduct of the claimant leading to her dismissal and also potentially reduced further under the principles in Polkey as to whether a fair procedure will result in a chance that she would have been dismissed fairly in any event.

68. Those are our findings. All claims apart from the unfair dismissal complaint are dismissed and remedy for that will have to be determined.

Employment Judge Lancaster

Date 8th August 2023

[i] CASE SUMMARY

The Issues

1. The issues the Tribunal will decide are set out below.

1. Time limits

1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.1.2 If not, was there conduct extending over a period?
1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.1.4.1 Why were the complaints not made to the Tribunal in time?
1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

2.1 Was the claimant dismissed?

2.2 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

2.3 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.3.1 there were reasonable grounds for that belief;

2.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
2.3.3 the respondent otherwise acted in a procedurally fair manner;
2.3.4 dismissal was within the range of reasonable responses.

3. Remedy for unfair dismissal

3.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.1.1 What financial losses has the dismissal caused the claimant?
3.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
3.1.3 If not, for what period of loss should the claimant be compensated?
3.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
3.1.5 If so, should the claimant's compensation be reduced? By how much?
3.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
3.1.7 Did the respondent or the claimant unreasonably fail to comply with it by?
3.1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
3.1.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
3.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
3.1.11 Does the statutory cap of fifty-two weeks' pay apply?

3.2 What basic award is payable to the claimant, if any?

3.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. Wrongful dismissal / Notice pay

4.1 What was the claimant's notice period?

4.2 Was the claimant paid for that notice period?

4.3 If not, was the claimant guilty of gross misconduct?

5. Disability

5.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

5.1.1 Did s/he have a physical impairment of asthma?
5.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
5.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
5.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
5.1.5 Were the effects of the impairment long-term? The Tribunal will decide:
5.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
5.1.5.2 if not, were they likely to recur?

6. Direct sex discrimination (Equality Act 2010 section 13)

6.1 Did the respondent do the following things through Mr Watkins' interview of 9 March and his signed statement dated 22 March 2021:

6.1.1 Say that he didn't like working with woman
6.1.2 Say that the claimant didn't like men
6.1.3 Refer to the claimant as a "clever woman"
6.1.4 Say that the claimant had a problem with robust banter

6.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who s/he says was treated better than s/he was.

6.3 If so, was it because of sex?

6.4 Did the respondent's treatment amount to a detriment?

7. Discrimination arising from disability (Equality Act 2010 section 15)

7.1 Did the respondent treat the claimant unfavourably by:

7.1.1 Requiring her to attend an informal misconduct meeting on or around 18 July 2020 when she was shielding as a person clinically vulnerable to the coronavirus

7.2 Did the claimant's inability to attend work whilst shielding arise in consequence of the claimant's disability:

7.3 Was the unfavourable treatment because of that?

7.4 Was the treatment a proportionate means of achieving a legitimate aim?

7.5 The Tribunal will decide in particular:

7.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

7.5.2 could something less discriminatory have been done instead;

7.5.3 how should the needs of the claimant and the respondent be balanced?

7.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

8. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

8.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

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

8.2.1 The requirement of an Administrative Support officer to fulfil his/her duties including as to the location of work.
8.2.2 The respondent's application of its disciplinary procedure requiring employees to attend an informal misconduct meeting

8.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant was shielding due to the coronavirus pandemic and unable to attend the workplace?

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

8.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

8.5.1 Provide the claimant with the means to work from home, including the provision of a networked laptop.
8.5.2 Allow the claimant to attend the informal misconduct meeting remotely by videoconferencing

8.6 Was it reasonable for the respondent to have to take those steps and when?

8.7 Did the respondent fail to take those steps?

9. Harassment related to sex/disability (Equality Act 2010 section 26)

9.1 Did the respondent do the following things:

9.1.1 The comments set out at paragraph 6.1.1 – 6.1.4 (sex only)
9.1.2 Capt Moore on 20 May 2020 expressing disappointment at the claimant requesting to work remotely despite her, on his account, saying that she did not have enough data to do so (disability only)

9.2 If so, was that unwanted conduct?

9.3 Did it relate to sex/disability?

9.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

9.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

10. Victimisation (Equality Act 2010 section 27)

10.1 The claimant did a protected act in submitting her first tribunal complaint under case number 1806784/21.

10.2 Did the respondent dismiss the claimant because the claimant did that protected act?

11. Remedy for discrimination or victimisation

11.1 What financial losses has the discrimination caused the claimant?

11.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

11.3 If not, for what period of loss should the claimant be compensated?

11.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

11.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

11.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

11.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

11.8 Did the respondent or the claimant unreasonably fail to comply with it?

11.9 If so is it just and equitable to increase or decrease any award payable to the claimant?

11.10 By what proportion, up to 25%?

11.11 Should interest be awarded? How much?

12. Holiday Pay (Working Time Regulations 1998)

12.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

12.2 What was the claimant's leave year?

12.3 How much of the leave year had passed when the claimant's employment ended?

12.4 How much leave had accrued for the year by that date?

12.5 How much paid leave had the claimant taken in the year?

12.6 Were any days carried over from previous holiday years?

12.7 How many days remain unpaid?

12.8 What is the relevant daily rate of pay?