**Case Number: 1802204/2022**
**1802386/2022**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs M Lynskey**

**Respondent:** **Direct Line Insurance Services Ltd**

**Heard: In Leeds** **On: 24 - 28 April 2023 Liability**
**15 June 2023 Remedy**

**Before:**
Employment Judge JM Wade
Mr R Webb
Mr L Priestley

**Representation**
Claimant: Ms R Senior, counsel
Respondent: Mr J Cook, counsel 24 to 28 April 2023
Ms Sharp, counsel, 15 June 2023

# REASONS

Introduction

1. The claimant had worked as a telesales consultant for the respondent insurer since April 2016. She resigned on 3 May 2022 and brought constructive unfair dismissal and Equality Act complaints. The Tribunal gave its liability decision in an extempore Judgment delivered on 28 April 2023 – the claimant having indicated that if the Tribunal could give an extempore decision that would alleviate the strain from the hearing.

2. Constructive unfair dismissal failed, and sex and age related complaints failed. Reasonable adjustments and Section 15 complaints relying on symptoms of menopause succeeded. The hearing was adjourned, with the parties' consent, to 15 June 2023, albeit it was known Mr Cook would not be available. The orders gave liberty to apply to vary the remedy directions.

3. The Judgment and remedy orders were sent to the parties on 5 May 2023 and a request for written reasons was sent by the claimant to the Tribunal on 12 May 2023, but not referred to me until 1 June, by which time it was not possible to provide reasons before the remedy hearing. The parties were directed to

approach remedy on the basis of their notes of the judgment, and that the Tribunal would do the same. The parties were again encouraged to seek to agree remedy, the claimant having confirmed that personal injury damages were not pursued.

4. On 13 June 2023 the claimant's solicitors raised a question with the Tribunal's judgment, indicating that the Tribunal appeared either to have overlooked one section 15 allegation, and/or not explained why it had not succeeded; the claimant sought clarification before remedy was addressed.

5. In the course of its reading at the start of 15 June the Tribunal confirmed its own notes and the decision that it had made, and identified that there was an error/omission from the written decision and invited Miss Sharp to take instructions on whether the matter could be addressed by a certificate of correction, or whether her client considered the matter required a re-consideration application. She was in difficulties but after some delay to gain instructions, was content that the matter could be addressed by correction.

6. On 15 June the Tribunal heard and determined the claimant's remedy case and after the remedy judgment was sent to the parties the respondent requested written reasons. The Tribunal indicated it would provide consolidated reasons for liability and remedy. Those reasons are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the Judgments given on 28 April 2023 (as corrected) and 15 June 2023 are repeated below for reference:

*The unanimous decisions of the Tribunal are:*

1. *The claimant's constructive unfair dismissal complaint is not well founded, the claimant having affirmed her contract after the last repudiatory breach (15 September 2021) as found by the Tribunal.*
2. *The claimant's complaints of sex and age direct discrimination and harassment are dismissed.*
3. *The claimant's complaint of a failure to make reasonable adjustments in the Telematics team from April 2021 succeeds, a just and equitable time limit having been decided by the Tribunal.*
4. *The claimant's Section 15 allegations 2.1.5 to 2.1.8 also succeed, time having been extended as above, and in other respects are dismissed.*

Issues

7. The complaints brought by the claimant were set out in an eight page list of issues agreed between the parties before this hearing (with one point of difference), which was subject to the Tribunal's approval. That included remedy issues which were further adjusted as a result of our decisions. We do not repeat

that list here; the relevant questions are apparent in our conclusions and explanations below.

8. The chronological factual allegations of breaches of the implied term are set out below, annotated with the type of discrimination also pursued:

    8.1. Failure to make reasonable adjustments. The claimant alleged that from 1 July 2020 she was required to meet the normal performance standards of the telematics role, that she struggled to meet those because of her disability and was therefore more likely to be subject to disciplinary proceedings and/or sanctions, and the respondent should have made any of eight suggested adjustments.

    8.2. In May 2020, Kim Ackroyd referring to the Claimant as "constantly trying to keep [her] head above water", criticising her performance - section 15;

    8.3. In June 2020, the Claimant being transferred into a different role, she felt, under false pretences, with Kim Ackroyd describing the new role as a "lifeline", without targets or complaints to deal with. This transfer resulted in financial loss for the claimant, instead of making adjustments to her existing role - section 15;

    8.4. In October 2020, Danielle Wilburn wrongly categorizing the claimant's performance struggles as a confidence issue. It is alleged that she spoke to the claimant, stating; "You aren't there yet at the same level of the team in terms of your performance. I believe that working on your confidence and self-belief will help this improve naturally." - harassment related to age and/or sex;

    8.5. In November 2020, Danielle Wilburn said the same again as the above, to the claimant, that she "requires a high level of support and her efficiencies are not in line with the team." - harassment age and/or sex;

    8.6. On or around 10 November 2020, Danielle Wilburn threatened the Claimant with disciplinary action, stating "I will be speaking to HR about the situation past and present, should I listen to a call where Maxine speaks to a customer in an unacceptable manner, I will take further action such as a disciplinary" - section 15;

    8.7. In December 2020, Danielle Wilburn criticized the Claimant's performance, stating that the Claimant struggled to get to grips with or understand her role, including that she didn't understand how to handle or resolve customer queries - section 15;

    8.8. In January 2021, Danielle Wilburn informed the Claimant that she would not be receiving a pay rise because her performance was rated "need for improvement" - section 15;

    8.9. On or around 30 April 2021, the Respondent commenced formal performance management proceedings against the Claimant, due to an alleged failure to understand and deliver in her role. The Claimant had previously explained to Danielle Wilburn that her disability and associated symptoms of menopause were impacting on her ability to

retain information and her emotional stability - section 13 direct age and/or sex and section 15;

8.10. The issuing of a written warning for the Claimant's performance on 30th April 2021, to last 12 months - section 13 direct age and/or sex and section 15;

8.11. On or around 15 September 2021, the Claimant was informed by Danielle Wilburn that she would not be exercising her discretion to continue the Claimant's sick pay because her level of absence was unsustainable to the business. The Claimant believes she had used 13 weeks of her potential 26 week rolling entitlement at this stage - section 13 direct age and/or sex and section 15;

8.12. On or around 29 October 2021, in a telephone conversation following up on the recommendation of 1-1 refresher training from a recent occupational health report, Danielle Wilburn stated "that is not happening now, we cannot afford training for a third time, we are a small bespoke team, a single point of failure and there is no money on the budget as that is being used for the new starters." - harassment age and/or sex.

9. In January 2023 the respondent conceded the claimant was a disabled person by reason of menopause symptoms, namely low mood, anxiety, mood swings, poor self-esteem, effects on memory and poor concentration. At the start of this hearing the respondent further conceded that it knew or ought reasonably to have known of the claimant's disability in June 2020. The claimant alleged it ought reasonably to have known by January 2020 because the respondent should have sought occupational health advice from that point on and from March she had reported her symptoms and treatment. Her reasonable adjustments case (despite a valiant effort to bring this forward in submissions) began from 1 July when she moved to a new role.

10. The Tribunal confirmed with the parties that we would approach the allegations chronologically, identifying the findings of fact and then applying the law to those facts.

<u>The liability hearing and the parties' representation</u>

11. The advocacy in this case was of a very high standard and of enormous assistance to the Tribunal. The way that matters were addressed by counsel on the law, procedure and evidentially deserves our thanks. Particularly for the claimant Mrs Lynskey, who was traversing upsetting matters, Mr Cook did all he possibly could to minimise that upset while putting his client's case in clear terms.

12. The point of difference about the list of issues was in relation to the Section 15 case. The claimant had presented two claim forms, 1802204/2022 on 9 May 2022 in which she made bare allegations of Equality Act contraventions and constructive dismissal; and then in a second claim form on 12 May, 1802386/2022, she provided a second ACAS certificate and included a request indicating advice from the Communication Workers Union that the claims be consolidated. To the second claim the claimant attached a claim statement of 9 pages or so. The claimant did not put a representative on record at this stage.

13. The claimant appeared in person at a case management hearing on 18 July 2022. Orders were made for a further hearing preliminary hearing on 17 October 2022.

14. records and confirmed the asserted disability was the menopause and its associated symptoms, which she had described in an impact statement. Further, as to her Section 15 case, she said: "the claimant relies upon the impact of her disability on her day to The claimant then instructed solicitors who provided the claimant's medical day activities **and performance** (as described in her impact statement above), side effects of which being brain fog, intense anxiety, inability to retain information, emotional instability and memory problems, as the "something arising from disability".

15. Those details were discussed with the Judge at the October preliminary hearing, at which the claimant was represented by her solicitors. The Judge attached a draft list of issues to those orders (it was not clear whether it was the parties' initial draft list or the Judge's list), but it did not include the impact day to day activities and performance – as pleaded above – but rather, simply the symptoms, as the "somethings arising". There was no correspondence then on that matter although when the case later came before me on an amendment application on paper in early December, I described the issue list as a draft list subject to the approval of the Tribunal.

16. Immediately before this hearing then, Ms Senior had focussed argument on whether the "something arising" was six or nine asserted symptoms, the claimant contending for further symptoms as "somethings arising".

17. The Tribunal initially directed that it would take the "somethings" as only those symptoms initially listed in the October list. When it became apparent that the claimant had asserted the impact on her performance, as a "something arising" (which was the tenor of her evidence and case throughout), the Tribunal recalled the claimant to enable the respondent an opportunity to ask further questions of the claimant in connection with that issue, the respondent maintaining that the case had been put on the basis of symptoms, not performance, as the something arising.

18. Mr Cook did ask further questions but was clear he did not accept that these measures were sufficient to address the prejudice to his client if the claimant's case was permitted to be expanded. The Tribunal directed that it would decide the claimant's pleaded case. Mr Dalby had addressed his position on performance and menopause symptoms in his statement.

19. Given the time constraints within the hearing, the Tribunal directed oral submissions on the final morning, and Mr Cook provided a comprehensive note of the law, which Ms Senior largely agreed but provided some additional points of emphasis from a number of authorities (constructive dismissal/affirmation, reasonable adjustments, direct discrimination and limitation).

20. In the course of those oral submissions, Mr Cook submitted as to the PCP that all elements of the telematics role needed to be "applied" to the claimant (and that they had not been at any stage), in reality. Ms Senior sought to characterise

the claimant's PCP as simply, the requirement to do her job – submitting that the PCP (and therefore duty to make adjustments) arose from January, in the sales team.

21. An application to expand the PCP had been refused in December 2022 and that decision had not been challenged then. In those circumstances the Tribunal was again clear it would decide the pleaded case and the claimant was limited in her reasonable adjustments case to the period from 1 July 2020.

22. We do not repeat the parties' submissions wholesale – it will be apparent from the conclusions below where they have been accepted or not.

The Law

Constructive Dismissal

23. The Employment Rights Act 1996 relevantly provides:

94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if ...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

24. The following principles are well established:

Western Excavating (ECC) Limited v Sharp [1978] IRLR 27;

25. If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all, or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains, for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

Courtaulds Northern Textiles Limited v Andrew [1979] IRLR 84;

26. A term is to be implied into all contracts of employment that the employer will not, without reasonable or proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.

Woods v WM Carr Services (Peterborough) Limited [1981] ICR 666;

27. To constitute a breach of the implied term of trust and confidence, it is not necessary to show that the employer intended any repudiation of the contract. The Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, was such that the employee cannot be expected to put up with it.

Malik v Bank of Credit & Commerce International SA [1997] IRLR 462;

28. In assessing whether or not there has been a breach of the implied obligation of mutual trust and confidence, it is the impact of the employer's behaviour on the employee that is significant – not the intention of the employer. The impact on the employee must be assessed objectively.

29. The "last straw" doctrine means that if a person resigns in response to a series of actions which, together, constitute a fundamental breach, the last of the actions (the "last straw") must be more than trivial: London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493. It must contribute, however slightly, to the breach of the implied term of trust and confidence.

30. The principles of affirmation were examined in Cockram v Air Products EAT 0038/14/LA and were helpfully summarised. Mrs Justice Silber said this (paragraph 25): "The question whether a party has affirmed the contract is fact sensitive and context dependent. It does not generally lend itself to bright lines or rigid rules." At paragraph 15 she says: "It is undoubtedly the case that an employee faced with an employer's repudiatory breach is in a very difficult position, as the courts have repeatedly recognised. Most recently, Jacob LJ described the difficulties in these circumstances in Bournemouth University Corporation v Buckland [2011] QB 323 at para. 54 as follows:

> "..t*here is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation."*

31. The tension between "last straw" and affirmation has recently been addressed in the Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978. At paragraph 51, Underhill LJ holds: "*I cannot agree with [the above] passage. As I have shown above, both Glidewell LJ in Lewis and Dyson LJ in Omilaju state explicitly that an employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation; provided the later act forms part of the series (as explained in Omilaju) it does not "land in an empty scale". I do not believe that this involves any tension with the principle that the affirmation of a contract following a breach is irrevocable. Cases of cumulative breach of the Malik term… fall within the well-recognised qualification to that principle that the victim of a repudiatory breach who has affirmed the contract can nevertheless terminate if the breaches continues thereafter… the right to terminate depends on the employer's post-affirmation conduct."*

Section 15 Discrimination

32. In section 15 cases, the key question is the reason why the claimant was subjected to the alleged unfavourable treatment. Section 15 says:

> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

33. The "something arising in consequence of B's disability" sometimes has to be proven by a claimant, or sometimes is accepted by an employer. Often, the "something" is a sickness absence or absence record. It can also be, for example, an inability to stand for long, or to read lengthy documents, or fatigue. These are just examples.

34. The Equality and Human Rights Commission Code of Practice on Employment ("the Code"), at paragraph 5.9, also gives examples of consequences of disability, including an inability to use certain work equipment, walk unaided or a need to follow a restricted diet.

35. Unfavourable treatment because of fatigue sounds straightforward: for example a security guard might say, I was disciplined for being found asleep on duty, but my fatigue arises in consequence of my arthritis. In T-Systems v Lewis (UKEAT/0042/15/JOJ) His Honour Judge Richardson sets out a four stage test for Section 15 discrimination:

> There must be a contravention of Section 39(2)
>
> There must be unfavourable treatment
>
> There must be "something arising in consequence of the disability"; and
>
> The unfavourable treatment must be because of the "something".

36. This means at stages 3 and 4 the Tribunal sometimes has to look at two different ways in which facts in the case relate to each other. The first is: does the "something" arise in consequence of disability? In the example above the Tribunal would have to find that the fatigue did arise in consequence of the arthritis (and not, for example, because the guard had been up all night looking after a sick child). Stage 3 can sometimes be straightforward, and sometimes complicated.

37. Stage 4 is whether the unfavourable treatment was because of the "something". Again, using the example above, was the disciplinary action because of the fatigue/falling asleep, or was it, in fact, because the guard swore at his manager when he was woken up?

38. "Because of" at stage 4 means that the "something arising" operated on the mind of the person making the decision (consciously or sub-consciously) to a significant (that is material) extent. See Lord Justice Underhill at paragraph 17 of IPC Media Limited v Millar UKEAT/0395/12 SM and at paragraph 25. The

Tribunal, as its starting point, has to identify the individual(s) responsible for the decision or act or behaviour or failure to act which is being complained about. It does not matter whether the putative employer has knowledge that the something arose in consequence of disability, provided there is knowledge of the disability itself - City of York v Grosset [2016] ICR 1492 CA. See also the full guidance in Pnaiser v NHS England [2016] IRLR 710 EAT at 31. "A Tribunal may ask why A treated the claimant in the unfavourable way alleged....alternatively it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment". Motive is irrelevant.

39. There is also often a "Stage 5" in a Section 15 claim: the employer in the example above can say that the disciplinary action was appropriate and necessary to achieve its aim of making sure security guards look after the premises.

40. This type of "justification" defence in section 15(2) is common to many other types of discrimination, including direct discrimination because of age, and indirect discrimination. Whether the employer's "means" are "proportionate" requires the Tribunal to determine whether they were "appropriate and necessary" (taking into account less discriminatory measures) (see Homer v Chief Constable of West Yorkshire [2012] UKSC 15 paragraphs 22 to 25). Section 15 does not derive directly from the European Equality Directive, but there is no judicial decision that the Homer approach should not be applied to Section 15 (2). Even on the bare statutory language, a structured approach is required to considering whether an employer has made out the defence.

Failures to make reasonable adjustments

41. Section 39 (5) imposes the duty to make adjustments on employers and Section 20 explains it:

> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (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.

Section 21 deals with failure to comply with the duty:

This section has no associated Explanatory Notes

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

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

42. An employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement (Schedule 8, paragraph 20 (1) of the 2010 Act).

43. The Tribunal potentially answering two questions: did the employer know about both disability and likely disadvantage; if not, ought the employer reasonably to have known? In Ridout v TC Group [1998] IRLR 628 the claimant had photo sensitive epilepsy. Her application form for a job said she had that disability. When she attended for interview she was put in a room with no windows illuminated by fluorescent strip lights. She attended wearing a pair of sun glasses hanging on a cord around her neck. She did not say the lighting in the room was a problem for her although she did comment on the lighting as she walked into the room in terms which the Tribunal found could merely have been to explain why she had dark glasses. The respondent did not realise that it should take any further steps. In the Judgment Morison P set out as one of the submissions made by the claimant that:

> "The onus in this case was on the prospective employee to inform the prospective employer of a disability but that once he or she has done that the onus passes to the employer to make such enquiries as are necessary to satisfy himself that he can discharge his duties under section 6 (the predecessor of section 4A). Such enquiries may simply be limited to making further enquiries of the employee. The submission made to us was that the appellant, having discharged the onus on her at the first stage, the prospective employer failed to take two opportunities to consider their position first on receipt of the application form and secondly when she arrived for interview".

44. That submission was rejected. The EAT said:

> "Subsection 6 requires the Tribunal to measure the extent of the duty, if any, against the actual or assumed knowledge of the employer both as to the disability and its likelihood of causing the individual a substantial disadvantage in comparison with persons who are not disabled … It seems to us they were entitled from the material before them to conclude no reasonable employer would be expected to know without being told in terms by the applicant that the arrangements which he in fact made in this case for the interview procedure might disadvantage this particular applicant for the job. As it was said in argument, this form of epilepsy is very rare".

45. And later:

> "We accept what Counsel for the appellant was saying that Tribunals should be careful not to impose on disabled people … a duty to 'harp on' about their disability … It would be unsatisfactory to expect a disabled person to have to go into a great long detailed explanation as to the effects their disablement had on them merely to cause the employer to make adjustments which he probably

should have made in the first place. On the other hand, a balance must be struck. It is equally undesirable that an employer should be required to ask a number of questions about a person suffering from a disability as to whether he or she feels disadvantaged. There may well be circumstances in which that question would not arise. It would be wrong if, merely to protect themselves from liability, the employers … were to ask a number of questions which they would not have asked of somebody who was able-bodied. People must be taken very much on the basis of how they present themselves".

46. As to the type of adjustments that were envisaged by the 2010 Act, the guidance from the 1995 Act is rehearsed in the Code. The Tribunal must take into account those parts of the Code which appear to be relevant:

At paragraph 6.28: whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular to:

- the extent to which taking the step would prevent the effect in relation to which the duty is imposed;
- the extent to which it is practicable for him to take the step;
- the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;
- the extent of his financial and other resources
- the availability to him of financial or other assistance with respect to taking the step;
- the nature of his activities and the size of his undertaking.

At paragraph 6.33, the following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments

- allocating some of the disabled person's duties to another person;
- transferring him to fill an existing vacancy;
- altering his hours of working or training;
- assigning him to a different place of work or training;
- allowing him to be absent during working or training hours for rehabilitation, assessment, or treatment;
- modifying procedures for testing or assessment;
- providing supervision or other support.

47. We also note that the purpose of the statutory code, approved by parliament, is to provide a detailed explanation of the 2010 Act and to provide practical guidance on compliance. In Spence-v-Intype Libra Elias P (as he then was) summarised the position in relation to reasonable adjustments under the 1995 Act at paragraphs 43 and 48:

*"We accept that the concept of reasonable adjustment is a broad one, but we do not consider that this assists the argument. The nature of the reasonable*

*steps envisaged in s4(A) is that they will mitigate or prevent the disadvantages which a disabled person would otherwise suffer as a consequence of the application of some provision, criterion or practice. That is in fact precisely what Lords Hope and Rodger say in the paragraphs relied upon; the duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise… In short, what s4(A) envisages is that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work."*

Harassment, direct discrimination and establishing Discrimination

47.1. Section 40 prohibits harassment by employers and section 26 relevantly provides:-

(1) *A person (A) harasses another (B) if—*

*(a) A engages in unwanted conduct related to a relevant protected characteristic, and*

*(b) the conduct has the purpose or effect of—*

*(i) violating B's dignity, or*

*(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

*…….. (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account*

*(a) the perception of B;*

*(b) the other circumstances of the case;*

*(c) whether it is reasonable for the conduct to have that effect.*

47.2. Section 39 prohibits direct discrimination by employers and Section 13 relevantly provides:

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

48. Section 136 of the Act states:-

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

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

49. This is a two stage process: it is for the claimant to prove facts from which the Tribunal could conclude an act of discrimination has occurred before the

respondent is called to provide an explanation. In examining those primary facts, poor treatment is not enough. See in particular Madarassy v Numora International Plc [2007] IRLR 246 para 56, per Mummery LJ: "The bear facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that on the balance of probabilities the respondent had committed an unlawful act of discrimination".

50. The well-established principles relating to direct discrimination are as follows:

> "(1) If the tribunal is satisfied that the prohibited characteristic was one of the reasons for the treatment in question, this is sufficient to establish direct discrimination. It need not be the sole or even the main reason for that treatment; it is sufficient that it had a significant influence on the outcome: Lord Nichols in ***Nagarajan v London Regional Transport [2000] 1AC501*** *House of Lords at 512H to 513B. Significant in this context means not trivial.*
>
> (2) *Where an actual comparator is relied upon, "there must be no material difference between the circumstances relating to each case.*
>
> (3) *Direct evidence of discrimination is rare and frequently tribunals have to infer discrimination from all the material facts: Elias J (President) in* ***Ladell****: "Where the applicant has proved facts from which inferences could be drawn that the employer treated the applicant less favourably [on the prohibited ground], then the burden moves to the employer" … then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on a prohibited ground. If he fails to establish that the tribunal must find that there is discrimination".*

Underhill J in the **Martin v Devonshire Solicitors [2011] ICR 352, para 37** said: "Tribunals will generally not go far wrong if they ask the question suggested by Lord Nichols in **Nagarajan**, namely whether the prescribed ground or protected act had a significant influence on the outcome". In **Igen Limited v Wong [2005] IRLR 258CA** the guidance issued in **Barton** in respect of sex discrimination cases and was said to apply and approved in relation to race and disability discrimination:

Limitation

51. Section 123(1) of the Equality Act 2010: "Proceedings on a complaint within section 120 may not be brought after the end of - (a) the period of three 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.

52. Those periods are extended by the ACAS conciliation provisions where conciliation is commenced within the relevant time either by the "stop the clock" provision or providing a further month from the close of conciliation.

53. Time runs from the date of the alleged discriminatory act (but lack of knowledge is relevant to the grant of an extension) - see Mr GS Virdi v Commissioner of Police of the Metropolis and another [2007] IRLR 24 EAT; In the case of a failure

to make a reasonable adjustments, an omission time runs from the date when a person does an act inconsistent with making the adjustment; or on the expiry of the period in which the person might reasonably have been expected to do it (Section 123(4)). See Matuszowicz v Kingston upon Hull City Council [2009] EWCA Civ 22 on the exercise of discretion in such circumstances.

54. In constructive discriminatory dismissal cases, time runs from the dismissal date, even though the alleged discriminatory conduct in response to which the claimant resigned is said to be much earlier.

55. The Tribunal also considers "forensic prejudice" in assessing the prejudice to each party from an extension of time - see Wells Cathedral School Ltd v Souter EA 2020 000801 JOJ.

56. Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132 makes clear that the Tribunal is entitled to consider the merits of a claim in the exercise of its discretion.

57. The Act confers the widest possible discretion on the Employment Tribunal in determining whether or not it is just and equitable to fix a different time limit Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640. That said the power of the Tribunal is a discretion, to be exercised judicially, assessing relevant factors and the weight to be given in each case. The onus is on the Claimant to persuade the Tribunal that it is just and equitable to extend time. Robertson-v-Bexley Community Centre 2003 IRLR 434 CA.

58. If there are circumstances which would otherwise render it just and equitable to extend time, the length of extension required is not of itself, a limiting factor unless the delay would prejudice the possibility of a fair trial see Afolabi -v- Southwark LBC 2003 EWCA Civ 15.

59. In exercising discretion under the Section 123 (1)(b) case law has also established that the Tribunal must consider the length of and reasons for delay, and consider the prejudice to both parties.

60. Section 33(3) of the Limitation Act 1980 contains a helpful checklist of other matters which might need to be considered (in personal injury and other claims with longer time limits), but also for the Tribunal to bear in mind if relevant:

the extent to which the cogency of the evidence is likely to be affected by the delay;

the extent to which the party sued had cooperated with any requests for information;

the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;

the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Evidence

61. The respondent objected to the admission of a supplemental statement from the claimant at the start of the hearing, covering parts of the

harassment/limitation case which should have been addressed in her main statement. Permission was given for the supplemental statement. The balance of prejudice lay with the claimant. There was time to take instructions; permission was also given for the respondent to lead further evidence if required on the basis of those instructions; the information was likely to be given in any event; the respondent could put questions to the claimant about the reliability/weight to be placed on the supplemental statement, and could make submissions to that effect.

62. As to oral evidence, we heard from the claimant, and then from Mr Dalby, who was her operations manager (her manager's manager) in 2020; from her manager, Ms Ackroyd, who managed her in a sales team from January to June 2020; and then from Ms Wilburn, who managed her from July 2020 until November 2021.

63. The Tribunal also listened to two recordings of telephone calls between the claimant and Ms Wilburn on 1 November and 17 November 2021 – one of about 45 minutes, and one of 50 minutes or so. We did so as an alternative to permitting the claimant to introduce a second and marked up version of the call transcripts, by which it was said we would have a better impression of the tone of the conversations.

64. The Tribunal already had a hearing file of some 1200 pages. Virtually all communications between the claimant and her managers, as well as her documented diary of thoughts on those communications, was documented.

65. This extensive documentation was exacerbated by the pandemic effect – the use of team chats and electronic messaging due to home working from March 2020, if not earlier. Volume was further exacerbated by the claimant's "over talking" - this was her description not the Tribunal's – but this was a fair description. Evidence from her written diaries and communications with her managers was lengthy and she had been encouraged in therapy to document her feelings and she did so, often at length.

66. We did permit two additions to the hearing file – a presentation document which gave photographs of some of the claimant's team members, going to her direct discrimination case; and an article from an insurance industry publication in February of this year, documenting the respondent's chief people officer's thoughts about the difficulty and stigma of conversations at work about menopause.

67. Our assessment of the witness evidence is apparent from our findings below. In short, we considered Mr Dalby and Ms Ackroyd to be witnesses of truth. Ms Ackroyd was frank about the difficulty in remembering matters having been on leave for around 14 months and matters involving her happening some three years ago.

68. Ms Wilburn's interactions with the claimant were comprehensively documented, and the calls to which we listened were consistent with her approach, which was generally straightforward. At times though, she was clearly wedded to a

performance management/disciplinary process that she believed had been correctly applied, with little apparent understanding of the effect of her approach on the claimant's declined mental health, impact upon her of the menopausal symptoms, or the respondent's obligations in relation to disability.

Approach to decision making

69. The way that the Tribunal approached its deliberations, findings, and conclusions, was to examine the eleven positive allegations (2 to 12 above), decide the facts and issues concerning those matters in order, assess the dismissal case, assess the reasonable adjustments case, address the limitation issues, and to stand back and consider as a whole whether any further matters require addressing. In its extempore decision it did not announce its conclusion on the Section 15 case concerning sick pay, nor refer to it in its limitation assessment, nor include it in the written judgment, and these were omissions not least due to pressure on time. The Tribunal had upheld the complaint.

Findings

Background

70. The claimant was employed by the respondent as a motor sales consultant from 11 April 2016. She had good and very good performance ratings in that role. She came to know Mr Dalby well, meeting for post work drinks with the teams from time to time. Until 2020 he considered her reliable in always speaking to customers in the right way for the respondent's business. She took great pride in her work and was very enthusiastic about the respondent and her role. She had taken up the role after a marriage breakdown. She was determined to make a success of it.

71. The respondent's "Resolving Issues at Work" policy provided that managers, before taking formal action, should consider whether: there are underlying reasons for the issue and have they been supported and identified, and whether there was anything a manager had not considered; whether any issues could be considered under the Equality Act; whether HR advice had been sought; and whether and Occupational Health report would be beneficial.

72. The respondent introduced a new initiative - Best For Customer (BFC) through 2019 which involved re-training the entire sales force. That coincided with the onset of menopausal symptoms for the claimant. She experienced "brain fog" and concentration difficulties, particularly in retaining information, and she was much less resilient to life's vicissitudes, being frequently tearful.

73. Nevertheless she formed a trusting bond with a new line manager in Ms Ackroyd from November 2019. Ms Ackroyd worked with her to reduce the amount of time regarded as "wasted time" - her "CCT" - customer conversation time was too long, perhaps reflective of the claimant's tendency to "over talk". That had also been identified by the claimant's previous line manager.

74. Sales consultant performance was measured against four targets and they had to achieve a "balanced scorecard". They included quality or regulatory matters – assurance – including statements which had to be made to customers, for example;

sales; CCT and customer experience (rated by survey of customers). While there was improvement in the claimant's wasted time, other aspects of her performance then declined. Ms Ackroyd's coaching and support was heavily documented, including in "personal growth" (PG) meeting notes and elsewhere.

75. The claimant's family encouraged her to visit her GP on 2 March 2020 because of their observation of her. She was diagnosed with hormone imbalance/depression/low mood and prescribed a course of citalopram. HRT was discussed but ruled out within a month. The claimant had told her GP that her job was suffering. By 30 April she had been advised (given that citalopram was helping) to continue for at least six months.

76. The claimant included a great deal of information about her personal circumstances in her PG preparation - those circumstances were under strain both at home and at work in this period and she was frequently tearful. While Ms Ackroyd may not (and certainly Mr Dalby we accept did not) read the entirety of those PGs, it was clear from the information the claimant provided that she was being profoundly affected by menopausal symptoms and was seeking treatment for them; that was apparent from March 2020.

Allegation 2 - in May 2020, Kim Ackroyd referring to the Claimant as "constantly trying to keep [her] head above water", criticising her performance - section 15/conduct without reasonable and proper cause

77. This was a comment of Ms Ackroyd in response to the claimant's self-review; in context (she went on to express admiration), this was not unfavourable treatment, it was Ms Ackroyd's honest and supportive assessment at the time. In particular the claimant had encountered customers with complaints, and she had taken the brunt of that, becoming upset, on top of the challenges she was facing in reducing CCT and other matters.

78. As an observation, the comment was with reasonable and proper cause - it aligned with the claimant's own description of herself at that time. The claimant was not affected by it at the time (in the sense of considering it said anything other than supportively), and had acknowledged herself the support she was receiving from Ms Ackroyd, which included one to one coaching about handling customer complaints.

79. Pausing there, the claimant had included information about her March GP appointment in her PG, and the respondent ought reasonably to have known of her disability in March, we find. The claimant fully shared that information with Ms Ackroyd, and if there had been any doubt or lack of understanding about it, she could reasonably have been referred to occupational health then. As we do not find any unfavourable treatment in this period, and the reasonable adjustments case does not begin until 1 July, this finding is for completeness in the chronology.

80. The claimant did then break down at work on or around 10/11 June, because Ms Ackroyd had raised with her a particular call with a customer which the claimant accepted was unacceptable. Ms Ackroyd authorised some short notice holiday as an alternative to short term sick leave; and when the claimant returned to work on

17 June they had a further conversation and Ms Ackroyd indicated she would put in place a "success plan", which would involve weekly coaching. The claimant's medication was helping her at this time, but she felt overwhelmed with the strain from work and saw her GP. She was diagnosed with work related stress, with a fit note advising she refrain for work for two weeks.

Allegation 3 - In June 2020, the Claimant being transferred into a different role, she felt, under false pretences, with Kim Ackroyd describing the new role as a "lifeline", without targets or complaints to deal with. This transfer resulted in financial loss for the claimant, instead of making adjustments to her existing role - section 15/conduct without reasonable and proper cause;

81. At this point Ms Ackroyd went to Mr Dalby, seeking his thoughts. Mr Dalby, with his liking for and knowledge of the claimant's previous record, suggested a move to the telematics team, to a role which had become vacant. He considered that formal performance management in her current role would destroy the claimant, and he said so when he telephoned the claimant on or around 19 June to offer her the role. He also said the role was a better fit for the claimant and "did not have all the challenges" of sales (the claimant's oral evidence). He did not say there were "no targets".

82. The role contrasted to general motor sales and retention because it involved talking to a specific customer group, about their existing policy, often technical questions, on one specific product, as opposed to covering different product standards and details, and being required to sell those different products.

83. The claimant was invited to think about the role over the weekend, and then have a more formal conversation. She was not provided with a job description – a "job on a page" document, but Ms Ackroyd did set out when they met on 29 June, the claimant's first day back, the main aspects of the role.

84. The claimant understood that the new role did not involve a sales related bonus, of about £3500 per year on her previous performance and earnings, but she decided with her husband that the move was sensible none the less.

85. On balance we consider the claimant is mistaken that Ms Ackroyd used the phrase "lifeline", just as we find she was mistaken that she was told there were "no targets" by Mr Dalby. The documentation reveals only that the claimant herself used the expression "lifeline", also saying this: "I feel absolutely privileged to be able to say - that Kim and Paul had my Health and Wellbeing at the forefront of their care plan for me.....I couldn't be more delighted at being given this opportunity...".

86. There was then a three way discussion between Ms Ackroyd and Ms Wilburn and the claimant to hand over her management and that was also entirely supportive, recognising that her new role would start from 1 July with one to one training.

87. Addressing the chronology to date, the respondent knew, or ought reasonably to have known, from March 2020, that the claimant had become a disabled person by reason of menopausal symptoms, not least because of her extensive sharing of information. Were there any doubt about matters, an occupational health referral

ought reasonably to have been made, which would also have spoken to the disadvantages the claimant faced in retaining information.

88. She was self-evidently at a disadvantage in comparison with colleagues without her disability in meeting the respondent's performance standards and targets, and generally more likely to be sanctioned or face disciplinary/performance warnings. She struggled to retain or access computer systems she had used for a long time; she struggled for words; in trying to reduce call waste time, she became cold and unfriendly at times. Ms Ackroyd was proposing a success plan in June 2020 and that typically preceded formal warnings. In making this finding we acknowledge that even without menopausal symptoms, the claimant was likely to spend longer on calls than some. Her menopausal symptoms exacerbated her challenge in balancing call time with other aspects of performance and with all other technical and sales targets.

89. Notwithstanding Ms Ackroyd may not have taken in the subtleties of the claimant's difficulties and understood she was a disabled person as a result, she was frequently acknowledged by the claimant to be doing all she reasonably could to support her, including one to one coaching and open conversations. Furthermore she sought advice from Mr Dalby. His pragmatic approach was to offer an alternative role to address precisely the disadvantages the claimant faced – in truth he made a reasonable adjustment. He may have been criticised for it later, because of perhaps a lack of involvement with HR or occupational health, but the Act requires practical steps which will help, rather than processes, and the claimant was, at the time, unsurprisingly appreciative of the practical step he made happen.

90. It is convenient to address one other aspect of the claimant's case – that her allegations are at odds with her frequently expressed praise of her managers in her PGs. The gist of the claimant's evidence was that this was the way the business worked, and she had to express herself in that way. We do not consider that evidence likely (but we had no other comparable PGs for other staff), but even if we did, it goes to knowledge: the respondent's understanding about an employee's health or state of mind, or contentment, if they express themselves in the way that she did, can only, reasonably, be to trust that information, a mantra being to communicate "openly and honestly".

91. In short, there was no unfavourable treatment of the claimant in the way described, in allegation 3, nor was there conduct without reasonable and proper cause (let alone likely to destroy trust and confidence).

<u>Allegations 4 – 6</u>

<u>In October 2020, Danielle Wilburn wrongly categorising the claimant's performance struggles as a confidence issue. It is alleged that she spoke to the claimant, stating; "You aren't there yet at the same level of the team in terms of your performance. I believe that working on your confidence and self-belief will help this improve naturally." - harassment related to age and/or sex and conduct without reasonable and proper cause</u>

In November 2020, Danielle Wilburn said the same again as the above, to the claimant, that she "requires a high level of support and her efficiencies are not in line with the team." - harassment related to age and/or sex and conduct without reasonable and proper cause;

On or around 10 November 2020, Danielle Wilburn threatened the Claimant with disciplinary action, stating "I will be speaking to HR about the situation past and present, should I listen to a call where Maxine speaks to a customer in an unacceptable manner, I will take further action such as a disciplinary" - section 15 and conduct without reasonable and proper cause;

From the start of the claimant's employment in the telematics team, Ms Wilburn talked to her every working day, not least because their communications were taking place during the Covid pandemic. The respondent had the challenge of moving its operations to home working and the claimant was the first person in that team to be trained remotely. The team used a "chat" function in Teams to seek advice from each other.

92. The claimant frequently expressed her feelings of happiness in moving to the new role and she had great regard for Ms Wilburn at this time, describing her as fantastic and similar glowing terms. Ms Wilburn had set up the telematics team some years ago and she had great enthusiasm for it.

93. The claimant was one to one trained by a colleague, Lisa, although she was quickly allocated to take calls due to business pressure. By September all was going well, the claimant was being highly praised for assurance and connecting with customers – efficiency was expected to improve when her confidence had improved. There were performance measures in this role, which were discussed with her by Ms Wilburn in a positive way. The claimant had let Ms Wilburn know that she was gradually coming off anti- depressants; she had a small upset with a colleague who was less then helpful (but also leaving). Otherwise she approached October feeling very positive.

94. The team comprised twelve to fifteen or so colleagues, five of whom over the age of fifty (two women and three men). The two women over fifty were the claimant's coach, Lisa, and the claimant. There were more men than women in the team – by late 2020/early 2021 there were more men than women generally, not least because of three new starters that autumn, but there were other, younger women in the team.

95. The claimant had three weeks' leave in October, unable to go out of the country but with family and renovating her home. She was in message contact with Ms Ackroyd, describing herself as loving the new role and "smashing it" and coming off her anti-depressants.

96. When she returned to work Ms Wilburn took her through a typical PG review and included her usual praise of the claimant's strengths and progress. The claimant herself made much of the arrival of three new starters whom the claimant perceived to be in their twenties and thirties, and that she felt they were progressing more quickly than she was. Ms Wilburn told her not to worry. In a coaching and performance discussion on 29 October she also made the comment above, continuing..."Today we have used this time to come up with a plan of action to develop [the claimant's] knowledge and confidence in herself and her role to bring her in line with the rest of the team by the end of the year". The context included that the claimant had previously

said her confidence was a challenge. Ms Wilburn provided information for the claimant on process and skills. Ms Wilburn was continuing to provide support but was also encouraging the claimant to suggest her answer to any question in the team chat, rather than just asking others. The claimant's conclusion to her PG from 26 October was "feeling happy and confident so far until someone tells me otherwise – happy and enjoying my new role – long may it continue". She confirmed she was fully off anti-depressants at that time.

97. Ms Wilburn then had some time off; and then when she returned she had two customer complaints, and on listening to the calls discovered the claimant had been abrupt and rude. Her conduct was in breach of the respondent's code and she discussed that with Mr Dalby and had two conversations with the claimant – one on 10 and one on 11 November; she was firm about that conduct not happening again, but also she documented that November would be for the recapping of training, including involving Lisa again.

98. They then had an additional coaching conversation on 13 November, and Ms Wilburn said that they would work on efficiencies next month to start 2021 in a strong position. The claimant explained that she now felt coming off medication was not necessarily the right decision. Ms Wilburn was clear that she believed the conduct on the call was behavioural – rather than about a performance standard, and in her first conversation with the claimant on 10 November, she did suggest the potential for a disciplinary referral as alleged.

99. In the claimant's November PG, Ms Wilburn twice made reference to getting the claimant "in line with the team", in terms of her efficiencies – or call length. She also referred to the high level of support being provided by herself to the claimant – they were continuing to speak daily.

100. Pausing there, the facts established by the claimant are not such that the Tribunal could conclude that Ms Wilburn's comments in October and November were related to sex and/or age, or less favourable treatment because of either or both of those characteristics. They were clearly and directly related to the claimant's particular development in the new role. Ms Wilburn would have been just as likely to identify confidence as an issue with a younger and/or male colleague who themselves referred to confidence as an issue. References to being in line with the team were simply identifying where the claimant's relative performance stood, and alongside many words of encouragement and actions to reach the required standard.

101. The age/sex related allegations are dismissed. Ms Wilburn's conduct was also with reasonable and proper cause in this respect.

102. As to Allegation 6 – the conversation about potential disciplinary action, the extracted sentence is part of two long conversations, each a day apart, in which the claimant entirely accepted the wrongdoing in the call handling, and sought to put mitigation to the effect that she struggled with challenging customers and had done so previously. She also believed there would be fewer such calls in this team, and the two that had taken place had particular mitigating features. Ms Wilburn considered disciplinary action, spoke to Mr Dalby, he said he would talk to the claimant (again pragmatically

adjusting what might otherwise have been a formal approach), he did so, and that was an end of it.

103. In her PG or similar self-reflecting document, the claimant had made reference to being in tears and emotional in her conversations with Ms Wilburn, and Mr Dalby, and she said this - "*the challenging feedback reduced me to tears once again and had me questioning why – I cannot accept that challenging feedback and why it reduces me to tears and why I cannot remain calm and accept that without becoming an emotional wreck?)I always want to do well and remain calm and professional even when those tough days and conversations have to happen – for some reason I don't seem to be able to remain in control of my emotions...? I will monitor this going forward and feedback any changes I feel necessary as and when required*."

104. In our judgment Ms Wilburn had reasonable and proper cause to raise these calls with the claimant – indeed she had to do so in such a regulated environment – and the claimant knows and recognises that. Indicating the potential for disciplinary measures but then deciding against, and opting for further coaching in discussion with Mr Dalby, is something about which the claimant has an unjustified sense of grievance. It was not unfavourable treatment, in the unanimous view of the Tribunal. If we are wrong about that, and assuming her conduct arose in consequence of menopausal symptoms, we consider speaking to the claimant as Ms Wilburn did, over two days, reflecting in between and taking advice, and deciding further coaching as the way forward, was a proportionate means of achieving a legitimate aim of the respondent, namely providing a high quality service to its customers.

Allegation 7 - In December 2020, Danielle Wilburn criticized the Claimant's performance, stating that the Claimant struggled to get to grips with or understand her role, including that she didn't understand how to handle or resolve customer queries - section 15 and conduct without reasonable and proper cause;

Allegation 8 - In January 2021, Danielle Wilburn informed the Claimant that she would not be receiving a pay rise because her performance was rated "need for improvement" - section 15 and conduct without reasonable and proper cause;

105. As to Allegations 7 and 8, it is somewhat artificial to take them separately. The respondent's pay strategy provided that annual increase in 2021 depended upon performance rating. There were three options: need for improvement, good or outstanding.

106. The chain of events is this. The claimant had completed her own review of the year in a 7 page document on 5 November, before the call incident above. She reported in that document that "I am being given all the right tools, feedback and support I could ask for and Danielle and I are quietly confident that the plan in place going forward will enable me to reach all the areas of expertise, knowledge required to fulfil my role and my confidence moving forward".

107. She had received end of year pay rises from reviews at the end of 2016, 2017, 2018 and 2019. She noted the difficulties in 2020 in her own assessment but ended it in an optimistic tone. She then had some holiday and was also absent from work with Covid in December 2020. She and Ms Wilburn could not meet for the EOY review

because of that absence which was nearly four weeks in total, but Ms Wilburn captured her thoughts in a "manager evaluation" document in December.

108. Ms Wilburn's evaluation involved her contacting Ms Ackroyd and recording some of the challenges for the claimant in the previous team and the impact upon her and the reason for the move to telematics. Her assessment set out the claimant's move in a balanced way. She noted that in telematics the claimant had "passed all her assurance with no feedback", but was "s*truggling to get to grips and understand the role and how to handle/resolve customer queries and requires a high volume of support on most interactions and seems to struggle to retain the information or learn from questions asked previously*". She then went on to acknowledge that training had not been straightforward due to customer demand, holiday and absence. She recognised that the claimant wanted to do well and excel, showing great passion and commitment.

109. Ms Wilburn then proposed to restart a training recap in the new year. She discussed the need for consolidation of skills and knowledge, before efficiencies could be tackled (essentially call time), in which she described the claimant as an outlier. Her call time was twice that of the rest of the team. She mentioned the two unfortunate calls in November but described them as unintentional, and that she did not want them to continue. Taken as a whole and in context, the comments were her honest assessment, explaining why "need for improvement" was the rating. The claimant did not know of this assessment in December.

110. In January on her return to work the Ms Wilburn discussed the grading with the claimant. This was a missed opportunity to explore the underlying reasons for her performance, reflecting on the whole year. The claimant was upset that she had moved from being a high performer in her previous rating, to NFI. Nevertheless, she responded by producing a training aid for herself and had six days of refresher training in January 2021, as promised by Ms Wilburn.

111. Objectively, Ms Wilburn had reasonable and proper cause (in the sense of honest and objective cause) for her rating of the claimant: essentially extended call time, not being fully able to undertake all tasks unaided; and unacceptable calls on two occasions, the latter Ms Wilburn had accepted was unintentional by the time of the assessment. It was the assessment which generated the lack of pay rise: the respondent had a group wide policy that all employees rated NFI were ineligible for pay awards. We did not hear about that process, and whether there was management approval of ratings/awards, but industrial knowledge tells us that it was likely Ms Wilburn's assessment required sign off by her manager (other aspects of management were so discussed and agreed).

112. Is this - an honest assessment with pay consequences - unfavourable treatment, about which the claimant could justifiably complain? In our judgment it was, in all the circumstances of this case: she had previously had good performance ratings across four annual assessments by the respondent; she had informed the respondent of the reasons she now struggled to retain information, and was emotional; she was mentally impaired because of the symptoms of menopause – there was a clear reason; and she was a disabled person as a result. Ms Ackroyd accepted by the time

of the assessment that the two poor calls were not intentional. The assessment was to have direct financial impact on pay and pension. This was a measurable and material deterioration for the claimant after four otherwise good years with the respondent. She could in those circumstances reasonably expect some reflection on whether she should be given the benefit of the doubt – rating her performance as "good" in the sense that she was doing all she could to achieve within her limitations. Need for improvement is inherently unfavourable if the person, through disability, cannot, in fact, improve, or meet the required standards.

113. These matters also impact on whether the unfavourable treatment was because of something arising in consequence of disability. It is clear that one reason for that rating, in Ms Wilburn's mind, was the claimant's "struggle to retain information" - she recorded that in her assessment. The assessment and consequent lack of pay rise was plainly something arising in consequence of the claimant's disability – on her symptoms case – inability to retain information and memory – was an effective cause. She had operated across the respondent's IT and sales systems from 2016 to 2019 without difficulty, and yet she could not, in 2020, embed new information, which concerned 70 or more processes, for her new role, and that is clearly part of Ms Wilburn's assessment of her.

114. In making this finding we recognise that part of the reason for the rating, call time /efficiency, was likely inherent in the claimant's personality and tendency to overtalk. Nevertheless, her menopausal symptoms were such that regulating that while taking on new processes became impossibly difficult in 2020/2021, in our judgment.

115. We then come to the respondent's justification defence. The respondent conceded the claimant was a disabled person in its amended response on or around 6 January of this year. It's concession concerning knowledge came at the start of the hearing. It did not include a legitimate aim in its amended response, but the aim was included in the agreed list of issues. We were encouraged to permit the respondent to rely on that aim as it had been set out prior to the exchange of witness statements and there was no prejudice to the claimant. adopt an informal approach and, if we reached the respondent's justification defence, to take account of it on the basis that there was no prejudice to the claimant in doing so.

116. Certainly there was not prejudice to the claimant in that approach but we did not hear any evidence about how the rating and pay decision in respect of the claimant achieved the respondent's legitimate aims which were (fully put): "the need to ensure that employees are performing in their role in order to deliver a high quality and efficient service to customers and run an efficient and profitable operation and to balance the needs of the respondent's business alongside the claimant's need for adjustments to her role or duties".

117. We did not hear, for example, of policy or decision making for disabled people generally, those ill or absent for treatment or appointments or whose performance is affected by disability during a performance year, and how that was applied to the claimant, nor did we hear of the consequences for overall profit or customer service of rating the claimant such that she would receive a pay rise, with appropriate

explanations or measures in place – in essence - why less discriminatory steps were not appropriate. This complaint is upheld subject to limitation.

118. As to whether these matters breached the implied term, it seems to us that giving an honest and objective assessment does not do so, in the sense of entering the rating and rationale on the form – allegation 7, but for the respondent to go on and implement that assessment without discussion or recognition of the claimant's disability through management or HR oversight, is not with reasonable and proper cause in our judgment. This conclusion also takes into account our finding of discrimination – subject to limitation. A rating of "need for improvement" inherently carries with it the implication that the claimant was being asked to do something she could, with effort, improve – rather than that she was being asked to achieve standards which she could not, because of her disability, achieve in the time required. This was likely to seriously damage trust and confidence. We do not find that it was calculated to do so.

Allegation 9 - On or around 30 April 2021, the Respondent commenced formal performance management proceedings against the Claimant, due to an alleged failure to understand and deliver in her role. The Claimant had previously explained to Danielle Wilburn that her disability and associated symptoms of menopause were impacting on her ability to retain information and her emotional stability - section 13 direct age and/or sex and section 15 and conduct without reasonable and proper cause;

Allegation 10 - The issuing of a written warning for the Claimant's performance on 30th April 2021, to last 12 months - section 13 direct age and/or sex and section 15 and conduct without reasonable and proper cause;

119. We then come on to the part of the chronology which is January 2021 through to 29 October 2021.

120. Having completed refresher training in January the claimant received good feedback in her February PG, and she had good feedback with a "Scorecard" of over 95% that month. Lisa listened back to calls and gave her good feedback, albeit there were still some problematic calls in the ones sampled, both through lack of knowledge and time of engagement with the customer. In March Ms Wilburn had some time off and a colleague "acted up" as team leader in her absence and gave the claimant some feedback about a particular customer. The claimant did not consider her team were fully supportive in Ms Wilburn's absence, but Lisa remained her primary coach and was supportive. There were again some problematic calls in March to which Lisa and the acting up team leader listened. Ms Wilburn had hoped the claimant would be signed off as competent at the end of March, but given her absence she proposed to listen to calls herself during April for that purpose and no doubt she had received feedback from her deputy about March.

121. In the first two weeks of April, Lisa coached the claimant by call listening. Ms Wilburn then listened to calls on 14 and 16 April and contacted HR with her manager Ms Jenkins.

122. Ms Wilburn wanted to invite the claimant to a first stage warning meeting, she set out a potted history for HR (page 717) in which there was no mention at all of any

mitigation or the claimant's disability, menopause or the symptoms she had described. The request for advice was, simply, despite training and coaching the claimant was still not following guidelines.

123. Ms Wilburn then listened to further calls on 19, 20 and 21 April. In a second call with HR on 21 April Ms Wilburn told HR there were "*no underlying conditions – she's just not able to complete calls at the minutes...some points last year she did go off for mental health for a week...she wants to do well but just not absorbing what she's doing, so she's happier and not on medication"* . This information was then confirmed back to her in an email from HR as follows: " *As discussed during our call today, you have confirmed you have all the documents, coaching, mentoring and training to support the case you have to take Maxine to the first stage disciplinary. You confirmed that Maxine does not have any mitigation as to why the guidelines for her role are not been followed. You are comfortable that this should go to the first stage which I would agree with. Any issues let us know."*

124. In saying there were no underlying conditions Ms Wilburn had either failed to recognise or take in the explanations the claimant had given to Ms Ackroyd and to her about the menopause and her symptoms, or she was being untruthful – the latter was the claimant's case. We consider that on balance it was the former, she gave HR wrong information, perhaps because she was set on her course and did not review the potential mitigation carefully. She had reached the limits of her compassion to support the claimant.

125. She had booked time with the claimant on Friday 23 April with a view to signing her off as competent or discussing that with her. Instead, in their call, she let the claimant know she would be inviting her to a disciplinary meeting the following Monday. The claimant was very upset and Ms Wilburn gave her the remainder of that day off and they resumed their discussion on Monday 26 April.

126. The claimant was then sent an invitation to a disciplinary meeting, to be held virtually, on 30 April. Ms Wilburn was to act as disciplinary manager and sent the claimant a complete set of the information which were, in essence her "case" or evidence to take the claimant to a disciplinary. She was the prosecutor – in that sense.

127. The meeting took almost the whole day on Friday 30 April and the claimant was unable to secure Ms Ackroyd as her representative or companion. Ms Wilburn had a note taker present; the claimant attended remotely from home. The discussions ran through all the performance issues and the claimant became very upset. After a forty minute adjournment later in the afternoon, Ms Wilburn told the claimant she was imposing a first written warning for 12 months with a "success plan" for three months. This was subsequently confirmed in writing and the claimant was informed to raise any appeal, "to the manager that held the meeting". She did not do so because she believed it would be pointless.

128. Ms Wilburn said this when giving her decision: "*you have mentioned that since January 2020 you have been in a pre-menopausal stage* (this was clearly wrong and not what the claimant had said at all in answer to Ms Wilburn's question about it) *and were given medication, you say this can impact people's ability to retain information, cause brain fog and impact emotional stability. However, despite being aware of this,*

*you took on a new role where you understood you would need to learn new processes and a new role. You then made the decision yourself to stop taking the anti-depressants. You have only reached out to the doctor on 26/04/2021 after our conversation on Friday to talk more about the menopause and how this might be impacting you. You haven't had conversations with me to tell me you're struggling and why or how I can help support you. You aren't on any treatment since stopping medication in September and you state you have been in a fantastic place up until Friday, and why I can't accept this as mitigation for your underperformance".*

129. Ms Wilburn took advice in the adjournment from HR and was advised, no doubt, to explain why she could not accept the claimant's health condition as good reason not to impose a disciplinary warning.

130. Pausing there, it is clear, applying the same analysis as that set out for the "need for improvement rating", that the disciplinary warning was unfavourable treatment because of something arising in consequence of disability. Ms Wilburn's call analysis identified calls where the claimant had not known the right process or step for the customer, despite training, and she explained and discussed this with the claimant. The menopause and its symptoms were mentioned many times by the claimant during the course of the disciplinary meeting, albeit Ms Wilburn appeared not to listen or take in the significance of the explanations the claimant was giving, and she was mistaken about the medical position when giving her decision.

131. The respondent has conceded knowledge of disability from June 2020. Ms Wilburn refused for her own reasons to accept its consequences and significance - this was apparent in the conversations backwards and forwards which are documented at great length. The claimant was clearly suffering with cognitive impairment (effects on memory/poor concentration) and that that was known at the time Ms Wilburn imposed the warning and was a reason for it. Had the claimant been learning this new role in 2016 or 2018 she would not have had the struggles she did, in our judgment, to retain the necessary information and relay it to the customer or apply it.

132. We remember our findings about Mr Dalby's approach in the summer of 2020, knowing that formal performance management would destroy the claimant, knowing she had previously performed well, and his recommendation against disciplinary action in November 2020, speaking to the claimant instead. We contrast that with Ms Wilburn's approach in April, with the support of her line manager, and HR, the latter being given wrong information from the outset, and even when HR was given the menopause explanation in the adjournment its advice appeared to be oblivious to the respondent's duty to make reasonable adjustments - *occupational health may be able to support you …...but at the minute they would just confirm she is going through the menopause and explain the symptoms which may not help you anyway."* We know, from the occupational health appointment which later took place, that amended targets were recommended as a reasonable adjustment.

133. On the claimant's symptoms based approach to the something arising, memory and concentration difficulties, it is very clear that her failures to absorb the full number of processes was at the heart of this disciplinary charges framed by Ms Wilburn and her disciplinary decision. We were helped by the principles set out in Mr Cook's

statement of the law in relation to the section 15 test, and whilst we focus on Ms Wilburn's reasons, when we come to assess whether the action is because of something arising in consequence of disability, this is an objective assessment of fact for the Tribunal. In our judgment objectively the 30 April warning and the decision to go down that disciplinary route without adherence to the respondent's procedure was unfavourable treatment because of something arising in consequence of the claimant's disability.

134. Was it appropriate and reasonably necessary to impose the warning? Was it a proportionate means of achieving the respondent's legitimate aim? The Tribunal has concluded it was not. Again we heard no evidence about how this step achieved the respondent's aim. The matters we take into account include whether a less discriminatory approach could have been taken (in respect of which our conclusion about the claimant's reasonable adjustment case applies). Further the process leading to the imposition of the warning was an investigation conducted by Ms Wilburn, and a hearing conducted by her. This was at odds with principles of fairness in the ACAS code and the respondent's procedure, which set out that the disciplinary manager ought not be involved in the disciplinary issues. Further the procedure provided a checklist for managers before beginning a formal process - including "what underlying reasons (ie not obvious) could be involved – have you shared these with your people manager". This was not done until the adjournment by which time the formal hearing was almost over – far away from "before beginning a formal process".

135. It is clear a less discriminatory approach could have been taken, including occupational health referral, consideration of other roles, and accepting the claimant's mitigation, namely her disability. This complaint is also upheld, subject to limitation. For the same reasons we also consider Ms Wilburn acted without reasonable and proper cause, and to impose a warning in these circumstances was likely to destroy or seriously damage trust and confidence, objectively.

136. As to the allegations of harassment or direct age and sex discrimination, the facts above are not such that we could conclude sex and/or age operated on the mind of Ms Wilburn or that her unwanted conduct (for that is what it was) related to age and/or sex. Other than the demographics of the team, the facts asserted came down to one or two interactions of colleagues and Ms Wilburn in the chat room – essentially encouraging the claimant to seek answers herself, or indicating weariness with the claimant's need for support. There was no evidence that coach Lisa, also an older woman, experienced similar treatment, and the simple reason why, was a frustration or weariness with the claimant's three areas of challenge described above. There is no evidence from which we can we find Ms Wilburn would have treated a male and/or younger colleague with the same challenges, but also mental impairment, any differently. These claims are universally dismissed, subject to limitation.

<u>The claimant becomes unwell</u>

137. The claimant did not appeal the warning given above. She commenced the success plan with further call listening, coaching and targets in early May. She consulted her

GP because she was having trouble sleeping and explained that she believed she had 66 days at work to improve and that the respondent was trying to manager her out. She was prescribed Zopiclone to help her sleep and diagnosed with stress at work but she continued to attend work and do her best. She also explained to her GP that "they flatly refused to accept menopause was a factor". She dug in, showed great resilience, and tried her best to meet the requirements of the success plan.

138. In mid-July the claimant experienced upset unrelated to work, and suffered panic attacks; she was advised on 15 July that she was unfit for work due to "stress at home". Towards the end of that month she accessed counselling through the respondent's employee support programme, and attended a menopause advice session recommended to her by Ms Wilburn. She found Ms Wilburn supportive in July, and maintained regular contact with her by phone and text message.

139. The claimant received help from her GP and explored potential treatment for both stress and menopause symptoms. She also discussed the strain of the success plan with the GP and relayed this onto Ms Wilburn when they had their regular catch ups.

140. In early August Ms Wilburn was clear that the success plan would remain in place on the claimant's return and so the claimant needed to be fully fit to return. She consulted Mr Rose about it, her new manager, who advised that the success plan could be paused for a month and she let the claimant know this on 11 August. That day Ms Wilburn had also forwarded to Mr Rose the notes of her catch up conversation with the claimant. She suggested to Mr Rose that sick pay be stopped – or asked him if he wanted to stop it. She considered it was a barrier to the claimant returning to work. The claimant did not appreciate this was a possibility, or that it was being discussed, within a month of her absence commencing. The claimant's treatment for stress/menopausal symptoms at this time was: counselling, weekly acupuncture sessions at £40 a session, and changing her diet and exercise. She had found sleeping tablets gave her nightmares, had discussed that with her GP and they were not to be prescribed again.

141. Ms Wilburn made a referral to occupational health and an assessment took place by telephone on 20 August. The advice to Ms Wilburn was that the claimant was likely to qualify as a disabled person, she would be unable to return to work for a further 6 to 8 weeks, and when she did so, a phased return was recommended for consideration over four weeks. In addition the practitioner recommended: an open dialogue about stress, a review of training needs, additional training time and an adjustment [to] target based work until menopausal symptoms have improved, possibly on an ongoing basis, with a likely fitness to carry out the role in the longer term. In short, that advice recognised and communicated to Ms Wilburn that for as long as the claimant's menopause symptoms continued, she would be unable to achieve the ordinary targets applicable for the team.

142. The claimant's fit note on 1 September advised she was not fit for a further four weeks due to stress at home. The respondent's sick pay policy provided that after five years' service an employee could receive up to 26 weeks of company sick pay in a rolling 12 month period. The payment of company sick pay was discretionary. By mid-

September the claimant had a further 13 weeks' of company sick pay within the published policy.

Allegation 11 - On or around 15 September 2021, the Claimant was informed by Danielle Wilburn that she would not be exercising her discretion to continue the Claimant's sick pay because her level of absence was unsustainable to the business. The Claimant believes she had used 13 weeks of her potential 26 week rolling entitlement at this stage - section 13 direct age and/or sex and section 15 and conduct without reasonable and proper cause;

143. At some point between 11 August and 15 September, Mr Rose in consultation with Ms Wilburn decided to exercise his discretion to stop the claimant's company sick pay, and Ms Wilburn communicated that decision on 15 September. Ms Wilburn had contacted HR about it in August and was advised to wait until the occupational health report; the essence of Mr Rose's reason in August was that the claimant was not doing enough to help herself return to work. From the documents it is clear Ms Wilburn and Mr Rose were concerned about two matters in that respect: whether the claimant was taking the sleeping tablets prescribed; and in relation to the menopause symptoms, her wish to avoid anti-depressants. Ms Wilburn had a view that the claimant should pursue anti-depressants as a treatment for her menopause and stress symptoms – having by then been absent for some weeks and knowing that they had been taken in 2020. She also interpreted and passed on selected aspects of the claimant's communications without acknowledging the full picture – for example – the GP had advised work was good for the claimant – but omitting – when she was well enough to return.

144. As to menopausal symptoms treatment, the claimant was unable to take HRT and was not on medication – this was confirmed in the occupational health report - and the other treatments she was pursuing had partly come out of the claimant's attendance at the menopause event recommended by Ms Wilburn.

145. The reason given for the decision at the time was that the respondent could not sustain the absence. The further reason was that Ms Wilburn saw sick pay as a barrier to the claimant returning to work – namely if the claimant was without pay she would have to return to work.

146. We have found the decision to remove company sick pay to be without reasonable and proper cause in all the circumstances objectively. We did not hear from Mr Rose. A subsequent grievance investigation found that the respondent **could** sustain the absence. The claimant was accessing treatments in regular discussion with her GP, had discussed those with occupational health, and occupational health's opinion was that she was unfit and it would be a further six to eight weeks before she was fit (which would have been until mid-October). There was no medical or other basis for and Ms Wilburn or Mr Rose considering the claimant was not "doing enough". If Ms Wilburn had concerns that treatment was inappropriate for menopause she could have asked that question of occupational health in clear terms, she did not. That leaves using pay removal as a means to bring the claimant back to work. In malingering cases, for example, that would be an exercise of discretion that was neither capricious nor high handed. This was not such a case.

147. We are mindful of the need to tread carefully where a benefit is discretionary – in considering whether its removal could breach the implied term - but in all the circumstances we consider it did.

148. It was likely to seriously damage trust and confidence – the claimant described it to her GP as the respondent seeking to force her out, albeit she accepted it could be done. It created for the claimant an immediate repayment of salary, or debt, because pay was arranged mid-month, part in arrears, part in advance. It created without any warning or prior discussion a hole in the family finances and further stress for the claimant at a time when she was, in any event, struggling. The claimant did negotiate a staged repayment, but by 29 September her fit note recorded "stress and anxiety with work situation" - it worsened her psychological health. In all the circumstances this was a repudiatory breach.

149. Again, there are no facts here from which we could conclude this was less favourable treatment because of, or conduct related to, age or sex. We also reject the claimant's case that Ms Wilburn or Mr Rose were seeking to put her into financial ruin (that is the gist of her case) in order that she would be declared and unfit person, for regulatory purposes, and unable to continue in this post. We consider this level of anxiety about the motives of others was without any grounds at all and irrational, but no doubt symptomatic of the claimant's psychological state and the impact on her trust in her employer at the time.

150. As to the Section 15 complaint, we have found two real reasons – the view about treatment – not doing enough - and wishing to use pay as a tool to make the claimant return to work. In light of the facts found above, we consider there was sufficient causal connection between the claimant's menopausal symptoms – and the view taken of her efforts to improve those without accessing anti-depressants for a second time – and the unfavourable treatment. This complaint succeeds, subject to limitation.

<u>September - October 2021</u>

151. The claimant then remained unwell, unsurprisingly perhaps given the pressures upon her, but was doing her best to recover. Her catch up calls with Ms Wilburn followed a script of questions typical in managing long term absence. On 29 September much of their discussion was about the impact of the pay decision on the claimant, but they also talked about a phased return and how that would work. The claimant was told the advice from Occupational Health about a phased return would be followed and that she would have one to one training refresher training with a particular colleague, JM. She was very encouraged by that because she knew him and had previously found him very supportive. They agreed they would next catch up on 29 October and the claimant would return to work on 1 November.

152. At around this time the claimant and her husband remortgaged their home, switching lender.

<u>Allegation 12 - On or around 29 October 2021, in a telephone conversation following up on the recommendation of 1-1 refresher training from a recent occupational health report, Danielle Wilburn stated "that is not happening now, we cannot afford training for a third</u>

time, we are a small bespoke team, a single point of failure and there is no money on the budget as that is being used for the new starters." - harassment age and/or sex and conduct without reasonable and proper cause.

153. The catch up on 29 October was intended to plan for the claimant's return to work on the Monday, 1 November. Again this was a lengthy discussion. Unfortunately, the offer of one to one refresher training with colleague JM was no longer possible because circumstances had changed - essentially budget pressures on the team. Ms Wilburn's approach was to try and put an alternative in place which involved the claimant refreshing herself by working through the training materials provided for a number of new starters who had joined the team on 1 October, alongside following the phased return recommendations. Ms Wilburn would then arrange coaching on any areas the claimant identified as problematic. The success plan was paused for the first month.

154. We find that Ms Wilburn used the words set out in the allegation above, or very similar words during this conversation, recorded in the claimant's note/diary at the time. However, they were said in the context of an otherwise lengthy discussion which was encouraging of the claimant's return on Monday. The words, "single point of failure", were not a reference to the claimant or loaded or derogatory towards her, but a jargon term used by the respondent to describe the telematics team, and which the claimant understood as such. The term simply meant that because the telematics team was a small bespoke team, with its own budget, resources could not be allocated from elsewhere. It is a statement of fact about the team to explain why Ms Wilburn could no longer access JM to one to one train the claimant. The new starters on 1 October had used available resources.

155. Ms Wilburn had changed the approach to the claimant's training, just before her return to work, but it was not without reasonable and proper cause, objectively; and it was an approach which also sought to tackle the claimant's training needs. She had not set out to mislead the claimant about her return, but the change was nonetheless upsetting and de-railing, given the claimant's anxiety, and in fact she did not then return to work. These are not facts from which we could conclude that this conduct, unwelcome to the claimant, related to sex or age. The reason why was the budget/resourcing constraints operating on Ms Wilburn at the time. We also consider she had reasonable and proper cause for that decision, bearing in mind the gentle commencement of the phased return, the hours to be worked, the initial phases of catching up and reading in to developments since the claimant was last at work, and the suspension of the success plan for the first month.

November 2021 to May 2022

156. The claimant then presented a grievance which alleged discrimination, including in connection with the disciplinary warning and the sick pay decision and other matters on 19 November 2021. Ms Wilburn ceased to be her line manager in January 2022, and while her grievance was determined. There was an investigation, grievance meeting and outcome, and subsequent appeal, ultimately resulting in the award of 13 weeks' sick pay to the claimant in a final decision sent on 30 March 2022. The initial grievance decision decided that the claimant's disciplinary warning could not

be removed. The appeal manager in turn said the warning would have expired by the time the claimant returned to work and "we very much hope that you will come back to work", or words to that effect. The claimant remained unfit for work throughout with "stress and anxiety related to work situation".

157. The claimant notified ACAS on 11 April, with a certificate on 28 April. The claimant resigned by letter on 3 May 2023 referring to treatment over the last 29 months, a failure to make reasonable adjustments, and age, sex and disability discrimination. She presented a claim to the Tribunal on 9 May; and a second claim on 12 May 2022. The second ACAS certificate is of no effect.

<u>The reasonable adjustments case</u>

158. We add the following to the facts found above.

159. In 2021 Mr Dalby found he could not continue in his Operations Manager post which included a great deal of people management and some customer facing, having been diagnosed with hearing loss; he asked for help, saw occupational health, and was allocated a role as Performance Optimisation Manager which did not involve telephony. It was a grade 5 role. As to whether the respondent's performance targets in the telematics role could be adjusted, they could.

160. The telematics team had four non telephony roles, responding to customer queries by email. On occasion, if the team leader was not there, members of that team would call customers if a complaint was made and the customer wished to speak to the team leader, or with the results of a complaint investigation.

161. Mr Cook's submission was that during the period when the claimant was at work in the telematics role – July 2020 until July 2021 – there was no point within that period where the normal requirements of the role were "applied to her" : she did not have to complete training by herself; she did not have to successfully meet targets in normal timescales or meet targets at all; it was not in dispute that she did, on occasions, have to take complaint calls or "challenging conversations" as they were known, albeit there were only four or so in her time in telematics, which was far less than in sales. In the round he submitted the PCP was not applied to her. As for reasonable adjustments, his submission was that if the duty arose, the respondent is required to take such steps as are reasonable, and in this case it became clear that however much support or reasonable adjustments were put in place the claimant was not capable of doing the telematics job.

162. In our judgment, the question is whether a PCP – in this case the requirement to meet the performance standards of the job as set out - put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, in that, on the claimant's case she was a greater risk of disciplinary measures?

163. We find the application of the standards was a gradual process but there was frequent assessment of the claimant's progress against each standard in the "scorecard" and these were discussed with her regularly. Assurance, or quality, for example – this was auditable and necessary and prioritised from the outset. For a long time it was accepted that her CCT – call time – would be longer than others –

as she trained and was expected to improve. Similarly her ability to be "signed off" or work without help, having mastered the information and processes for telematics customers. She was expected to reach the required standard – the PCP was applied to her, but not until 2021. It plainly did put her at a substantial disadvantage in comparison with those without her cognitive impairment, and Ms Wilburn ought reasonably to have known that. The point in time was April 2021, when, in reality Ms Wilburn considered the ongoing challenges could no longer be permitted or tolerated. At that time the disadvantage the claimant faced in doing her job while struggling with menopausal symptoms ought to have been recognised as such and adjustments made.

164. As far as those reasonable steps are concerned, many of them could have been done: call time and non-assurance targets could have been reduced; consideration could have been given to a non-telephony role, given the mailbox team existed, for a period at least to address the anxiety she felt from challenging customers; a disciplinary process could have been abandoned and the mitigation accepted. In short the failure to make reasonable adjustments case succeeds from April 2021, again subject to limitation.

165. As to that, when did the respondent do something which was inconsistent with making these adjustments? When Ms Wilburn decided to take the claimant's deficiencies through a disciplinary process without considering the underlying reasons. On our findings that is when time starts to run on the reasonable adjustments case, 16 April 2021.

Equality Act limitation - conduct extending over a period

166. Ms Senior did her best to persuade us that the respondent had engaged in conduct extending over a period such that the complaints were in time, applying Hendricks. A difficulty for the claimant is that conduct after the end of October was not pleaded at all as acts of discrimination. She described (and indeed we listened to) conversations in November with Ms Wilburn which contained passages which were not sympathetic to the claimant's situation, as well as lengthy discussion about the disciplinary warning, success plan and other matters; we also had before us papers relating to the determination of the grievance, and the outcome on the appeal. None of those matters were alleged to be discriminatory acts (or breaches of the implied term) and this hearing has already had challenges in deciding the pleaded case in the time available. We cannot decide that those matters were contraventions or discriminatory conduct extending over a period such as to bring the claim within the Section 123(1)(a) time limit. In order to uphold the four contraventions (and indeed dismiss others on merit) we have to decide whether the Tribunal thinks a different time limit should apply. Our decision on dismissal may affect that.

Did the claimant resign in response to the breach and did she affirm her contract

167. We then look to the dismissal case and affirmation. We have found repudiatory conduct and contraventions of the Equality Act from January to September 2021. We are satisfied that the claimant resigned substantially in response to those matters, and in particular the disciplinary warning and sick pay decision, which are

all recorded by her GP in consultations as her mental health declined. She had previously hoped to remain with the respondent until she retired, but the grievance and ACAS process ultimately broke that resolve.

168. We ask ourselves whether the claimant has waited too long before resigning. There are no bright lines with affirmation. It is very fact sensitive but we bear in mind that the claimant resiliently came back and tried to carry on in May and June of 2021. Had the unfortunate personal events not occurred, she may not have been in a position to need counselling and time off in July of 2021, but they did, and in addition to her menopausal symptoms she was unwell. She joined a union in November 2021 after the 31 October conversation and discussed that with her GP. At that time she felt she could not return to work and decided to raise a grievance. She had union representation throughout the grievance and appeal. In evidence, but not in her pleaded case when represented by solicitors, it was said that the final straw was the lack of engagement with ACAS in April 2022; she said the respondent left its ACAS response to the last minute, but we put those ACAS matters to one side.

169. On the claimant's pleaded case we have to assess whether from 15 September 2021 which is the last material repudiatory breach that we have found, the sick pay decision, did the claimant affirm her contract by waiting until 3 May 2022 to resign. We have concluded that she did affirm her contract. We recognise she was unwell through that period and was not attending work and had challenges at home, but she attended meetings and pursued the respondent's internal dispute resolution process with union support, for six months or so before taking the decision to resign. She prepared a very good appeal which resulted in an outcome and payment of sick pay, which she accepted, and did not return. This being a contract law test, we find in those circumstances she has lost the right to end her contract in reliance on the 2021 breaches that we have found. The consequence of that conclusion is that the unfair dismissal and discriminatory dismissal cases fail.

<u>Equality Act limitation – Section 123(1)(b)</u>

170. We then return to the Equality Act contraventions. We note that the second ACAS certificate has no bearing on our assessment of time; and that conciliation in the first certificate was not commenced until some 15 months, 10 months and 7 months after the respective contraventions, it provides no extension. We must ask whether we think up until 9 May 2022 is a just and equitable extension in respect of the allegations but particularly those we would otherwise uphold.

171. Ms Senior took us through the right factors for us to consider in exercising our discretion and which are many in this case. As to the reasons for delay, they include the claimant's health - in essence she says her cognitive impairment was the reason she did not bring a claim sooner – she did not realise she was being discriminated against, and when she did, she followed the internal process because all she wanted to do was come back to work, with her grievances recognised. She also points to her personal circumstances at home which were under strain. We repeat the matters that we considered in relation to affirmation above, because they too are relevant. We consider there was little if any evidential prejudice to the respondent because memory was supported by such a great volume of

contemporaneous documentation in this case. That was all the more so in the later allegations than the earlier allegations concerning Ms Ackroyd and Mr Dalby. In reality the respondent had been on notice of many of the allegations since the November grievance and had fully documented interviews. The oral evidence that we heard was generally clear from the respondent witnesses, albeit Ms Ackroyd could not remember discreet matters, and one conversation was not remembered by Ms Wilburn.

172. The internal process did take four months, and we also consider that it did not provide the claimant with the full outcome she sought – the removal of the disciplinary warning from her record. Withdrawing the warning was plainly open to the respondent having received the occupational health report and understood matters, but it chose not to do so.

173. It is inherently prejudicial for a respondent to lose a limitation defence, but in circumstances where the constructive dismissal case was in any event going to be heard, and the ground covered, that is less so. The prejudice is plain to the claimant in circumstances that we would otherwise uphold contraventions having examined matters through a full hearing.

174. We consider all these matters including the reasons set out by Ms Senior, and that Mr Cook gave us the right direction on the law. He says the claimant had the means to bring an earlier claim, through union support, but chose to pursue the internal process.

175. On balance the claimant has persuaded us it is in the interests of justice to extend time such that we can uphold the contraventions we would otherwise find. We exercise our discretion to extend time such that those complaints succeed. It also follows that the Equality Act complaints that are without merit as set out above are dismissed.

Remedy

Introduction

176. The claimant provided an additional hearing file of around 100 pages and a nine page witness statement for this hearing, including an updated schedule of loss and the respondent provided its counter schedule. The counter schedule contended for an injury to feelings award of £8000; and financial loss arising from the NFI rating as £224.01. There was no interest calculation.

177. The claimant's schedule sought an injury to feelings award of £29,600 to £33,700; aggravated damages of £5000; financial loss of £36,492.44; ACAS uplift, grossing up and interest.

178. The claimant's witness statement had been presented very late, but again we gave permission for it, weighing the balance of prejudice and that there was no application for a postponement. We had encouraged the parties to seek to agree remedy, and it is not unusual in those circumstances for disagreement to arise late

in the day and hence preparation is compressed. We were not told that was the case here. We considered a fair hearing could take place.

179. After some delay, for the reasons described above, we heard oral evidence from the claimant. The respondent had not sought to adduce any oral evidence about mitigation or any other matters.

180. Ms Sharp sought to put questions on assertions of fact which had already been covered in the liability hearing and about which we had made findings. She had been put in a very difficult position by the circumstances and her instructing solicitors were not present and obtaining instructions was delayed; she was assisted only by Mr Cook's notes, and the respondent had not sought any variation to the previous orders consequent on the claimant's correspondence, or led any mitigation or other evidence. It was a perfect storm of unfortunate circumstances for Miss Sharp.

181. Nevertheless both advocates provided as much assistance as they could to the Tribunal in making the necessary calculations consequent on our decisions of fact and principle and we are again grateful for that. We were able to produce a final Judgment this afternoon with the advocates' help.

Issues

182. These were set out in the orders for the adjournment as follows:

*The headline issues arising appear to be: but for the contraventions found:*

*182.1. What different sums and benefits, if any, would the claimant have earned – does she have financial loss?*

*182.2. What injury to feelings has she suffered and what would be a just award?*

*182.3. What interest should the Tribunal award?*

183. The claimant had pursued in her original schedule of loss, an uplift of 15% asserting unreasonable delay in the respondent's grievance process; and this was increased to 25% in her revised schedule. In her revised schedule there was also a claim for aggravated damages on the basis of the conduct of the respondent, essentially in its conduct of the proceedings. She had also withdrawn a general damages claim for psychiatric injury of £10,000 – the Tribunal had discussed the need for expert evidence on causation of such an injury on the last occasion.

184. The respondent's remedy case on financial loss, in short, was that because the Tribunal had not found a discriminatory dismissal, nor was the claimant well enough to work, the claimant suffered no loss of earnings as a result of, or but for, the contraventions found.

185. The claimant's remedy case on financial loss was that but for the discrimination she experienced, the claimant would have remained employed with the respondent earning the sums and benefits she previously enjoyed for at least a period until 24 October 2024 which is 18 months from the start of the liability hearing. That is the position set out in the schedule. Her witness statement also asserted that she

resigned because of the unlawful discrimination she suffered including the failure to make reasonable adjustments.

The Law

186. Any award of compensation for discrimination will be assessed under the same principles as apply to torts (see s124(6) and s119(2)). The central aim is to put the claimant in the position, so far as is reasonable, that he or she would have been had the tort not occurred (Ministry of Defence v Wheeler [1998] IRLR 23 and Chagger v Abbey National plc [2010] IRLR 47).

187. Where loss has occurred as a result of the discrimination, tribunals are expected to award compensation that is both adequate to compensate for the loss and proportionate to it (Wisbey v Commissioner of the City of London Police [2021] EWCA Civ 650).

188. Sections 124 and 119 give the Tribunal the power to make recommendations and make awards for injury to feelings. The latter are compensatory not punitive, and are to compensate subjective feelings of upset, frustration, mental anguish and the like. Tribunals are required to assess the severity of the contraventions and apply the -Vento bands: the most serious – for example a lengthy campaign; serious; and less serious - an isolated or one off occurrence. We have to assess the degree of injury, with awards taking into account the value in every day life of sums of money, and bearing in mind the full range of personal injury awards, being all the while concerned that awards command respect and are not a way to untaxed riches. Aggravated damages are available when a contravention is done in an exceptionally upsetting way – high handed, malicious, insulting or oppressive behaviour; or where the motive is spiteful or vindictive; or where subsequent conduct fails to apologise or is unnecessarily oppressive (Zaiwalla & Co v Wallia ) [2002] UKEAT 451/00

189. As to assessing loss, paragraphs 22 to 26 of Mr J Edward v Tavistock and Portman NHS Foundation Trust [2023] EAT 33 is a helpful reminder of the Tribunal's task:

> *22 The approach to loss of earnings (both past and future) was addressed by the EAT in the well-known series of cases brought against the Ministry of Defence by servicewomen who had been dismissed on grounds of pregnancy. The parties put Ministry of Defence v Hunt [1996] ICR 554 before me. Hunt draws on the general guidance set out in Ministry of Defence v Cannock [1994] ICR 918. In Cannock, the claimants argued that if they had not been dismissed they would have returned to service after a period of maternity leave and would have progressed their service careers. Morison J began his general guidance as to compensation by referring to the principles Judgment approved by the court for handing down Edward v Tavistock and Portman NHS Trust © EAT 2023 Page 10 [2023] EAT 33 stated by the House of Lords in Mallett v McGonagle [1970] AC 166 (a fatal accident case). He cited (949F-G) the following passage of Lord Diplock:*
>
> ***"The role of the court in making an assessment of damages which depends on its view as to what will be and would have been is to be contrasted with its ordinary function in civil actions of determining what***

***was. In determining what did happen in the past the court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend on its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate of what are the chances that a particular thing will or would not have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards."***

*23 Morison J then went on to consider a series of hypotheticals that would arise in assessing compensation. In doing so he made the following observation (951A-C):*

*"What* ***are the chances that had she been given maternity leave and an opportunity to return to work, the applicant would have returned? The answer is not, with respect to some industrial tribunals, a question of fact at all….. The question is to be answered on the basis of the best assessment that the industrial tribunal can make having regard to the available material."***

*24 In Cannock, Morison J said (953D) that the tribunal should normally calculate damages for future loss of earnings by using the multiplicand and multiplier method adopted by the courts in personal injury cases. He said it was not satisfactory for a tribunal to calculate loss by taking earnings over the full period of loss and then deducting a percentage for contingencies and accelerated payment.*

*25 While a multiplicand/multiplier approach may be appropriate particularly in cases of long-term or career long loss, in many cases the tribunal will instead make a determination as to when the employee is likely to get another job on equivalent terms and calculate the loss to that date, awarding no loss after that date. This was described as the "usual approach" by Elias LJ in Wardle v Credit Agricole Corporate Bank [2011] ICR 1290. In Wardle, at the time of the tribunal remedy hearing the claimant was in a new job, paying less than he earned at the respondent. The starting point for compensation was the difference between his old pay and his new pay. However, the tribunal found that there was a 70% chance that within three years of the hearing the claimant would return to a job that was as well paid as his job with the respondent. The tribunal awarded compensation for the whole period through to the claimant's retirement, but discounted it by 70% after the first three years, to reflect the chance of the claimant finding a job that fully replaced his lost earnings. The Court of Appeal held that the tribunal erred in its approach. After considering the rare cases where it is appropriate to assess loss over a career lifetime, Elias LJ said: Judgment approved by the court for handing down Edward v Tavistock and Portman NHS Trust © EAT 2023 Page 11 [2023] EAT 33 "[51] However, in my view the usual approach, assessing the loss up to the point where the employee would be likely to obtain an equivalent job, does fairly assess the loss in cases – and they are likely to be the vast majority – where it is at least possible to conclude that the employee will in time find such a job. In this case the tribunal has in effect approached the case on the assumption that it must award damages until the point when it can be sure that the claimant would find an equivalent job. [52] In my judgment, this is the wrong approach.* ***In the***

***normal case, if a tribunal assesses that the employee is likely to get an equivalent job by a specific date, that will encompass the possibility that he might be lucky and secure the job earlier, in which case he will receive more in compensation than his actual loss, or he might be unlucky and find the job later than predicted, in which case he will receive less than his actual loss. The tribunal's best estimate ought in principle to provide the appropriate compensation. The various outcomes are factored into the conclusion. In practice, the speculative nature of the exercise means that the tribunal's prediction will rarely be accurate. But it is the best solution which the law, seeking finality at the point where the court awards compensation, can provide."***

*26 This passage was cited with approval by Underhill LJ in Griffin v Plymouth Hospital NHS Trust [2015] ICR 347:*

> *"[9] The tribunal considered the issue of future loss of earnings at paras 5.3.2-5 of its original remedy reasons. After referring to various factors affecting the assessment it held that she was likely to obtain suitable alternative employment at 25 hours per week in a year's time; and it awarded one year's loss of earnings, being £15,201.48, on that basis. At the risk of spelling out the obvious, that is not a finding that it was more probable than not that the claimant would find a job after precisely one year. Rather, it is an estimate, made on the assumption that the claimant continued to make reasonable efforts to mitigate her loss, of the mid-point of the probabilities."*
>
> *After quoting paragraph 52 of Wardle, he continued:*
>
> *"It is, however, convenient to refer to it, as the tribunal did, as the date on which it was likely she would obtain employment."*

190. In Cooper Contracting Ltd v Lindsey UKEAT/0184/15, Mr Justice Langstaff (then President of the EAT) set out key principles derived from case law that tribunals should take into account when considering the issue of mitigation of loss including:

    190.1. The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

    190.2. The burden of proof is on the respondent, as the wrongdoer. The claimant does not have to prove that they have mitigated their loss.

191. The correct approach to grossing up is to be found in Yorkshire Housing Ltd v Cuerden UKEAT/0397/09/SM.

Further Findings and conclusions

192. The claimant's employment ended by resignation on 4 May 2022. We found that not to be a dismissal. The claimant remained unwell and in August 2022 her GP referred her to a specialist support service, "Working Win", which provided free advice and support to patients and employers to help patients return to work. She was successful in starting a new NHS role as a temporary clerical officer at a hospital on minimum wage in February 2023, which was due to end at the

beginning of May 2023. In fact it has continued and the claimant has been highly recommended for the permanent post.

193. Between May of 2022 and February 2023 she remained unfit for work, but started applying for roles in January 2023. She had been prescribed mirtazapine in December 2021 and continued to take that for her symptoms and remained and under the care of her GP. In July 2022 he let her know of the working win service to help a return to work. She was unable to access state benefits because of savings and capital.

194. The parties agreed that the claimant's respondent salary information in her Schedule, and the respondent's base figures in its counter schedule were accurate; the claimant was not challenged about the sums included in her schedule for the benefits, pension contributions and so on.

195. The claimant would have earned £404.60 had she remained in employment with the respondent gross per week. We find deploying our industrial knowledge to the information provided, that she would earn £430.44 in salary from the NHS post, with NHS benefits including a final salary pension at the point at which she accesses the permanent post. That is better, financially, than her package with the respondent.

196. The claimant's initial period of ill health, was certified as arising from stress at home. From 29 September 2021 her GP assessed it as arising from "the work situation". That came immediately upon the impact of the decision on pay being felt by the claimant, which we have found to be a contravention. She had first sought medication in May of 2021 on the impact of the disciplinary hearing, which was profound.

197. She identifies in her statement that her decision not to pursue personal injury damages was because of the cost of expert medical evidence. Nevertheless, we have to consider, given her remedy case, to what extent, on normal tortious principles, the claimant can be said to have lost earnings in the period until the NHS post, but for the contraventions. We have the claimant's medical records until July 2022, including letters from her GP. We know that the claimant recovered her resilience quickly in 2020 after a short spell of absence and with treatment; and prior to 2020 had very little absence from work. We know that the July 2021 events at home brought on the initial absence, but that was against the background of sleeping difficulties brought about by the disciplinary hearing – that is the clear impression from the medical records. We also deploy our industrial knowledge as a panel of three in observing that mental functioning and resilience often deteriorate as a result of the cumulative effect of life events and blows. The claimant had a series of those over this period, and the majority documented in the GP notes are work related and which we have found to be contraventions.

198. Ultimately we have to assess matters on the basis of the evidence as best we can, and we find that on balance, her extended period of ill health would not have occurred but for the contraventions she suffered. We assess matters on the basis that but for the discriminatory treatment between January and September, the claimant in our judgment would have returned to work and/or would have been able to take up alternative work much sooner than, in fact, she has.

199. The consequence of that finding is that past financial loss comes to be assessed from January 2021, the first contravention, through to this hearing date 16 June 2023, but future loss is extinguished by the NHS post from 1 September 2023. There are a number of calculations that need to be done and the financial loss components have not been challenged as to their detail.

200. There is one item that we consider is not recoverable on a but for test having explored that matter in evidence: the re-mortgage costs of the claimant and her husband, completed on or around 15 November 2021. The facts are these. The claimant and her husband had bought a property, invested in it jointly with some refurbishment, had some considerable equity in it, around 50%, and decided to access some of that equity, each receiving a 50% share, on or around 15 November. In our judgment that is a financial decision that many people take for a range of reasons, including changing interest rates. Its timing was fortuitous, if other savings were not available to cushion the impact of the September pay decision, but we consider losses asserted in connection with this step are simply too remote and cannot be said to arise but for the contraventions. Such being the length of a typical re-mortgage process, we do not find this was necessarily directly connected to the events at work, but we only had the outcome letter to consider rather than the application documents and the claimant was understandably unable to be very precise in the absence of that documentation.

Injury to feelings

201. We repeat the facts above concerning the claimant's performance history. Further she had expressed in her performance reviews great loyalty, love of the job, and her plan to remain in employment until retirement. This was not a case, as is sometimes seen, which has developed either since the hearing or in remedy. That had always been her expressed wish. Her employment had become a necessity since divorce in 2015 or thereabouts and she had invested great energy in making a success of it.

202. The destruction of those hopes and plans and the financial security that comes through them was devastating for her. But for the contraventions there is a good chance that ambition would have been fulfilled, subject to the normal vicissitudes of life that can affect any of us at any point.

203. Certainly for the claimant there were other aspects of her life that caused upset, but in addition to her medical records, it is very clear from her discussions with line management at the time( comprehensively documented and in the case of the November discussions, audio recorded) the prevailing upset was in connection with the challenge to her job security, the financial challenge she was facing, the experience of a day long disciplinary hearing, during which she was reduced to tears, and the damage to professional standing caused by the disciplinary warning. A profound cause of upset was the respondent's refusal to accept the claimant's impairment as mitigation in the disciplinary hearing, a theme which continued in criticising her for "not doing enough" to help her recovery in September.

204. The impact on the claimant's anxiety, low mood and emotional state was profound. The length of time over which the contraventions occurred is some eight months,

January to September. The previous line management team had done all they could to help the claimant deal with the symptoms arising from menopause, including a change of role, but their management was about six months. Ms Wilburn became weary after nine months. There was not a wholesale lack of compassion and understanding from her to be heard on the November recordings, on which the claimant's distress is obvious, but there was the same determination to continue with her management process. That was after the occupational health report and when the claimant was still profoundly upset and would rather not have continued their conversations. She also refused to contact the claimant's GP (or raise with occupational health the prospect of liaising with the claimant's GP).

205. We also consider the claimant could reasonably have expected Ms Jenkins and Mr Rose, who were either copied in or involved in calls, and had the opportunity to challenge and act, and to read and understand the full material that was available, to have acted differently. To find out that Mr Rose considered the claimant not to be doing enough to improve her situation was later deeply upsetting. Mr Dalby recognised that performance management formally through the respondent's processes would destroy the claimant and he said so. On our findings that is not an entirely inaccurate characterisation of what, in fact, then happened.

206. Balancing that profound impact on the claimant, these events are far from a sustained and deliberate campaign of harassment or discrimination of the very worst kind, which would come to be assessed in the very serious Vento band. It is a serious and sustained number of contraventions over a period involving both the claimant's line manager and her line managers and HR. It properly falls within the middle band taking into account the totality of the claimant's statement and the impact on her health and on her emotional well-being.

207. We find assess the compensatory sum at £23,000. Interest runs from January 2021 (neither advocate contended for a staged or different approach).

Aggravated damages

208. The claimant considered that the respondent's failure to concede she was a disabled person was conduct which sounded in aggravated damages. This was put in submissions powerfully as a theme of conduct starting with the claimant's management saying "no" – not accepting the claimant was doing her best for her performance rating, not accepting her symptoms as mitigation for disciplinary purposes, she was not doing enough to help herself and saying "no" to sick pay, and then in these proceedings, saying, in effect no we do not concede disability.

209. The claimant provided her impact statement, GP records, fit notes and occupational health report on 30 August 2022 in accordance with case management orders. The respondent said, in a letter of 20 September: " we confirm that the respondent does not concede disability status at this stage.....there is currently insufficient medical evidence to show any direct link between these issues and the pleaded disability of menopause".

210. The claimant then provided a letter from Dr Wilkinson on 11 October 2022 explaining the symptoms of menopause, which contained information he had

previously written in a more detailed letter of 24 November 2021. The context for the November letter was that the claimant had been clear with Ms Wilburn on 19 November that she wanted Ms Wilburn to speak to her GP and Ms Wilburn did not consider that necessary, referring to the occupational health report. The claimant had frequently discussed her consultations with Dr Wilkinson with her managers, and his name was known to them.

211. The claimant was conceded to be a disabled person by the respondent in these proceedings on or around 6 January 2023, in the amended response; and knowledge just before the April 2023 hearing. The original pleading said: "The Respondent makes no admissions as to whether the claimant is disabled.....The Respondent does not have sufficient information to enable it to determine whether the claimant has a physical or mental impairment or whether any impairment of the Claimant (as to which no admissions are made) does not have a substantial and long term adverse effect....."

212. The appeal outcome in Marcy 2021 said in terms, "everyone had a good understanding of your health challenges", and again, "I have ascertained there are far less targets and far fewer challenging conversations within the telematics role.....Therefore I believe this was a reasonable adjustment made for you taking into consideration your feedback, your performance in Sales/Retention and your health" and " I cannot find any evidence that anyone has used your medical condition against you".

213. That appeal outcome was given in the knowledge that occupational health had advised that the claimant's condition and symptoms were likely to qualify her as a disabled person.

214. The claimant was a person working in a business regulated by the FCA, whose integrity had never been in doubt during her employment. The respondent had the opportunity at any stage to ask occupational health to contact the claimant's GP and verify any matters; Ms Wilburn was directly asked to do so in November 2021. At various stages letters from the claimant's GP verifying the accounts she had given of her treatment and difficulty had been provided.

215. It seems to the Tribunal in all these circumstances very regrettable that a concession was not made at an earlier stage, or at the earliest stage, and certainly immediately after the claimant provided the October letter from Dr Wilkinson (if for any reason the respondent's position was that it had not seen the November letter). It is in our judgment oppressive not to have done so, and we were without any explanation for the delay between then and January or the necessity of this approach in all the circumstances of this case. It put an additional burden on the claimant, who was then a litigant in person trying to bring a claim and we note that she then instructed solicitors to represent her at the 17 October hearing.

216. It is also clear, in our judgment, that this has been an additional and separate source of upset for the claimant since she commenced proceedings and we assess that properly as sounding in aggravated damages. We award £2,500 in that respect. It could, and the claimant says, should, have been conceded right from the outset, given her invitation from November 2021 to speak to her GP. This was not a case

where the impact on day to day activities was opaque – they were evident at work and over a sustained period of time, with frequent communication from the claimant. The knowledge concession on the basis of discussions the claimant had with her manager in June 2020 speaks for itself.

ACAS uplift

217. The ACAS uplift case was initially put on the basis of delay, but in submissions developed to include its content. It was said that both the initial grievance decision and the appeal failed to disclose to the claimant or conclude that the claimant's condition had not been put forward to HR by Ms Wilburn and her manager prior to disciplinary steps, which was at odds with the decision recorded above – "everyone had a good understanding of your health challenges".

218. As to delay, there was significant work in both the original grievance process and at appeal stage, interviewing four witnesses, reviewing documentation, and providing detailed and lengthy decision letters. This was substantial work. In the round neither 19 November to 26 January, nor 7 February to 30 March for the appeal, were unreasonable periods to take, given representation and meetings with the claimant. It was a period of four months or so, which we did consider relevant to the exercise of discretion on limitation, but it is not such that we could consider it an unreasonable failure to comply with a Code provision.

219. As to the outcome, it is not a requirement of the Code that a grievance outcome or appeal provides all remedies sought – it must be conducted fairly and implicitly in good faith and it is in all parties' interests that all issues are tackled. The claimant's professionally pleaded particulars did not assert the grievance and appeal outcomes as being without reasonable and proper cause, and we did not, as a result hear from those witnesses. In the round we cannot conclude an unreasonable failure to comply with the Code in outcome or delay, nor, consequently, any uplift.

220. The calculations arising from the decisions above were then discussed with the parties on the basis of the schedule and counter schedule figures, and confirmed, as recorded above.

Employment Judge JM Wade

Date 4 August 2023