EMPLOYMENT TRIBUNALS

Claimant: Ms T Begum

Respondent: London Fire Commissioner

Heard at: London South in public in person and by CVP

On: 4-6, 11-13 April 2023 (in chambers pm 11, all day 12 and am 13 April)

Before: **Employment Judge Tsamados**
Ms G Mitchell
Ms L Gledhill

Representation
Claimant: in person by CVP
Respondent: Mr B Amunwa, Counsel

REASONS

These are the reasons for our Judgment dated 13 April 2023 which was sent to the parties on 31 May 2023. They are provided at the request of the Claimant. Oral reasons were given at the end of the hearing. These written reasons additionally set out the background to the hearing and our findings of fact in more detail. However, they do not materially depart from the oral reasons that were given.

Background

1. The Claimant presented two claim forms to the Employment Tribunal raising complaints against the Respondent, her former employer. Her claims named the Respondent as the "London Fire Brigade" but this was subsequently amended by consent to the "London Fire Commissioner".

2. The first claim was received by the Tribunal on 29 March 2021 (in case number 2301194/2021) following a period of Early Conciliation which started on 8 February and ended on 8 March 2021. It contains complaints of discrimination on the grounds of religion or belief, race and/or disability, harassment, victimisation, "detriment" (not linked to any particular legal

complaint), breach of health and safety policies, breach of contract and breaches of the Respondent's policies and duty of care.

3. The second claim form (in case number 2303325/2021) was received by the Tribunal on 5 August 2021 following a period of Early Conciliation which started on 2 and ended on 3 August 2021. It contains complaints of unfair dismissal, religion or belief, race and disability discrimination, "automatic wrongful dismissal", victimisation, "breach of health and safety act" and breach of contract.

4. In its responses received by the Tribunal on 1 June 2021 and an unknown date (in respect of the second response), the Respondent denies both claims in their entirety.

5. By a letter dated 2 November 2021, the first claim was listed for a public preliminary hearing to be heard on 15 August 2022 to determine the Respondent's application that the claim be struck out or deposit orders issued.

6. By a letter also dated 2 November 2021, the full hearing was listed for seven days commencing 3 April 2023. In addition, suggested case management orders were issued.

7. By a letter dated 27 January 2022, the two claims were directed to be heard together by Employment Judge ("EJ") Hyams-Parish.

8. The preliminary hearing on 15 August 2022 was conducted by EJ Truscott KC. The Respondent was represented by Mr Amunwa of Counsel, as at this hearing, and the Claimant was unrepresented. EJ Truscott converted the hearing to a case management discussion because the Respondent had withdrawn its applications, having received further information of her claims from the Claimant. However, the claims still needed further particularisation. EJ Truscott KC made orders for the better particularisation of the claims as well as disability-related disclosure and preparation of a list of issues. He also listed a public preliminary hearing for 29 November 2022 to determine the following: any application by the Claimant to amend her claims; whether the Claimant was a disabled person for the purposes of section 6 of the Equality Act 2010; any application by the Respondent for the claims to be struck out or deposit orders made; and to deal with any further case management.

9. The Claimant subsequently instructed solicitors who assisted her in re-formulating her case and narrowing down the issues in dispute between the parties to those before us today.

10. The preliminary hearing on 29 November 2022 was conducted by EJ Nicklin but was converted to a case management discussion due to insufficient time to determine all of the issues.

11. The arrangements between the Claimant and her solicitors meant that she was provided with advice and assistance but unrepresented at that hearing (as indeed continued to be the arrangement through to our hearing). The

solicitors provided her with written submissions for the preliminary hearing and, in addition, revised Particulars of Claim (dated 14 October 2022). These documents identified her complaints as discrimination arising from disability, failure to make reasonable adjustments and victimisation. The other complaints were not pursued any further.

12. The record of that hearing also indicates that the parties completed a Scott Schedule dealing with the issues arising in respect of each of the identified complaints and a list of issues was largely agreed (subject to the Claimant's application to amend which was then heard).

13. EJ Nicklin made the following case management orders: the Respondent's name was amended to the London Fire Commissioner; the Claimant's amendment application was granted so as to allow the complaints set out in her amended Particulars of Claim, and in respect of the PCP set out at paragraph 19 of that document; the filing of an updated and agreed list of issues; general case management preparation for a public preliminary hearing to determine disability, to be held on 16 January 2023.

14. The hearing on 16 January 2023 was conducted by EJ Dyal at which he determined that the Claimant was a disabled person and then dealt with case management. EJ Dyal made the following orders: the parties to agree a revised list of issues in the light of his Judgment on disability; as to disclosure; as to preparation of a bundle; as to exchange of witness statements; and as to preparation of a neutral chronology, cast list and a reading list.

15. EJ Dyal's Judgment states that the Claimant became a disabled person within the meaning of section 6 of the Equality Act 2010 on 25 May 2021 and that the relevant impairments are depression and anxiety. Neither party requested written reasons for his decision.

The Issues

16. The parties have agreed a list of issues. This is at pages 134 to 139 of the bundle. It sets out complaints of disability discrimination relating to failure to make reasonable adjustments, discrimination arising from disability and victimisation. It also identifies that there are time limit issues.

17. I indicated to both parties that these were issues that the Employment Tribunal would determine and that we would not depart from them unless there were exceptional circumstances.

18. The complaints in respect of unfair dismissal, race and religion and belief discrimination and breach of contract, whilst not formally dismissed, were not pursued at the preliminary hearing or in the list of issues or at our hearing.

Conduct of the hearing

19. This matter was originally listed as an in person hearing for seven days, although this did seem an over generous period of time given that the Claimant's complaints had considerably narrowed since it was set.

20. On 31 March 2023, the Claimant sent an email to the Tribunal in which she requested to attend the hearing by way of Cloud Video Platform ("CVP") for reasons of health and travel time. This request was granted by the Acting Regional Employment Judge, Employment Judge Balogun.

21. The Tribunal panel sat in person at the London South Tribunals.

22. The Claimant attended by CVP and represented herself although she had been "briefed" by her solicitors, as she put it. Initially, the Claimant indicated that her witnesses were not able to attend in person, being unsure of what actual days they needed to be at the Tribunal to give evidence and the need to take time off work. I suggested that they could also attend by CVP if that was more expedient and the Claimant subsequently made arrangements with them to do so.

23. Mr Amunwa, Counsel for the Respondent, and his instructing solicitors, attended the hearing in person. However, on the first day of the hearing, at least three of the Respondent's witnesses also attended by CVP despite having no permission to do so. It was ultimately agreed that whilst the Respondent's witnesses could observe the hearing by CVP, they had to attend in person to give evidence. But we agreed that two of the Respondent's witnesses, Ms Robinson and Ms Patel could give evidence by CVP due to personal/domestic circumstances (which for reasons of privacy it is not appropriate to go into in these reasons). Subsequently, Mr Amunwa advised us that Ms Biggs was also not able to attend in person due to personal circumstances (which again for reasons of privacy it is not appropriate to go into in these reasons) but he indicated that it might be possible for her to attend by CVP.

24. On 3 April 2023, we dealt with preliminary matters and then spent the rest of the day reading the witness statements and referenced documents in the bundle. I explained the Tribunal procedure to the Claimant, that we would first deal with liability and then remedy if appropriate, Mr Amunwa gave an indication of how long he would spend cross examining the Claimant and as to the order in which he intended to call his witnesses. I explained that the usual Tribunal day consisted of starting at 10 am, a mid morning break, an hour for lunch, an afternoon break and finishing by 4 pm. The Claimant asked for 10 minute breaks each hour and we agreed to this.

25. On 4 April 2023, we heard evidence from the Claimant. Mr Amunwa had at the start of the hearing indicated that he would spend about 3 hours cross examining the Claimant. At 3.40 pm the Claimant said that she had been questioned now for 6 hours and it was affecting her mental health (but I would point out that there had been a number of technical and other difficulties during the day which had led to much lost time). Mr Amunwa said he did not have many more questions. I suggested we continue for another half hour or adjourn until the following morning. However, the Claimant became distressed and so we adjourned at this point.

26. Later that afternoon, the Claimant's solicitors sent an email to the Employment Tribunal asking for the following adjustments to be made to the

proceedings: a lunch break to last for at least one hour each day; a 20 minute break in the morning of each day; a 20 minute break in the afternoon of each day; and for each day to finish no later than 4pm. They explained that owing to the Claimant's disability, she was finding it difficult to cope with the timings and breaks as currently set for the hearing and felt that the long days and short breaks were detrimentally affecting her health and her condition to the point that she did not feel able to put forward her best case. I would note that whilst this did not accurately reflect what had happened during the hearing that day, we did take the contents of the email on board.

27. On 5 April 2023, I asked the Claimant if she was okay to continue today. She indicated yes. I explained to her that it was very tiring giving evidence but pointed out that in fact she had only been questioned for 2 hours 50 minutes on the previous day, although I appreciate she was in the Tribunal hearing for the whole day. She explained that the difficulty was that she was unable to rest during our breaks and so she thought it would help to have 20 minute breaks morning and afternoon. I went through the adjustments that her solicitors had set out in their email and said that we had no problem with any of them and in fact, apart from having a slightly shorter lunch because of the technical delays yesterday we had met all of them.

28. We continued to hear the Claimant's evidence, interposing her witness, Mr Walsh who attended by CVP. In the afternoon, we started the Respondent's evidence and heard from Mrs Robinson.

29. On 6 April 2023, we interposed and heard evidence from the Claimant's witness, Mr Richardson, who attended by CVP. We then continued to hear evidence from the Respondent's witnesses, Mrs Lowry, by CVP, and Ms Ramsey.

30. On 11 April 2023, we heard evidence from Ms Patel by CVP and from Mr Johnson. Ms Biggs was not able to attend even by CVP because of the personal domestic issues which prevented her from attending in person. I explained that this would affect what weight, if any, we would give to her testimony. We then heard submissions (written and oral) from both parties.

31. On 12 and the morning of 13 April 2023, we sat in Chambers to deliberate and reach our decision. We gave oral Judgment and Reasons on the afternoon of 13 April.

32. We became aware that before the start of our hearing on 4 April 2023, the Respondent's witnesses and the Claimant had been placed in the same CVP room by our clerk and could hear each other talking.

33. The standing instructions to the Tribunal administration are that each witness is to be admitted to the CVP room separately by the clerk to deal with any connectivity issues and then each placed in their own private room, known as a "lobby".

34. We were concerned because at one point we could seer the Respondent's witnesses laughing and joking on the large CVP screen in the hearing room

(albeit we do not believe it was about the case) and the Claimant subsequently confirmed that she had heard the tail end of their conversation.

35. We were very conscious that the Claimant should not have been exposed in this way to the Respondent's witnesses, however innocuous their conversation, and that this would not have happened if the parties had been in separate waiting rooms if they appeared in person at the Tribunal.

36. We apologised to the Claimant and said that we would take steps to prevent this from happening again.

37. Unfortunately, the same thing occurred on a subsequent occasion and I again apologised to the Claimant and spoke again to the administration, making it absolutely clear that this must not happen again (in this or any other case).

38. With the agreement of the parties, the Tribunal directed that pursuant to Rule 50 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 we will anonymise the name of any persons referred to in evidence who are not present at this hearing should written reasons for our Judgment be requested. We indicated that anonymisation would be done by the use of initials.

39. There were a number of occasions on which the Claimant's solicitors sought to determine the order of events at the hearing and the Claimant in effect used their apparent tardiness in preparing her for the case as her explanation for her lack of preparation. This took the form of a request for us to deal with both liability and remedy at our hearing to avoid the Claimant having to attend a further hearing. In addition, they sought to vary the order of the Respondent's witnesses so as to allow them more time to provide the Claimant with a list of cross examination questions.

40. I reminded the Claimant that this case had been listed for this hearing for some considerable time and that if she chose to use solicitors in this way it was a matter for her. Whilst we attempted to accommodate the Claimant as much as we could, I explained that we had to balance the interests of both parties and the need to use judicial time expediently. The Claimant was of the view that we had seven days in which to hear the case and so we could accommodate the solicitors' requests. I reminded her that two of the seven days were intended for us to deliberate, reach a decision, give that decision and if appropriate deal with remedy.

41. Finally, the Claimant referred to her mental health and the impact that the case was having on this on a number of occasions. We took this on face value and attempted to accommodate her as best we could. We indicated that we were alert to the fact there was a finding that she was disabled because of depression and anxiety, as EJ Dyal had found, and that such matters did not necessarily resolve themselves quickly or indeed at all. However, we reminded her that we had no written reasons for EJ Dyal's decision, that disability was identified as from 25 May 2021 and we had not been provided with any medical evidence in support of her continuing ill-health or of her mental health issues.

Documents & Evidence

42. We were provided with the following electronic documents: a bundle index and bundle running to 1362 pages, which we will refer to as "B" followed by the relevant page number where necessary; a chronology; an updated cast list, a witness statement index and bundle; and a list of essential reading (from the Respondent).

43. We also had a copy of the bundle produced at the public preliminary hearing which determined the issues of disability. We will refer to this as "PHB" followed by the relevant page number where necessary.

44. During the course of the hearing the Respondent provided us with the following documents: a letter dated 11 April 2023 from King's College Hospital in support of Ms Biggs inability to attend the hearing; Management Brief to OH and the Claimant's fitness for work certificates for various dates; its instructing solicitors' note of the Employment Tribunal's decision on disability on 16 January 2023; and copies of the Claimant's fitness for work certificates.

45. Both parties provided us with written submissions at the close of evidence. In addition, Mr Amunwa provided us with an authorities bundle consisting of 126 pages. We were also provided with a copy of Charlesworth v Dransfields Engineering Services UKEAT/0197/16/JOJ.

46. We heard evidence from the Claimant and from her witnesses Peter Walsh and Thomas Richardson by way of written statements and in oral testimony. We heard evidence on behalf of the Respondent from Jacqueline Robinson, Shevonne Ramsey, Divya Patel, Victoria Lowry and Dominic Johnson by way of written statements and in oral testimony. We also had a statement from Sharon Biggs who was unable to attend the hearing due to personal domestic circumstances. As indicated above, we explained to the parties that her absence would affect what weight, if any, we attached to her testimony.

Findings of Fact

47. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.

48. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

49. We have anonymised the names of any persons not directly involved in the complaints brought by the Claimant or not giving evidence.

50. The Respondent is responsible for running the operations of the London Fire Brigade ("LFB") which operates 102 fire stations across London as well as a river station.

51. The Claimant was initially employed as a temporary worker by Hays employment agency, working in the Respondent's Local Intervention Fire Information ("LIFE") Team between July and December 2019. At that time, her line manager was Shevonne Ramsey, Deputy Youth Manager. The Claimant's Team Leader at that time was Ms JO.

52. The Respondent established a Safety First Team in January 2020. The Claimant was successful in obtaining employment as the Booking Coordinator in the Safety First Team (FRS Grade B), commencing her position on 17 February 2020 and employed on a fixed term contract to expire on 1 June 2023.

53. We were referred to the Claimant's contract of employment (at B170-175). The Claimant's employment was subject to a probationary period, the terms of which are set out at clause 8 of that contract:

> *"Your appointment is subject to the satisfactory completion of a six month's probation period, during which time your performance, attendance and conduct will be subject to monitoring and assessment. Reviews of your performance will take place at two monthly intervals at which time you will receive written reports of your progress and be given the opportunity to make comment on any matter of concern to you. During your probationary period you will be subject to the LFC's probation procedure and the LFC's discipline (conduct, performance and attendance) procedure will not apply to you."*

54. We were also referred to the requisite Probation Procedure at B924-936. In addition, we were indirectly referred to elements of the Respondent's Managing Attendance Policy at B948-967 and to the Harassment Procedure at B968-986.

55. We were not referred to the Claimant's job description or to the Respondent's Grievance Procedure.

56. Reference was made in the Respondent's evidence to previous complaints of bullying and harassment that the Claimant had made against her line manager whilst working at LIFE, namely, JO. The relevance of this was to support the contention that the Claimant had issues against all of her managers. The Claimant refuted this in her evidence. She alleged that she was not the only employee who complained about JO and that she only brought the complaints because Ms Ramsey told her to. The Respondent's witnesses denied these allegations. We were not convinced that this evidence was actually of any relevance, but on balance of probability we accepted the Respondent's evidence.

57. As we have indicated above, the Respondent established the Safety First Team in January 2020 and the Claimant was employed as the Bookings Co-ordinator from February 2020. The Safety First project was funded by the Metropolitan Police Service ("MPS") whereby the MPS, the Respondent and the London Ambulance Service, were to jointly attend secondary schools to provide educational inputs. The Safety First Team's role was to provide fire safety sessions to secondary schools (the Education Team provided such sessions to primary schools).

58. The project was due to go live in March 2020. However, it was unable to start due to the onset of the Covid-19 pandemic and the lockdown. This had a huge impact on the project, and the Respondent quickly had to move from in-

person to remote delivery. As a result, the Claimant's role was largely redundant for a period of time because she was unable to book school visits. During this period she was utilised to support the new online approach that the Respondent had quickly to develop.

59. We appreciate that at this time events were fast moving and there was a lot of confusion about the extent of the Covid-19 lockdown and how long it would last.

60. The Respondent had been expected by the MPS to provide sessions to year 8 students and this rapidly had to change to virtual delivery with of course the expectation that it would eventually revert to face-to-face delivery.

61. Two posts within the project were funded by the MPS, the Claimant's post of Bookings Co-ordinator and the Safety First Manager post. There were also three Education Officers who were employed on fixed term contracts.

62. The overall head of the Safety First Team and Education Team was Ms SP, the Youth Engagement Manager. Below her was Ms Ramsey, the Deputy Youth Manager.

63. The Claimant had a number of line managers during the course of her employment in the Safety First Team: Ms KD, from 17 February to 18 November 2020; Ms AW, from 19 November 2020 to 6 January 2021; Ms Ramsey, from 7 January to 1 March 2021; and Ms JO, from 1 March to 16 July 2021.

64. The Education Team and the Safety First Team both delivered Fire Safety sessions to schools, but the Education Team delivered fire safety sessions to primary school children whereas the Safety First Team delivered fire safety sessions to secondary school children.

65. The Claimant's role required her to liaise with schools and referral agencies to make bookings for the Respondent's Safety First Education Officers to deliver workshops. The Claimant's role also required her to send out all the information to the Education Officers informing them of the bookings. Her role was pivotal to ensuring all information relating to bookings was shared with the Education Officers. All of the necessary documentation had been created by KEB who worked for the MPS. This included email templates to be used in liaising with external agencies. The Claimant was expected to edit the information appropriately for each booking.

66. It is fair to say that there were issues between the Claimant and her original line manager, KD, which at one end of the spectrum amounted to what the Claimant loosely described at the time as "bullying", "harassment" and "victimisation", and at the other end of the spectrum, that they simply did not get on because of a clash of personalities. The relationship was clearly very strained and this affected the health of both the Claimant and KD.

67. As early as 10 March 2020 there was an attempt at mediation between the Claimant and KD by Sharon Biggs, the Care, Health and Safeguarding Manager. The Claimant did not deal with this in evidence and KD was not

called as a witness. Ms Biggs dealt with this at paragraph 10 of her witness statement but did not attend our hearing to give evidence. However, her evidence is supported by a contemporaneous email at B181. But the matter was not raised in cross examination.

68. As a result of the onset of the Covid-19 pandemic, the Claimant and the Safety First Team were working from home from 16 March 2020 onwards. This greatly affected the work of the Team which from the Claimant's perspective was to organise bookings in secondary schools for the Education Officers to deliver fire safety sessions. Of course, at this time schools were closed and largely providing lessons to pupils either through homework and/or remotely.

69. On 23 June 2020, KD sent the Claimant a letter entitled Probation Period Standard Setting Letter (at B221-222). This records the outcome of their discussion held on 22 June as to the Claimant's performance and conduct under the Respondent's Probation Procedure. The Procedure sets out a review process as part of probation. The format of the letter is set out in Appendix 3 of the Procedure (at B934).

70. The Claimant describes this letter as a "false Standards Setting Letter" by which she means that it contains untrue allegations and by which she was unfairly targeted and unfairly treated.

71. In June and July 2020 there was a further unsuccessful attempt at mediation between the Claimant and KD.

72. The Claimant attended her 5 month probation review meeting in August 2020. On 2 September 2020, KD wrote to the Claimant (at B279-283). This attached her Probation Review Form. The letter advised the Claimant that her probation was extended by 3 months as a result of the Covid-19 lockdown to 17 November 2020. This was as a result of the lockdown impacting on the ability to demonstrate key duties and responsibilities in her role and the Respondent being unable to assess her performance. This extension had been agreed by the Respondent's Head of Service, Assistant Commissioner Paul Jennings and applied to all probationers in the Safety First Team.

73. We heard evidence that a member of staff in the Education Team who was dealing with primary schools did not have her probation extended because she did not have to go into schools. We accept this evidence.

74. The Claimant sent a grievance against KD to Victoria Lowry, the then Deputy Head of Community Safety, on 21 August 2020. This was after the Claimant's probation review meeting but before her receipt of the confirmation letter. Her grievance is at B262-273. It alleges in essence that KD had bullied and harassed her. It includes what appears to possibly amount to an allegation of race discrimination in the second paragraph at B272.

75. The Claimant updated her complaints in emails to Mrs Lowry dated 27 August (at B1024-1025).

76. The Respondent dealt with the grievance under its Harassment Complaints Procedure (at B968-986) rather than as a grievance. This is evidenced in Mrs Lowry's email to Mr MD, the Primary Authority Business Group and Transport (Fire Safety) Manager, dated 2 September 2020 (at B1028).

77. MD had been appointed by the Respondent to investigate the Claimant's complaint, as it was referred to in correspondence between the Claimant and Mrs Lowry. Mrs Lowry forwarded the Claimant's emails containing and updating her complaint onto MD (emails dated 1 & 2 September 2020 at B1026-1028).

78. On 30 September 2020, the Claimant sent an email to MD updating him on her concerns about the way she had been treated by KD (at B309).

79. Between 1 and 25 October 2020, the Claimant was absent from work reporting work-related stress.

80. On 13 October 2020, MD sent an email to Mrs Lowry setting out his brief into the review of the Claimant's allegations of harassment and bullying (at B331-336). His conclusion was that based on the documentation he had reviewed and he determined that there was no requirement for a formal investigation into harassment and bullying against KD (at B336).

81. On 13 October 2020, Mrs Lowry spoke to the Claimant by telephone to discuss the outcome of her complaint against KD. She confirmed this in an email sent to the Claimant on 14 October 2020. The email set out MD's outcome as follows:

> *"Based on the documentation reviewed there is no requirement for a formal investigation into Harassment and Bullying against (KD). This was a line manager , supported by the relevant senior manager and People Services carrying out their role as expected by London Fire Brigade."*

82. The email went onto confirm that a Management Brief had been sent to Occupational Health (OH) (essentially a referral form) and the Claimant would be assessed by OH before her return to work. The email ended by stating Mrs Lowry's hope that they could now move forward to enable the Claimant to return to work and work to improve her relationship with KD (at B347).

83. On 4 November 2020, Mrs Lowry sent a letter to the Claimant confirming the outcome of her complaint against KD (at B362-363). In essence, this states that the issues would be dealt with locally and informally.

84. Having considered the evidence, we find on balance of probability that what the Claimant raised was not really harassment. It was more to do with the Claimant not liking the way that KD managed her and KD's management style. We accept that the Respondent was entitled to deal with these issues locally and informally. We appreciate that the original complaint contained a matter implicitly giving rise to a potential complaint of race discrimination but it was not pursued by the Claimant at the time in those terms.

85. As indicated above, from 1-25 October 2020, the Claimant was off work due to work related stress (this is how OH refer to her absence, although we were not provided with a certificate of fitness for work for this period).

86. The Claimant underwent a telephone OH assessment on 19 October 2020. The OH Medical Outcome Report is at B861-862. The Respondent's Referral to Occupational Health is at B860.

87. The OH report states that the Claimant has been under "significant stress", that this is affecting her sleep and making her quite anxious. It further states that she has been signed off work for a short period by her GP and is having psychological counselling. It further indicates that the Claimant reported that the cause of her stress was the difficulties she had been experiencing with her manager and to a lesser degree, the extension of her probationary period. The OH adviser states that there are no underlying causes of the Claimant's stress and that she will be fit to return to work once her current sick leave expires at the end of the week. The report also indicates that the Claimant's condition does not fall under the "DDA" (the legislation relating to disability prior to the enactment of the Equality Act 2010).

88. On 26 October 2020, the Claimant attended a return to work meeting with KD. The record of this meeting is at B359-360 & 361. At that meeting KD told the Claimant that her probation was likely to be extended due to her ill-health absence. The Claimant was asked to complete a stress risk questionnaire.

89. In November 2020, there were further attempts at mediation between the Claimant and KD.

90. On 17 November 2020, the Claimant attended a further Probation Review meeting with KD. The outcome of this was that her probation was extended by a further 3 months to 17 February 2021 due to her attendance issues (she had taken16 days of ill-health absence). The extension of probation letter is at B394.

91. The Claimant was issued with a second Standard Setting Letter during the meeting (at B376-378). This was as a result of performance issues coming to light during her ill-health absence. The letter was subsequently updated on two occasions at B394 and B714. The review form is at B398-402.

92. The Claimant did not agree with the outcome of the meeting and did not agree to the extension. She challenged the outcome of her review and the issuing of the Standard Setting Letter on procedural grounds and expressed her concerns as to the way in which KD treated her and the effect on her health. It is fair to note that again the Claimant described the Standard Setting Letter as "false" but by which she meant that she did not agree that the criticisms of her performance were true.

93. From 17 November 2020, KD was off sick with work related-stress and AW, the Deputy Head of Youth Services, took over as the Claimant's line manager (until 7 January 2021).

94. There were repeated attempts to agree a stress action plan with the Claimant between 23 December 2020 and 22 January 2021 although it was ultimately finalised (at B499 onwards).

95. On 23 December 2020, the Claimant attended a further probation meeting with AW to discuss performance issues (at B428).

96. On 4 January 2021, KD came back to work, on a phased return and attached to a different team. She did not resume management of the Claimant. The Claimant alleges that KD was transferred whereas she was not allowed to. However, we heard evidence from the Respondent, which we accept, that whilst KD's post was also funded by the MPS, she was employed on a permanent basis as opposed to being on a fixed term contract and on probation, as the Claimant was, and, moreover, KD was in fact on secondment from her permanent role as a Fire Setters Intervention Scheme ("FIS") Caseworker.

97. On 7 January 2021 Ms Ramsey became the Claimant's line manager, having returned from Maternity Leave in December 2020.

98. On 14 January 2021, the Claimant attended a further Probation Review meeting and on the same date she issued a second grievance. It is not clear whether the review meeting took place before or after she sent her the grievance or indeed who the grievance was sent to (the Respondent has a central system to which grievances are uploaded).

99. The Claimant's grievance is headed January 2021 and it is at B434-443. However, in evidence it was accepted that it was submitted on 14 January, although no one was able to give the time of submission.

100. In essence, the grievance raises the following matters: concerns about the first probation meeting in May 2020 and the outcome; denial of the Claimant's opportunities to discuss her concerns and subsequently being asked to attend a meeting on 22 June 2020 at which she was given a standard setting letter; the impact of this all on her health; the failure to investigate her first grievance properly or at all; the further extension of her probation in August 2020; detrimental treatment by KD on her return to work after her period of ill-health on 26 October 2020; the further extension of her probationary period because of her sickness absence; the requirement to attend a performance meeting on 13 November 2020, which in fact took place on 17 November 2020 and turned out to be a performance hearing at which her probation was extended to February 2021; at that meeting being issued with a further standard setting letter; failings and delays in drawing up the stress action plan; and the false statements made in both standard-setting letters.
101. At B440-441 the Claimant summarises her grievance under 3 headings: probation; bullying/harassment; and health and safety at work. She stresses that her mental and physical health has been affected by these matters, that she requires a swift and fair hearing by someone not involved in the matters and then lists the outcomes that she seeks at B442-443. This includes a transfer to an alternative commensurate post either through mutual exchange or to an existing vacancy.

102. The grievance is "augmented" on 3 February 2021 at B547-562, ie updated. The augmentation is from B556 onwards. In essence, this section sets out further unresolved issues relating to the standard-setting letters; her

probation which includes her concerns about what happened to her after a Safety First meeting held on 27 January 2021 (which we will come to). The Claimant repeats her transfer request in more detail at B562.

103. The Respondent did not see this grievance as giving rise to a protected act (for the purposes of the Claimant's victimisation complaint).

104. The Claimant's further Probation Review was also conducted on 14 January 2021. The Claimant attended with her union representative, Mr TP, who was accepted by both parties to be an experienced representative. The review was conducted by Ms Ramsey.

105. There is no written record of the meeting but we heard evidence from both the Claimant and Ms Ramsey as to what was discussed. However, we were given no indication of at what time the meeting was held. Ms Ramsey could not recall whether she had seen the Claimant's further grievance at this point or at a later point. However, it is clear from the email at B1356 that she had certainly seen the grievance by 25 January 2021.

106. There is a dispute between the parties as to what was agreed at the meeting. We refer to email correspondence between the Claimant, Ms Ramsey and TP at B536-538 and B532. We also heard oral evidence as to what was discussed at the meeting. We also took into account that Ms Ramsey had exchanged email correspondence with and had spoken to SP prior to the meeting (at B1090) and in her discussion with SP, SP had confirmed that there were no further issues with the Claimant's attendance and that she was happy with her performance since the Standard Setting Letter dated 17 November 2020.

107. On balance of probability, we find that Ms Ramsey gave the Claimant an overly positive impression at the meeting that she had passed her probation. She had spoken to SP, who had in effect given her the green light to pass the Claimant (albeit at that stage which was before the probation period had actually come to an end). It was a remote meeting with the Claimant and Ms Ramsey accepted that perhaps she did not make it clear that the passing of probation was subject to review to the end of the probationary period (on 17 February 2021) and she tried to make things sound positive. We also heard oral evidence from Ms Divya Patel, an Outreach Manager (who conducted the subsequent probation hearing on 15 February 2021), as to the usual procedure being that probation could only be assessed at the end of the probation period and could only be determined by a senior manager. Given that Ms Ramsey was not in a position to determine that probation had been passed until the end of the probation period and probation had to be signed off by a senior manager, it was unfortunate and misleading that both the Claimant and TP were given the impression that the Claimant had passed her probation at the meeting on 14 January. But we do not think there was anything untoward in this.

108. On 27 January 2021, there was a Safety First meeting attended by members of the Respondent's Safety First Team, including the Claimant and Ms Ramsay and KEB on behalf of the MPS. The meeting was held by Microsoft

Teams to further discuss and plan the delivery of virtual safety first sessions to schools following the Covid-19 lockdown restrictions.

109. During the meeting, the Claimant said that she was not aware of the plan to deliver safety first training virtually to pupils in their homes and expressed concerns about the lack of direction she had been given by Ms Ramsay and SP with regard to booking workshops. In evidence, Ms Ramsay denied that the Claimant was unaware of the plan and the lack of direction given. In addition, the Claimant said at the meeting that SP had told her that Safety First could not deliver virtual home training. Again, Ms Ramsay denied this in evidence. Further, another member of the Safety First team, TR, an Education Officer said that he was unaware of the virtual delivery. Again, Ms Ramsay denied this in evidence.

110. Later that day, at 20:37 hours, SP sent an email to the members of the Safety First team. This is at B515. In this email she stated that she received very poor feedback from the MPS that evening who had concerns about the capability of the team to deliver Safety First effectively after the views expressed in the meeting. The email went on to set out the current position regarding the project - in effect, for the avoidance of doubt. This particularly addressed the position regarding the Claimant's awareness of and involvement in delivering sessions to pupils virtually. SP went on to state that with this information in mind she was confused as to why the impression had been given at the meeting that the Team had not been adequately informed, particularly by the Claimant. She further stated that the meeting was a multi-agency meeting organised purely to investigate how virtual delivery would or would not work. Her email went on to state that the meeting:

> *"… was <u>not</u> an opportunity to complain, challenge or to embarrass the LFB in front of our partners and funders. Raising internal concerns (and in this case I was informed it seemed like "gripes and moans") in a multi agency forum is not appropriate, and has only served to make the SF team look unprepared and unprofessional. It is worth remembering that the Met Police fund all SF posts and so we should be giving them confidence, not concern.*
>
> *I have spent a lot of my personal time tonight on the phone and writing this email trying to smooth out and resolve some misunderstandings with partners and funders which I shouldn't have had to do. Myself, Shevonne and the Met are really disappointed in how this meeting went today, and so Shevonne will discussing this with each of you individually this week and setting out expectations in writing going forwards so this doesn't happen again."*

111. In an email dated 28 January 2021, the Claimant replied to SP's email stating that there had been a misunderstanding and in particular she stated that they were not complaining at the meeting, but simply saying that they were not aware that the project was to be delivered to children at home and that this was the first time they had heard of it because KEB was under the impression that they all knew. This email is at B515.

112. In a Microsoft Teams meeting later that day with Ms Ramsay, the Claimant maintained that she was not aware that the session was to be delivered virtually. Ms Ramsay told her it was unprofessional for her to raise these concerns during a meeting with their external partner and she if she had any further concerns regarding the lack of information conveyed to her or needed guidance regarding delivery of the sessions, she should speak to her in the first instance.

113. We were referred to various emails dated 27 and 28 January 2021 at B520-528. The Claimant initially sent emails to KEB, SP and Ms Ramsey regarding the procedure for booking sessions with local schools and in particular her lack of awareness that she was required to book schools until after the meeting on 27 January 2021 (at B526). SP responded to the Claimant only, setting out her position and in particular told the Claimant to go through Ms Ramsay only and not directly to KEB (at B526). This was repeated in an email to the Claimant only, from Ms Ramsey (at B525). The Claimant replied to SP in which she responded to the substantive matters raised by SP and by way of explanation for her direct approach to KEB, she made some disparaging comments about Ms Ramsay (at B525-526). Hower, her email was also addressed to KEB.

114. We were also referred to an email from KEB to SP dated 28 January 2021 regarding the meeting the previous day. The email sets out her general concerns about the meeting and the comments in particular made by TR and the Claimant. Her note also highlighted the lack of response to what TR and the Claimant said from Ms Ramsay.

115. On 29 January 2021, Ms Ramsay set out in writing the discussion that had taken place the previous day with the Claimant. She expressed her disappointment with the Claimant's conduct during the Safety First meeting and that she felt it to be inappropriate unprofessional behaviour that brought the Respondent into disrepute. Her email stated that moving forward, the Claimant should display appropriate work etiquette as this was not evident during the meeting. The email pointed to the Respondent's behaviour strategy which outlines what is required of staff and she set out some of the requirements that she would like to see from the Claimant moving forward. The email reiterated that if the Claimant had any concerns as to information that is not conveyed to her, she should go through Ms Ramsay not the external partners. This email is at B539.

116. Ms Ramsay also telephoned and then sent an email to TR on 29 January 2021, with regard to his conduct at the meeting. He stated that he was unaware of virtual delivery, he apologised and stated that he was not trying to be difficult. Her email is at B1174 in which she set out the gist of their discussion. In particular, her email states that they discussed the importance of remaining professional during meetings even more so when holding meetings with partners. Her email recognise that it was important to have concerns and queries answered but to be mindful of the manner of approach in raising those views in meetings particularly with external partners. The email ended that they would be moving towards holding weekly team meetings that will give him and the team the opportunity to raise any concerns or feedback on issues and that this will avoid a similar situation taking place again.

117. In an email dated 1 February 2021 sent to various managers, including Ms Ramsay and Mrs Lowry, the Claimant set out what she felt was misinformation passing around about her with regard to the Safety First meeting held on 27 January 2021. This is at B565.

118. On 4 February 2021, SP sent an email to Ms Ramsay setting out a record of a telephone conversation that she had with KEB late afternoon on the day of the Safety First meeting. This is more probably than not the feedback that she had received from KE as referred to in her email to the team at B515. A slightly redacted copy of this appears at B568-569. What this email asserts is that the Claimant's comments at the meeting were more extensive than she alleges. In essence, that she said that she did not realise about the plans for virtual delivery to pupils at home and had referenced SP several times in questioning the direction that SP and Ms Ramsay had given her about whether she should continue to book workshops or not if pupils still had not returned to school.

119. The Claimant's position with regard to the Safety First meeting is that the whole Team were confused about what was going on because they were not being given correct information by management and that the MPS were frustrated with management. She said that TR and PC, a Crossfire Support Officer, had expressed their frustration and all that she had done was to say that SP had given an instruction to her but the MPS was saying something different. Her further position is that Ms Ramsay gave her a misconduct warning in her email of 29 January 2021, at B539, whereas she did not give such a misconduct warning to TR and PC who said much more than her at that meeting. In addition, she states that this is supported by the unredacted version of KEB's email to SP of 28 January 2021 at B518-519a redacted had been produced and relied upon at her probation hearing on 15 February 2021.

120. Without the need to go into the substantive matters raised by the Claimant at the meeting it was clearly inappropriate her to criticise her line managers in front of KEB, a representative from the external funders. It was also inappropriate for to repeat these criticisms in emails KEB and to write as she did to the entire Team. We did not hear any evidence as to the position regarding PC and it was not put to the Respondent's witnesses in cross examination. However, the main difference in the approach taken by the Claimant and TR was that TR apologised actions in raising concerns at the meeting and the Claimant showed no such contriteness. SP and Ms Ramsay were concerned about the Claimant's conduct at the meeting and her emails to KEB. This is understandable.

121. We were concerned that Ms Ramsay was at the meeting and appeared not to respond at points where it would have been appropriate for her to do so and in effect, close down the comments raised by the Claimant. In oral evidence, Ms Ramsay explained that she was working from home and breastfeeding her son (something that all the Team were aware of), and for this reason she always turned her camera off. She became emotional at this point and said that she knew it was her responsibility to speak up but she could not because she did not want to disclose her personal circumstances to the external partner.

122. For the purposes of the victimisation complaint, we asked ourselves, what changed between 14 January 2021 and the probation hearing held by Divya Patel on 15 February 2021 and outcome letter dated 2 March 2021 which

resulted in the Claimant's probation being extended by a further 4 months to 2 July 2021 (the notes at B609-619 and the letter at B729-730)?

123. There were two particular things: the Claimant's grievance of 14 January (which was either sent before or after the probation review and which Ms Ramsey could not recall whether she had seen it at the time of their meeting or afterwards – she had certainly by 25 January – at B1356) and augmented on 3 February 2021; and what had happened at the Safety First meeting on 27 January 2021.

124. We considered the sequence of events which we set out as follows:

    a. Prior to 14 January 2021, SP had in effect given the green light to Ms Ramsey to pass the Claimant's probation period;

    b. On 14 January 2021, the Probation Review meeting was held, at which Ms Ramsey gave the Claimant a positive view that she had passed her probation;

    c. On 14 January 2021, either before or after the Probation Review meeting, the Claimant raised her further grievance;

    d. By 25 January 2021, there is clear evidence that Ms Ramsey had seen the grievance;

    e. On 27 January 2021, the Safety First meeting was held with MPS and members of the Safety First Team, including Ms Ramsey and the Claimant;

    f. On 3 February 2021, the Claimant sent her augmented grievance;

    g. On 4 February 2021, the Claimant was invited to attend her probation hearing (at B586) in which serious concerns were raised about her performance during the probation period and therefore not attaining the required standards;

    h. On 15 February 2021, the probation hearing took place, conducted by Ms Patel (at B609-619);

    i. On 2 March 2021, the Claimant is sent a letter notifying her that her probation is extended by 4 months (at B729-730).

125. We deal with the conclusions we reached later on in our reasons.

126. The Claimant's second grievance hearing took place on 17 February 2021 and was conducted by Sharon Biggs, the Care, Health and Safeguarding Manager. The notes of the hearing are at B1195-1204.

127. The outcome of the Claimant's probation hearing was held in abeyance until after the grievance outcome.

128. The Claimant made a further request for a transfer on 22 February 2021 (at B684-685).

129. On 26 February 2021, Ms Biggs wrote a letter to the Claimant advising her of the outcome of her second grievance (at B724-745). In essence, the grievance was not upheld.

130. From 1 March 2021 onwards, the Claimant was absent from work due to ill-health (in fact until the end of her employment). We were provided with the Claimant's fitness for work certificates separately by the Respondent during the hearing. The certificates are for the following periods and reasons for absence: 2 March 2021 for 6 weeks "stress/anxiety, with depressed mood"; 12 April to 28 May 2021 "depression and anxiety"; and 29 May to 10 July 2021 "depression and anxiety". The Claimant's GP notes at PHB149 indicate that she was given a further fitness for work certificate for the period 11 July to 13 September 2021 in respect of "depression and anxiety".

131. On 1 March 2021, the Claimant underwent a further OH assessment again by telephone. We were referred to the OH Medical Report at B864-865. This stated that the OH adviser did not consider the Claimant fit for work at present due to the severity of her symptoms and that it would be difficult for her to consider a return to work whilst the work-related issues remained unresolved.

132. As we have indicated above, Ms Patel wrote to the Claimant on 2 March 2021 as to the outcome of her probationary hearing held on the 15 February 2021 (at B729-730). This letter set out Ms Patel's concerns about the Claimant's performance and attendance issues, including the need to address performance issues such as improving, building and maintaining effective working relationships with her line managers/partners, planning and organising her work to meet timelines set, and following reasonable management instructions. She was referred to the Respondent's behaviour expectations relating to "Takes Ownership and Responsibility".

133. On 16 March 2021, the Claimant attended her grievance appeal meeting which was conducted by Mrs Lowry. The Claimant was represented by her Trade Union representative, TP. We were referred to the minutes of that meeting at B748-750.

134. On 24 March 2021, Mrs Lowry sent a letter to the Claimant containing the outcome of her appeal. This is at B746-747. The letter indicates that the issue focused on the most during the hearing was the Claimant's transfer request which was not referenced in the grievance outcome letter. Mrs Lowry did not uphold the Claimant's grievance on appeal for the following reasons:

"• Your union representative confirmed in the hearing that there were no outstanding formal complaints against anyone in your line management chain, and that you were getting on well with your current immediate line manager.

• The post you are currently in is externally funded, and there are no current vacancies to transfer you into within the Fire Safety Department.

• Under the Probation policy it states that someone who is currently under probation cannot undertake secondments, except in exceptional circumstances. Although you are requesting a transfer rather than

a secondment, I agree with the ethos of the policy in that you should see out the rest of your probation in the role you were recruited to for consistency purposes. In this respect, your line manager will be able to assess your progress against the actions detailed in your probation hearing outcome letter."

135. The Claimant underwent a further OH assessment on 25 May 2021 and the Medical Outcome Report is at B869-870.

"I conducted a telephone review with Ms Begum. She continues to report significant psychological symptoms. As you are aware. Ms Begum continues to experience ongoing work-related concerns. She advised me while she is keen to return to work, she feels unable to return to her current team.

Ms Begum is currently accessing treatment for anxiety and depression. She has recently started attending talking therapy and is pursuing online CBT. She also has started antidepressant medication. She has not noticed any benefits of treatment yet. We discussed that she is at an early stage of treatment so the benefits of treatment might not be apparent yet. However, given that the trigger for her symptoms appears to be the work related concerns, there may be some limitations in the effectiveness of treatment while these concerns remain ongoing.

Rehab plan 'suitable enabling options
Continue current treatment and GP review

The adjustments outlined in my report dated 8/3/21 remain relevant. In addition to this, updating the stress risk assessment is also advised if Ms Begum returns to work. Transfer to an alternative team is likely to have a positive impact on her psychological wellbeing. However, I fully appreciate this is a management decision.

Prognosis/estimated timescale for return to work and/or full work capacity
Ms Begum is currently unfit for work and the prognosis remains uncertain. Clinical improvement and a return to work would be anticipated, with the benefit of adjustments and if her work related concerns could be addressed."

136. The OH adviser recommended review in 4-6 weeks.

137. However, it is fair to point out that the Respondent did not see this report until after the probation hearing.

138. The Claimant's final probation hearing took place on 26 May 2021 by way of Microsoft Teams and was conducted by Ms Biggs. We were referred to the minutes of this meeting and supporting appendices at B780-795. The Claimant was again represented by TP.

139. On 16 June 2021, Ms Biggs sent a letter to the Claimant advising her of the outcome of her probation. This letter is at B814-816. Ms Biggs' decision was to dismiss the Claimant with one month's notice because of her unsatisfactory attendance during her probationary period. Her last day of service was to be 16 July 2021. The reasons for her decision are set out below:

"1. Your attendance falls far short of what is expected from a Brigade employee on probation. Whilst I accept that your absence may have been triggered by your perceptions of your work environment, your complaints have been investigated/reviewed with no findings made in your favour. Unfortunately, your levels of absence are unsatisfactory and there do not appear to be any prospects of a return to work in the foreseeable future;

2. Your references to reasonable adjustments are noted and I understand that the Brigade has a duty to make reasonable adjustments for those with a disability as defined within the Equality Act. I am unable to say whether your condition(s) would meet the disability definition, but it would appear from the OH reports dated 19 October 2020; 01 March 2021, 28 April 2021 and 25th May 2021 that you did not have any underlying health conditions prior to October 2020. The 25th May 2021 report states that your condition is currently affecting your ability to carry out day to day activities, but the prognosis (whilst uncertain) is that your psychological health would improve if the work-related concerns could be addressed. I have seen no evidence to suggest that your condition(s) are likely to continue to have a substantial effect on you for the required 12-month period (in accordance with the Equality Act). In

saying this, I have considered whether your request to transfer to a new team could be an adjustment to assist with your condition. The role you were appointed to is a fixed term, externally funded by the Met Police. This makes a transfer more difficult. Although your representative tried to separate the outstanding concerns regarding your performance and your attendance, they are somewhat interlinked and must both be passed in order to satisfactorily complete the probation period.

3. The Brigade has offered a range of support to you including support meetings, a stress risk assessment and action plan, Occupational Health appointments, Counselling and Trauma services support, management support, change of managers, mediation and extended probation periods. I fully appreciate that the extended probationary periods were unwelcomed by you and you considered them to be unjustified, but from the evidence I have seen, rather that dismissing you, management were seeking to give you the opportunity to improve by extending your employment and providing clear guidance on what you needed to do to demonstrate your ability to conduct the role to a satisfactory standard. Rather than viewing this as a support mechanism, you took the view that your managers had created false and defamatory evidence against you.

4. You cited other members of staff who have passed their probation periods who are of a different race and religion to you. I have seen no evidence that they were doing the same role or work as you; nor that they had the same or similar performance concerns as you. Therefore, they are not in my view, appropriate comparators. I have also seen no evidence that the management of you was in any way connected to your race and/or
your religion."

140. On 21 June 2021, the Claimant appealed against the outcome of her probation. Her appeal is at B817-819. Her appeal set out the following grounds:

"• The LFB were in breach of the statement of particulars clause 8 (probation) when my probation period was extended retrospectively after expiry of the agreed period of six months on 17 August 2020.

• The LFB's probation procedure 0809 has not been adhered to in that the LFB extended my probation period beyond the typical six month period despite me demonstrating my suitability (conduct, performance and attendance) within the given timeframe. My performance, conduct and attendance were assessed as ''satisfactory'' and ''suitable'' on each probation review report, however my probationary status has continued without good reason and without my agreement.

• The exceptional circumstances relied upon as reasonable cause to prolong my probationary period have yet to be justified. FRS B is the most junior grade of FRS staff and it is unreasonable to be subject to probation beyond six months without justification.

• There is reference to expired warnings given for performance and/or conduct which are unrelated to the allegation of ''attendance issues''. The historical warnings were in any event unfounded and never substantiated with factual evidence.

• I was notified of "serious concerns" in relation to "attendance issues" on 30 April 2021. A hearing took place before the allegation was set out in sufficient detail. I have remained absent until being notified of dismissal on 16 June 2021. This suggests there were concerns for one thing and a decision to end employment for another.

• My probation period was extended again on 2 March 2021 for a further four months (until 2 July 2021). Although I was absent from work when this letter was issued, there was no mention of actual or potential attendance concerns, the improvements required or how this will be monitored.

• The LFB's Managing Attendance policy 889 has been referred to in respect of absence ''triggers''. I understand that such triggers are in place to provide early support and monitored over a 12 month rolling period. You state that my attendance ''falls far short of what is expected''. The application of clause 8 of the Managing Attendance policy alone is grossly unreasonable in the circumstances. I believe this policy should be applied in its entirety or not at all. I also believe it should either apply during a probation period or it shouldn't and must not be applied selectively. My circumstances should be judged fairly and consistently with others.

• I am absent from work due to a common mental health illness. That absence is related to a diagnosed impairment. I have requested reasonable adjustments to support my return to work. The LFB has discriminated against me on grounds of disability.

• I have requested a move to an alternative position to remove or reduce risks to my wellbeing. This has been denied and therefore I am unable to attend work. The LFB has denied me the chance to further demonstrate my suitability and return to work without objective justification.

• I have been subject to discrimination on grounds of race and religious belief as I have been treated less favourably than colleagues in similar circumstances who do not share the same characteristics."

141. On 24 June 2021, the Claimant was sent an email, copied to TP, inviting her to an appeal hearing to be held on 7 July 2021. This is at B820-821. The email attached the appeal documents the index to which is at B822.

142. By way of response later that day, the Claimant sent an email which included the following paragraph:

"My union rep (TP) will attend the Appeal hearing on my behalf as I am currently unwell. I provided a doctors note to management explaining my absence during the probation hearing."

143. It would appear in response to the invite email, TP requested a change of time for the appeal hearing on 7 July 2021 as the email to the Claimant which is copied to TP dated 28 June 2021 and attached letter indicate (at B825 & 826).

144. The Claimant was to undergo a further OH assessment on 28 June 2021. However, the Medical Outcome Report is headed "DNA" – ie did not attend. This is at B871.

145. On 7 July 2021, the Claimant's appeal hearing was held. It was conducted by Dominic Johnson, Subject Matter Expert, Industrial & Employee Relations, People Services Department. The Claimant was represented by TP who presented the appeal on her behalf in her absence.

146. Mr Johnson sent an email and letter to the Claimant dated 13 July 2021 notifying her of the outcome of her appeal. This is at B828 & 829-832. Mr Johnson set out comprehensive reasons for his decision to uphold the decision to dismiss the Claimant within his letter. These are repeated below:

"1. The Brigade's Probationary procedure allows management to extend the probationary period in exceptional circumstances. I believe your Head of Service was entitled to extend your initial probationary period given the circumstances around Covid-19 which inevitably would have had an impact on your work even though you were office-based. With regards to the comparator cited, the individual was in a different team, and no evidence was presented that this was an identical role to yours, nor that similar circumstances applied. Please also note, to respond to one of your written grounds of appeal, that the Probation Policy/statement of particulars do not state that a probation period is passed if six months elapses and the employee is not advised of an extension by the 6-month date. Under the statement of particulars, appointment is subject to the satisfactory completion of a 6-month probationary period, and it is not excluded that an employee may be advised that this stipulation has not been met (i.e. that the probationary period has been extended) a short period after the end of the initial 6 months employment.

2. I am satisfied that your management was entitled to extend your probation in November 2020 on account of 16 days sickness in October, and that they were entitled to notify you of the performance concerns outlined in the letter of 17/11/2020 from (KD) (noting that you have challenged the contents of this letter). For each extension of probation management is entitled to be satisfied that there is satisfactory conduct, attendance and performance for the full period of probation and is not required, for example, to discount unsatisfactory attendance during an extension of probation on the basis that attendance was satisfactory during the initial probation period. In addition there is no compelling evidence of unfair treatment and/or bullying by your management chain; these allegations have been looked into and not upheld during the period of your probation.

3. As indicated above, I believe reference to an extension of probation in December 2020 by (TP) at the appeal related to the extension in November 2020, which I have addressed in point (2) above.

4. I believe the Outreach Manager was entitled to extend your probation following the hearing on 15/02/2021 given the ongoing concerns over your performance as set out in the letter dated 02/03/2021. It is true that at the time there was no mention of attendance concerns; this is because your long-term sickness commenced on 01/03/2021 after this hearing took place; the concerns at this hearing were performance issues that needed to be addressed.

5. It may be the case that you were first notified of concerns in relation to attendance issues on 30/04/2021. You commenced long-term sickness on 01/03/2021 and have remained on continuous long-term sickness since that date. Inevitably this would give rise to attendance concerns within a few weeks of this sickness commencing. I am not persuaded that your management needed to set out this 'allegation' in more detail. Simply by virtue of being long-term sick, with no clear date when you would be returning to work, would inevitably have constituted a concern especially given that you were on probation.

6. I am satisfied that is appropriate to use the Brigade's sickness absence triggers as a measure to determine whether an employee's attendance is acceptable during their probationary period. This is not 'mixing and matching'; it is using a sensible and appropriate yardstick to determine whether or not attendance is satisfactory during the probationary period. In any event by this time you were on long-term sickness which is not a sustainable level of attendance under any yardstick. At the time of the Probationary Hearing held on 26 May 2021, your sickness absence totalled 76 lost working days and there was no indication when you would be in a position to return to work and maintain regular attendance.

7. You requested a transfer to another department as a reasonable adjustment. I do not consider this reasonable or appropriate as you have had several different managers but there has been an ongoing pattern where you have alleged you have been treated unfairly. Indeed you are now requesting a transfer outside of your entire line management chain. This demonstrates to me that a transfer to another department is unlikely to be successful. Unfortunately I do not have any confidence that if you were transferred outside the Fire Safety department similar difficulties and issues would not arise with a new set of managers.

I believe that ordinarily an employee should complete their probationary period within the role they are appointed to before a management transfer is considered. Whilst this might not apply if the employee was being treated unfairly, as noted above there is no substantive evidence or finding that you have been unfairly treated and/or bullied or victimised. I also concur with the points made by Sharon Biggs in her letter of 16 June 2021 that the fact you are on a fixed-term contract in a post externally funded by the Met Police makes a transfer more difficult. I do not believe the comparator cited in this ground of appeal is relevant as the individual is a permanent member of staff who passed their probation several years ago; they were detached into the Safety First team and they therefore had an alternative base post. They also have not left the Fire Safety department whereas you are seeking a transfer outside of the department.

8. I do not accept that you have not been given any support to return to work. In her letter dated 16/06/2021 Sharon Biggs listed the support you have been provided with in paragraph 3. I also agree with the remainder of what is stated in this paragraph by Ms Biggs in relation to the extensions of your probationary period.

9. Your representative, (TP), was unable to provide any details to support your claim that you have been discriminated on the grounds of race and religion, other than to state that other employees within your team had passed their probation. I agree with the points on this issue made by Ms Biggs in her letter dated 16/06/2021, paragraph 4.

At the appeal the Management Representative, Sharon Biggs, confirmed the reasons for her decision set out in the letter dated 16 June 2021 and gave a detailed explanation as to how she reached her decisions. I believe Ms Biggs was entitled to reach the decision to dismiss you at the hearing held on 26 May 2021, and I am therefore satisfied that the decision to dismiss you during your probationary period for unsatisfactory attendance is justified."

147. On 14 July 2021, the Claimant attended a rescheduled OH assessment. We were referred to the Medical Outcome Report at B872. This does not contain any further work related advice, simply recording that the Claimant still continues to experience significant psychological symptoms, is accessing appropriate treatment and that she is due to leave her role that week.

148. There are OH documents headed Consultation Notes at PHB172-199. These are not documents that were seen by the Respondent's managers at the time

of the events in question. They contain fuller notes made by the OH advisers at each of the Claimant's OH assessments. In particular, they address the issue of whether the Claimant was disabled under the Equality Act at her various assessment appointments. We have dealt with these documents more fully in our conclusions dealing with the issue of disability. We note though that this was not a question posed by the Respondent to OH at any stage although it could have formed part of the management referral to OH. By way of example, we refer to the Referral to Occupational Health at B860 and 863. The issue was only addressed in the report dated 19 October 2020 at B861-862 as we have set out above.

149. As we have indicated above the Claimant's employment ended on 16 July 2021.

Submissions

150. We received written and oral submissions from both parties. Whilst we do not propose to set these out in our Judgment, other than by specific reference, we have taken them fully into account in reaching our decision.

Relevant Law

151. Section 15 Equality Act 2010:

"(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."

152. Sections 20 of the Equality Act 2010:

"(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…"

153. Section 21 Equality Act 2010:

"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…"

154. Section 26 Equality Act 2010:

"(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.
(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(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."

Conclusions

Time limits

155. There are time limit issues arising in respect of the complaints. These are set out at paragraphs 1 to 4 of the Agreed List of Issues (at B134-135). We decided to park consideration of time limits until after we had determined whether any of the Claimant's complaints were well-founded.

Burden of proof

156. Under section 136 of the Equality Act 2010, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. We have taken account of the guidelines set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof.

157. We have also taken into account Madarassy v Nomura International plc [2007] IRLR 246, CA which found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be *"something more"*. There has to be enough evidence from which a reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

158. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondent's explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

159. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so.

Disability

160. At the preliminary hearing held on 16 January 2021, EJ Dyal decided that the Claimant was a disabled person because of her anxiety and depression from 25 May 2021. The reasons for his decision were given orally at the hearing and neither party requested written reasons. The issue of the Respondent's knowledge of disability was not determined at that hearing.

Reasonable adjustments

161. Under sections 20 and 21 of the Equality Act 2010, there is a duty upon employers to make reasonable adjustments. Failure to do so constitutes unlawful discrimination. Where an employer applies a provision, criterion or practice ("PCP") which puts a disabled person at a substantial disadvantage compared with people who are not disabled, the employer must take such steps as are reasonable to avoid the disadvantage. The purpose of the adjustment is to address the disadvantage.

162. The adjustment has to be reasonable. In considering whether an employer has met the duty to make reasonable adjustments, the Tribunal must apply an objective test. Although we should look closely at the employer's explanation, we must reach our own decision on what steps were reasonable and what was objectively justified. Relevant factors can include the extent to which the adjustment would prevent the disadvantage, the practicality of the employer making the adjustment, the employer's financial and other resources, and the cost and disruption entailed.

163. There is no duty to make reasonable adjustments if the employer does not know and cannot reasonably be expected to know that the worker has a disability and does not know or cannot reasonably be expected to know that the worker is likely to be placed at a substantial disadvantage as a result.

164. The issues that we are required to determine are set out at paragraphs 7 to 9 of the Agreed List of Issues at B135-137).

165. The Claimant relies on two PCPs.

166. PCP1 is that the Respondent maintained a PCP of refusing a transfer away from the team following allegations of bullying for returning staff who have been off sick owing to the same.

167. We have taken into account the Respondent's written submissions at paragraphs 33 to 36. In view of our findings, we considered this a one-off act not amounting to a PCP. We were guided by Ishola v Transport for London (2020) ICR 1204, in which the Court of Appeal, whilst accepting that the words "provision, criterion or practice" were not to be narrowly construed or unjustifiably limited in their application, considered it significant that Parliament had chosen these words instead of "act" or "decision". The words "provision", "criterion" and "practice" all carry the connotation of a state of affairs indicating how the employer generally treats similar cases or how it would deal with a similar case if it occurred again. The Court of Appeal also pointed out that a PCP must be capable of being applied to others. Thus, although a one-off decision or act can be a practice, it is not necessarily one,

and not every act of unfair treatment of a particular employee can be formulated as a PCP.

168. In her witness statement, the Claimant pleads this PCP in the singular rather than the general as it is put in the Agreed List of Issues and she did not apply for and was not given permission to amend.

169. Indeed, the premise set out in PCP1 may have been more suited to a direct discrimination complaint in that the Claimant is in effect arguing she had been treated less favourably than KD in this regard. But that is not what is before us. This in turn cements our conclusion that this is a one off act and not a PCP.

170. Nevertheless we have gone onto consider the issue of the transfer which was at the heart of this complaint to the Employment Tribunal and find that it would not have been reasonable of the Respondent to transfer the Claimant as she requested because:

    a. The Respondent did not allow secondments during probation periods and by analogy to transfer requests;

    b. The funding issues;

    c. Concerns as to how to transfer someone with previous and ongoing performance and attendance issues;

    d. There were specific reasons why it was possible to transfer KD that did not apply to the Claimant's situation.

171. The second PCP2 that the Claimant relies upon is that the Respondent maintained a PCP of proceeding with probation review meetings in the employee's absence where said employee was absent due to ill-health.

172. We heard no evidence that this was a wider practice.

173. However, turning to our findings. The Claimant had in fact been called to a meeting initially scheduled for 11 May 2021 and then moved to 26 May due to her Trade Union representative's unavailability. The meeting did subsequently go ahead in her absence after the representative had told the Respondent that the Claimant was not fit to attend, that he would be representing her and asking for the date to be rearranged for his convenience.

174. There is no contemporaneous evidence that the Claimant asked for the meeting not to go ahead because she could not attend. In her oral testimony, she said there was an email to this effect and we gave her the opportunity to produce it during the course of the hearing but she did not do so.

175. There is no indication in correspondence that there is such are request or that one had been made in the notes of the meeting (at B775 & B777 & B780-786 respectively). In fact in the email at B775, her representative wrote to the Respondent stating that the Claimant was unable to attend and he would

be representing her. Moreover, the Claimant submitted a written submission for the meeting.

176. It appeared from the Claimant, giving her the benefit of the doubt, that she was confusing this meeting with an earlier meeting with Mrs Lowry (this emerged in cross examination when the Claimant said she thought that her representative had spoken to SB and Mrs Lowry who in fact were not involved in the meeting under consideration).

177. Turning to the pleaded reasonable adjustment, that the Respondent should have delayed the meeting until such time as the Claimant could engage.

178. The Respondent did delay the meeting to allow her representative to attend and there was no question raised at the time of delaying the meeting so as to allow the Claimant to attend but only to delay it to allow her representative to attend.

179. We therefore find that this complaint is not well-founded and is dismissed.

Discrimination arising from disability

180. This arises under section 15 of the Equality Act 2010. A complaint of discrimination arising from a disability is essentially where a claimant is alleging that she has been treated unfavourably as a result of something arising from her disability. It is a defence to such a complaint if the employer can prove the unfavourable treatment was a proportionate means of achieving a legitimate aim.

181. The issues for us to determine are set out at paragraphs 10 to 15 of the agreed list of issues.

182. The first of these is as to knowledge (at paragraph 10).
183. The Respondent accepts the Employment Tribunal's earlier finding that the Claimant was a disabled person because of anxiety and depression from 25 May 2021 onwards (not that acceptance is required given that it is the Tribunal's ruling). But it does not accept that it had knowledge of the disability at the time that this complaint arose.

184. We are hampered by the lack of written reasons for the finding of disability from 25 May 2021 made by EJ Dyal at the earlier Employment Tribunal hearing. The Respondent has produced an attendance note of that part of the hearing which was made by the attending solicitor. However, this does not add anything as to how this date was arrived at or specifically how disability was established. The previous decision does not deal with knowledge.

185. Having considered our findings, we conclude that the Respondent ought to have known that the Claimant was disabled by 28 April 2021, given the length of her sick absence by that point and that she was signed off work by her GP until the end of May 2021 (we reference her fitness for work certificate dated 13 April 2021). By this time, the Claimant would have been off from 2 March to 28 May 2021 (which is approximately 3 months) and was an ongoing issue

which would not be resolved until the underlying matters were addressed (as OH indicated in its assessment).

186. The Respondent had access to OH advisers and could raise specific questions in the Management Brief it provided by way of referral to OH. The Respondent had made regular referrals in the past and OH had previously indicated that the Claimant was not disabled but for some reason does not deal with this issue in any of the other OH Assessments. We find it would have been reasonable for the Respondent to have asked OH particularly given the lengthen period of the Claimant's absence.

187. We do note that OH did indicate in the consultation notes (to which the Respondent's managers were not privy at the time) that the Claimant had "not met" (dated 8 March 2021 at B880), then "almost met" (dated 25 May 2021 at B883) and then had "most likely met" the definition of disability (dated 14 July 2021 at B884, albeit this was after her employment had ended). For some reason, this information was not included in the OH Assessments. So had the Respondent asked the specific question they would almost certainly have got these answers.

188. Turning then to the "something" arising from disability that the Claimant relies upon - which is at paragraphs 11 and 12 of the agreed list of issues.

189. In short, the something arising is at paragraph 11, her sickness absence from 25 May to 16 June 2021 which the Respondent accepts and at paragraph 12, her impaired performance from 25 May to 16 June 2021. The Respondent does not accept this.

190. Having considered paragraph 12, there is no evidence to support the assertion that her performance was impaired as pleaded. The Claimant was not at work during this period. Any previous assessment of her performance related to the period she was at work. The Claimant herself does not argue that there were any issues with her performance. She was dismissed for absence not performance.

191. Moving onto the unfavourable treatment relied upon at paragraph 13 of the agreed list of issues. This is said to be the Claimant's dismissal.

192. Case law has determined that the "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

193. The Respondent submits that given that only one of the days of the Claimant's absence was disability-related, it could not be said that her dismissal resulted from the disability but from her sick absence prior to that. However, the Respondent's evidence was that for all intents and purposes they treated the Claimant as if she was disabled under the Equality Act 2010, we have found that they ought to have known the Claimant was disabled from an earlier date and in any event the Respondent had knowledge of the preceding days of absence which were for the same reasons.

194. We therefore conclude that the Claimant was dismissed because of her sick absence and that this was something arising from her disability.

195. Turning then to the Respondent's defence which is set out at paragraphs 15 of the agreed list of issues. The Respondent submits that if it is found that the alleged unfavourable treatment of the Claimant was because of the relevant thing or things arising from her disability, it was nevertheless justified as a proportionate means of achieving a legitimate aim. Namely: a) to ensure that the Respondent's employees met required standards of attendance and/or performance, including during the probationary period; b) the fair, reasonable and consistent application of the Respondent's probation policy and related policies and procedures; and c) the importance of safeguarding the use of public funds by ensuring efficient and effective delivery of services by staff working with the Respondent.

196. Mr Amunwa sets out the justification arguments at paragraphs 27 to 29 of his written submissions. In respect of each legitimate aim relied upon this comes down to the following:

    a. The Respondent was entitled to dismiss employees based on its required standards of attendance/performance during the probationary period. It was fair and reasonable for the Respondent to rely on triggers within its Managing Attendance Policy as guidelines. The Claimant's claim does not challenge this. By any measure, the Claimant lack of attendance far exceeded the expected standards of attendance for probationers (even when those triggers are adjusted to account for disability absences). The Claimant's conduct was also indirectly relevant to the decision to dismiss her. This was because she insisted that the blame for her circumstances lay with management. Ms Biggs was obliged to consider the Claimant's performance to the extent that it was relevant to understanding the context in which the Claimant came to be off sick and her perceptions of management;

    b. The Respondent's consistent application of the probation policy also justified the dismissal. Essentially, the Claimant sought to obtain a transfer from her position. The Respondent was right to conclude that this was not an acceptable outcome by reference to the probation policy, given that her role was externally funded for a three-year fixed term. The Respondent was not at liberty to create a new equivalent vacancy whilst back-filling the Claimant's role. The Respondent's conclusion was also justified given the Claimant's performance and attendance histories. There was a connection between the Claimant's performance and attendance. The Claimant had not embraced the range of support offered to her by management. A transfer was not a reasonable option in the circumstances;

    c. Efficient and cost-effective service delivery outweigh the impact on the Claimant. The Respondent was conscious of the need for the Safety First project to be delivered successfully in coordination with external partners and supported by external funding. Not dismissing the Claimant and/or transferring her to another department would not advance these aims, given the Claimant's attendance history and the background to it

197. We have also taken into account the Respondent's written submissions at paragraphs 30 and 31.

198. We accept that the Respondent satisfies the defence to this complaint and that dismissing the Claimant was fair and proportionate means of achieving those legitimate aims.

199. Much significance is placed by the Claimant on the failure to consider a transfer. The Respondent did consider this but it was not appropriate to do so given that she was a probationer on a fixed term contract funded by a third party.

200. At the time of dismissal, there was no indication of when the Claimant could return to work. The Respondent submits that the Claimant had informed JO on 26 April 2021 that she would not be returning to work (this comes from the log of well-being calls at B728). But to be fair to the Claimant, she stated that this as not accurate in an email dated 6 May 2021 in that what she said was she did not fell like returning to work at that moment because of her mental state and feeling unsafe at work (at B774).

201. Nevertheless, it was essentially the Claimant's perception of the way in which she had been treated by management that prevented her from returning in as far as it was the trigger for her ill-health and unless those matters were resolved to her satisfaction it was unlikely she would ever return to work.

202. We therefore find that this complaint is not well-founded.

Victimisation

203. Under section 27 of the Equality Act 2010, it is unlawful to victimise a worker because she has done *a "protected act".* In other words, a worker must not be punished because she has complained about discrimination in one or other of the ways identified within section 27.

204. This complaint is set out at paragraphs 16 to 20 of the agreed list of issues.

205. We need to establish that there is a protected act, that there has been detrimental treatment and that this is because of the protected act.
206. We have taken into account the shifting ground of the protected act set out at paragraphs 44-50 of the Respondent's submissions.

207. In the agreed list of issues at paragraph 16, the Claimant relies on the grievance on 14 January 2021 as augmented by her grievance of 3 February 2021 as being the protected act. As we have indicated, these are essentially the same apart from the update towards the end of the later grievance.

208. There are two possible ways in which what the Claimant alleges could amount to a protected act. An act done for the purposes of or in connection with the Equality Act or making allegations of contravention of the Equality Act.

209. The grievance(s) raises allegations of unspecified bullying and harassment which in turn has affected the Claimant's health but does not give any indication that the alleged bullying and harassment is linked to disability. At that stage, the Claimant was not disabled and could not be because of the length of time since the diagnosis of work-related stress, no indication that the impairment would last or was capable of lasting 12 months and which is confirmed in the comments from the OH adviser which the Claimant references in paragraph 10 of the grievance (at B436 and B549). Whilst she previously raised more detailed allegations against KD in her first grievance, this was determined by the Respondent not to amount to harassment under its policy and the Claimant did not pursue those matters further within her second grievance. They fall outside the agreed list of issues in any event and so we have not considered them further other than noting that those allegations, whilst containing more detail that the grievance under examination, were nevertheless still nebulous.

210. We note paragraph 18 of the agreed list of issues, that in the event that the Claimant's grievance is found to have fallen short of a protected act, did the Respondent think it had done a protected act or would do one? The Respondent's evidence was that they did not think the grievance was a protected act and they gave no indication that they thought the Claimant would, as the statute inelegantly puts it, "do one". The issue was about the Claimant's concerns as to the way she was being managed which affected her well-being.

211. The alleged detriments that the Claimant relies upon are set out at paragraph 19 of the agreed list of issues.

212. The first of these at sub-paragraph a., in essence, being invited to a probation hearing (which more correctly was in the letter dated 4 February and not 15 February as pleaded, which was the date of the meeting) due to serious concerns about performance having been told two weeks before that there were none.

213. Of course, the Claimant would have been invited to a probationary hearing regardless of the outcome and so it cannot be a detriment to be invited to one. However, it can be a detriment to be invited to a meeting at which serious concerns about performance are to be discussed having previously been given the impression that probation would be passed as a matter of course.

214. The second alleged detriment is set out at sub-paragraph b. In essence, that the Claimant's probation was extended by 4 months.

215. We considered the Respondent's written submissions at paragraph 52 b as to whether this can amount to a detriment. We looked at the De Souza case quoted and were somewhat surprised by the Judgment but in any event did not find it helpful.

216. However, the Employment Appeal Tribunal in Warburton v The Chief Constable of Northamptonshire Police, The Chief Constable of Northamptonshire Police v Warburton EA-2020-000376-AT; EA-2020-

001077-AT, gives clearer and more up-to-date guidance of what can amount to a detriment.

217. The meaning of detrimental treatment in discrimination law has been given a relatively wide interpretation by the courts, as, indeed, have the analogous words "disadvantage" and "less favourable treatment" (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 and Williams v Trustees of Swansea University Pension & Assurance Scheme and another [2018] UKSC 65

218. In Warburton, the EAT dealt with this in the context of victimisation and found as follows. The correct question for a Tribunal to ask itself is whether the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment (following Shamoon)? Detriment is to be interpreted widely in this context. It is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the Tribunal itself. The Tribunal might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to her detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.

219. We are therefore content that probation being extended by 4 months as opposed to being dismissed or even having the passing of your probation confirmed is a detriment.

220. We then turned to consider the causal link between the protected act and the detriment complained of. The test is whether the one had a significant influence on the other. Significant is defined as something more than trivial. It does not have to be the primary cause as long as the protected act is a significant factor.

221. Taking into account the period of time between the protected act and the detriment, the knowledge or lack of knowledge of the protected act, that there can be subconscious motivation – it does not have to be conscious motivation – the question we must ask ourselves is why did the Claimant receive the less favourable treatment? Was it because of the protected act?

222. This detriment gave us the most cause for concern although we stress that we have not found there was a protected act. Nevertheless we felt that it was important that we go onto consider causation.

223. We went through a process of weighing up our findings for and against causation being shown.

224. Dealing first with those factors for causation:

    a) The greenlight to passing probation given by SP;

b) The indication given that the Claimant had passed probation by Ms Ramsay at the meeting on 14 January 2021;

c) The contra-indication given in the probation hearing invite letter dated 4 February 2021;

d) That Ms Ramsey was aware of the Claimant's second grievance on 25 January 2021;

e) Performance issues were raised albeit SP said there were none;

f) The probation hearing invite letter dated 4 February 2021 is vague as to what the performance issues are.

225. Turning then to those factors against causation:

a) There had to be a probation hearing anyway;

b) Ms Ramsey admitted in evidence that perhaps she gave an overly positive view;

c) Probation had to be decided at the end of the probationary period and by a more senior manager than Ms Ramsey;

d) The performance issues arose between 14 January and 4 February 2021 (as listed at paragraph 24 of Ms Ramsey's witness statement);

e) The probation hearing invite letter set out that there were performance issues and enclosed documents in support and an index of documents;

f) The Safety First meeting with MPS on 27 January and the Respondent's concerns about the Claimant's comments in the meeting and the emails that she subsequently sent to the MPS;

g) That the Respondent considered the Claimant's behaviour at the meeting of considerable concern;

h) The embarrassment that was caused to SP and Ms Ramsey (ie on balance of probability it had become personal);

i) That a different manager, Ms Patel, conducted the probation review hearing;

j) That the Claimant's probation was extended rather than her being dismissed and so she was given an opportunity to address the performance issues;

k) The management recommendation was to dismiss the Claimant but Ms Patel did not do so;

l) There had been performance issues since 14 January 2021 which were sufficient to reverse the previous indication and to warrant an extension;

m) There is nothing that obviously points to the action taken being disproportionate;

n) There is nothing to obviously indicate that raising the grievance was a significant factor in the action taken.

226. Having considered this matter very carefully, we find on balance of probability that it was predominantly the issues around the meeting of 27 January 2021 which understandably brought about a general review of performance issues in the round and resultant "personal factors" given the professional embarrassment caused to the Respondent which were the reasons for the meeting and the consequent extension of the Claimant's probation. We could not find that the alleged protected act was a significant factor.

227. Turning then to the alleged detriment at sub-paragraph c., in essence not upholding the Claimant's grievance.

228. We accept that this is capable of amounting to a detriment.

229. However, having considered our findings we find that there is no causal link between this and the protected act. The grievance was not upheld because the Claimant had done a protected act, ie complained of discrimination. It was not upheld because it did not stand up to analysis.

230. The alleged detriment at sub-paragraph d. is in essence not upholding the Claimant's grievance on appeal.

231. We accept that this is capable of amounting to a detriment.

232. However, having considered our findings, we find no causal link between the detriment and the protected act for the same reasons as set out in respect of sub-paragraph c.

233. The final alleged detriment that the Claimant replies upon is at sub-paragraph e. In short, the Claimant alleges that she was dismissed because of the protected act.

234. We accept that dismissal is capable of amounting to a detriment.

235. However, we do not find that the Claimant was dismissed because she had done a protected act. It is clear from the evidence that the Claimant's employment was ended because of her sickness absence.

236. Although the Claimant was disabled by this time, victimisation relies upon a protected act and in any event we have found that there was no protected act.

237. We therefore find that the complaint is not well-founded.

Our Judgment

238. Our final conclusion is that we find that the Claimant's complaints are not well-founded and we dismiss her claims.

239. The complaints of race discrimination, religion or belief discrimination and damages for breach of contract were not pursued as indicated in the record of the preliminary hearing held on 25 November 2022. At that hearing, the Claimant produced her revised Particulars of Claim (dated 14 October 2022) identifying the complaints as discrimination arising from disability, failure to make reasonable adjustments and victimisation. This was reflected in the draft and subsequently agreed list of issues. Those other complaints were not pursued in evidence or submissions at our hearing.

240. On reviewing the matter in preparation of these written reasons, we also found that this extended to the Claimant's complaint of unfair dismissal and have corrected our Judgment dated 13 April 2023 accordingly.

Employment Judge Tsamados
Date: 27 September 2023