Case Number: 3333432/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms N Lal	v	Driving & Vehicle Standards Agency

Heard at: Watford, in person

On: 25-29 September 2023, 2 and 3 (and, in private, 4 and 5) and 6 October 2023

Before: Employment Judge Hyams

Members: Ms B Robinson
Mr A Scott

Representation:

For the claimant: On 25-29 September 2023, Mr Kevin Harris, of counsel, and after then, the claimant in person

For the respondent: Mr Julian Allsop, of counsel

UNANIMOUS JUDGMENT ON LIABILITY

The claimants' claims of

(1) unfair dismissal within the meaning of section 98 of the Employment Rights Act 1996 ("ERA 1996"), contrary to section 94 of that Act,

(2) unfavourable treatment within the meaning of section 15 of the Equality Act 2010 ("EqA 2010"), contrary to section 39(2)(c) and (d) of that Act,

(3) a failure to make a reasonable adjustment within the meaning of sections 20 and 21 of the EqA 2010,

(4) direct discrimination within the meaning of section 13 of the EqA 2010 because of race and/or disability, contrary to section 39(2)(c) and (d) of that Act,

(5) victimisation within the meaning of section 27 of that Act, contrary to section 39(4)(c) and (d) of that Act,

(6) detrimental treatment within the meaning of section 47B of the ERA 1996, and

(7) unfair dismissal within the meaning of section 103A of the ERA 1996,

do not succeed and are accordingly dismissed.

REASONS

Introduction; the claims and the procedural history

1 The claimant was employed by the respondent as a driving examiner. She was dismissed summarily, i.e. without notice, on 8 November 2017. Her claims in these proceedings relate to the manner in which she was treated before she was dismissed, and the fact that she was dismissed. The claimant approached ACAS on 5 June 2018, and the early conciliation certificate was issued on that day. The claim form was presented on 25 September 2018. The claims made in the claim form related to events which occurred from 2010 onwards. The claimant had made a claim to an employment tribunal of disability discrimination in 2010, which was settled and dismissed on its withdrawal accordingly in 2011.

2 By agreement with the respondent and Employment Judge ("EJ") Manley, recorded by the latter in her record of a preliminary hearing which took place on 27 June 2019, the claimant was permitted to add claims of unfair dismissal and further claims of discrimination in relation to her dismissal. The parties informed EJ Manley on that date that they had nearly agreed a list of issues. An agreed list of issues was then sent to the tribunal in compliance with an order made by EJ Manley at that hearing, and that list was the one which was put before us at the start of the hearing on the basis that it was an apt list of issues. We accepted that it stated the issues on the claims as they were advanced to us, and we concluded that the claims were best determined by reference to it. However, we do not set out that list in these reasons in full below. The claims made are listed in our above judgment. The list was long (it was at pages 87-94). The following claims on the facts were made in it.

The claimed factual basis of the claims

3 In paragraph 4 of the list of issues it was claimed that in the following respects, the respondent treated the claimant "less favourably because of her race and/or disability".

> "a. The non-appointment to the LDTM position in or shortly after August 2017;
> b. The instigation and continuation of disciplinary proceedings;
> c. The imposition and continuation of suspension;
> d. The actions of Mr Perkins towards the Claimant at the time of suspension as detailed in her grievance;

e. The manner in which the investigation was conducted;
f. The contents of the investigation reports;
g. The manner in which the disciplinary hearing was conducted;
h. The decision to dismiss".

4 In paragraph 5 of the list of issues, it was claimed that "the Claimant [was] subjected to the following unfavourable treatment arising in consequence of her disability and/or perceptions of her condition and associated absences:

a. Requiring the Claimant to use annual leave for her medical appointments in 2010;
b. Failing to appoint the Claimant to the LDTM position in or soon after August 2017;
c. The nature and tone of the meeting on 4 October 2017;
d. The issuing of a formal absence warning on 26 October 2017;
e. The rejection of the appeal against that warning on 3 January 2018,
f. Failing to manage the Claimant's disability-related information in a sensitive and appropriate manner (i.e. by leaving such information visible in the workplace);
g. Suspending the Claimant ostensibly due to her concerns as to the inappropriate handling of disability-related information in or around April 2018;
h. Dismissing the Claimant on the ostensible grounds set out at (g)".

5 In paragraph 7 of the list of issues, four claimed provisions, criteria or practices ("PCPs") within the meaning of section 20(3) were claimed to have arisen, putting the claimant at a substantial disadvantage as compared with persons who were not disabled. Those PCPs were in the form of (1) the "requirement for consistent and regular attendance in general and/or enforced by way of attendance warnings", (2) the "requirement to undertake driving tests", (3) "Suspension of the Claimant (such as to lead to an exacerbation of her health)" and (4) "Dismissing the claimant (such as to lead to an exacerbation of her health)". In paragraph 8 of the list of issues, it was claimed that the following were adjustments which it would have been reasonable, within the meaning of section 20(3) of the EqA 2010, to make to avoid those disadvantages:

'a. Not issuing an attendance warning and/or upholding the appeal;
b. Extending the absence triggers and/or excluding disability-related absences;
c. Extending the period of "one on one off" tests;
d. Not suspending the Claimant;
e. Not dismissing the Claimant.'

6 In paragraph 9 of the list of issues, the following protected acts within the meaning of section 27 of the EqA 2010 were stated to be relied on by the claimant.

"a. Lodging earlier Employment Tribunal proceedings on in [sic] 2010.

The Respondent concedes that this was a protected act.

b. On 21 February 2018, disclosing to Mr Wildash that personal information pertaining to her disability had been left open and on public display in the workplace.
c. On 27 February 2018, the Claimant made the above disclosure to Mr Perkins and showed him photographs that she had taken of the personal information."

7 The treatment which it was claimed was less favourable treatment of the claimant, which was detrimental to her within the meaning of section 39(4)(c) and (d) of the EqA 2010, "because she did the above protected acts [i.e. those stated in paragraph 9 of the list of issues, as set out in the preceding paragraph above] either individually or cumulatively", was stated in paragraph 10 of the list of issues, in the following terms.

"a. Mr Perkins stopped approving the Claimant's expenses leading her to suffer financially (18 May 2015);
b. Mr Perkins initially instructed the Claimant to use her annual leave to take medical appointments before ultimately relenting (September & October 2010);
c. Instigating an investigation against the Claimant as regards Mr Loizou's grievance from June to November 2017;
d. Refusing the Claimant's application for the LDTM Barnet position in or soon after August 2017.
e. The nature and tone of the meeting on 4 October 2017;
f. The issuing of a formal absence warning on 26 October 2017;
g. The rejection of the appeal against that warning on 3 January 2018;
h. Failing to manage the Claimant's disability-related information in a sensitive and appropriate manner (i.e. by leaving such information visible in the workplace) (January 2018);
i. Suspending the Claimant ostensibly due to her concerns as to the inappropriate handling of disability-related information in or around April 2018;
j. Subjecting the Claimant to a continued period of suspension and/or failing to reconsider or lift the suspension from April 2018 until her dismissal in November 2018;
k. Failing to take timely action in respect of the Claimant's disclosures as to the Sat Nav Testing in both December 2017 and January 2018;
l. The instigation and continuation of disciplinary proceedings
m. Failing to respondent [sic] whether adequately or at all to the Claimant's grievances as set out in her grievance letter dated 16 May 2018;
n. The actions of Mr Perkins towards the Claimant at the time of suspension as detailed in her grievance of 17 April 201[8];
o. The manner in which the investigation was conducted and commenced 26 April 2018;
p. The contents of the investigation reports dated 2 July 2018 and 9 October 2018;

q. The manner in which the disciplinary hearing was conducted on 5 November 2018;
r. The decision to dismiss on or around 8 November 2018; and
s. The terms of the letter of dismissal on 8 November 2018."

8 In paragraph 11 of the list of issues, it was claimed that the claimant made the following protected disclosures, that is to say disclosures within the meaning of section 43A of the ERA 1996.

'a. On 30 January and 15 February 2017, the Claimant made a disclosure of information in respect of Mr Soterios Loizou who was seen taking cigarette breaks on returning early from an extended test thus "short testing" in contravention of legal requirements.
b. On 14 December and 4 January 2018 the Claimant made disclosures of information to Ms Vear-Altog that the Sat Nav was programmed to speak at the very same time as a test candidate was navigating a sharp bend endangering the safety of both a candidate and an examiner.
c. On 21 February 2018, the Claimant made a disclosure of information to Mr Wildash that personal information pertaining to her and to two colleagues had been left open and on public display in the workplace.
d. On 27 February 2018, the Claimant made the above disclosure to Mr Perkins and showed him photographs that she had taken of the personal information.'

9 In paragraph 13 of the list of issues, it was claimed that all of the things set out in paragraph 10 of the list of issues were (i.e. those things which are set out in paragraph 7 above), in addition to being victimisation within the meaning of section 27 of the EqA 2010, also detrimental treatment within the meaning of section 47B of the ERA 1996.

10 One salient feature of this case was that (as indicated in paragraph 1 above), the claims related to many events in respect of which the claim was out of time unless those events formed part of conduct extending over a period within the meaning of section 123(3)(a) of the EqA 2010 or an act extending over a period within the meaning of section 48(4) of the ERA 1996. Because it was contended by the claimant that the matters in respect of which her claims were made constituted such conduct, the jurisdictional issue of time was left to be determined at trial.

11 The claims were first listed to be heard over 10 days starting on 15 June 2020. That was during the first Covid-19 lockdown, and as a result, EJ Skehan on 15 June 2020 relisted the hearing to take place over 10 days starting on 25 April 2022. On 7 April 2022, the respondent's representatives sought a postponement of that hearing on the basis that counsel instructed to appear at the hearing was, for urgent family reasons, unable to appear at the hearing. The claimant opposed that application, but on 20 April 2022, it was granted by EJ Hyams. On 8 May 2022, the case was relisted, to be heard over 10 days starting on 25 September 2023.

The evidence which we heard

12 We heard oral evidence from the claimant on her own behalf and from Mr John Moloney, a trade union representative, on her behalf. We heard oral evidence from the following witnesses on behalf of the respondent.

12.1 Mr Charles (known as "Chas") Perkins, who at the time of giving evidence to us was employed by the respondent as Operations Delivery Manager for the respondent's North and West London driving test centre areas.

12.2 Ms Nicola Morgan, who at the material time was employed as a Local Driving Test Centre Manager.

12.3 Ms Jan Nascimento, who was at the material time employed by the respondent as an Operations Delivery Manager.

12.4 Mr Paul Day, who was at the material time employed by the respondent as a Local Driving Test Centre Manager.

12.5 Mr Rowland Williams, who was at the material time employed by the respondent as an Operational Delivery Manager.

13 There was before us at the start of the hearing a bundle of documents which was 797 pages long, excluding its index. That was an agreed bundle. The respondent then, at the start of the hearing and without objection from the claimant, added to it a further 66 pages. The claimant put before us a supplementary bundle containing 292 pages, not including its index. The claimant also put before us a bundle containing judgments and reasons relating to the claim of a Mr Hitesh Umradia made against the same respondent. Mr Umradia is referred to by us further below. That bundle contained 52 pages excluding its index. We were not referred to, and did not read, that bundle.

14 During the course of the hearing several further documents were disclosed and put before us.

15 Having heard that evidence and read such of those documents as were put before us and relied on by either party and those to which we referred ourselves in the course of our deliberations (to which we refer below), we made the following findings of fact.

Findings of fact

The claimant's job, and when it started

16 The claimant started employment with the respondent on 2 March 2003 as a driving test examiner. She was employed at that time and until 2012 to do that job at the respondent's Watford driving test centre. Before 2009, the claimant

became, as she put it in paragraph 7 of her witness statement, "an Advanced Driving Instructor (ADI) examiner", doing that work as an enhanced duty, in addition to her work as a driving test examiner.

Mr Perkins' roles up to 2010

17 Mr Perkins was the claimant's line manager, on a temporary basis, from October 2004 until April 2005. Otherwise, he was employed at one of the respondent's other driving test centres as a driving examiner.

What happened in 2009

18 During 2009, the claimant was, as she said in paragraph 3 of her witness statement, which we accepted, "diagnosed with Adult Onset Still's Disease (AOSD)". There, the claimant described that disease as:

> "a rare lifelong auto-inflammatory disease, which is analogous to a severe form of rheumatoid arthritis. The nature of the disease means that I suffer from joint pain, persistent high spiking fevers and a bumpy rash: I can suffer from flare-ups at any time and when I do, I can feel pain in any of the joints in my body. This causes me serious pain and severely limits my mobility. There is no rhyme or reason to how often I get flare-ups, or which joints are affected when I do. However, the symptoms are noticeably more pronounced when I am suffering from stress."

19 In paragraph 7 of her witness statement, the claimant said this:

> "In 2009, I returned to work after taking a long period of sickness absence. Upon my return to work, I was looking forward to returning to my previous enhanced duties as an Advanced Driving Instructor (ADI) examiner. I informed Chas [i.e. Mr Perkins] of my desire to do this, but my request was rejected. I felt that I was being held back and discriminated against because of my disability and so I subsequently lodged Employment Tribunal proceedings in 2010. I contend that in so doing, I made a protected act. My claim was ultimately resolved and withdrawn in 2011, but I still felt strongly that I had been discriminated against because of my disability".

20 However, Mr Perkins was not the claimant's line manager at that time. In addition, given the content of the letter from Dr R Hall-Smith which we set out in paragraph 25 below, it appears that at least in 2010, the claimant was carrying out her "previous enhanced duties as [an ADI] examiner".

21 The pleadings in the claim made by the claimant to an employment tribunal in 2010 were not before us, and the claimant did not tell us what was in them, so it is impossible to know whether or not Mr Perkins was named or somehow blamed in any way in it.

22 In those circumstances, we did not accept the assertion in paragraph 7 of the

claimant's witness statement that Mr Perkins was involved in any decision (if such were made) not to permit the claimant to "[return to her] previous enhanced duties as an Advanced Driving Instructor (ADI) examiner".

What happened in 2010

23 During 2010, before September 2010, Mr Perkins became manager of the respondent's St Albans driving test centre. In that role, Mr Perkins provided cover for the Watford driving test centre during periods of annual leave of the manager of that centre.

24 In May 2010, the claimant was involved in a road traffic accident while conducting a driving test.

25 On 26 July 2010, Dr Hall-Smith wrote to a Mr Frank Davenport, of the respondent's HR team based in Nottingham, the letter at pages 109-110. In it, the doctor wrote this about the claimant.

> "She returned to work on the day of her medical assessment, on a phased basis, and indicated that she had driven her car and found that to be comfortable. She feels confident that she will be able to perform emergency stops if required, and our doctor assessed her leg function which he thought was normal.
>
> With regard to work pressures, she stated that she finds ADI testing less demanding that [sic] normal driving test work and therefore if there were any possibility of adjusting the balance between her ADI testing and normal testing this would be preferable for her, although obviously this has to be a management decision. In addition to finding this less pressurised, she also feels her posture is less constrained during these tests compared to her sitting position with novice drivers as she stated that she has to be in a semi-turned position towards them. Obviously in the ADI tests there is less likelihood that she would need to grab the steering wheel or perform an emergency stop.
>
> I would not consider these adjustments to be absolutely essential however, and if they cannot be accommodated I would recommend a phased rehabilitation programme starting off with a reduced number of tests and building up to the usual seven tests over approximately three weeks. I am unclear how many tests she has returned to and it may be reasonable to increase by one test per day per week, back to the normal seven.
>
> Her underlying medical problem would, in my opinion, be covered by the Disability Discrimination Act, however it would be hoped that her shingles will be a one-off event and she will not require any further absence as a result of this condition."

26 On 27 September 2010, the claimant sent the email at page 112 and its

enclosure at page 113, asking Mr Alun Watts (who was, it appeared, her line manager at the time) for "blood test, and annual leave request" on 26 and 27 October 2010. The enclosure set out the slots sought as time off. The claimant sought slots 4, 5, 6 and 7 (there were 7 such slots in each working day) for the blood test, which was going to occur on 27 October. The claimant sought the whole of 26 October as annual leave.

27 On the next day, 28 September, Mr Perkins sent the email at page 111, which was in the following terms.

> "As you are probably aware due to the current economic climate Doctor and Hospital appointments need to be taken as Annual Leave. However if this is Disability related I can authorise DAL for this.
>
> Please send me the DAL form or let me know if you want A/L for this.
>
> Again, due to the current situation of the Agency, all leave should be booked after the FBD so it does not lead to test cancellations.
>
> On this occasion I will authorise the A/L, but please ensure all further leave is booked well in advance."

28 On 7 October 2010, Mr Perkins sent the email at page 114 to the claimant. It was in these terms.

> "Further to my email on 28/09.
>
> I seem to have misunderstood the instructions given to TCM's regarding Hospital and Doctor's appointments and would like to correct this.
>
> Appointments do not need to be taken as annual leave, but in the current financial times should be attempted to be made outside working hours where possible.
>
> If you could then please clarify why this appointment is needed in working time it will help with my decision. You have applied for annual leave on 26/10 (which I have already authorised) and the appointment is on 27/10 if these are routine appointments and are disability related you should apply to take them as DAL. When I spoke to you on the phone, you stated to me that you did not have time to fill in the DAL form, yet this would not take more than a few minutes. If these tests are disability related, this is the method that should be used.
>
> I am able to authorise the appointment in working time if there is no other alternative available and you can evidence this, but will require a copy of the appointment letter for file please."

29 The acronym "DAL" was, we saw from page 674, short for "Disability Adjustment

Leave". That was the second page of a document that was not named but was described in the index to the main bundle as "Disability Adjustment Leave (DAL) guidance". The document was 13 pages long. It permitted up to eight weeks of DAL in any year. It stated (on pages 674 and 675) that DAL could be given for attendance at medical or specialist appointments for the employee's condition.

30 On 28 October 2010, Mr Perkins wrote this to the claimant (page 115):

> "Further to your email of 07/10.
>
> I can only apologise if my honest mistake regarding doctor's appointments has caused you any concern."

31 It was impossible to know from the preceding email which we have set out in paragraph 28 above for what that apology might have been thought to be required. In paragraph 6 of her witness statement, the claimant said this.

> 'I received a further email from Chas on 7 October 2010, stating that he had "misunderstood" and wanted to "correct himself" as "appointments do not need to be taken as annual leave" [bundle page 114]. I responded to Chas on 7 October and he apologised to me for this by email on 28 October [bundle page 115). Despite this, I was upset by Chas' initial response and felt that he was not taking my condition seriously; his initial emphasis was focused entirely on the business, rather than on my wellbeing.'

32 That passage was not an accurate reflection of the effect of Mr Perkins' email of 7 October 2010, which we have set out in paragraph 28 above. That email spoke for itself. It was clear from it that Mr Perkins had said that if the claimant needed (by implication paid) time off for a blood test then she could have it if it was disability-related. All she needed to do was to fill in a DAL request form. In her oral evidence to us, the claimant accepted that it would not take a long time: she said (as noted by EJ Hyams) that it "it takes more than a couple of minutes, but I agree not a long time".

33 The claimant was also noted by EJ Hyams to have said shortly afterwards, in response to this question from Mr Allsop "Do you agree that the message conveyed in this email to you prioritised your well-being?" to have agreed that that "particular email" prioritised her well-being.

The situation concerning an expenses claim made in May 2015

34 On 18 May 2015, the claimant sent Ms Cheryl Robinson (who was Mr Perkins' line manager) an email about a claim for expenses incurred by her (the claimant) in relation to her employment. The email was at page 140. It was the only documentary evidence before us relating to that claim for expenses. It was copied to Mr Perkins and two other persons. The email bears repeating in full. It was in these terms.

'Hi Cheryl,

I am really sorry to have to bother you once again regarding my claims, but I wanted to make you aware that I have now been forced to request short notice leave for 20/05/15 and wanted to explain why.

I submitted my T&S claims from 07/05/15, as we discussed Chas rejected one of my claims. I am still a little unsure as to why my original claim was rejected, but I still amended the claim and put "over 10 hours" in the comments box, and advised Chas of this on the 12/05/15 at 11.36am. None of my claims have been signed off. My colleagues have advised me that theirs were signed off last week Thursday. Unfortunately due to some unforeseen expenses at the beginning of this month I do not have any money for petrol now. Nick always signed off claims immediately so this has never been a problem. It has been 10 days since I submitted my first claim, 6 days since I amended it. I appreciate that you did advise me that claims will take a little longer, however 10 days and still nothing has been signed off?

The amount outstanding is a total of £131.62, if there was a problem with my claim submitted on the 7th May 2015 then why has my claim for the 6th May not been signed off? At least this would have covered my petrol and got me through this week. As you can appreciated £131.62 is a lot of money. I am now aware since you have advised me claims will take a little longer and will make sure this situation does not happen again.

I have text on my phone from my bank dated 11/05/15 advising me I only have £9.43 in my account which I am happy to show you, I am also happy to provide bank statements for proof of prior claims paid in almost two days after being submitted.

I hope this situation can be resolved as a matter of urgency, as I am sure you can appreciate this has put me in a very difficult position.'

35 Mr Perkins wrote this in paragraph 77 of his witness statement in relation to the claimant's claim (stated in several places in the agreed list of issues) about the situation to which that email related:

"I would not have normally been responsible for signing off Ms Lal's claims but if there was no manager in charge of that centre then as counter-signing officer they would come to me. But I do not remember refusing to sign off any of her claims. I may have questioned the odd claim, which is part of my job, and I would question everyone else's as well. I do remember one time where Ms Robinson asked me to look in the inbox to see whether Ms Lal had submitted any claims. From memory she had submitted a claim but it was recently submitted, by a day or so, and we have 30 days to approve claims."

36 It was the claimant's evidence (in paragraph 10 of her witness statement) that Mr Perkins, by contrast, "willingly certified the expenses of other colleagues, including Mr Nic Nicolau, another Driving Examiner".

37 The claimant accepted that Mr Perkins was not responsible in May 2015 as her line manager for the initial approval of her expenses claims. In cross-examination, Mr Perkins said (without contradiction) that managers had 30 days within which to approve an expense claim. The claimant accepted that Mr Perkins was the counter-signatory for her expenses claims. Mr Perkins said that he checked for expense claims to approve as a counter-signatory weekly, but that he checked for expense claims made to him by persons who reported directly to him "every couple of days". He said too that if the claimant's expense claim had been put before him as a counter-signatory then he would have approved it (and it was clear that he meant that he would approve it only if it was appropriate to do so) within a day or two if the claim was made on a Friday, but not if it was made on a Monday. He firmly denied approving the expense claims of Mr Nicolau any more quickly than those of the claimant. Mr Nicolau was of Cypriot origin. Mr Perkins said that expense claims were made electronically and that if they were not approved at the appropriate time, then they were "automatically escalated". He also thought that Ms Robinson might have asked him to "check the claim box". We accepted all of that evidence of Mr Perkins.

38 We heard no evidence (from either party) about the date when Mr Nicolau made the claim for expenses on which the claimant based her assertion that his claim had been treated differently by Mr Perkins.

39 EJ Hyams asked the claimant whether she had a credit card at the time. She said that she did. She also accepted the proposition that she would have had a month's free credit on that credit card for any purchase made on it. She said that she did not use the card often, however.

Events in 2017 relating to Mr Soterios Loizou (known as "Sid") and relevant parts of the respondent's code of conduct and guidance on what is gross misconduct

40 On 26 January 2017, the claimant and some colleagues were outside the Barnet test centre, taking a cigarette break, when they saw their colleague, Mr Soterios Loizou, also taking a cigarette break. They had not expected to see him there as he had been administering an extended driving test for a person who had been convicted of a serious driving offence and had lost his licence. Mr Loizou's presence there at that time suggested that he had ended the extended test early. It was said by the claimant in paragraph 13 of her witness statement that that was an instance of "short testing" which was "in contravention of the legal requirements", but no such legal requirements were drawn to our attention by either party. The claimant also said this in that paragraph:

> "This would have had a direct impact on the quality and conformance of the tests. This was witnessed by me, Jan Vear-Altog, Barry Kent, Richard Miller

> and Hitesh Umradia. We all agreed to submit a group complaint to management. Myself and a number of my colleagues had experienced issues with Sid prior to this, including his aggressive behaviour in the office, having a bad attitude towards customers and previous examples of short testing. We had reported these issues to Cheryl Robinson and David Smith but no action had been taken. On 30 January 2017, I sent two e-mails to David Smith, Chas Perkins and Cheryl Robinson on behalf of the group to inform them of the breach and request that it be formally investigated [bundle page 169-171]".

41 The claimant sent a further email, which she also copied to Mr Perkins, on 15 February 2017. In it, she made further allegations of misconduct by Mr Loizou. The email was at page 172. It was about conduct of Mr Loizou which the claimant summarised in paragraph 14 of her witness statement in such a way as to make it clear against the background of the amended pleadings that the email at page 172 added nothing for present purposes to the email of 26 January 2017. That in turn is because the protected disclosure referred to in paragraph 8 of the further amended "Rider to ET1" (at page 52) was stated to be the provision of information (only) that Mr Loizou had conducted a "short test".

42 The amended Rider to ET1 continued in paragraph 9:

> "This led to a baseless retaliatory grievance against the Claimant adopted and pursued by Mr Perkins from June to November 2017."

43 In fact, what happened was that Mr Loizou did not state a grievance as such. Thus there was no adoption and pursuit of a grievance raised by Mr Loizou. What happened was that an investigation into the claimant's conduct was commenced after Mr Day sent the email dated 6 June 2017 at page 188. The email was in these terms (the bold font was in the original).

> "As you are aware I have been investigating a case involving allegations of misconduct against Sid Loizou at Barnet. I interviewed him last Friday 02 June. Below is an extract from the meeting notes. You will see his response to my early questions where he has made an allegation of bullying and harassment relating to Neelam Lal.
>
> **PD: How would you describe the culture / team spirit at Barnet DTC?**
>
> **SL: It was good until about a year ago. Then Hitesh came. This is all a bullying campaign against me. Neelam (NL) told me not to trust Hitesh. As soon as he opened his mouth all the others left the room. I stayed, everyone left. NL did not like it. I was the only one to welcome him. She told me that he talks rubbish, the others listened to her but I prefer to judge people by what I see not just do as I'm told by someone else. Because I have not done what she (NL) wanted I have been bullied and victimised. Last year's Christmas party was being organised by NL. She asked for a deposit to be paid by the Friday of**

that week. My girlfriend had a clot in her leg and I was off that week being with her at the hospital. I could not commit to attend until I knew what was happening with my girlfriend. I came back to work on 1st November and was told I was too late the numbers were fixed and I could not go. I didn't go to the party. NL has a problem with me. She has the 0907 slot off every day. Now she doesn't have to make everyone a drink but she does. Everyone else's is put on their desk mine is always left in the kitchen. I came out of the Tea Fund and brought in my own stuff. NL is constantly asking what route did I do, this was from last year August to December. We were great friends until Hitesh arrived and then when I did not go along with her all these accusations started about me short testing. I don't know what the others are saying.

PD: You will receive the witness statements in due course.

PD: How would you describe your working relationship with your colleagues?

SL: I was getting along fine, but NL has been turning people against me.

I believe you may want to talk to the MoJ Case Worker, Kath Leather, in order to confirm a separate investigation may be required into these claims".

44 At pages 722-727 there was a copy of the respondent's code of conduct, the "Civil Service code". On page 724, under the heading "Civil Service values", this was said.

"As a civil servant, you are appointed on merit on the basis of fair and open competition and are expected to carry out your role with dedication and a commitment to the Civil Service and its core values: integrity, honesty, objectivity and impartiality. In this code:

- 'integrity' is putting the obligations of public service above your own personal interests
- 'honesty' is being truthful and open
- 'objectivity' is basing your advice and decisions on rigorous analysis of the evidence
- 'impartiality' is acting solely according to the merits of the case and serving equally well governments of different political persuasions

These core values support good government and ensure the achievement of the highest possible standards in all that the Civil Service does. This in turn helps the Civil Service to gain and retain the respect of ministers, Parliament, the public and its customers.

> This code sets out the standards of behaviour expected of you and other civil servants. These are based on the core values which are set out in legislation. Individual departments may also have their own separate mission and values statements based on the core values, including the standards of behaviour expected of you when you deal with your colleagues."

45 At page 707, the respondent's internal guidance document entitled "How to: Assess the level of misconduct" stated this:

> "Gross misconduct is serious enough to destroy the working relationship between the employee and employer and its likely sanction is dismissal. The following are examples but this list is not exhaustive:
>
> ...
>
> • physical violence or threatening behaviour, including more serious cases of bullying, harassment and discrimination
>
> ...
>
> • vexatious or malicious grievances with serious consequences for department/customers/public
>
> ...
>
> • significant or repeated breach of the Civil Service Code".

46 Mr Perkins' evidence in paragraph 7 of his witness statement was that as Mr Loizou had "made this accusation", i.e. as set out in paragraph 43 above, "we were then obliged to investigate it and so we undertook this residual disciplinary investigation". As far as Mr Perkins was concerned, therefore, if we accepted his evidence in that regard, he felt obliged to investigate (but plainly he meant cause an investigation into) the allegation of bullying on the part of the claimant, because of the seriousness of the allegation. We accepted that evidence of Mr Perkins. We did so not only because we had heard and seen him give evidence but also because a failure to carry out an investigation into an allegation of bullying is capable of being a breach of the implied term of trust and confidence as far as the person making the allegation is concerned. The investigation was carried out by Mr Anthony Pill and it found (as Mr Perkins said in paragraph 11 of his witness statement) "insufficient evidence to support the allegation of bullying and harassment made by Mr Loizou against Ms Lal".

The process of appointing Mrs Jan Vear-Altog to the post of Local Driving Test Manager ("LDTM")

47 During 2017, the claimant applied for the post of manager of the Barnet driving test centre. The post was a career development role (formally called a "Career

Development Opportunity" and given the acronym "CDO") and was to be held otherwise than on a permanent basis. Mr Perkins was one of the people who interviewed candidates for it. He referred to the events relating to the application process in paragraphs 14-22 of his witness statement. He gave supplementary evidence in chief by way of oral evidence that "we", meaning he and Ms Robinson "asked everyone at Barnet whether they wanted to apply for the role and no one did". In addition, he said that he and Ms Robinson said that it would be better to have someone from the test centre managing it rather than someone from outside the centre. Mrs Vear-Altog and the claimant were both examiners at the centre, and Mr Perkins said that "because of the issues at the centre, Ms Lal [i.e. the claimant] seemed more appropriate to deal with the issues". He also said that he and Ms Robinson did not think that Mrs Vear-Altog would apply, but she did so. EJ Hyams then asked Mr Perkins what he meant by "the issues at the centre", and he said this (as noted by EJ Hyams, and tidied up slightly for present purposes):

> "I suppose it was more of an issue with the staff between themselves not getting on, with there being minor disruption. They were not serious issues but recurring issues, and Ms Lal seemed to be more in control of it than Mrs Vear-Altog. She [the claimant] seemed to be more assertive with the other examiners, the other staff, than Mrs Vear-Altog: she had more leverage over them."

48 It was not put to the claimant in cross-examination that she had been asked by Mr Perkins to apply for the post of LDTM as a CDO. In cross-examination, Mr Perkins said that he recalled that the claimant did want to apply for the role but that he could not "recall how it came about", i.e. how she did in fact come to apply for it. The process had by the time of the trial before us occurred six years previously, so it was unsurprising that memories of it were hazy. There was no advertisement for the post in the bundle, and it was Mr Perkins' oral evidence that he and Ms Robinson might have "put out an expression of interest and asked for an email back to me or the centre manager", but that he could not remember. However, in his witness statement he gave detailed evidence about the manner in which the claimant's and Mrs Vear-Altog's applications were made and assessed, and there were in the bundle copies of those applications. The applications were made on a form headed "Expression of Interest LDTM". The claimant's was at pages 203-205 and Mrs Vear-Altog's was at pages 206-208. The claimant was interviewed by Mr Perkins and Ms Kelly Galton. Mrs Vear-Altog was interviewed by Mr Perkins and Ms Nascimento. In paragraph 19 of his witness statement, Mr Perkins said that the reason for the interviewing panel being different was that "both candidates had annual leave and they could not do the same day". We accepted that evidence of Mr Perkins.

49 The manner in which the claimant came to apply for the role was, in fact, not material. The only evidence to which the claimant could point in support of the proposition that the fact that she was not given the role and Mrs Vear-Altog was given it was the result of some kind of unlawful discrimination, consisted in the scores given in the documents at pages 203-208. The claimant's total score was

five points. Mrs Vear-Altog's was ten. We examined the scores closely. Mr Perkins was cross-examined on them. His rationale for them was that an assertion which was unsupported by an example or something specific to support it was taken as a statement only and given no mark. We accepted that evidence of Mr Perkins. We could see no justification in the scores given to the claimant and Mrs Vear-Altog as shown in the documents at pages 203-208 which undermined that explanation. Rather, the scores given were consistent with it and there was nothing to suggest that the disparity of scores was anything other than objectively supported and rationally based.

50 Mr Perkins addressed the manner in which the appointment was made in paragraph 20 his witness statement.

> 'The advertised position was for a Career Development Opportunity (a 'CDO') rather than mainstream recruitment. In the mainstream recruitment two different scores, for interview and application, are collected. Recruiting on a Career Development Opportunity ('CDO') is different, and allows us to simply select an appropriate candidate without interview, as it is a temporary post and simply for development. By way of background a mainstream recruitment would be for a substantive post. This follows a different process; it would go on civil service jobs and be advertised publicly. A CDO is different. In a CDO the applicant already has a post and there is no official post being offered. A person on a CDO is in the post temporarily to get experience of the role or the grade. As the role is only temporary it does not follow the usual process – with both an application and an interview. However as both candidates were in the same office it seemed fair to give both a chance to demonstrate their suitability for the role by way of interview, following the application process. Both candidates were asked the same questions. The first question was "As a new LDTM, what would be your main priorities when taking over Sector 161". The second was "What skills do you have which would make you a good LDTM for Sector 161". Mrs Vear-Altog showed good awareness of what was needed and was able to fully answer the questions with convincing discussions. Ms Lal on the other hand said she would need a lot of help with the role, did not get on with IT and her main point she kept repeating when asked was "I want to be like Nick Maylor" which was not answering the question at all. Nick Maylor was a previous manager at DVSA and a previous manager of Ms Lal. It was clear that Mrs Vear-Altog had prepared fully for the interview, yet Ms Lal appeared to have done no preparation at all.'

51 In oral evidence to us, the claimant denied saying that she wanted to be like Nick Maylor, but we preferred Mr Perkins' evidence to hers in this regard. We accepted that paragraph (20) of Mr Perkins' witness statement in its entirety.

The involvement of Ms Morgan in relation to the claimant's employment

52 In paragraph 29 of her witness statement, the claimant said this.

"Due to my disability, I had been afforded reasonable adjustments from around 2016 and was on a restricted programme of "one on, one off" testing. This meant that I did a test and then I had a break of a test cycle before the next test, so I was effectively in the car testing for only half of my working day. This was of assistance to me, as it ensured that my joints did not stiffen up from being in the car for prolonged periods. During the time in between testing, I undertook administrative duties in the office. I was always keen to keep busy and fill the time where I was not out of the office undertaking tests."

53 In paragraphs 6-11 of her witness statement, Ms Morgan said this.

'6. Ms Lal's sickness absence was managed by me. Due to the Claimant's disability she was on a restricted programme of "one on one off" testing. This meant she was on a reduced schedule for conducting exams, in that she would only test in every other exam slot. In between testing Ms Lal undertook administrative duties in the office and this also included time to allow Ms Lal to recover and to stretch, enabling her to be ready for the next test.

7. In September 2017 I had email correspondence with Carol Hedger, HR Case Manager who was assigned to give HR advice and support.

8. On 13 September 2017 Ms Hedger sent me an email stating that she had been assigned Ms Lal's case to provide support. In that email she asked for some background to the case together with a copy of her sickness absence history and previous Occupational Health reports. She said she would then provide advice on next steps.

9. On 14 September 2017 I responded to Ms Hedger and stated that it was a complex case and explained that Ms Lal suffered from Stills disease. I explained that the previous Local Driving Test Manager (LDTM) had stepped down and that I was picking up the case. My concern was that the policy may not have been followed correctly because I could not see that proper records had been kept and I could not see evidence that Ms Lal's restricted testing programme had been reviewed. I also said in that email that Ms Lal's actual absence in the rolling 12 months was vague. I explained that on each of our SSC (HR) system, operations workbook and TARS (deployment) systems, her absence was recorded as different figures. The minimum amount of absence for the past 12 months was 46 days to date, with more on the deployment system which I said was probably the true figure.

10. I highlighted in that email that Ms Lal had been sent to Occupational Health in the beginning of August 2017 by her previous manager. The workbook showed that she had a formal meeting on 23 May 2017 with no targets set, stating that this was because of her condition. I had no

> paperwork relating to that meeting. Having looked at the case I saw that Ms Lal had been on a restricted testing programme for more than a year which I did not think had ever been reviewed and it was not clear why that was so. She also had considerable time off for disability adjustment leave (DAL), which appeared to have always been authorised. For example, the DAL guidance lays out at section 8 the role of the line manager and I could not see, because of the lack of records, how this role had been discharged [AB/679].
>
> 11. I also added that I had not met Ms Lal and was not located at Barnet Driving Test Centre (DTC). I was looking after the case until a new LDTM could be trained which would be around the end of October 2017, when I would work closely with the new LDTM."

54 While some of that passage described the content of an email and to that extent therefore did not, strictly speaking, consist of evidence, it was an accurate description of the content of that email (which was at pages 220-221). We therefore accepted that passage of Ms Morgan's witness statement in its entirety.

55 We saw that Ms Hedger had responded on 15 September 2017 to the email of 14 September 2017 to which Ms Morgan referred in paragraphs 9-11 of her witness statement (Ms Hedger's email was at page 220), and among other things had said this about the claimant's restricted duties in the form of being required to carry out only four rather than seven driving tests per day:

> "In terms of the restricted duties, yes it would be appropriate to refer her back to OH to establish how long the restricted duties should last as she has been on restricted duties for over a year and this is no longer sustainable by the business."

56 We do not need to refer here to the sequence of events which followed in regard to the management of the claimant's absences and in relation to the adjustment of being required to carry out only four rather than seven driving tests a day. That is primarily because the claimant's claim of illegality was about the following things only (stated in paragraph 4 above and repeated in paragraphs 7 and, by way of cross-reference, 9 above):

> "e. The nature and tone of the meeting on 4 October 2017;
> f. The issuing of a formal absence warning on 26 October 2017;
> g. The rejection of the appeal against that warning on 3 January 2018"

57 In addition, we saw nothing untoward in the conduct of Ms Morgan in relation to the adjustment of being required to conduct only four driving tests per day. In fact, that adjustment stayed in place until the time of the claimant's suspension on 17 April 2018, which we describe below, and theoretically remained in place until the claimant's dismissal.

58 We heard oral evidence about the meeting of 4 October 2017. That meeting was

followed by the email from Ms Morgan dated 6 October 2017 at pages 224–226. The email was detailed and measured. The only material complaint that the claimant made in her witness statement about the meeting was made in paragraph 31. That was that the meeting was "exhausting". However, in oral evidence, the claimant said that it "felt hostile", although she accepted that she did not at any time say that to Ms Morgan

59 It was put to Ms Morgan in cross-examination that she was aggressive at the meeting, and it was the claimant's case (stated in paragraph 8 on page 69) that she had caused the meeting to be longer than necessary as a result of "insensitive and repetitive questioning". It was Ms Morgan's unchallenged evidence (and we accepted) that the meeting was for two purposes, and that Ms Morgan had in advance catered for the possibility of the meeting taking more than an hour because there was so much to discuss with the claimant. The first part of the meeting was, said Ms Morgan, an informal return to work meeting, as the claimant had up to 4 October 2017 been absent because of sickness. EJ Hyams' notes of Ms Morgan's cross-examination (tidied up for present purposes) in regard to that meeting, were in the following form.

> "Q: The meeting of 4 October; you would usually have a one-hour slot for that kind of meeting?
> A: On that day it was the first time I had met the claimant. I had some occupational health information about her condition [i.e. Adult Onset Still's Disease]. I did not know her current condition and the issues which she was experiencing. When I took over [responsibility for managing the claimant's health] she was absent on the sick; the first part of the meeting I had with her on 4 October 2017 was her return to work meeting. We had that and then we started with an informal meeting when I was looking for information on her condition and how to manage it going forward. It was part of the one meeting; we used two slots. She was recorded to be on a restricted programme and we used an hour slot in the morning and one in the afternoon and we continued the conversation in the afternoon. I do not recall it going for the whole hour; it certainly went on in the second slot.
>
> Q: It was very long for an informal meeting?
> A: I understood that the claimant had other issues in addition to the condition for which she got a time adjustment; she had blood pressure issues and other health issues.
>
> Q: Page 224; during the meeting you challenged the claimant about the need for her adjustments?
> A: No. I asked her why she needed a restricted programme and she gave me the information; she was very candid and told me how the condition affected her as you can seen from the email at 225-6."

60 Having heard from both Ms Morgan and the claimant about that meeting, and having read the email at pages 224-226, we concluded that there was nothing

wrongful of any sort in the way in which Ms Morgan conducted the meeting. She was in no way hostile to the claimant. In addition, the meeting was in itself completely appropriate.

61 Ms Morgan was the manager of the respondent's Slough and Uxbridge driving test centres. She said that she was not aware of the fact that the claimant had made a claim to an employment tribunal in 2010. In paragraph 11 of Ms Morgan's witness statement, she said, and we accepted, that she had not by the date of the email of 14 September 2017 at pages 220-221 met the claimant. Given that factor and given that there was nothing before us evidentially to suggest that she was, or might have, been aware of the claimant's employment tribunal claim of 2010, we accepted that evidence of Ms Morgan.

62 There was nothing before us to suggest that Ms Morgan was aware of the fact that the claimant had complained that Mr Loizou had conducted a short test, and it was her oral evidence (which we accepted) that she had never met Mr Loizou and did not know about the claimant's allegation that he had conducted a short test.

63 On 6 October 2017, Ms Morgan invited the claimant to a meeting at which she (Ms Morgan) would consider whether any "formal action [was] appropriate". That was stated in the letter at pages 229-230. The letter stated the reason for the meeting in its first paragraph, which was in these terms.

> "You have been absent for 29 days on 5 occasions between 13th September 2017 and 23rd May 2017. This means you have exceeded your Trigger Point of 20 days / 10 occasions, which includes a reasonable adjustment of 30%. I must now consider whether any formal action is appropriate."

64 In a later part of the letter (on the same page), this was said:

> "One purpose of the meeting is to enable me to consider whether to give you a Written Improvement Warning. We will also consider whether any of the reasons for not issuing one apply in your circumstances. Following our meeting, I will decide whether or not you should be given a Written Improvement Warning. I must remind you that if I do this and your attendance level does not improve within the specified timescale, your employment with the Department could be affected."

65 However, at the meeting, which occurred on 23 October 2017, having heard from the claimant, Ms Morgan gave the claimant a written improvement warning. The warning was formally recorded in the letter dated 26 October 2017 (which wrongly stated that the meeting occurred on that day), of which there was a copy at pages 263-266. The warning was on page 265 and was in these terms.

> "I have decided to give you a first Written Improvement Warning and will monitor your attendance for three months from 27th October 2017 to 26th January 2017. This is called the Improvement Period. If your attendance is

> unsatisfactory at any time in the Improvement Period, I will consider your case again and may give you a final Written Improvement Warning. Your attendance will be unsatisfactory if your absences reaches 5 days or 3 occasions during the Improvement Period. This takes into consideration the 30% increase in your triggers that I implemented as a reasonable adjustment on 4th October 2017. You will see that I have prorated the three month improvement period target to 25% of your adjusted targets."

66 The reason for giving that warning was the number of absences recorded by Ms Morgan in the letter at pages 263-266 at page 263, in the following way.

> "We went onto review and agree the following absences since your last absence review meeting, which was held on 23rd May 2017. I had explained previously that we are only considering your absences from this date due to a paperwork gap.
>
> **13th June 2017 to 21st June 2017– work related stress (7 days)**
>
> **4th July 2017 to 21st July 2017 – work related stress (14 days)**
>
> **18th August 2017– right shoulder pain**
>
> **29th August 2017 to 1st September 2107 [sic] right shoulder pain (4 days)**
>
> **11th September 2017 to 13th September 2017 - recovery after your right shoulder injection to disperse calcium build up (3 days)**
>
> **Total 29 days / 5 occasions**"

67 The claimant accepted that that was an accurate statement of her absences. The claimant's claim that the giving of the formal warning was wrongful in some way was based primarily on the proposition that Ms Morgan had decided in advance of the meeting of 23 October 2017 that she would be giving such a warning to the claimant, i.e. irrespective of what the claimant said at the meeting. However, the first meeting (of 4 October 2017) was an informal fact-finding meeting. Ms Morgan had not before that first meeting met the claimant. It was a long meeting (so long that the claimant now claimed, in these proceedings, that it was too long and that she found it exhausting), during which Ms Morgan investigated in depth the reasons for the absences on the basis of which warning was later, on 23 October 2017, given. Those reasons did not change between 4 and 23 October 2017, and the meeting of 23 October 2017 was necessary in order to permit Ms Morgan to discuss the situation formally with the claimant, and to give the claimant a formal opportunity to say anything which she wanted to say in opposition to the proposition that she be given a formal warning. Not holding such a meeting and simply giving a written warning would have been objectionable. Holding such a meeting and giving a warning at the end of the meeting was not obviously reasonably objectionable. Even if Ms Morgan had made a fairly firm

decision before the meeting of 23 October 2017 that she would give the claimant the warning that she in fact did give, that would not in itself have been objectionable because the factual basis for it did not, we repeat, change between 4 and 23 October 2017.

68 The real issue here was whether or not the warning was a proportionate means of achieving a legitimate aim, within the meaning of section 15(2) EqA 2010, or tainted to any extent by an unlawful factor such as the claimant's race (or, technically, the fact that the claimant had a disability, i.e. so that the warning would in that scenario have been given because Ms Morgan had an animus against disabled people as such or persons with the disability which the claimant in fact had). While that issue is not a factual one, and it might appear that we are here addressing it, we refer to it only to illustrate how we were required to address the question of whether or not predetermination was in any way unlawful. In considering that question, we concluded that if there had been no objectively justifiable factual basis for the warning, then that would have supported all of the claims which were made about it but that the time when the decision was made would be material only if it indicated an unreasonable failure to take into account anything that the claimant might say about the circumstances. Our conclusion on the latter issue is indicated in the preceding paragraph above, and here we state it for the avoidance of doubt. There was no such unreasonable failure. As for the question whether there was a firm factual basis for the warning, we concluded that there was and therefore that the warning could not in itself be said to be evidence of an unlawful motivation (using the word "motivation" in the manner discussed by Underhill LJ in for example paragraph 72 of his judgment in *Nailard v Unite the Union* [2019] ICR 28) for the purposes of discrimination and whistle-blowing claims.

69 The claimant appealed against that warning, and the appeal was considered by Ms Nascimento. The appeal meeting took place on 18 December 2017, as shown by the notes at pages 330-335. Ms Nascimento dismissed the appeal, communicating that decision in the letter dated 3 January 2018 at pages 349-351. One of the reasons for appealing was that the outcome was predetermined. On page 350, Ms Nascimento wrote this in that regard:

> "I have spoken with NM (LDTM) and she confirms that a decision was given after the break, however as far as she was concerned the meeting had reached a conclusion because no additional information was offered or given. The notes of that meeting show that on return from the break NM enquired if you were ok and had a long enough break and you replied 'yes'. You then went on to say how stressful it was to keep discussing it and NM asked you if there was anything that we could do to alleviate this?. Your response was 'I think all has been covered'. This therefore confirmed, that as far as NM was concerned, the meeting had concluded and that you had nothing further to add. If you felt you had further information to add then that was the point in the meeting where you should have informed NM of any additional information.

> NM confirms that she did read the decision from a typed sheet, however this was done purely to ensure that the relevant points were covered such as the sustained improvement period and the appeals procedure."

70 Ms Nascimento gave oral evidence to us. She said that she was not aware of the fact that the claimant had made a claim to an employment tribunal in 2010. Given that there was nothing before us evidentially to suggest that she was, or might have, been aware of that claim, we accepted that evidence of Ms Nascimento.

71 She also said that she was not aware of the allegation of the claimant that Mr Loizou had conducted one or more extended driving tests that were shorter than they should have been. Given that there was nothing before us evidentially to suggest that she was, or might have, been aware of that allegation, we accepted that evidence of Ms Nascimento also.

72 At page 330, this exchange was noted.

> "NL - I'm concerned as to whether there will be no bias when making the decision. The day after the formal attendance meeting I spoke with Cheryl Robinson (OM) and she advised me that I had no grounds for appeal and that the appeal would not be upheld.
>
> JN - Well I am here to conduct the meeting and I will make an unbiased decision, are you saying you don't want me?
>
> NL - It does concern me.
>
> JN - why are we here then?"

73 Ms Nascimento was cross-examined on that exchange and when asked why she said the latter words, said this (as noted by EJ Hyams):

> "It was not meant with any malice or anything like that; it was purely because Ms Lal had had every opportunity to object to me being the decision-maker."

74 It was then put to her that the third paragraph on page 334 was to a disabled employee "an aggressive and hostile sentence". The material part of that paragraph was in these terms.

> "We have an attendance management policy which applies to everyone, we can't just have different standards for different people. What is it you actually want from this meeting?"

75 Ms Nascimento's response was (as noted by EJ Hyams):

> "No; it was explaining to Ms Lal that the attendance policy applied to everybody and that the agency had complied with it by putting in reasonable

adjustments for Ms Lal but that could not go on indefinitely as it impacted on the business."

76 We accepted that that was genuinely Ms Nascimento's view at the time.

The claimant's stated concerns about the safety of a driving test route permitted by the respondent

77 On 4 December 2017, the respondent introduced the use of satellite navigation ("sat nav") systems into driving tests. This was a major change.

78 On 19 December 2017, Mrs Vear-Altog recorded on page 338, on the penultimate page of the performance and development management report which started at page 336, that the claimant had "contributed significantly to the development and input of the new routes for the SAT Nav".

79 In paragraph 43 of her witness statement, the claimant said that "during the induction process", presumably meaning the period when the sat nav system was starting to be used, she "noted that the Sat Nav was programmed with incorrect directions which led to the Sat Nav talking at the same time that the candidate would have to navigate a sharp bend." She continued:

> "43. ... This particular bend only has room for one car to proceed at a time, as there is a blind spot on the approach and the lane is very narrow. In addition, there is very thin kerb, which is regularly used by people walking their dogs, due to there being a park nearby. The Sat Nav issue put both me and the candidate at risk of danger and also exposed other road users and pedestrians to potential risk.
>
> 44. I discussed the issue with my colleagues, who echoed my concerns and confirmed that they would not conduct the route until the Sat Nav issue was amended. On 14 December 2017, I raised the issue verbally with Jan Vear-Altog. I requested that the route be amended, and the Sat Nav systems updated, to avoid this serious health and safety risk. Jan informed me that she would not be able to do so that day. By 20 December 2017, the issue was still yet to be addressed and so I put my concerns in writing in an e-mail to Jan Vear-Altog [bundle page 344 to 345]."

80 In that email, which the claimant copied to Mr Perkins, the claimant was highly critical of Mrs Vear-Altog. In cross-examination, the claimant accepted that it was a "not very nice" email. It was in fact hostile, with the hostility being most clearly shown by the following passage:

> 'This is a serious health and safety risk I have raised with you, my colleagues feel the same, yet nothing has been done. I appreciate you are currently busy with Scott the new entrant, however you carried out 8 or 9 consecutive check tests with him since I raised my concerns, surly [sic] one

slot could have been used to amend route 9? On Monday the 18/12/17 you was on leave, and sadly on the 19/12//17 & 20/12/17 you still have not addressed any of the concerns raised.

Obviously these are new routes and there are going to be teething problems and no doubt amendments are going to be made to some routes. There are concerns regarding route 1 which also need to be discussed, but whenever concerns have been raised, you have not once looked up from your computer to find out what the problem is or offered any help to try and resolve these problems. Please [may] I ask, you actually take these concerns on board and please let's try and resolve some of the issues we are having concerning the routes.

I feel it imperative to raise another issue, on 08/12/17 you conducted a test. The result was a fail, but no serious fault was actually marked on the DL25. The owner of the company 5 day rang the office to discuss why a serious fault had not been marked and what the serious fault was. This raises real concerns for me, I appreciate anybody can omit to mark things on their paperwork, but to miss out the actual reason why the candidate did not pass leaves me confused on how the debrief was given?

Recently you attended a management course at Cardington, you will be at some point conducting check tests with me, you are also in the process of training a new entrant. In my opinion a manager should lead by example, this does not give me much confidence.

You have also just advised me on 20/12/17 that Nicola Morgan will be dealing with my attendance. In my meeting with Nicola on 26/10/17 to quote Nicola, she states " Hopefully moving forward with JAN you will find some continuity as you have had lots of different managers". So please may I ask if you successfully completed your management training course at Cardington why is Nicola Morgan still dealing with my case? Are you not my direct line manager? This is totally unheard of where an LDTM from a different test centre deals with a member of staff where a test centre has a manager present. You have worked at Barnet test centre along with me for many years, you are fully aware of my condition so would you, who has knowledge of my history be best placed to deal with my case? You have advised me that this decision has come from management, am I to understand from this then that management do not have confidence in your ability to deal this my case competently or efficiently?'

81 Mrs Vear-Altog's response was measured. It was sent on the following day, 21 December 2017. It was at page 346 and was in these terms.

"Firstly Neelam regarding your concerns about the 'dangerous' situation that you think could arise from the Sat Nav giving wrong directions, everyone knows that there are teething problems with some of the directions including Route 9 and Route 1. Every test has a risk element.

> Examiners are trained to risk manage a test. As examiners if any problems do arise it is perfectly acceptable to step in and to verbally advise the candidate to ignore the Sat Nav it is the end of the independent drive and that you will be giving directions from that point on and in addition give advise on any local issues that may arise or the candidate might not be aware of, the same procedure we would follow if the standard of the candidate was of an exceptionally poor quality. This is what we are trained to do to avoid any situations that could affect our Health and Safety on a day to day basis and is for the examiner to manage at that time.
>
> You say nothing has been done, but you have already agreed that I have verbally accepted a change to the route. So this is not the case. You have made [your] concerns known, and I have responded and accepted the proposed change.
>
> Physical action was taken on the test de-brief given.
>
> With regard to your absence it is far better for all concerned including yourself that Nicola Morgan continues dealing with your attendance due to her previous knowledge of your situation and continuity. If you have any other concerns or questions regarding this do not hesitate to ask."

82 On 4 January 2018, the claimant sent the email at page 353 to Mrs Vear-Altog, stating that the "dangerous" situation which she had discussed with Mrs Vear-Altog was that while she (the claimant) was "trying to manage the situation on route 9, the Sat nav [was] talking at the same time [which drowned] out [the claimant's] instructions and [confused] the candidate". In answer to questions asked by EJ Hyams, the claimant said that the route used for each driving test was chosen by the examiner. There was a number of possible routes. It was possible for the claimant and all of her colleagues at the Barnet test centre to decline to use the route which the claimant had asserted in her email of 20 December 2017 and again on 4 January 2018, was dangerous. If no driving test examiner in the Barnet team used that route then no negative consequence of any sort would occur. If, however, some examiners used that route, and others did not, then the fact that the route had not been used by some examiners would be recorded on what the parties referred to as the respondent's "CHI" system, which was a performance management system. Mr Perkins in oral evidence said that it was open to the claimant to decline to use the route and that if the fact that she had done so became apparent from consideration of the CHI system, then no negative consequence would occur to her if she said that it was because she thought that the route was dangerous. We accepted that evidence. The claimant herself accepted in oral evidence that she was able in practice to decline to use the route.

The drawing by the claimant of the respondent's attention to Mrs Vear-Altog's notebook and the events which followed that action

83 On 21 February 2018, the claimant contacted by telephone Mr Joe Wildash, of

the respondent's HR team. He subsequently (in the circumstances which we describe in paragraph 96 below, when asked by Mr Day to do so) wrote the statement of which there was a copy at page 507, showing what happened on 21 February 2018. The statement was made at some time before 2 July 2018 and was in these terms.

> "Following our telephone conversation of 15 May, this is my recollection of events regarding the above.
>
> Ms Lal telephoned me around lunchtime on 21 February 2018. She explained that her manager had left a diary on her desk which contained personal data about her (namely details of her sickness). Ms Lal explained that a colleague had seen it and had read it out to her whilst another colleague was present. I was asked if this was a breach of personal data. I said that potentially it was and that the matter could be taken forward formally if she so wished and would need to be investigated. I also said that the individual who read out the information could be investigated as well as they shouldn't have read it and certainly not have read it out. I opined that they should have put the diary away in the drawer and reported it. I added that if she wanted the matter to be taken forward formally she should report the matter to her line manager's manager to carry out a fact finding exercise. I also said that I wanted to check with the Information Assurance Team (IAT) to ensure there was nothing I had missed. After speaking to Trevor Chapman on the IAT I emailed Ms Lal at 13:50 that day and again at 14:57 setting up a time to speak. We spoke between 15:05 and 15:30 that day and I confirmed the information that I had previously given was correct and that if she so decided, the matter should be reported to her line manager's manager for a fact finding investigation to take place. Following that, a decision would be taken as to whether a full investigation needed to take place by an independent investigation manager in accordance with the Agency's disciplinary procedures. I also pointed out again that her colleague who read out the data could be subject to a formal investigation as well.
>
> Ms Lal thanked me and said she would report the matter to Mr Perkins."

84 The claimant did that and as a result Mr Perkins invited her to a meeting on 27 February 2018. His witness statement described what happened at that meeting merely by reference to (but by way of a description of the contents of) the email which he sent on that day to the claimant of which there was a copy at pages 366-367. That email spoke for itself, and was in our judgment the best evidence of what had occurred on that day. So far as relevant, it contained this passage.

> 'This led onto your concerns about the data issue, which you said had been seen by yourself and other staff, when Jan had left personal information on view in the office. You said that what you had seen contained information about your disability, target setting and management instructions. You showed me some photos of a book on a desk. This looked like a ring bound

notebook. You explained that this was your "stuff", and "others had photos of their stuff on other pages". You said that it involved Richard Miller, Hitesh Umradia and yourself. You said that this was not the first time it had happened.

I explained that if it was what it appeared to be, then it may constitute a breach of policies, and as such I would investigate this fully. I would consider the meeting as the fact find, as we had discussed it, and you were happy with this. I asked if you wanted to consider going down any other route other than a formal investigation to try and resolve this. You said that you did not. I mentioned mediation and discussion etc.

You said "No, I want a formal investigation". You asked if I still needed a letter to confirm the facts I said that I needed your concerns put in an email and sent to me along with any photos you had, in order to give the investigation officer a starting point. I explained that I may be the decision officer, if that was the case then I would be in touch with you.'

85 In an interview with Mr Day on 23 May 2018, Mr Perkins said (as recorded in the notes of that meeting at pages 499-501) this about the way in which the question of how the claimant was going to send him the photographs was discussed on 27 February 2018:

"During the meeting, she showed me the photos on her phone. I asked her to send me an email with her concerns and send me the photos. She said she would print the photos and give them to me.

3) PD: You did not ask her to go and get them printed and enlarged?

CP: No. I assumed she would do it in the office. We have a coloured copier and a black and white printer in the office."

86 Mr Perkins subsequently on 27 February 2018 had a meeting with Mrs Vear-Altog. He then sent her the email of that date at pages 368-369. In it, among other things he said that he would be "initiating an investigation due to the seriousness of the possible allegations against [her]". That investigation was initiated in the manner shown by Mr Perkins' email of 1 March 2018 at page 370 addressed to "HR.Business.Partner.Support". It appeared that Mr Perkins enclosed with that email the emails at pages 366-367 and 368-369. The email at page 370 was in these terms.

"Hello,

I have spoken to Ruth Clarke about the case below, and been advised to send this through with the fact find, which is attached.

I have been approached by Neelam Lal from Barnet DTC. She requested a meeting with me. She has made serious allegations of the LDTM (HEO)

breaking data protection by leaving personal information on the desk. She also considers that the LDTM is bullying her. The LDTM seems to feel it is the other way around.

At the fact find Neelam initially refused a meeting with me as she wanted a TU rep present, and was advised that this was not needed as it was an informal meeting. Neelam then said that the TU rep was also involved. I explained that if this was the case then I would not speak to both at the same time as I needed independent views as it was an informal fact find meeting (HR advice were contacted by me, and confirmed that this was the case). Eventually we did get round to meeting the same day and discussed this. Neelam has stated that it also involves other members of the office and named two other people, however there may be more. From Neelam's version of events it appears that the data may have been left on a desk, and the staff then took it upon themselves to look through the book.

The LDTM (Jan Vear-Altog) in post is on a CDO which both herself and Neelam applied for in September 17. The current LDTM was the successful candidate. The LDTM feels that she has not been supported from the start by this individual and some of the other office staff, and advised me that Neelam had walked out of her EOY meeting (Neelam confirmed this to me). It clearly needs investigating, and I have advised both members of staff that this will be the case. I have spoken to my Line manager (Cheryl Robinson) and we feel it would be better if this was investigated independently of the line management chain due to the other issues at the centre which have complicated the relationships of staff. There are also other factors being dealt with at the same time, such as absence, ongoing disability adjustments etc. which were separate, but may be mentioned in any investigation.

Due to this complicated situation at the DTC we feel it would be better for the Agency if a trained investigator and decision manager undertakes this."

87 Ms Sharon Collyer was asked by the respondent to carry out the investigation into Mrs Vear-Altog's conduct which was initiated by Mr Perkins via that email. Ms Collyer interviewed the claimant on 10 April 2018. There were notes of the interview in the main bundle before us, both in their original form and with the claimant's additions to them. Those additions were in capital letters in the version of the notes at pages 393-397. Those amended notes were sent back to Ms Collyer under cover of the email sent at 14:02 by the claimant on 16 April 2018 of which there was a copy at page 404. The whole of those amended notes was relevant. The most material part of the notes started with the following passage.

"SC asked NL to confirm that the photographs AND EMAIL which had been sent GIVEN TO CHAS (DO NOT RECAL ATTACHMENT MENTIONED) as an attachment, were the ones she had provided to Chas Perkins as evidence of the data she had seen?

NL confirmed that was correct.

1. SC -You say in your e-mail to CP, that you spoke to Joe Wildash on 21.02.18 was that on the same day that you saw the book open?

NL I can't remember the date of when the photographs were taken, but it was just a few days before I spoke to Joe Wildash and he had advised her to speak to Chas Perkins.

2. SC What did you discuss with Chas Perkins?

NL I told CP that I had contacted JW and he had advised me to inform him of the incident in writing.
3. SC when did you see the book open?

NL I have seen the book open several times from the day JVA took over as the LDTM of Barnet in October 2017.

4. SC Asked NL to confirm the date on which the event took place and the date on which the photos were taken.

NL I'm not sure of the exact date that the photographs were taken, but (IT WAS AROUND THE TIME I HAD, HAD MY TREATMENT FOR MY SHOULDER) NEVER SAID IT WAS A COUPLE OF WEEKS PRIOR TO CONTACTING JW. DID NOT MENTION JANUARY AS MY TREATMENT WAS ON 01/02/18 I think it was a couple of weeks prior to contacting JW, maybe January.

5. SC why the delay in contacting JW as the alleged incident was quite a serious one.

NL I don't think I was in work for medical reasons. THERE WAS NO DELAY, I DID CONTACT JW.

6. SC Do you have your phone? Can you check the date of when the Photographs were taken?

NL (leaves the room and returns with her phone) looks in her phone explained that she doesn't have the dates of when the photographs were taken.

SC looks at the phone as NL was showing her the photo library and said (I DON'T THINK MY PHONE SHOWS THE DATE there weren't any dates on any of them. There appeared to be a lot of photos on the phone. SC asked NL to click on any one of the photos, explaining that on doing so it would show the date it was taken. At that point NL told SC that she no longer had the photos of the incident as she had deleted them. I TOLD SC I HAD TO TRANSFER THE PHOTOS ONTO A USB STICK TO GET THEM

PRINTED TO GIVE TO CHAS>

7. SC Are there any other photographs available?

NL no.

SC CP sent the photographs as a PDF document, did you email the Photos to Chas?

NL I told Chas couldn't email the photos because I didn't have the facilities to scan and print the photographs, so I downloaded them from my phone to a USB stick and had to go to a local shop to print them, I put everything in a file and gave a copy to CP.
8. SC Just to clarify for the purpose of the notes, you gave CP a hard copy of the photos.

NL Yes.

9. SC Have they been forwarded to anyone other than CP? (Who? Date?)

NL I also gave a copy of everything including the USB stick, e-mails and photographs to my solicitor."

88 On 13 April 2018, Ms Collyer sent the email at page 407 to a Mr Graham Watts, copying it to Mr Perkins. It was in these terms.

"Thank you for your help and advice over the past few days. As requested, please find attached the photographs relating to the case I am investigating. They were taken by Neelam Lal (Driving Examiner Barnet DTC) on a personal mobile phone, of the LDTM's personal workbook which was allegedly left unattended in open view.

The photos show entries of sensitive sick absence data relating to NL and two other members of staff. The personal workbook is owned by Jan Vear Altog (LDTM line manager of NL).

During her interview (10.04.18), NL confirmed that the photos were taken on her personal phone and that she had downloaded them on to a USB stick. The photos were printed off at a local shop so that printed copies could be given to JVA's line manager Chas Perkins when formally reporting the incident. Although I did not see the photographs for myself at the interview as it is claimed that they have now been deleted, CP confirmed to me that they were shown to him on the phone during the initial fact finding meeting.

NL also told me in her interview that the USB stick and e-mails relating to the reporting of this incident have been given to her solicitor as further

evidence in a case she is building against the agency. (Tania Bend - Neeves's Solicitors – Luton. Approx 9th March.)

I received the typed notes of the meeting with NL this morning and have forwarded them to her for checking and approval.

NL also claims that another member of staff has taken photos of the workbook on his personal phone. His interview is booked for 17/04/18 and one other member of staff, alleged to have seen the workbook is being interviewed 19/04/18.

Whilst I am fully aware of the seriousness of the above and the possibility that another investigation may now need to take place, I am mindful of protecting the integrity of my own investigation and am concerned that alerting the staff prematurely that they themselves may have improperly disclosed or accessed information, may jeopardise the interviews I am about to conduct. I also need to ensure that NL approves, signs and returns the notes of her meeting to me.

With that in mind, I am happy to take your advice on if / how you would like me to take this forward."

89 Then on 16 April 2018, the claimant spoke to Mr Perkins in a conversation which was recorded by him on the following day in the email at pages 439-440. The email was sent to the respondent's HR Business Partner Support email address. The material part of the email was this:

'I have attached some emails between Sharon Collyer I/O and Graham watts. Along with my HR case work advice. To help I have also outlined whay [sic] has happened in the last few days below

13/4 8:30 Spoke to SC to get GW update, and he still needed to take further advice before starting any action. SC informed GW that CP was already aware and was going to speak to HRBP today and take advice. Email from SC to GW confirming that photos were taken on NL personal phone, put on an memory stick, printed off at a local shop and also sent to a solicitor.

On 16/4/18 I visited Barnet to sort out EOY issue following an email from NL. N came into office at 15:30 to say thank you for sorting it out. Then went on to say that she had given information regarding Grievances, with SL, Target setting, warnings, Sick management, Appeals with Jan N, an Application for CDO post, etc to a solicitor. NL went on to say that she considered the fact that she did not get the post of LDTM as disability related. I asked if she had given any documents to the solicitor she said "no just information". I again asked later if she had given anything to the solicitor she again said "no just information". I said I would confirm our conversation, she said "don't bother I will deny it. it is off the record and just a courtesy to let you know. I'm not like Hitesh I won't give up I will see it through"

She continued to say about taking appointments out of hours and being told that she makes no effort to help herself (NM). I explained that I was not managing her attendance, so didn't know what had been said. She then said about a case 10 years ago when SR tried to take her off ADI, and said she would "follow it through this time".
She went on to ask why I was the decision officer in JVA's case. I explained that was the process we follow. Fact find, appoint a I/O then wait for the report before making any decision. I also said that It may be the case that I may not be the decision officer.

She then left the office.'

90 When giving oral evidence to us, the claimant denied saying on 16 April 2018 to Mr Perkins that she would deny saying what she did in fact say to him on that day. However, we accepted that the email which we have set out in the preceding paragraph above was an accurate description of what happened on 16 April 2018. That was (1) because we found Mr Perkins to be an honest witness, doing his best to tell us the truth, (2) what he said to Mr Day on 23 May 2018 as recorded on page 500 was so far as relevant to the same effect as the email set out in the preceding paragraph above, and (3) because of our acceptance of his (Mr Perkins') evidence given to us that the fact that the claimant had said that she would deny what she had said to him was of considerable concern to him at the time. It was also because it was consistent with him saying in the email to which we now turn that he suspended the claimant in part because of "a breakdown in the relationship between herself and the Agency".

91 Also on 17 April 2018, Mr Perkins sent the email to Mr Marvin Badal at pages 432-433. In it, he wrote this:

"I have now suspended Neelam and explained that it is due to unauthorised disclosure of information and a breakdown in the relationship between herself and the Agency, the fact that any evidence must be preserved and other witnesses in the office may be influenced if she remains.

She has been issued with the attached, which is slightly different as the one on file has the wrong EAP details (they changed recently).
I have retrieved her keys and passes and explained that she must not contact the other members of the office as this is confidential.

She asked to clear her desk, I said it was not necessary, as it was not finding her innocent or guilty, simply suspending her as the best thing to do while the investigation takes place. She said she wanted to clear her desk. I asked if she would like to wait until the others went out on test before she collected her things, she seemed to agree then She chose not to do this. She took a black back [i.e. probably, bag] into the office, started clearing her desk and made a point of handing the keys to me in view of others.

I have asked IT to lock her account and advised her that if she needs to

attend the office for any reason, then she must contact the line manager or myself."

92 In paragraph 57 of her witness statement, the claimant said this about what happened when she was told by Mr Perkins that she was being suspended.

> "On being informed of my suspension, I went straight to the toilets to compose myself. I was in the toilets for no longer than a couple of minutes. When I came out, Chas Perkins was standing very close to the door and he had quite clearly watched me go inside and was waiting for me to come out. This was incredibly threatening and humiliating. My natural reaction was to hold my hands up and ask Chas to step back and allow me some space. Chas informed me that he had been asked by HR to escort me off the premises and proceeded to follow me to the kitchen, where I went to retrieve my belongings, completely ignoring my request. I felt I was being treated like a criminal."

93 Mr Perkins said that he had not acted in any kind of threatening way, and that he had merely escorted the claimant to ensure that she did not tamper in any way with any relevant evidence. We accepted his evidence in that regard so that we accepted that whatever he did, his intention was not to threaten the claimant. While it was not determinative of anything, we record here that at least when he was giving evidence before us, he was mild-mannered and patient.

The claimant's grievance

94 At pages 455-460, there was a copy of a grievance stated formally by the claimant on 21 May 2018. The grievance was acknowledged in the letter of 30 May 2018 at page 467 sent to the claimant by Ms Ruth Clarke. It was responded to substantively in the letter at pages 470-471 from Ms Robinson to the claimant. Ms Robinson referred there to the respondent's requirement that grievances were raised within three months of the event or issue causing concern unless there were exceptional circumstances and said that much of the grievance was about things that "[fell] well outside this time scale". We read that as a statement that the claimant's grievance about events which occurred more than three months before 21 May 2018 would not be considered because there were no exceptional circumstances justifying them being considered out of time. As for the matters complained about which related to the disciplinary action which had been taken against the claimant, Ms Robinson first set out the following passage from the respondent's grievance policy.

> "Where an employee raises a grievance during another procedure, such as poor performance, attendance or discipline, the ongoing process will continue. Where the ongoing process and the grievance are related, it may be appropriate to deal with both issues at the same time. Wherever possible, the grievance should be dealt with at the appeal stage of the relevant process. This would include complaints of bullying, harassment and discrimination."

95 Ms Robinson then said this:

> "This policy will be followed and your concerns will be addressed as part of the disciplinary process. I appreciate that you feel strongly about the decision to pursue disciplinary action, however the charges of gross misconduct are alleged at this stage. As you will have been advised, suspension is a neutral act and does not imply a foregone outcome. You have the opportunity to make your cases as part of the disciplinary procedure, including at appeal if applicable."

The investigation carried out into the claimant's conduct

96 Mr Perkins asked Mr Day to investigate the claimant's conduct in regard to the photographing and use of the photographs of Mrs Vear-Altog's notebook. Mr Day's report was dated 2 July 2018 and it (with its appendices) was at pages 472-524. It therefore included the statement of Mr Wildash at page 507 which we have set out in paragraph 83 above. The report spoke for itself and for the sake of brevity, we do not set out any part of it here. Mr Day gave evidence about it, and we concluded from his evidence and the report itself that he carried out his investigation in a completely straightforward manner.

97 Mr Williams was asked by the respondent to hear the disciplinary case against the claimant on which Mr Day had reported on 2 July 2018. Mr Williams then asked for a further investigation to be carried out by Mr Day. He did so for the reasons which he set out in paragraph 21 of his witness statement, which was in these terms, which, for the avoidance of doubt, we accepted.

> "Initially Paul Day was the investigating officer and provided me with an initial report. Within that report it mentioned that Ms Lal said she was building a case against the DVSA. For my part, having read that initial report I wondered what that meant and why she was doing that – I wanted more explanation around the reasons of why she was doing what she had said she was doing. My thought was that the rational thing to do, if this just would have been a concern about data protection, would be to close the book and put it away. Based on that, and the way she had described her activities, it started to appear to me that there may have been some kind of deliberate attempt to pursue her line manager going on and that she was trying to get evidence in whatever way she could. This of course does not take away from the fact the information was left out. However, the issue, for me, was why Ms Lal responded in the way that she did."

98 Mr Williams' witness statement continued, in the following further relevant paragraph (number 22) which, also for the avoidance of doubt, we accepted.

> "This was also relevant to the question of the data breach. Whereas Mrs Vear-Altog's breach appeared accidental, Ms Lal's breach seemed motivated and purposeful. This is why it is relevant that Ms Lal said she was

> building a case, not because of her consulting her solicitor – which of course is her right to do, but the reasons why she was motivated to say she was building a case in the first place and the way she went about doing that. There also seemed to be an attempt on Ms Lal's part, it seemed to me, to make Mrs Vear-Altog's life difficult."

99 Only during the hearing before us did Mr Williams refer to an email which he had sent to Mr Day, asking him to carry out a supplemental investigation. That email had not been disclosed before the hearing. We concluded that the failure to disclose the email was inexcusable but was also not deliberate. It appeared to be the result of a failure by anyone acting on behalf of the respondent to ask Mr Williams for a copy of it: Mr Day said in paragraph 37 of his witness statement that Mr Williams had sent him an email on 21 August 2018 asking for a further report, but in that paragraph Mr Day referred only to page 527 in relation to that email. That was the first substantive page of the supplemental report which was subsequently produced (the report, with its appendices, was at pages 525-592). On that page, under the heading "1. Introduction", this was said.

> "Rowland Williams is the Decision Manager for two Investigation Reports completed by me in July 2018.
>
> One Report was for Neelam Lal and the second for Hitesh Umradia both relating to photos of personal sensitive information taken at Barnet DTC.
>
> Rowland Williams sent me an email on 21 August with a series of questions for me to complete a supplementary investigation. These points are detailed in:
>
> 4. INVESTIGATION FINDINGS
>
> 5. CONCLUSION AND RECOMMENDATIONS."

100 However, the email itself was material and its text was in fact not discernible from either the investigation findings or the conclusion and recommendations sections of the report. As Mr Day said in his report at page 527, the email enclosed a document stating a series of questions. The body of the email was this:

> "I would like some further information regarding the disciplinary case you have investigated involving Neelam Lal and Hitesh Umradia. I can see that it is clear photos were taken and printed outside of DVSA, I would like to understand more about the relationship between these individuals and the DVSA so I have a full picture. I have put few questions in the attached document, it would be helpful if you could do some more investigation based around those questions.
>
> Thank you for your help, happy to discuss."

101 We heard no evidence about any discussion between Mr Williams and Mr Day

following that email. The questions set out in the enclosure to the email were in the following text, which is the complete text of the enclosure.

> 'I would like to have a better understanding why Neelam and Hitesh were suspended, what was the specific reason for the suspension? What was the risk in them remaining at work during the investigation?
>
> I note that Richard Miller has stated "I saw the book on Jans desk and it was open. I saw notes about me, Hitesh and Neelam. So I told them and Neelam asked me if it was ok to take a photo." Can you ask Richard to confirm that this statement is accurate please? Can you ask for confirmation that it was Richard who alerted Neelam and Hitesh to the book.
>
> Hitesh states – "I went to put something on Jans desk and I noticed a notebook open with my name on it as well as Neelam and Richards names. I highlighted it to the people in the office and with their permission, I took a photo of it." Can you ask Hitesh to confirm that this statement is accurate please? Can you ask for confirmation that it was Hitesh who alerted Neelam and Richard to the book.
>
> What was Hitesh putting on Jans desk?
>
> Where is that in the photo?
>
> Does Jan still have the book? If so can you get it. I would like to know what entries were made following the entries in the photos to help establish when the photos were taken.
>
> I can see some Sat Nav boxes on the desk, why were they there?
>
> What did the staff do with the boxes after they were given their sat navs?
>
> Can you interview Jan please, she may be able to answer some of the above.
>
> What has the relationship been like between staff in the office, in particular Jan and Neelam / Hitesh? Can you get some detail around this.
>
> Does Jan believe a case is being built up by Neelam? Can Jan give some examples.
>
> Would you be able to get some photos of the desk showing where it is located and how obvious personal information would be if left on the desk? Add an investigation view on this please.'

102 We observe at this point that those were all highly material questions, and that they were astutely posed.

103 Mr Day's supplemental investigation report contained these words on pages 536, 537 and 538 respectively, under the heading "Conclusion and recommendations".

103.1 "Evidence from witness statements indicates a lack of trust or a good working relationship amongst members of the Team at Barnet."

103.2 "Evidence from witness statements indicates unacceptable behaviour by NL, HU and RM towards JVA since she took up the Career Development Opportunity LDTM post."

103.3 "Considering the above policy guidance, there is therefore a case of bullying to answer."

104 The report's appendices included the email of 20 December 2017 to which we refer in paragraphs 79-80 above. The appendices also included records of interviews with Mrs Vear-Altog, Mr Perkins, Mr Tony Ausano, Mr Barry Kent, Mr Richard Miller, Mr Pavel Cocianga, Mr Scott Hadley, and Mr Hitesh Umradia. Some, but not all, of those persons said things that formed the basis of the things summarised in paragraphs 103.1 and 103.2 above. We refer to those which formed such basis in the following paragraphs below. Before doing that, we record that on page 541, Mrs Vear-Altog was recorded to have said this.

> "The only time my desk would have had the Sat Navs and routes on it would have been prior to 4th December 2017. The boxes for the Sat Nav were put away in the safe after that date."

105 Mrs Vear-Altog was also recorded to have said a number of things which were evidence of challenging and disruptive behaviour by the claimant. By way of example, at the top of page 544, Mrs Vear-Altog was recorded to have said this:

> "So it was their general behaviour and attitude towards me. There was an End of Year that I attempted to talk to Neelam. She called me a liar and stormed out, when I said I didn't want to be shouted out. I documented this on her End of Year. She then had a meeting about it with Chas and called me a liar."

106 The claimant relied heavily on the fact that Mrs Vear-Altog was recorded to have said then that that had occurred in September 2017 and that after it:

> "We had another meeting with Chas. I said for the New Year and new report we should draw a line under it."

107 However, at the top of page 545, this exchange was recorded:

> "31) PD: Do you believe that Neelam is building a case against the Agency?

JVA: Yes I do. It is not possible she could accuse me of bullying and harassment. My behaviour towards her is to the letter. Not like hers towards me. It wouldn't surprise me at all. If that's what she is trying to do.

32) PD: Why would it not surprise you?

JVA: I know what she is like. She has done it before, others have suffered.

33) PD: Is there anything else? Would you like a break to consider anything?

JVA: I just think that if everybody were interviewed it would highlight the true behaviour. I am sure some wouldn't like to be interviewed but some would tell the truth."

108 On page 554, Mr Perkins was recorded to have said this.

"Neelam declined mediation, which would have been good. She said once about the incident with data, we were in the kitchen and she said she didn't want to go down the grievance path just the disciplinary route. I told her that if she went down the disciplinary she wouldn't know the outcome. She said she knows what she wants and she would know if it happens and if she got it. She was alluding to the fact that she didn't want Jan in the office as manager, she wanted her out of post, and she'd know if that happened. I think the relationship between Neelam and Jan has a big bearing on the case you've been investigating."

109 The whole of Mr Day's interview of Mr Ausano is relevant. For convenience only, we merely set out the following extract from it, at pages 564-566.

'2) PD: Please explain the team spirit at Barnet when you started.

TA: It was good, enjoyable?

3) PD: Please explain if this has changed and if so when and why do believe it has changed? I do appreciate that it is not comfortable when discussing colleagues...let me know should you wish to pause for a moment. If it has changed, when did it and why?

TA: Where it changed was when Jan became TCM

4) PD: Last year?

TA: Yes before the Sat Nav test came it. It became borderline nasty

5) PD: Can you explain? I just ask you to be open and honest

TA: It all started when Dave left the post. Chas said he'd like to keep it (in-

house) within the office. Majority of people asked me if I wanted it. Even Neelam asked me. I don't get on with her, previously I did, that's another story. They said they didn't want Jan to get it. At this point Neelam did not have any intention to go for the TCM Role.

6) PD: Who?

TA: General office

7) PD: Before the LDTM posting did everyone get on with Jan

TA: Yes. When the post came up people asked me, I don't know if that was because they thought I could do it or it was because they didn't want Jan to have it. Then I found out that Neelam went for it and that surprised me.

8) PD: Thinking about the time since Jan Vear-Altog (JVA) has been in the LDTM post, have you been aware of any relationship issues between members of the team and or JVA?

TA: There were 2 occasions both on meetings. There were various discussions that got heated. One point where Neelam was criticising Jan about one thing after another. She was constantly trying to have a pop. It was clear what she was trying to do.
Picking out every tiny fault. I got frustrated and walked out, as I didn't want to listen.

9) PD: How did it make you feel?

TA: Uncomfortable, that's one of the reasons I walked out. The way she spoke to her at another meeting was the same. At the start of another meeting it started to get heated again. I said under my breath "not again" and Neelam said in an aggressive tone 'if you've got something to say' say it' I said it's best I don't say anything (wanted me to say what I had said out loud.) It got heated again. Jan was saying that we should have jobs. Hitesh got aggressive about it, he raised his voice. I regret not saying to tone it down. As it was making me feel uncomfortable. I've never heard anyone talk to a TCM about something that has been mentioned many times by most TCM's. Barry stepped in and said something to calm the situation down.

10) PD: When was this meeting?

TA: I couldn't give a date

11) PD: What was Neelam saying?

TA: There was a route that was coming right out of Sainsbury's (a) car park with left turn only arrow which was faded. It was just criticism after criticism,

it was obvious what she was doing, she was trying to put Jan down. I came back in and apologised to Jan for leaving.'

110 At pages 577-578, there was this record of what Mr Cocianga said to Mr Day.

"3) PD: Please explain the team spirit at Barnet when you started.

PC: First, when I was detached there it was lively and fun. A good laugh

4) PD: Who was the Manager?

PC: Dave Smith

5) PD: Please explain if this has changed and if so when and why do believe it has changed? I do appreciate that it is not comfortable when discussing colleagues...let me know should you wish to pause for a moment.

PC: It changed when Jan took job.
6) PD: Last year?

PC: End of July. I was on holiday and I received a message from Barry asking if I wanted to be LDTM. No way! When I returned Dave had moved back to Borehamwood. This position came up in Barnet and 2 people applied and Jan got the job

7) PD: Thinking about the time since Jan Vear-Altog (JVA) has been in the LDTM post, have you been aware of any relationship issues between members of the team and or JVA?

PC: It was very stressful

8) PD: For you?

PC: For me but indirectly. When I came back from holiday and came into depression and stress, it was a personal issue. Jan got job and you could see the atmosphere change. It was secretive stuff.

9) PD: Could you explain what you mean?

PC: Talking in secret

10) PD: Who?

PC: Barry, Neelam, Hitesh and Richard. I went outside for cigarette breaks and it was more frustration on their side towards Jan. Sometimes I blocked my hearing to keep my sanity straight.

11) PD: What things?

PC: Jan had just got the job and it was the time of transition from the old test to the new sat-have [sic] test, we needed to change the routes and prepare for the new test, that is why we needed to give her a chance to perform. I told Neelam as well. I said to let her prove herself. She was doing her job trying hard to please everyone, it wasn't easy for her. It was stressful for me to witness those behaviours.

12) PD: Where there witnesses in the office. Was there a time in a Team Talk where people criticised Jan?

PC: Yes at a Team Talk with everyone there

13) PD: Can you elaborate?

PC: In the Team Talk Jan was trying to do her job as a manger, they were disagreeing on everything

14) PD: They?

PC: Richard, Barry, Hitesh and Neelam. I don't want to put people in trouble. Everyone is a nice person, I did not hear Barry and Hitesh raising their voices.

15) PD: How were they talking?

PC: Raised voices, it made me feel uncomfortable. I was shaking when I came home.

16) PD: How was Jan?

PC: She kept her cool, I gave her credit for that

17) PD: What things, areas or topics were discussed?

PC: Routes. She had a lot of work cause of the Sat Nav, it was a hard time to come in. She knew how hard it was to get everyone involved so she was trying to do it all herself. What she got was rejection, it wasn't nice. It was a mistake not to delegate tasks, I understand why she didn't as she wanted to keep the peace. That's just my view."

111 At page 584, the record of the interview of Mr Hadley conducted by Mr Day contained this passage.

"SH: ... . It became a gang mentality against one person. One would start then the others would join in and gang up.

20) PD: When you say gang who is this?

SH: Neelam, Hitesh and Richard a little (one outburst) who apologised later. The next morning.

21) PD: To confirm, Neelam and Hitesh?

SH: Yes

PD: I have no more questions for you. I would like to say thank you for being honest and open. Is there anything else you would like to add to add?

SH: (Long think) I am new and would like to thank people as they have supported and helped me.
I disagree with the behaviour towards Jan and she did not deserve it. She was new and was not given much help with routes. Her life was made hard for someone new.
It seemed like a witch-hunt.

22) PD: Witch-hunt?

SH: To get Jan out."

112 On 16 October 2018, Mr Williams sent the claimant both of Mr Day's reports and their appendices under cover of the letter at pages 593-594. The first part of the letter was in these words.

> "I am writing to inform you that you are required to attend a formal meeting under the Department's Discipline Procedure.
>
> The formal meeting will consider the allegation/s that you did not following [sic] Agencies policies when dealing with sensitive data, including unauthorised and unsecure copying of Data involving the Agency and it's staff at some time between December 2017 and march 2018.
>
> The report of Paul Days investigation into your alleged misconduct has been sent to me to consider whether misconduct/discipline action should be taken. I enclose a copy of this report and a further supplementary report which may only be shared with your companion. Sharing it with other individuals may be viewed as serious misconduct.
>
> At the end of the meeting I will decide what further action to take. I must make you aware that the allegations concerning you not following Agencies policies may result in your dismissal, other penalty or no further action."

113 The meeting was originally intended to take place on 26 October 2018 but it was put back at the claimant's request and it occurred on 5 November 2018. Mr Williams' witness statement contained a long passage describing what happened

at the meeting of 5 November 2018, but that was based on the contemporaneous notes of that meeting at pages 597-608. At page 599, there was this passage (the reference to "RW" being to Mr Williams, the reference to "NL being to the claimant, and the reference to "JM" being to Mr Moloney).

> "RW - I would like to make reference to the Supplementary report
>
> NL - I am not prepared to discuss anything to do with the supplementary report. I do not feel that it is relevant to this meeting.
>
> RW - OK. But I am going to ask anyway. Tony Ausano has said that you constantly criticise Jan Vear-Altog for one thing or another. Scott Hadley says your behaviour towards Jan seemed like a witch-hunt. Do you want to respond to that?
>
> JM - this is not relevant. It's a different matter - peoples' relationships. We will argue that the data is not relevant to the relationships.
>
> We will argue whether in fact the information is data, as I will argue later on.
> RW - Let me clarify my position on that point. I need to make a decision on
>
> > Was there a breach of policy?
> >
> > If there is will it be necessary to impose a sanction?
> >
> > Will the matter be resolved in a way that will allow all to work together properly in the future?
>
> JM - I make an appeal to the Caseworker (MB). This meeting is about misuse of data. We will conclude that there has been no breach. It is after the fact where people go, we must deal with the strict hear and now. Even if the Supplemental report said that all relationships were ok it wouldn't help decide if a data breach occurred."

114 As that passage shows, the claimant refused to answer questions arising from the content of the supplemental report. When Mr Moloney was being cross-examined before us, he said this:

> "I remember that Neelam said she had been given clear legal advice and was going to stick to that advice in the meeting."

115 Mr Williams decided that the claimant should be dismissed. His reasons for her dismissal were in his letter dated 8 November 2018 at pages 609-615. The most important passage in that letter was on the final two pages. It was this.

> "A key consideration for me is to establish whether you have been looking for ways, as witness statements suggest, to destroy or seriously damage the mutual relationship between you and your work colleagues, and in

particular Jan Vear-Altog. There are inconsistencies with the witness statements, you told me you took the photos and contacted Joe Wildash about a week later. Hitesh Umradia says you contacted Joe Wildash on the same day.

Richard Miller says he discovered the book on Jans desk, Hitesh Umradia says he discovered it.

The timings you have given me do not fit in with what the photos show, i.e. sat-nav boxes on the desk, test routes on the desk and blank pages in the book, which are no longer blank and contain entries which appear to have been written in January.

It concerns me that witnesses indicate a behaviour from you that appears to be destroying the working relationships in the office. I question how the book was found, as there are inconsistencies I am not clear as to what is the correct version of events.

You were not prepared to provide any response or mitigation to the allegations made and, despite me giving you several opportunities, you were adamant you would not respond.

In conclusion I am satisfied that you have breached the acceptable use of IT and communications equipment policy. You have not handled personal data appropriately.

There are several areas of inconsistency with statements you have made compared to other evidence, particularly around the timing of the photos being taken. Integrity is fundamental to the driving examiner role, I am not satisfied that you have set out the facts and relevant issues truthfully.

This means that I cannot rely on you to be honest and respectful. You appear to have conducted yourselves in a manner calculated to destroy or seriously damage the mutual relationship of confidence and trust between you and your Manager. I believe the way you have handled the personal data and stored it to be a part of that calculated behaviour and an acceptable working relationship between you and the DVSA is irrecoverable."

116 For the sake of completeness, we record that on page 612, Mr Williams wrote this:

> "The evidence above indicates to me that it is probable the photos were taken in December, although this is not proven conclusively, the balance of probability is weighted towards this conclusion."

Mr Day's knowledge of the claimant's claim in 2010

117 Mr Day's oral evidence was that he did not know until these proceedings had been commenced that the claimant had made a claim to an employment tribunal in 2010. We accepted that evidence.

The claimant's appeal against her dismissal

118 The claimant appealed against her dismissal. She did so in the letter at pages 616-619. There were 14 grounds of appeal. Ms Cheryl Robinson heard the appeal, which was first intended (as stated in the letter from Ms Robinson at page 620, dated 23 November 2018) to take place on 6 December 2018. At the claimant's request, the hearing of the appeal was put back to 5 February 2019. The notes of the appeal hearing were at pages 638-647. The hearing last two hours. During it, the claimant responded to the contents of the supplementary report of Mr Day and to the proposition that the photographs of Mrs Vear-Altog's notebook were taken by the claimant "before February": at page 646, the claimant said that that was not right.

119 Ms Robinson dismissed the claimant's appeal, stating that outcome and the reasons for it in the letter dated 13 February 2019 at pages 648-656. Ms Robinson did not give oral evidence to us, although she had made a witness statement, which was put before us. It contained (in particular, but not only, in paragraphs 21-24) a cogent and carefully-reasoned rationale for dismissing the claimant's appeal against the decision of Mr Williams to dismiss her. What was said in the witness statement added to the content of the letter at pages 648-656. We asked Mr Allsop why Ms Robinson was not called to give oral evidence. He said that (1) she had retired on 29 April 2019 and now lived for part of the time in Spain, (2) she had refused to attend the hearing of a claim made by Mr Umradia, and (3) as a result, the respondent had not again approached her with a view to pressing her to attend the hearing which was eventually heard by us.

<u>The relevant law</u>

Direct discrimination within the meaning of section 13 of the EqA 2010

120 A claim of direct discrimination within the meaning of section 13 of the EqA 2010 is of less favourable treatment because of a protected characteristic than would have occurred if the claimant had not had that protected characteristic. This is a claim of an unlawful motivation, the motivation being the fact that the claimant had the protected characteristic in question. Proving a person's motivation is usually difficult, for obvious reasons. That is why section 136 of the EqA 2010 was enacted. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

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

121 When applying section 136, it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's evidence about, but not its explanation for, the treatment. That is clear from paragraphs 19-47 of the judgment of Leggatt JSC (with which Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblin agreed) in the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] ICR 1263.

122 However, as the House of Lords said in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, in some cases the best way to approach the question whether or not there has been direct discrimination within the meaning of section 13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred.

123 If there is no evidence from which the inference could be drawn that a claimant's treatment was to any extent because of a protected characteristic, then the claim of direct discrimination is likely, if not very likely, to fail.

124 Claims of direct discrimination because of disability rarely succeed. That is because it is rare for employers to treat disabled employees less favourably simply because of their disability. Rather, if the claim of a breach of the EqA 2010 in relation to the claimant's claimed protected characteristic of disability were to succeed then it would be most likely to succeed under section 15 or section 20 of that Act. In fact, a claim of a breach of section 20 is less straightforward to make than a claim of a breach of section 15, and in many, if not most, cases, if a claim of a breach of one of them succeeds then the other will do so also, but if the claim of a breach of one of them fails then the other will also fail. That is clear as a matter of principle but was helpfully stated by Elias LJ in *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2016] IRLR 216.

Section 15 of the EqA 2010

125 We therefore turn to section 15 of the EqA 2010. It provides that:

"(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."

126 In *Pnaiser v NHS England* [2016] IRLR 170, Simler P (as she then was) sitting in the EAT gave (in paragraph 31 of her judgment) the following guidance about the manner in which the question whether there has been unfavourable treatment for the purposes of section 15 of the EqA 2010 should be addressed:

> "In the course of submissions I was referred by counsel to a number of authorities including *IPC Media Ltd v Millar* [2013] IRLR 707, *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14/RN and *Hall v Chief Constable of West Yorkshire Police* [2015] IRLR 893, as indicating the proper approach to determining section 15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:
>
> (a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. 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.
>
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).
>
> (d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment,

and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability".

> Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

127 There is the following helpful summary of the applicable principles in paragraph L[377.01] of *Harvey* concerning the question whether any unfavourable treatment "is a proportionate means of achieving a legitimate aim":

> "The EAT in *Hensman v Ministry of Defence* UKEAT/0067/14/DM, [2014] EqLR 670 applied the justification test as described in *Hardy and Hansons Plc v Lax* [2005] EWCA Civ 846, [2005] IRLR 726, [2005] ICR 1565 to a claim of discrimination under EqA 2010 s 15. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. (Applied *Monmouthshire County Council v Harris* UKEAT/0010/15 (23 October 2015, unreported)). As stated expressly in the EAT judgment in *City of York Council v Grosset* UKEAT/0015/16 (1 November 2016, unreported), the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in *Grosset* ([2018] EWCA Civ 1105, [2018] IRLR 746) upheld this reasoning, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'."

Section 20 of the EqA 2010

128 Section 20 provides so far as relevant:

> "(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."

Victimisation

129 Section 27 of the EqA 2010 provides:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because–

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act–

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act."

130 The word "detriment" in that section is applied from the claimant's and not the alleged victimiser's perspective: *St Helens Metropolitan Borough Council v Derbyshire* [2007] UKHL 16, [2007] ICR 841.

131 It was indicated by Underhill LJ in paragraph 49 of his judgment in *Chief Constable of Greater Manchester Police v Bailey* [2017] EWCA Civ 425 (with which the other two members of the court agreed) that claims of direct discrimination within the meaning of section 13 of the EqA 2010 and of victimisation within the meaning of section 27 of that Act require what is in substance the same approach when determining "what was the reason why the respondent did the act complained of".

Protection against detrimental treatment, and dismissal, for "Whistleblowing"

132 A claim of detrimental treatment for "whistleblowing" is made under section 47B of the ERA 1996. In order to succeed in claiming such detrimental treatment, an employee must show that he or she made a disclosure falling within section 43A of the ERA 1996. That means a disclosure falling within section 43B of that Act that is made in accordance with sections 43C-43H of that Act (and making the disclosure to one's employer is within sections 43C-34H). Section 43B provides so far as relevant:

'In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following— ...

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, ...

(d) that the health or safety of any individual has been, is being or is likely to be endangered'.

133 The approach which is required to be taken by an employment tribunal when it is applying that section was stated most clearly and helpfully by the Court of Appeal in *Chesterton Global Limited v Nurmohamed* [2017] EWCA Civ 979, [2018] ICR 731. In paragraph 8 of his judgment (with which Beatson and Black LJJ can be taken to have agreed: see paragraphs 40-45 of the report), Underhill LJ said this:

> "Those provisions were subject to some exegesis by this Court in *Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] ICR 1026. Two points in particular are emphasised in that case, though in truth both are clear from the terms of the section itself:
> (1) The definition has both a subjective and an objective element: see in particular paras. 81-82 of the judgment of Wall LJ (pp. 1045-6). The subjective element is that the worker must believe that the information disclosed tends to show one of the six matters listed in sub-section (1). The objective element is that that belief must be reasonable.
> (2) A belief may be reasonable even if it is wrong. That is well illustrated by the facts of *Babula*, where an employee disclosed information about what he believed to be an act of criminal incitement to religious hatred, which would fall within head (a) of section 43B(1). There was in fact at the time no such offence, but it was held that the disclosure nonetheless qualified because it was reasonable for the employee to believe that there was."

134 Having discussed (in the helpful passage at paragraphs 9-17 of his judgment) the legislative history, Underhill LJ referred in paragraphs 27-31 to the "nature of the exercise required by section 43B(1)". At the end of paragraph 32 of his judgment, Underhill LJ said this:

> "Mr Reade [i.e. Mr David Reade QC, counsel for the employer] emphasised that it was not his position that a disclosure affecting the personal rights of a worker could not also, on the facts of a particular case, be in the public interest, as indeed the Minister made clear. A disclosure, say, which tended to show that hospital doctors were being required to work excessive hours might well be in the public interest, as well as in the personal interests of the doctors themselves, because of the risk to patients; but that would be because of the nature of the disclosure, not because of the number of doctors affected."

135 In paragraph 34 of his judgment, Underhill LJ recorded that Mr James Laddie QC, counsel for the claimant employee:

> 'suggested that the following factors would normally be relevant (I [that is, Underhill LJ] have paraphrased them slightly):
>
> (a) the numbers in the group whose interests the disclosure served – see above;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer – as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far.'

136 The nub of Underhill LJ's judgment was in paragraph 37, which was in these terms:

> "Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character [Endnote 5: Although disclosures tending to show breaches of the worker's own contract are the paradigm of disclosures of a "private" or "personal" character, they need not be the only kind: see the Minister's reference to disclosures "of minor breaches of health and safety legislation … of no interest to the wider public".], there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

137 If a protected disclosure within the meaning of section 43A of the ERA 1996 is made under section 47B of that Act, then section 48(2) of that Act places on the respondent the burden of proving "the ground on which any act, or deliberate failure to act, was done". However, a detriment within the meaning of that section

must (applying *Ministry of Defence v Jeremiah* [1980] ICR 13) be something which a reasonable person would say was a detriment.

Unfair dismissal for whistleblowing

138 Section 103A of the ERA 1996 provides that a dismissal the reason or principal reason for which is that the employee made a disclosure within the meaning of section 43A of that Act, is automatically unfair.

Unfair dismissal within the meaning of section 98 of the ERA 1996

139 The first question for a tribunal determining a claim of unfair dismissal within the meaning of section 98 of the ERA 1996 is what was the reason for the claimant's dismissal. That is a result of subsections (1) and (2) of that section which, so far as relevant, provide this:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it— ... (b) relates to the conduct of the employee".

140 In deciding what is the reason for an employee's dismissal, the following statement of Cairns LJ In *Abernethy v Mott Hay and Anderson* [1974] ICR 323, at 330B-C, is applicable.

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

141 Where the employer has satisfied the tribunal that the reason is a potentially fair one, the question of the fairness of the dismissal falls to be determined under section 98(4) of the ERA 1996, which provides this:

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a

sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

142 In a claim of unfair dismissal where the tribunal concludes that the reason for the dismissal was the claimant's conduct, the following issues arise.

142.1 Did the employer, before concluding that the employee had done that for which he or she was dismissed, carry out an investigation which it was within the range of reasonable responses of a reasonable employer to carry out? The best authority in that regard is the decision of the Court of Appeal in *J Sainsbury plc v Hitt* [2003] ICR 111.

142.2 Were there reasonable grounds for concluding that the claimant had committed the conduct for which he or she was dismissed? The following statement of the applicable principles in *British Home Stores v Burchell* [1978] IRLR 379 shows why that question needs to be answered, and how it has to be answered (although the third question stated in the following extract is the predecessor to the question which we have stated in the preceding sub-paragraph above; the correct test is as stated in that sub-paragraph).

> "What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

142.3 Had the employee been sufficiently warned that the conduct for which he or she was dismissed might lead to his or her dismissal?

142.4 Was the employee given proper warning about the matters which would be in issue at the disciplinary hearing at which the decision might be made that the employee should be dismissed? In this regard the decision of the Court of Appeal in *Strouthos v London Underground Ltd* [2004] IRLR 636 needs to be taken into account. Pill LJ gave the leading judgment in that case, and paragraphs 6-12 and 41 are the most important ones of that judgment. May LJ's judgment was helpful

too, but we saw that it was to the same effect as those paragraphs of Pill LJ's judgment. Dyson LJ simply agreed that the appeal should be allowed, implicitly agreeing with both of those judgments. In paragraph 12, Pill LJ summarised the position thus:

> "It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge."

143 The final question which will then need to be answered is whether the dismissal of the claimant for the conduct for which he or she was in fact dismissed was outside the range of reasonable responses of a reasonable employer.

Time limits

144 Claims of discriminatory conduct contrary to section 39 of the EqA 2010 must as a result of section 123(1) of that Act be brought within three months (extended as necessary by any period of early conciliation) unless it is just and equitable (within the meaning of section 123(3)(b) of that Act) to extend time. If there is conduct extending over a period within the meaning of section 123(3)(a) of the EqA 2010, then the time limit starts to run from the end of that period. There is a body of case law relating to the concept of "conduct extending over a period". It includes the decision of the Court of Appeal in *Hendricks v Commissioner of Police for the Metropolis* [2003] ICR 530. There is in paragraph L[828] *Harvey on Industrial Relations and Employment Law* this helpful summary of one of the key cases.

> "Where a series of acts are alleged to amount to discrimination (or indeed harassment or victimisation), a finding that one or more was not discriminatory will mean that it cannot be considered to be part of a continuing act. This was the conclusion of the EAT in *South Western Ambulance NHS Foundation Trust v King* [2020] IRLR 168. Relying on her grievance as a protected act, the claimant contended that the investigation of her grievance, its dismissal and dismissal of her appeal were acts extending over a period. The first was found to be discriminatory, the remainder were not and in these circumstances the EAT held there could not be a continuing act under EqA 2010 s 123. As only the dismissal of the grievance appeal had occurred within the primary limitation period, the complaint of victimisation was out of time. Citing from *Hendricks*, Choudhary P warned '… that reliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time. The claimant must still establish constituent acts of discrimination or instances of less favourable treatment that evidence that discriminatory state of affairs.' (at [36]).

145 The factors to be taken into account in determining what is "just and equitable"

for the purposes of section 123(3)(b) of the EqA 2010 are subject to even more case law than that which relates to the question whether or not there has been conduct extending over a period. *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 contains, in the headnote, a helpful comment of Sedley LJ:

> "There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing employment tribunal proceedings, and Auld LJ is not to be read as having said in *Robertson* [i.e. *Robertson v Bexley Community Centre* [2003] IRLR 434] that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it."

146 *British Coal Corporation v Keeble* [1997] IRLR 336 has in the past been understood as being to the effect that the factors relevant when applying section 33 of the Limitation Act 1980 are to be applied in determining whether it is just and equitable to permit a claim to be made outside the primary time limit of three months (extended, if it is commenced before that period of three months ends, by any period of what is now called "early conciliation", i.e. by reason of section 140B of the EqA 2010).

147 However, in paragraph 37 of his judgment in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 27, [2021] ICR D5, with which Moylan and Newey LJJ agreed, Underhill LJ said this:

> 'The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes [in ([1995] UKEAT 413/94]) "the length of, and the reasons for, the delay". If it checks those factors against the list in [*British Coal Corporation v Keeble* [1997] UKEAT 496/98, [1997] IRLR 336], well and good; but I would not recommend taking it as the framework for its thinking.'

148 Claims of detrimental treatment within the meaning of section 47B are made under section 48 of that Act, subsection (4)(a) of which provides that 'where an act extends over a period, the "date of the act" means the last day of that period'. If a claim is made outside the primary limitation period of three months (extended as necessary by any early conciliation) then it will be out of time and therefore outside the jurisdiction of the tribunal unless it was not reasonably practicable to make it within the primary limitation period of three months (extended by any

early conciliation) and it was made within a reasonable period of time after the expiry of that period.

Our conclusions on the claims made here

149 Taking the claims in the order in which they were set out in the list of issues, our conclusions on the facts relating to them were as follows.

Paragraph 4a (set out in paragraph 3 above)

150 There was nothing in the evidence before us, nor was there in our findings of fact stated in paragraphs 37-41 above, anything from which we could draw the inference that the failure to appoint the claimant to the CDO of LDTM in August 2017 had anything to do with the claimant's race, or her disability. We concluded on the evidence before us that it had nothing whatsoever to do with either of those protected characteristics.

Paragraphs 4b-4d

151 Given the evidence to which we refer and our findings of fact stated in paragraphs 83-93 above, we concluded that (1) Mr Perkins' decision to instigate disciplinary proceedings against the claimant, (2) his decision that she should be suspended and (3) his acts towards her when she was suspended had nothing whatsoever to do with the claimant's race or the fact that she was disabled. There was nothing in our findings of fact from which we could draw the inference that they were affected by either of those protected characteristics, and in any event we were satisfied on the evidence before us (including Mr Perkins' oral evidence) that they were not so affected.

Paragraphs 4e and 4f

152 As we say in paragraph 96 above, we found Mr Day's investigations to have been carried out in a straightforward way and the reports which resulted were in our judgment objectively justified. In those circumstances, there was nothing in our findings of fact from which we could draw the inference that either Mr Day's investigation or his reports of that investigation were affected by either of those protected characteristics, and in any event we were satisfied on the evidence before us (including Mr Day's oral evidence) that they were not so affected.

Paragraphs 4g and 4h

153 Given the evidence and our findings of fact to which we refer in paragraphs 97-116 above, we concluded that neither the manner in which Mr Williams conducted the disciplinary hearing nor his decision that the claimant should be dismissed were in any way affected by either of her protected characteristics. That was because there was nothing in the circumstances as we found them to be which would have justified us in drawing the inference that the claimant's dismissal was to any extent because of either her race or her disability, and

because in any event, we concluded, there was before Mr Williams cogent evidence of that for which she was in fact dismissed, which was, we concluded, having heard from him, solely her conduct as described in the passage from his letter of 8 November 2018 set out in paragraph 115 above. In addition, we saw nothing in the evidence before us from which we could draw the inference that the manner in which Mr Williams conducted the disciplinary hearing was to any extent tainted by discrimination because of the claimant's race or her disability, and we concluded on the balance of probabilities, having heard from Mr Williams, that it was not so tainted.

Paragraph 5a (set out in paragraph 4 above)

154 The claimant was not required by Mr Perkins to use annual leave for her medical appointments in 2010. This was clear from the factors which we have set out in paragraphs 26-33 above.

Paragraph 5b

155 As we say in paragraph 150 above, we concluded that the failure to appoint the claimant to the CDO of LDTM in August 2017 had nothing whatsoever to do with her disability.

Paragraph 5c

156 The nature and tone of the meeting of 4 October 2017 was, as we say in paragraph 60 above, entirely appropriate and in no way was Ms Morgan hostile towards the claimant.

Paragraph 5d

157 There was nothing wrong, in any way, with the issuing of an attendance warning by Ms Morgan on 26 October 2017. In our view, it was a proportionate means of achieving the legitimate aim of encouraging the claimant to attend work more frequently than she in fact was attending.

Paragraph 5e

158 Given that the warning was itself lawful, i.e. not in breach of section 15 of the EqA 2010, dismissing the claimant's appeal against it was also not a breach of that section.

Paragraph 5f

159 The fact that Mrs Vear-Altog left on her desk in view of anyone who went behind it information (in her personal notebook) relating to the claimant's disability was in our judgment not unfavourable treatment by Mrs Vear-Altog because of something arising in consequence of the claimant's disability within the meaning of section 15 of the EqA 2010. It was, rather, an inadvertent leaving out of that

information in such view. For the avoidance of doubt, that meant that we concluded that it was not done by Mrs Vear-Altog to any extent because of, that is to say in our judgment it was to no extent caused by, the claimant's disability.

Paragraph 5g

160 The same was true of the suspension of the claimant. It too was not unfavourable treatment because of something arising in consequence of the claimant's disability. In fact, the claimant was, we found, suspended purely because Mr Perkins genuinely believed that she could no longer be trusted. We found that belief to be reasonably held, but that is not material here.

Paragraph 5h

161 Equally, the claimant's dismissal was in no way connected with her disability. Mr Williams' decision that the claimant should be dismissed was based (we concluded, as we have said in paragraph 153 above) solely on her conduct as described by him in the passage set out in paragraph 115 above.

Paragraph 6

162 The issue in paragraph 6 (which as stated was simply that which arises where applicable because of section 15(1)(b) of the EqA 2010) did not arise because we found no treatment within the meaning of section 15(1)(a) of the EqA 2010.

Paragraph 7 (set out in paragraph 5 above)

163 The first two claimed PCPs were, we agreed, PCPs within the meaning of section 20(3) of the EqA 2010. However, we could not accept that the third or fourth such claimed PCPs were within that subsection. We could not see how the claimant's suspension or her dismissal were PCPs within the meaning of section 20(3), but in any event we found (as stated in paragraphs 151 and 153 above) that neither the claimant's suspension nor her dismissal were to any extent related to her disability.

Paragraph 8 (set out in paragraph 5 above)

164 That led to the inevitable conclusion that there was no failure to take a reasonable step within the meaning of section 20(3) of the EqA 2010 by failing to do the things referred to in paragraphs 8d and 8e of the list of issues. That was because (as we have said in the preceding paragraph above) the claimant's suspension and dismissal were in no way related to her disability.

165 The other adjustments, stated in paragraphs 8a-8c, were in our view not reasonable adjustments within the meaning of section 20(3) of the EqA 2010. In our view, those things which the respondent did by way of making allowances for the claimant's disability and adjusting the respondent's attendance procedure for that disability, were at least sufficient to satisfy the requirements of section 20(3).

As for the extension of the period of "one on one off" tests, we saw no justification on the facts before us for such extension. In fact, even by the time of the claimant's suspension, as we record in paragraph 57 above, that period had not been curtailed.

Paragraph 9a (set out in paragraph 6 above)

166 While the parties agreed that the making by the claimant of a claim to an employment tribunal in 2010 was a protected act within the meaning of section 27(2) of the EqA 2010, as we say in paragraph 21 above, there was no evidence before us about the content of that claim.

Paragraphs 9b and 9c

167 We found it hard to see how telling Mr Wildash about the leaving out by Mrs Vear-Altog of her notebook on her desk could properly be said to be a reference of any sort to the EqA 2010. In fact, as he recorded, (see paragraph 83 above), her sole focus was the data protection legislation. The fact that the notebook had in it an express reference to the EqA 2010 was incidental. In those circumstances and on the facts before us we concluded that complaining that the notebook had been left out on Mrs Vear-Altog's desk was not a protected act within the meaning of section 27(2) of the EqA 2010. As a result, we address the claim of victimisation within the meaning of section 27(1) of that Act on the basis that there was only one protected act within the meaning of section 27(2) for the purposes of the claims made in paragraph 10 of the list of issues.

Paragraph 10a (set out in paragraph 7 above)

168 In the circumstances to which we refer in paragraphs 34-39 above, Mr Perkins did not stop approving the claimant's expenses in 2015. In any event, we concluded on the basis of all of the evidence before us that whatever Mr Perkins did in that regard, he did not do it to any extent because the claimant had made a claim to an employment tribunal in 2010. For the avoidance of doubt, we accepted that Mr Perkins knew in 2010 that the claimant had made a claim to an employment tribunal in that year.

Paragraph 10b

169 As we say in paragraph 154 above, the claimant was not required by Mr Perkins to use annual leave for her medical appointments in 2010.

Paragraph 10c

170 Mr Perkins' decision to instigate an investigation into the claimant's conduct towards Mr Loizou was, given the text set out in paragraph 43 above, objectively justified, and there was in the circumstances before us nothing from which we could draw the inference that that decision was to any extent motivated by the fact that the claimant had made a claim to an employment tribunal in 2010. In

any event, having heard from Mr Perkins, we concluded that the fact that the claimant had made that claim had nothing to do with his decision to instigate the investigation (which was carried out by Mr Day) into that alleged conduct of the claimant, alleged, that is, by Mr Loizou.

Paragraph 10d

171 Given our conclusions stated in paragraphs 49-51 above, we saw nothing in the circumstances from which we could draw the inference that the fact that Mr Perkins decided that Mrs Vear-Altog should be appointed to the CDO post of LDTM in August 2017 had anything to do with the fact that the claimant had made a claim to an employment tribunal in 2010. In any event, we were persuaded on the balance of probabilities on the evidence before us that it had nothing to do with that fact.

Paragraphs 10e and 10f

172 Given our finding stated in paragraph 60 above, we concluded that there was no detrimental treatment within the meaning of section 39(2)(d) of the EqA 2010 in the meeting of 4 October 2017. But in any event, as stated in paragraph 61 above, Ms Morgan did not know of the claimant's claim to an employment tribunal of 2010. Thus the claim made in paragraphs 10e and 10f were not well-founded and had to fail.

Paragraph 10g

173 Given our finding in paragraph 70 above about Ms Nascimento's lack of knowledge of the claimant's 2010 claim, the claim recorded in paragraph 10g had to fail.

Paragraph 10h

174 Given our finding stated in paragraph 159 above (namely that the leaving out by Mrs Vear-Altog of the notebook was inadvertent), the claim stated in paragraph 10h had to fail.

Paragraphs 10i, 10j, 10l, and 10n

175 There was nothing on the facts that we found which could have justified us in drawing the inference that Mr Perkins did any of the things about which complaint was made in paragraphs 10i, 10j, 10l and 10n because the claimant had made a claim to an employment tribunal in 2010. In any event, we concluded on the evidence before us on the balance of probabilities that those things were done to no extent because the clamant had made that claim. Thus the claims stated in those paragraphs 10, 10j, 10l and 10n had to, and did, fail. For the avoidance of doubt, we concluded also that whatever he did, Mr Perkins was not influenced by the fact that the claimant was saying that she was going to make a claim to an employment tribunal, even though he knew that such claim was likely to

include a claim of disability discrimination.

Paragraph 10k

176 We did not see that there was any "failure to take timely action in respect of the Claimant's disclosures as to the Sat Nav Testing in both December 2017 and January 2018", but in any event there was nothing in the circumstances from which we could draw the inference that what Mrs Vear-Altog did or omitted to do in response to what the claimant said about the sat nav routes was to any extent done or omitted to be done because the claimant had made a claim to an employment tribunal in 2010. As a result, we concluded that the claim stated in paragraph 10k failed.

Paragraphs 10o, and 10p

177 Given our conclusion (stated in paragraph 117 above) that Mr Day did not know about the claimant's claim to an employment tribunal in 2010 until after these proceedings had begun, the claims stated in paragraphs 10o and 10p had to, and did, fail.

Paragraph 10m

178 There was nothing in the circumstances stated in paragraphs 94-95 above from which we could draw the inference that the refusal by Ms Robinson to deal with the claimant's grievances in so far as they were in time separately from the disciplinary proceedings, or her refusal to deal with those which were out of time, had anything to do with the doing by the claimant of any of her claimed protected acts. There were obvious explanations for the manner in which the claimant's grievance was dealt with and we concluded (despite the fact that we had not heard from Ms Robinson) that that manner was in no way affected by the fact that the claimant had in some way relied on or referred to the EqA 2010 (including by making a claim to an employment tribunal in 2010).

Paragraphs 10q, 10r and 10s

179 We could see nothing in the circumstances before us from which we could draw the inference that Mr Williams' conduct of the disciplinary hearing and the decision that she should be dismissed, were tainted to any extent by any extraneous consideration, whether the fact that she had made a claim in 2010, or that she was planning to make, or had made, this claim, or any other claimed unlawful reason. We concluded from his oral evidence and the documents before us that his decision was made purely because of the claimant's conduct referred to in the part of the letter at pages 609-615 set out in paragraph 115 above, and was for the reasons stated by him in that letter. We also concluded, both from his evidence and the contemporaneous documents, that the manner in which he conducted the disciplinary hearing and the terms of the dismissal letter were tainted by no unlawful motivation (using that word in the manner indicated in paragraph 68 above, as, for the avoidance of doubt, we do throughout these

reasons) of any sort (whether the claimant's race or her disability, or the fact that she had alleged short testing on the part of Mr Loizou, or the fact that she had made a claim to an employment tribunal in 2010 or might now make another such claim).

Paragraph 11a (set out in paragraph 8 above)

180 We accepted that the claimed public interest disclosure stated in paragraph 11a was one which fell within the meaning of section 43A of the ERA 1996. That was because a reasonable person would have concluded that short-testing a driver whose licence had been removed might cause a dangerous situation on the road subsequently.

Paragraph 11b

181 However, there was, in the circumstances to which we have referred in paragraphs 81 and 82 above, nothing dangerous in the circumstances relied on in paragraph 11b. Thus, that to which paragraph 11b referred was not a protected disclosure within the meaning of section 43A of the ERA 1996.

Paragraphs 11c and 11d

182 We concluded that the things referred to in paragraphs 11c and 11d of the list of issues were not things which, applying the principles stated by Underhill LJ in *Nurmohamed* as set out in paragraphs 134-136 above, the claimant could reasonably have believed that it was in the public interest to disclose. Thus, those things referred to in paragraphs 11c and 11d were not protected disclosures within the meaning of section 43A of the ERA 1996.

Paragraph 13

183 Paragraphs 10a and 10b concerned things which occurred before any claimed public interest disclosure was made. Thus the claims made in those paragraphs read with paragraph 13 had to, and did, fail.

184 We concluded that Mr Perkins initiated the disciplinary investigation into the claimant's conduct about which complaint was made in paragraphs 10c and 13, i.e. because of the allegation of bullying made by Mr Loizou, in no way because the claimant had asserted that Mr Loizou had carried out a short test. It was purely because of the allegation of Mr Loizou set out in paragraph 43 above. Thus, the claim stated in paragraphs 10c and 13 of the list of issues had to, and did, fail. Indeed, we concluded that none of Mr Perkins' actions towards the claimant were done to any extent done because the claimant had alleged short-testing on the part of Mr Loizou. That was because (1) there was nothing in the circumstances before us, including our above findings of fact, from which we could draw the inference that Mr Perkins' actions towards the claimant were to any extent done because the claimant had made that allegation, and (2) having heard and seen Mr Perkins give evidence, we were satisfied on the balance of

probabilities that those actions were not done to any extent because the claimant had made that allegation. That meant that the claims stated in paragraph 13 read with paragraphs 10i, 10j, 10l, and 10n also had to, and did, fail.

185 There was nothing in the evidence before us or in our findings of fact stated in paragraphs 49-51 above from which we could draw the conclusion that Mr Perkins' decision that Mrs Vear-Altog and not the claimant should be appointed to the post of LDTM was made to any extent because the claimant had asserted that Mr Loizou had carried out a short test. Having heard Mr Perkins' oral evidence, we were in any event satisfied on the balance of probabilities that that decision was to no extent so made. Thus the claim made in paragraphs 10d and 13 had to, and did, fail.

186 Given our finding stated in paragraph 62 above that Ms Morgan did not know about the allegation of short testing on the part of Mr Loizou, the claims made in paragraph 13 in reliance on the content of paragraphs 10e and 10f had to, and did, fail.

187 Given our finding in relation to Ms Nascimento's knowledge of the short testing allegation, stated in paragraph 71 above, the claim made in paragraph 13 in reliance on paragraph 10g had to, and did, fail.

188 Given that we have found in paragraph 159 above that Mrs Vear-Altog's leaving out of the notebook was inadvertent, we concluded that the claim made in paragraph 13 read with paragraph 10h had to, and did, fail.

189 The claim made in paragraph 13 read with paragraph 10k of the list of issues was in our judgment, given our findings of fact stated in paragraphs 79-82 above, about something which was not detrimental within the meaning of section 47B of the ERA 1996 (read in the light of *Ministry of Defence v Jeremiah* [1980] ICR 13). In any event, there was nothing in the evidence before us from which we could have concluded in the absence of an explanation from the respondent that the way in which Mrs Vear-Altog dealt with the claimant's allegation that the use of a sat nav on route 9 led to a dangerous situation, was to any extent done because the claimant had alleged that Mr Loizou had carried out a short test. There was, also in any event, in our judgment in the circumstances described by us in paragraphs 79-82 above no "[failure] to take timely action" in regard to the sat nav issues which the claimant raised as described in those paragraphs. Thus the claim made in paragraph 10k read with paragraph 13 had to, and did, fail.

190 There was nothing before us to indicate (so that we could draw the inference) that the manner in which Ms Robinson dealt with the claimant's grievance was to any extent connected with the fact that the claimant had alleged short testing by Mr Loizou. Despite the fact that we had not heard oral evidence from Ms Robinson, we concluded that the claim made in paragraph 13 read with paragraph 10m therefore failed.

191 There was nothing before us to indicate (so that we could draw the inference)

that the manner in which Mr Day carried out his investigations into the claimant's conduct and recorded those investigations was to any extent connected with the fact that the claimant had alleged short testing by Mr Loizou. In any event, having heard from Mr Day, we concluded that his conduct in that regard was not so connected. Thus the claims made in paragraph 13 read with paragraphs 10o and 10p had to, and did, fail.

192 Given our findings in paragraph 179 above, namely that (1) Mr Williams' decision that the claimant should be dismissed was made purely for the reasons stated in the letter dismissing the claimant, at pages 609-615, and (2) the way in which he conducted the disciplinary hearing and the terms of that letter were tainted by no unlawful motivation, including the fact that the claimant had made her assertion of short-testing on the part of Mr Loizou, the claims made in paragraph 13 read with paragraphs 10q, 10r and 10s had to, and did, fail.

The claim of unfair dismissal

193 Given our finding stated in paragraph 179 above, the claim of unfair dismissal within the meaning of section 103A of the ERA 1996 had to, and did, fail. Given that finding, the reason for the claimant's dismissal was her conduct and only the conduct referred to in the passage from the dismissal letter set out in paragraph 115 above.

194 As for the claim that the claimant's dismissal was unfair within the meaning of section 98(4) of that Act, we came to the following conclusions.

194.1 The claimant was, or should have been, aware that a serious breach of the civil service code of conduct could lead to her dismissal. Thus, she was sufficiently warned that the conduct for which we have found Mr Williams in fact dismissed her might lead to her dismissal.

194.2 There were reasonable grounds for concluding that the claimant had done those things of which Mr Williams found her guilty in the passage of the outcome letter set out in paragraph 115 above. For the avoidance of doubt, there were reasonable grounds for the conclusion set out in paragraph 116 above, which was to the effect that the claimant had taken photographs of the notebook which Mrs Vear-Altog had left out on her desk at the beginning of December 2017 (the most clear such ground being the evidence to which we refer in paragraph 104 above, namely the statement of Mrs Vear-Altog made to Mr Day and recorded on page 541).

194.3 The claimant was given sufficient (albeit oblique) warning that her conduct towards Mrs Vear-Altog was a major concern for Mr Williams, such that the authority of *Strouthos* was distinguishable, and we did distinguish it. That was because of the quotations set out in paragraphs 103-112 above, which showed in our judgment that the claimant was informed in advance of the disciplinary hearing which led to her

dismissal about the substance of the allegations against her. Plainly, it would have been rather better if Mr Williams had said that the data protection issue was the trigger for the supplemental investigation of Mr Day and that the major issue for Mr Williams was the background to the raising by the claimant of that issue. Ideally, Mr Williams would then have spelt it out that he was considering whether the claimant should be dismissed because of her conduct towards her colleagues, and in particular Mrs Vear-Altog since the latter became temporary LDTM, because that conduct appeared to be gross misconduct. However, those things were reasonably discernible from the passages set out in paragraphs 103-112 above, and the fact that the claimant had taken legal advice on whether she should respond to the content of the passages referred to in paragraph 104 above and in part set out in paragraphs 104-111 above, showed that she was well aware of the allegations and their importance. That fact undermined the claimant's claim that it was not fair to her (so that it was outside the range of reasonable responses of a reasonable employer) to consider those things at the disciplinary hearing of 5 November 2018. In any event, for the avoidance of doubt, we concluded that it was not unfair within the meaning of section 98(4) of the ERA 1996 to dismiss the claimant for conduct which was alleged in Mr Day's supplemental report. In any event, the claimant was able on appeal to respond to the content of that report without being in any doubt about its purport and its importance, and (see paragraph 118 above) she took up that opportunity.

194.4 The things which Mr Williams concluded the claimant had done, as stated in the passage from his letter of 8 November 2018 at pages 609-615 which we have set out in paragraph 115 above, constituted conduct which was, if it occurred, a serious breach of the civil service code.

194.5 In our judgment, in all of the circumstances as we found them to be and on the basis of what we say in the preceding subparagraphs above, the claimant's dismissal was within the range of reasonable responses of a reasonable employer.

195 For those reasons, the claim of unfair dismissal within the meaning of section 98(4) of the ERA 1996 failed.

Time issue

196 We considered the issue of limitation last. We did so in order to ensure that we had a full picture of all of the relevant events. In our judgment, there was no conduct or act extending over a period (within the meaning described in paragraph 10 above) in any respect. That was because we found no wrongful conduct on the part of the persons who did those things about which the claimant complained in these proceedings.

197 As for whether it was just and equitable to extend time for the making of any

claim that was made about events occurring before 26 June 2018, and whether it was reasonably practicable for the claimant to make a claim about any such events within three months of their occurring, we saw nothing in the circumstances which could have justified a conclusion that it was not reasonably practicable for the claimant to make a claim of detrimental treatment within the meaning of section 47B of the ERA 1996 within the primary limitation period of three months. That was because the claimant drew our attention to no evidence to support such a conclusion. She also was well aware of the possibility of making a claim to an employment tribunal, having done so in 2010, and at no time did she say to us that she was unaware of the three-month time limit for the making of such a claim. In addition, she accepted, when it was repeatedly put to her by Mr Allsop, the proposition that she had chosen not to make a claim under the EqA 2010 knowing about that time limit. Thus, in our judgment, it was not just and equitable to extend time for the making of a claim under the EqA 2010 about anything that occurred before 26 June 2018.

In conclusion

198 In conclusion, none of the claimant's claims succeeded. We therefore dismissed them all.

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Employment Judge Hyams

Date: 13 October 2023

SENT TO THE PARTIES ON

9 November 2023

FOR THE TRIBUNAL OFFICE