EMPLOYMENT TRIBUNALS

Claimant: Mrs T Fayokun

Respondent: Johnson and Johnson Medical Limited

Heard at: Reading **On: 6-17 February 2023**
10,11, 15 and 16 August 2023

Before: Employment Judge Gumbiti-Zimuto
Members: Mrs A Brown and Mrs F Betts

Appearances
For the Claimant: In person
For the Respondent: Mr P Gorasia, counsel

RESERVED JUDGMENT

1. The claimant's complaint that Alessandra Toro directly discriminated against the claimant by racially profiling her is well founded and succeeds.

2. The claimant's complaints of unfair dismissal, victimisation, harassment, direct discrimination on the grounds of religion or belief and race discrimination other than as set out above are not well founded and are dismissed.

REASONS

1. The claimant was employed by the respondent, a medical devices business latterly as a senior manager, global strategic insights, from 24 April 2017 until dismissal with effect in January 2020. By a claim form presented on 17 July 2019, following a period of early conciliation from 17 May 2019 to 16 June 2019, the claimant brought complaints of direct discrimination on the grounds of race, direct discrimination on the grounds of religion and belief, and victimisation. The claim is essentially about the whether the claimant was subjected to discrimination by the respondent and its employees in the period from the commencement of the claimant's employment and the commencement of the claim. The claimant has been given permission to include a complaint about her dismissal which took place in January 2020.

2. The claimant's application to add further respondents was refused. The claimant made an application to add Alessandra Toro, Pavi Gupta and Kyle

Conway as individual respondents. At the point that the application was made the time limit for presenting complaints against these individuals had passed. They were all named in the original claim form and their actions and potential liability must have been known to the claimant at the time of the commencement of the claims and no claim was made against them. The claimant was making a tactical decision in applying to add the individuals as claimants, the claimant stated that her purpose was to ensure that they attend the hearing. The respondent confirmed that it does not rely on the statutory defence contained in section 109 (4) Equality Act 2010. I refused the application to amend the claim as there was no prejudice to the claimant's claim or limitation on the remedy she seeks if the application is refused.

3. The final list of issues in this case is dated 6 April 2021. It is this document that the Tribunal has considered in determining the matters in dispute between the parties.

4. The claimant gave evidence in support of her own case and produced a lengthy witness statement. The respondent relied on the evidence of Alessandra Toro, Pavi Gupta, Kyle Conway, Lisa Roger, Wanda Hope, Ross Campbell, Rabina Kajla, and Elaine Murphy who all produced witness statements which were taken as their evidence in chief. The claimant also produced a witness statement from Adrian Mandipe who did not attend to give evidence. The Tribunal was also provided with a Trial Bundle of 3522 pages of documents. From these sources we made the following findings of fact.

5. The respondent, Johnson & Johnson Medical Limited, is a medical devices business which is part of the Johnson & Johnson Family of Companies.

6. The claimant was born in Nigeria and lived there until 2007 when she relocated to work in the United Kingdom. The claimant's employment with the respondent began on 24 April 2017 and terminated on 10 January 2020. The claimant was employed as "Senior Manager, Global Strategic Insights".

7. Initially the claimant reported to Alessandra Toro, who at the time was Director for Strategic Insights and Analytics. Alessandra Toro had been involved in the recruitment process for the claimant and states that following the claimant's interview she made the decision to hire the claimant. Alessandra Toro was aware that the claimant was born and raised in Nigeria and that she had previously worked in Nigeria before moving to the United Kingdom in 2007. Initially the claimant and Alessandra Toro both considered that they had a good relationship, and both gave evidence of shared moments when they supplied each other with collegial support, shared birthday lunches, exchanged gifts of snacks and discussed personal matters.

8. On 22 July 2017 the claimant had her first mid-year review with Alessandra Toro. The claimant is recorded as having made a "terrific start" "demonstrated a strong leadership and ability to connect and influence with key stakeholders and partners".

9. The claimant and Alessandra Toro met on the 7 February 2018 and 22 February 2018 to discuss the claimant's annual performance appraisal (the Year End Review).

10. By the time that the claimant's Year End Review was conducted there had been tension between her and Alessandra Toro arising from what the claimant describes as Alessandra Toro requesting or expecting the claimant to manipulate aspects of research and analytics projects and to cover up identified project errors. The claimant gives examples "Russia Growth Levers in October 2017", "UK CVue/Professional (ECP) Tracker" and "EMA P2P Research Set Up". The claimant's contention is that this led to the situation where, by the time the end of year review took place, Alessandra Toro was not giving the claimant objective and unbiased feedback.

11. Alessandra Toro denies the claimant's contentions and states that her feedback of the claimant in the year end review was "entirely positive on the "What". Alessandra Toro goes on to state that,

> "feedback on the "How" which also starts with positive feedback on what the Claimant had done well and goes on to give some development opportunities in terms of the claimant's communication style which was reflective of the feedback I had received from stakeholders relating to the claimant."

12. In the respondent's performance review process, the "What" is essentially what the claimant has achieved in the review period i.e., the extent to which the claimant met her deliverables. The "How" is essentially the manner in which the achievements have been carried out: i.e., looking at how the claimant had worked alongside other stakeholders in the business and engaged with them.

13. Prior to this end of year review, Alessandra Toro considers that she and the claimant had a good relationship and that it was not until around February 2018, around the time of the claimant's end of year performance review, that issues started to arise between the claimant and Alessandra Toro. It was also around this time that Alessandra Toro says that she provided the claimant with the result of her investigation into the complaint raised by the claimant about her compensation package with the respondent not matching what the claimant had been offered on recruitment.

14. In early December 2017 the claimant had raised with Alessandra Toro that HR had told her, on joining the respondent, that her bonus potential could be up to 40% but that she had come to realise that her maximum bonus potential was actually 20% (p488). Alessandra Toro raised this matter with HR who stated that it had been made clear to the claimant that her bonus potential was 20%. Alessandra Toro gave the claimant feedback on the outcome her investigations.

15. On 15 February 2017 the claimant sent an email to Alessandra Toro stating that she was *"snowed under at the moment with multiple priorities.*" A meeting took place at which the claimant and Alessandra Toro discussed the claimant's

workload. There are very different views of that meeting between the claimant and Alessandra Toro.

16. The claimant says that her workload during January - February 2018 was more intense than usual so she escalated things to Alessandra Toro and asked her for help, but she did not help. The claimant says that she explained that she could not take on more work; she was working round the clock, barely getting 4 hours sleep a day, and that she was not seeing her children; that she broke down in tears and warned Alessandra Toro to expect that all the balls the claimant was juggling would begin to drop because the claimant simply could not cope with taking more extra work at that point in time (a reference to the numerous projects that the claimant says she was working on simultaneously). The claimant says that Alessandra Toro's response was to scold her *"for not saying no to several of the project requests"*, however the claimant says that Alessandra Toro also gave her contradictory indications when she was "*scolding me for saying no to the Russia market sizing that was not my job"*.

17. Alessandra Toro recalls the meeting with the claimant on 15 February 2018 differently; during the meeting they discussed the claimant's workload priorities. Alessandra Toro says that during this meeting, the claimant took her through the claimant's work and Alessandra Toro says that she assisted the claimant to prioritise this.

> "In summary: (a) I recognised the importance of progressing the growth levers work and agreed with her that this should be a priority however that said, I explored with the Claimant ways that she could work smarter on this project and explained that she did not need to attend every meeting if she did not consider it an effective use of her time to do so. I explained that she should feel empowered as a senior manager to decline meeting invitations so long as she explained the reason for this. (b) Also on the growth levers project, the Claimant explained that she was having to amend the a slide deck too frequently. I considered that this was another example of the Claimant's tendency to seek false precision – I explained that she should not feel the need to tweak it every time as it would never be completely perfect but was supposed to represent a general approach. (c) With regards to the slide deck for the strat plan meeting, the Claimant was visibly stressed by Ms Allen having changed her request on the contents of the presentations and so this is when I said I would take one of the Claimant's presentations off her, would amend the slides and we could then co-present it. (d) With regard to another piece of work at point 4 of the Claimant's notes, I explained that this could be de-prioritised until March. (e) With regards to point 5 of the Claimant's list, I had received feedback that the Claimant had not engaged with this project for a number of weeks and so on that basis I did say that I thought the Claimant should speak with the project leaders at least to check in."[1]

[1] Alessandra Toro (AT) witness statement paragraph 55.

18. According to Alessandra Toro, following this conversation, the claimant said that she felt much more comfortable about her workload and that Alessandra Toro reassured the claimant that she should feel comfortable to raise any workload concerns to her and that she would do her best to help the claimant.

19. On 20 March 2018 the claimant and Alessandra Toro attended a "Strat Plan Workshop". The claimant and Alessandra Toro co-presented one session, the claimant made another presentation on her own. There is significant disagreement between the claimant and Alessandra Toro about the lead up the Strat Plan Workshop. The claimant explains how she and Alessandra Toro attended Strat Plan preparation meetings following which the claimant and Alessandra Toro would have debrief meetings to discuss *"how to carry out next steps"* during which the claimant was criticised about "*how I sat down in the meeting; how I spoke or I didn't speak; how I did not appear engaged; and her interpretation of my body language."* The claimant says that the meetings were used as a *"forum for dressing me down and became very abusive."*

20. The claimant refers specifically to an occasion after the 19 February 2018 Strat plan preparation meeting, when Alessandra Toro criticised the claimant's *"manner of speech and sitting down. And again said that my body language was offensive and said that I was not engaged with the meeting."* When the claimant challenged this she states that Alessandra Toro,

> "proceeded to berate me for not accepting feedback when she was only trying to help me get rid of my bad mannerisms. She said that I could not see myself and so it was up to her to tell me how I came across. She then told me what she said was a true story of an uncouth, unrefined lady in the corporate workplace who came into work with rumpled blouses, very tight clothes, with disgusting mannerisms such as picking nose and scratching different parts of her body whilst giving presentations. In the story, she claimed that it was only when that lady's line manager videoed the lady whilst giving a presentation to very senior customers and showed her the video, did the lady accept the feedback and allowed the manager to help her improve her ways. She told me that similar to the lady in her story, I was not seeing myself and how I came across to people. So she will help me improve my offensive mannerisms by always monitoring me and telling me. She emphasised that she was only trying to help me because many colleagues found my mannerisms offensive and so did not like me."

21. Alessandra Toro says that is untrue. In response to questioning about this allegation by the claimant Alessandra Toro stated that she never subjected the claimant to such criticism; that she did not criticise the claimant's mannerisms or identity; that she only provided the claimant with feedback about how she collaborated and communicated with others when she as under stress and during projects where she did not feel comfortable. Alessandra Toro states that her feedback to the claimant was never racially or religiously based.

22. Alessandra Toro also pointed out that the claimant did not complain to anyone about the alleged behaviour at the time and says that there would have been plenty of ways and occasions when the claimant could have complained about the various alleged behaviours that the claimant says were the way that she was being treated, if she felt that was the case. Alessandra Toro says that the claimant simply did not do so. Alessandra Toro said that the claimant was "*creating a* [false] *narrative based on a conversation about the Berlitz profile that I have apologised for and … creating a narrative of me being this person who berates you, harasses you, punishes you: none of those allegations are true*."

23. In April 2018 the claimant, Alessandra Toro and others were on a work trip to Jacksonville, Florida, USA. The claimant says that Alessandra Toro, on the first day of the trip ignored her. The claimant also refers to a mix up involving a breakfast meeting, this formed a topic of discussion in a one-to-one meeting that took place on their return to the UK. On the last day, after experiencing difficulties getting a Taxi to the airport, the claimant asked Alessandra Toro to assist her by booking an "Uber" to take her to the airport.

24. At a one-to-one meeting on 19 April 2018, the first after the trip to Florida, the claimant complains about the use by Alessandra Toro of a document that she describes as a "racial profiling document". The use of this document by Alessandra Toro had the effect of fatally poisoning the claimant's view of her relationship with Alessandra Toro. The claimant's account of the meeting and that of Alessandra Toro are at odds with each other.

25. The claimant says that at the very start of the one-to-one meeting she told Alessandra Toro that she wanted "*to discuss the breakdown in our communication and relationship"*. The claimant says that Alesandra Toro's response was to say: *"I know I've been poking you"*. Alessandra Toro then proceeded to explain to the claimant that she had *"researched Nigeria and realized that she was very different to Nigerians in many ways.*" She then went through a document she was holding and made a number of comments about differences between her and Nigerians including, Nigerians not keeping to time and "*I'm different from Nigeria*".

26. The claimant then says that having made her point, Alessandra Toro put the document aside on the table and moved on to other topics. The claimant says that Alessandra Toro told her that the negative Nigerian traits explained in the document were the reason she had been treating the claimant in the manner that she had been treating her before that meeting, and that she would continue to treat the claimant differently going forward.

27. The claimant says that she was very upset and very pained by what was said. As she was leaving the claimant took the document. The claimant says that in later meetings over the next four weeks, Alessandra Toro verbally abused her and reminded her that the negative Nigerian traits were the reason colleagues did not

want to work with the claimant. The claimant says that this was the point that she gave up on trying to repair her relationship with Alessandra Toro.

28. Alessandra Toro sees this encounter differently. After the claimant had made reference to them not communicating appropriately Alessandra Toro states that she showed the claimant the Berlitz report. Alessandra Toro says that the document described by the claimant as "racial profiling" was no such thing. Alessandra Toro states that she is a certified trainer for Berlitz "cultural fluency" which is designed to support people from different cultures in working together more easily understanding different cultural preferences in terms of working. The tool looks at working cultures in various countries.

29. After a difficult conversation with the claimant Alessandra Toro states that she had used the tool to make a comparison between herself, the claimant and others. The claimant says this was not true and the comparison was limited to her. The document that the claimant produced appears to support this claim and the comparison with other cultures appears to have been carried out later by Alessandra Toro. The claimant was identified as Nigerian for the purposes of the profile because Alessandra Toro thought that was how the claimant identified her working style. Alessandra Toro states: *"I found the reports obtained through this process to be helpful to me; for example, the fact that the Nigerian working profile was "fluid" was in contrast to my personal "fixed" preferences (page 1680); meaning that whereas I see deadlines as fixed and set in stone, this indicated to me that I should not adopt or assume the same approach with someone who identified with a Nigerian workstyle. In addition, the report assisted me in understanding that in contrast to my direct approach, the Claimant's preference (and the preference of my other direct reports) was an indirect approach (page 1684) and so I identified that I could try and scale back my approach to bridge the gap between myself and my direct reports."*

30. The claimant was the only person with whom these reports were shared. This took place in the meeting after the Jacksonville trip during which the claimant was given feedback about a number of matters that arose during the trip, namely the "breakfast meeting", the "Uber incident", and a matter relating to liaison with the Russian team.

31. In the meeting on the 19 April the claimant states that she was told by Alessandra Toro that she was technologically backwards, but this is denied by Alessandra Toro. It appears to the Tribunal that this dispute arises out of a discussion about the use of the Uber app, which Alessandra Toro was urging the claimant to use but the claimant was expressing her reluctance to do so. This part of the exchange is now perceived by the claimant as an indication that Alessandra Toro considered that the claimant was technologically backward however the Tribunal consider that it is not likely that this was said in so many words.

32. On 24 April and 4 May 2018, the claimant and Alessandro Toro exchanged emails concerning the claimant's business travel plans. This exchange is construed by the claimant in a negative way as to Alessandra Toro's responses while Alessandra Toro says that she was simply attempting to makes sure that the claimant's travel plans were in accordance with the respondent's travel policy which required that the claimant's contribution to the meetings had to be of importance in order to obtain approval.

33. At a weekly 1-2-1 meet on 30 April 2018 the claimant was told by Alessandra Toro that there were problems with her HOW, this is a reference to the respondent's appraisal system which looks at what was achieved by an employee and how it was achieved. The claimant states that she was told that this was something that had come from Pavi Gupta, Senior Director Global Strategic Insights, who wanted to have "*360 feedback*" to "*uncover the problems with my HOW*". During this meeting the claimant states that Alessandra Toro made reference to the claimant's "*negative Nigerian traits*".

34. The claimant and Alessandra Toro had other 1-2-1 meetings on 10 May and 14 May during which the claimant states that Alessandra Toro once more made reference to the claimant's "*negative Nigerian traits*" when discussing the request for 360 feedback.

35. The claimant was due to have another 1-2-1 meeting with Alessandra Toro and before the meeting she wrote an email to Alessandra Toro on 21 May 2018 (p1248) explaining why she was "*not keen to share my 360 feedback.*" In her email the claimant stated that Alessandra Toro had criticised the claimant to the extent that the claimant "*now dread meeting with you 1 on 1 as I'm certain there will be another attack on my personal identity or work."* The claimant listed a number of matters including an alleged reference to the claimant acting in a Human way; calling the claimant an African Lioness; making reference to stereotypes of Nigerians: all of which had a traumatic effect on the claimant.

36. The claimant and Alessandra Toro had a 1-2-1 meeting on the 21 May 2018, also attending this meeting by telephone was Pavi Gupta, Senior Director Global Strategic insights, who explained that he was attending the meeting because of the email that the claimant had sent to Alessandra Toro.

37. Pavi Gupta took charge of the meeting, stating that the claimant was wrong about there being hostility, harassment or discrimination against her from Alessandra Toro. The claimant says that Pavi Gupta then said that he would give the claimant an off-cycle pay increase to off-set the bonus issue that the claimant had previously raised with Alessandra Toro in December 2017.

38. Alessandra Toro states that she received the email of the 21 May and told the claimant that she did not feel comfortable having the conversation with the claimant 1-2-1 so she sent an email to Pavi Gupta requesting that he join the meeting.

During the meeting the claimant "*focussed on complaining about the cultural navigator profiling exercise"* and she also referenced *"continued dissatisfaction with her compensation package".* Alessandra Toro states that she considered that the conversation went well. Alessandra Toro states that the claimant did not mention the alleged African Lioness comment or the reference to the claimant dealing with a conversation in a human way. The claimant's account is that the "*racial profiling document was not discussed in this meeting".* The claimant further states that Pavi Gupta took charge of the meeting.

39. Pavi Gupta states that the claimant did not raise any allegations of race discrimination in respect of Alessandra Toro's conduct, Pavi Gupta did not consider that the profiling exercise an issue of race discrimination. Pavi Gupta and Alessandra Toro both state that the claimant and Alessandra Toro at the meeting on 21 May and the follow up meeting on 24 May agreed that they would work on rebuilding trust, to improve their working relationship.

40. On balance the Tribunal considers that it would have been clear to all concerned that the claimant was complaining about discrimination on racial grounds, it seems likely to us that it was such an interpretation of the email of 21 May 2018 that led Alessandra Toro to "*not feel comfortable have a conversation with her one-to-one*" and thus contacting Pavi Gupta and ask him to attend the one to one meeting.

41. Following the meetings of 21 and 24 May Alessandra Toro speaks of relations between her and the claimant being good: the claimant says that Alessandra Toro became extremely cold towards her, shutting her out by being reluctant to communicate and interact with her. The Tribunal consider that it is likely that nothing very much changed between the claimant Alessandra Toro as by the end of June she states that the claimant's attitude towards her was such that she was considering making a complaint.

42. In June 2018 Kyle Conway became the claimant's line manager but she continued to work with Alessandra Toro until about September 2018. On 18 July 2018 at a 1-2-1 meeting, for a mid-year review, the claimant told Pavi Gupta about her unhappiness about the manner in which Alessandra Toro behaved towards her and also raised the issue of her salary increase. The claimant states that she was told to move on from the issues with Alessandra Toro and to remind Pavi Gupta about the pay issue in September 2018.

43. The claimant says that at around this time June/July 2018 although Kyle Conway was aware of the problems in the relationship between the claimant and Alessandra Toro, he ignored it and distanced himself from any issues.

44. The claimant raised a grievance on 8 August 2018, in the grievance the claimant stated that she had been "*subjected … to hostility, racial abuse and bias*" by Alessandra Toro.

45. On the 15 August 2018 the claimant sent an email to Wanda Hope, Chief Diversity, Equity and Inclusion Officer. This led to a telephone conversation between the claimant and Wanda Hope in the course of which the claimant set out to her the discrimination she had suffered and the impact on her wellbeing. It is not part of Wanda Hope's role to investigate complaints and she listened to the claimant's issues and encouraged her to continue to address these matters in the grievance process.

46. The claimant and Pavi Gupta exchanged email in the period around 7-14 September 2018. The email exchanged showed that the claimant and Pavi Gupta had very different recollections of what had happened in the meeting of 21 May 2018 in particular whether the claimant had been promised an off cycle pay increase and whether the claimant had made complaints about racial bias.

47. Meetings to discuss the claimant's grievance took place between 13-19 September 2018. The claimant was sent a grievance outcome on 27 September 2018. The claimant considers that there was inexcusable delay in dealing with her grievance which had been lodged on 8 August. The claimant considers that the grievance investigation was "*botched*". She also complains about the manner in which the grievance outcome was delivered, a letter was read out to her at the grievance outcome meeting, but she was denied a copy of the letter and was subsequently a letter which was different to what was read out to her at the grievance outcome meeting. The claimant's grievance was not upheld.

48. In August 2018 Kyle Conway had asked the claimant to take over a project[2] from Alessandra Toro. The claimant considers that Alessandra Toro had "*doctored different parts aspects of the analytics"*. The claimant speaks of raising her concerns with Alessandra Toro (who told the claimant to "*make up my own numbers if the ones that she made up did not work*". The claimant says she then subsequently raised the issue with Kyle Conway who told the claimant to do her "*best to see it through for the year*".

49. The claimant began a period of sick leave on 1 October 2018, the claimant reported that she was suffering from work related stress. The claimant considers that her absence was caused by work and therefore that under the respondent's policy the absence should not have counted as part of the claimant's contractual sickness pay allocation.

50. Kyle Conway states that it was evident from the claimant's sick notes the reasons for her absence when it was work related stress. The claimant's fit notes were uploaded onto the respondent's system as was required by the respondent. Kyle Conway describes the claimant variously complaining of a number of health-related matters: headaches (June 2018), dizziness (July 2018), anaemia (July, September 2018). When the claimant was off sick in October 2018, he understood this to be "*caused by the traumatic experience at work which I took to be a*

[2] Go older/presbyopia volumetric project.

reference to the grievance process" and the claimant submitted a sick note which stated work related stress as reason for absence.

51. In October 2018 the claimant was awarded a Gold encore as recognition of her hard work for exhibiting Johnson and Johnson behaviours. While the claimant points out that this was not acknowledged by Kyle Conway: Kyle Conway contradicts her stating that in his performance meeting with her he was clear she had performed well in the delivery of her projects.

52. In February 2019 the claimant was given a year-end performance review rating of "Fully Meets/Partially Meets" by Kyle Conway. His justification was that from a "What" perspective the claimant fully met the expectations of her, however, from a "How" perspective he considered that there was an inconsistency in how the claimant approached projects. Kyle Conway states that:

> "I considered that the claimant was excellent at dealing with projects with her comfort zone or that she is passionate about, I did consider that when dealing with projects outside her comfort zone or which she did not have the same passion for, the claimant did not have the same attitude."

53. From 21 February 2019 the claimant was unable to work due to sickness. The claimant informed Kyle Conway that the sickness was caused by work and so she did not consider that it should count against the statutory and company allowances. Kyle Conway did not follow the process that the claimant wanted him to and so she states that she lost out because the wrong policy was used to manage her absence. The Tribunal find that Kyle Conway followed the respondent's policies.

54. On 19 February 2019 the claimant sent an email to Wanda Hope and others, stating that she had suffered workplace abuse reciting some of the history of her complaints of discrimination and complaining about the outcome of the grievance. Lisa Roger spoke to the claimant on 11 March 2019 to discuss the claimant's email. The claimant considers that Lisa Roger did nothing to help her but merely gave the appearance of helping her while not doing so at all. Lisa Rogers said that following her discussion with the claimant it was evident that the claimant did not want to engage with a formal grievance process and therefore there was little the respondent could do for the claimant if she was unwilling to engage with the grievance process.

55. The claimant submitted fit notes throughout her sickness absence. Later during her absence, 2 April 2019, the claimant was informed of the help available to the claimant through the respondent and of the grievance process should she wish to formalise her complaints.

56. Kyle Conway also kept in contact with the claimant at times reminding the claimant about the need for her provide further sicknotes. When the claimant objected to Kyle Conway communicating with her Lisa Roger from HR took over communicating with the claimant about the sickness management process.

57. In May 2019 the claimant approached ACAS for early conciliation which continued started on 17 May and finished on 16 June 2018, following the provision of an ACAS Certificate the claimant commenced proceedings against the respondent on the 17 July 2019.

58. The claimant and Kyle Conway continued to have intermittent contact in the period up to November 2019. There was a suggestion that a reference to Occupational Health should be made for the claimant. The claimant was informed that unless she agreed to a referral to Occupational Health by 7 November 2019 the respondent would invite the claimant to a formal capability meeting.

59. On 7 November 2019 the claimant was invited to a formal capability meeting. The claimant indicated that she wished to participate in the meeting in the capability process through written submissions. The respondent agreed that the claimant should provide her written submissions by 27 November 2019.

60. The claimant was asked to provide written submissions on her current state of health and wellbeing and capability to return to work in a full-time, part-time or phased capacity, the date of her expected return, the reasonable adjustments that the claimant believed she needed an indication of how long they would be required.

61. On the 27 November 2019 the claimant sent her written submissions.

62. In a letter dated 10 January 2020 the claimant was informed that she was dismissed. In the letter the respondent explained that as the claimant did not appear to have any foreseeable return to work date the respondent commenced the capability process. The respondent informed the claimant that they could not continue to employ the claimant where there is no prospect of the claimant returning to work. The letter set out the matters taken into account by the respondent and also informed the claimant that she had the right to appeal against dismissal.

62. The claimant appealed against the decision to dismiss and her appeal was refused and the decision to dismiss the claimant was upheld.

Unfair dismissal

63. The claimant has the right not to be unfairly dismissed (section 94 Employment Rights Act 1996 (ERA). Section 98 ERA states that in determining whether the dismissal of an employee was fair or unfair, it shall be for the employer to show the reason (or, if there was more than one, the principal reason) for the dismissal. The reason must be a reason falling within subsection (2) of section 98. Capability is a reason that falls within that subsection. Capability, in relation to an employee, means her capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

64. Where an employer has fulfilled the requirements to prove a potentially fair reason, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.

65. The Tribunal must not substitute its views about the employee's capacity for that of the employer. Whenever a person is dismissed for incapacity, it is sufficient that the employer honestly believes on reasonable grounds that the person is incapable. Matters that the Tribunal should ask include, the question whether the employer can be expected to wait longer; whether there has been consultation with the employee to take her views in to account; whether steps have been taken to discover the employee's medical condition and their likely prognosis.

66. What was the reason for the claimant's dismissal? Capability was the reason. The claimant at dismissal had been off work for almost a year and had been signed off work for a total period that would have been more than one year. At the point of the claimant's dismissal there was no foreseeable date of return to work. Kyle Conway was mindful of the fact that the claimant's absence was due to work related stress. Kyle Conway took into account the length of the claimant's absence, her representations and the medical evidence which did not indicate any foreseeable return to work for the claimant.

67. Did the respondent follow a fair procedure in dismissing the claimant? The claimant had been off sick continuously from 21 February 2019 and there had been no indication that the claimant was likely to return to work in the foreseeable future. An occupational health report had been prepared in July 2019 which did not indicate a likely return to work date.

68. The claimant was initially asked to permit a referral to occupational health. The claimant was informed about the importance of her working with the Occupational Health to allow the respondent to have an up-to-date basis to consider her state of health.

69. The claimant did not respond to the requests and later stated that she had not received the communications from Kyle Conway. The claimant's failure to respond to the request resulted in the claimant being informed that unless she agreed to a referral to occupational health by 7 November the capability procedure would be followed, the claimant was warned that this could have resulted in the claimant's dismissal.

70. The claimant was offered the option of engaging with the capability process by telephone or by written submissions. The reason for this was to accommodate the

claimant's ill-health which was continuing. As of October 2019, the claimant was signed off until November 2019 and would later be signed off work until March 2020. The claimant opted for presenting written representations and was given guidance as to the areas that her submissions should cover to assist the respondent in considering its decision.

71. The claimant produced her written submissions in accordance with the agreed timeline. Kyle Conway considered the claimant's representations. The claimant appeared to object to Kyle Conway dealing with her case. Kyle Conway considered that as the claimant's line manager he was the correct person to consider the claimant's case.

72. Kyle Conway considered the claimant's contention that she was hounded and harassed at work and concluded that the claimant had not been hounded and harassed, any communication he had with the claimant was in his view acceptable and reasonable. The claimant had not been required to attend meetings after 4, 8 or 12 weeks as the absence management procedure provided for.

73. Kyle Conway noted that the claimant had been told that it was not possible to determine a recovery time, when she would be able to return to work. The claimant's absence meant that Kyle Conway's department 's contribution to the business was diminished by the claimant's continuing absence. Kyle Conway considered that the claimant was a long way off being able to return to work.

74. Kyle Conway considered that the claimant's grievance about Alessandra Toro had been dealt with prior to the claimant going off sick and he did not consider that there was anything more that the respondent could look to do in respect of the issues raised by the claimant.

75. Kyle Conway concluded that the appropriate decision was to terminate the claimant's employment on grounds of ill health capability.

76. In all the circumstances we consider that the respondent followed a fair procedure. The evidence of Kyle Conway shows that he took into account relevant factors and that the respondent had been patient in waiting until November 2019 before commencing the capability procedure. The reason for the claimant's dismissal was capability.

77. In section 2.9 (a) of the list off issues the claimant set out a number of factors which she relies on as showing that the claimant was unfairly dismissed. The matters set out at 2.9 (a) (i) to (xvii) by the claimant in our view are not made out so as to show that the claimant was unfairly dismissed.

78. The question of discrimination is dealt with elsewhere in this judgment. Kyle Conway did take into account that the claimant's illness was work related stress. The respondent did take into account the occupational health opinions that Kyle Conway had before him. The respondent did use the applicable policy in dealing with the claimant's sickness absence. The claimant has not identified which policy allowed her to remain on long term sick leave absence for a minimum of three years. The respondent's sick pay policy, concerning work-related accidents did not apply in the claimant's case and the income protection insurers concluded that the claimant did not qualify for income protection. The respondent did take

into account the nature of claimant's absence and the fact that the claimant is disabled does not bar the respondent from dismissing the claimant in an appropriate case. The claimant was not harassed to return to work. The respondent asked the claimant to consent to referral to occupational health in about October 2019 the claimant did not respond and the respondent therefore took into account the information that they had in their possession. There is no evidence at all that the claimant's appeal was not conducted in good faith.

79. The claimant contends that there was unfairness in respect of the procedure in the ways set out in 2.9 (c). Kyle Conway explained the reasons for dismissing the claimant which included that the respondent had gone far beyond the corporate guidelines and rules before instigating the capability procedure; the department was under pressure in terms of managing budgets and headcounts; the department could not hire another person to do the claimant's job; the option of recruiting a contractor to replace the work that the claimant did was considered but rejected for reasons about the practicality of doing so.

80. The respondent made adjustments to the managing attendance policy relating to the number of meetings. The respondent took no action in respect of lack of contact by the claimant, and the claimant continued to receive sick pay even though she did not strictly comply with the absence reporting requirements. The respondent agreed to the claimant's requests about communication with her.

81. The respondent did not consider that the claimant's sickness absence was work related and it is not clear that there was any particular action that the claimant says should have been taken in this regard. The claimant continued to receive sick pay notwithstanding that the respondent did not consider that the claimant was not considered to have suffered a work-related injury.

82. The respondent did take steps to obtain an updated occupational health report. The claimant's failure to comply with the request to cooperate meant that a report was not available.

83. The respondent consulted with the claimant. The respondent did not consider alternative employment; however the claimant was not fit to work at the time and at the point of the Tribunal hearing she was not in a position to be able to return to work. Alternative employment would have made no difference. The claimant's original "stressor" Alessandra Toro was no longer involved in the claimant's management at the time of the claimant's sickness absence and dismissal.

84. The Tribunal note that the claimant had problems with Alessandra Toro. The claimant makes complaints about Pavi Gupta and Kyle Conway however the Tribunal do not find that the claimant was required to work in a toxic atmosphere.

85. The claimant was never at a point where the claimant was ready to return to work, until she was ready to work there was no sensible basis to consider the claimant's working environment.

86. The Tribunal have concluded that the dismissal of the claimant was in all the circumstances within the range of responses of a reasonable employer, the claimant's continuing absence with no return date in sight was a matter that the respondent was

entitled to conclude was such that the claimant's dismissal was appropriate action. The claimant's complaint of unfair dismissal is not well founded and is dismissed.

Disability

87. Was the claimant a disabled person at all material times, i.e. from early 2019 until her dismissal, pursuant to section 6 Equality Act 2010 (EA)?

88. Section 6 EA provides that a disabled person is someone who has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on the ability of the disabled person to carry out normal day to day activities. A long-term effect of an impairment is one which has lasted at least 12 months; the period for which it lasts is likely to be at least 12 months; or it is likely to last for the rest of the life of the person affected.

89. The relevant time for assessing whether an individual is disabled on a long-term basis is at the material time of the discriminatory act. Stress may amount to disability but it is permissible to distinguish between a mental condition which is an impairment within the meaning of section 6 EA and a reaction to adverse circumstances which does not amount to a mental impairment.

90. The respondent contends that the claimant was not a disabled person at any material time. The claimant must show that she had a mental impairment which had a substantial and long-term adverse effect on her ability to carry out normal day to day activities.

91. The claimant has produced a statement about disability and produced her GP records. The claimant describes how over a period of time from 2018 onwards she suffered poor sleep, avoided interacting with work colleagues, and how her using the toilet and social contact with people were all affected by her condition. In her disability statement the claimant describes how matters got progressively worse. The claimant describes being unable to function in October 2018 and at about that time the claimant took time off work for an extended period. The claimant returned to work after this period of time but continued to be suffering from the same malaise though still at work. From February 2019 the claimant was off work with work related stress. The claimant's condition had not improved at the time of the Tribunal hearing, and she remained unwell.

92. The claimant's GP records show that the claimant was suffering from low mood, feeling very low, had lost motivation, and had poor sleep on 21 September 2018, the medical records show that the claimant continued to complain of similar issues through to March 2019. From about April 2019 the claimant's medical records begin to make reference to anxiety and depression. The claimant is recorded as having problems sleeping, suffering a loss of appetite and had low mood.

93. The Tribunal is satisfied that by October/November 2019 the claimant had been suffering from a mental impairment, which had a substantial adverse effect on her

ability to carry out normal day to day activities for a period of at least 12 months. The Tribunal is satisfied that the claimant's condition over a period of time got worse and in our view was more than an adverse reaction to adverse life events.

94. The respondent made an occupational health referral after the claimant had been off work from 21 February 2019. In May 2019 Lisa Roger asked the claimant if she could consent to referral to Occupational Health. Lisa Roger did this at this time because the claimant had no foreseeable return to work date and Lisa Roger wanted medical advice on this. Lisa Roger and the respondent were aware that the claimant had been providing sicknotes that referred to depression and work-related stress. The Occupational Health Report provided to the respondent referred to the claimant suffering "*chronic depression, anxiety and low mood"* with symptoms including *"significant reduction in sleep/concentration as well as fatigue."* The claimant continued to provide fit notes and report as unwell until the end of her employment.

95. The Tribunal is satisfied that taking into consideration all the information the claimant provided the respondent about her health and well-being between 2018 and 2020 the respondent knew or ought to have reasonably known that the claimant was a disabled person from about October/November 2019.

96. Section 13 EA (read together with section 39 (2)) provides that an employer must not discriminate against an employee by dismissing her or subjecting her to any other detriment. An employer discriminates against an employee if because of her disability he treats the employee less favourably than he treats or would treat others. Where the employee seeks to compare her treatment with that of another employee there must be no material difference between the circumstances relating to each case.

97. If there are facts from which the employment tribunal could decide, in the absence of any other explanation that the employer contravened the provision concerned the employment tribunal must hold that the contravention occurred. However, this does not apply if the employer shows that it did not contravene the provision.

98. The claimant complains, in point 2.5(a)(i) of the list of issues, about the manner in which she was communicated with and treated by the respondent during her period of sickness and disability, related to starting and conducting the dismissal process.

99. The claimant makes a number of complaints of direct discrimination in which she seeks to compare the way that she was treated in contrast to a colleague SP who similarly had been off sick for a period of time but was not a disabled person. The claimant wanted Kyle Conway to maintain contact with her through her husband, but he refused to do so and continued to contact the claimant directly. The claimant says that she was threatened with absence management, capability process and dismissal. The claimant says that she was harassed with frequent direct communications. The claimant says that she was harassed by being asked to

provide a return-to-work date when her prognosis was uncertain. The claimant says that there was no warmth or genuine concern extended to her in the communications from the respondent. In respect of all these matters the claimant compares her treatment to that of SP.

100. The claimant also complains that the respondent failed to carry out a stress risk assessment in her case, and that this was against the advice of Occupational Health who recommended a stress risk assessment to be *"carried out with the employee to identify any work place stressors"*.

101. The respondent denies these complaints by the claimant. Kyle Conway contends that more adjustments and exceptions were made for the claimant during her absence than would ordinarily be made, as to communication with the claimant he states that he limited his communications with the claimant to checking in prior to the expiry of fit notes or to remind the claimant that a fit note was needed and that there were long periods of time when there was no contact with the claimant. Kyle Conway states that the communication with the claimant was supportive and the claimant's characterisation of it as a charade is wrong. Kyle Conway states that in around October 2019 he offered to contact the claimant through her husband, but she did not respond to this offer at the time it was made by him.

102. Lisa Roger explained that the claimant requested that the respondent contact her through her husband, but she states that the respondent owes the claimant a duty of care as an employee and she believed that the respondent should have direct line of communication with the claimant, and so she offered to copy the claimant's husband into all copies of correspondence.

103. The respondent stated that a stress risk assessment would have been carried out when the claimant has a return-to-work date, however she never returned to work or had a return-to-work date. Kyle Conway said that there was in his view little value in conducting a stress risk assessment whilst the claimant continued to be absent and such an approach was in fact in line with the recommendation made in the Occupational Health Report.

104. Kyle Conway states that the claimant was asked to provide a return-to-work date on occasions. Kyle Conway stated that this was reasonable, and that the claimant could have properly answered such a request with a response that she is not able to provide such a date. That would have been an appropriate response.

105. The conclusion of the Tribunal is that in respect of the matters complained of in 2(5)(a)(i) we are not satisfied that the claimant was treated less favourably. The treatment of the claimant in respect of communication in the period of her sickness was appropriate and justified. It was not always the same as others may have been treated or were treated but the claimant was treated in a way that was justified in the circumstances as they appeared to the respondent's manager Kyle Conway and HR Lisa Roger in the period relied on by the claimant.

106. The claimant complains, in point 2.5(a)(ii) of the list of issues, about the decision to terminate her employment on 10 January 2020- after her sick note informed the respondent that the claimant's sickness absence will definitely exceed 12 months.

107. The claimant states that comparators show that she would not have been subjected to the absence management capability dismissal process so early in the sickness absence.

108. Kyle Conway states that in other circumstances a decision to terminate the claimant employment would likely have been reached sooner as the respondent's attendance management policy suggests considering the question of continuing employment after 12 weeks of absence. Kyle Conway states that the decision to dismiss the claimant was made taking account of the length of absence, the claimant's representations, and the medical evidence before him that did not suggest a foreseeable return to work for the claimant.

109. The claimant had been off work for almost a year before she was dismissed. The claimant had been absent from work from 21 February 2019 and dismissed on 10 January 2020 at a point when the claimant did not have a return to wok date. The claimant had provided a sick note that would have taken her to the 2 March 2020.

110. The respondent has a policy for managing long term absence this is the "Management of Attendance and Restricted Duties Policy". The claimant suggests that an alternative policy was available for the respondent to use in the circumstances of the respondent's case, the dismissing officer Kyle Conway and Lisa Roger both indicate that this policy was the appropriate one for use in the claimant's case. We accept that evidence from the respondent's witnesses as correct.

111. The policy deals with contact with the employee during their absence. The policy also deals with, among other matters, management of long-term absence, i.e., more than four weeks. Under the policy meetings take place after 4 weeks, 8 weeks and 12 weeks. At 12 weeks income protection might be explored. If that is not approved the policy envisages that the Line Manager will schedule a formal meeting to consider the employee's health status and or possible return to work in the foreseeable future or the continued suitability for the role in light of medical advice obtained. A possible outcome of this meeting is termination of employment on the grounds of capability.

112. The claimant made enquiries about income protection and was informed by the income protection insurers that she was not entitled to income protection. This was not the respondent's decision.

113. The respondent has a sick pay policy which allows for discretionary sick pay. The claimant commenced sick absence on 21 February 2019 and then produced fit

notes taking her up to a date beyond the date of dismissal on 10 January 2020. Kyle Conway states that it was around July that there was first consideration of whether to engage the claimant in a formal capability process. Kyle Conway however held back from conducting the capability process until October 2019. In September 2019 Kyle Conway wrote to the claimant and suggested a skype call to discuss the claimant's occupational health report (i.e. produced in July 2019). After the claimant stated that she only wanted communication by post (i.e. not email) Kyle Conway wrote to the claimant and suggested that an up to date occupational health report be obtained. The claimant's response was to state that she wished all communication direct to her to cease completely. Kyle Conway responded with an offer to contact the claimant through her husband and repeated the request for the claimant to cooperate in respect of obtaining an occupational health report. There was no response from the claimant so Kyle Conway wrote to the claimant explaining that if she did not consent to the occupational health report request by 7 November the respondent's capability process would be commenced.

114. Kyle Conway explained that by October 2019 the claimant's absence meant that her work was either covered by another team or external suppliers or it did not get done. The respondent could not hire someone else to do the claimant's work and the option of hiring a contractor had been considered but then rejected. Kyle Conway stated that: *"I considered clarity was needed on how long the claimant's absence might last and, if necessary, for the business to move on."*

115. On 7 November 2019 Kyle Conway again wrote to the claimant inviting her to a capability hearing. The option of the meeting to take place by telephone and the claimant to submit written submissions was offered to the claimant, the claimant was informed of her right to representation at the meeting and told that this could be her husband. The claimant was also told that one outcome of the meeting could be that the claimant's employment is terminated.

116. The claimant responded stating that she would like to be able to present written submissions by the 27 November 2019. This was agreed by Kyle Conway who also reminded the claimant of areas that would assist him in his decision namely, her current state of health and when she expected to be able to return to work.

117. Kyle Conway explained the process he went through in coming to the conclusion that the claimant's employment should be brought to an end. This evidence was not capable of challenge by the claimant. He explained that the claimant had been absent almost a year and that there was no foreseeable date for the claimant's return to work and he concluded it was appropriate to end the claimant's employment. This was the reason for the termination of the claimant's employment. The claimant's appeal against her dismissal was not successful.

118. The claimant has sought to rely on hypothetical comparators in support of her claim for direct discrimination in respect of employment. The conclusion of the Tribunal is that the claimant's employment circumstances are materially different to the

comparators as the claimant had been informed by the income protection insurer that she did not qualify for income protection insurance.

119. The reason for the claimant's employment being brought to an end was not because of her disability. The Tribunal therefore conclude that the claimant's complaint of direct disability discrimination is not well founded and is dismissed.

120. Section 15 EA provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. This 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.

121. The claimant has to show that she has been treated unfavourably by the employer, there is no question of comparison arising. The Tribunal has to determine, focusing at this stage on the thought process of the employer, what the reason for the impugned treatment was. The 'something' that causes unfavourable treatment need not be the sole or main reason but it must have at least a significant influence on the unfavourable treatment. The reason or cause of the unfavourable treatment must be something arising in consequence of the claimant's disability. The causation decision is objective and does not depend on the thought processes of the alleged discriminator.

122. The claimant states that she was subjected to unfavourable treatment as listed in section 2.6(a) of the list of issues.

123. Was the claimant treated unfavourably in respect of the way and manner in which the respondent and its employees / representatives communicated with and treated the claimant during her period of sickness and disability, related to starting and conducting the dismissal process?

124. The conclusion of the Tribunal is that the claimant was not treated unfavourably in this regard. We accept the evidence that has been given by Kyle Conway and Lisa Roger in respect of their actions in communicating with the claimant during the period when the claimant was absent from work through sickness. The evidence does not establish that the claimant was treated unfavourably on the contrary the Tribunal consider that the evidence shows that there was in some respects favourable treatment of the claimant. The respondent's Management of Attendance and Restricted Duties Policy includes provision for meetings take place after 4 weeks, 8 weeks and 12 weeks. These did not take place in the claimant's case and in our view that meant the claimant was too some extent treated more favourably. There was a limited amount of contact with the claimant and that was in our view not unfavourable treatment.

125. Was the claimant treated unfavourably in Kyle Conway's frequent direct communications to the claimant, torturing her and worsening her mental health to

the point of being suicidal. The Tribunal do not accept that the evidence that was given by the claimant and Kyle Conway shows that there were frequent direct communications to the claimant. We recognise that there was some contact between the claimant and Kyle Conway. There was in our view a responsibility on Kyle Conway to maintain some contact with the claimant.

126. We also are able to accept that there was from the claimant's point of view distress caused to her. However, we do not consider that such distress was a reasonable consequence of the nature of the contact that there was between the claimant and Kyle Conway. The Tribunal therefore conclude that there was not unfavourable treatment.

127. Was the claimant treated unfavourably by Lisa Rodger's continuous direct communication to the claimant, torturing her and worsening her mental health to the point of being suicidal. The Tribunal do not consider that there was unfavourable treatment. The initial reason that Lisa Roger contacted the claimant was as a result of the claimant's email of 19 February 2019 to Wanda Hope and others. Lisa Roger, in attempting to address the claimant's concern that communication with her line manager made her condition worse, became more involved in the claimant's sickness absence management. Lisa Roger's communication with the claimant was supportive. The Tribunal do not consider that it is made out by the claimant that there was "continuous direct communication" with the claimant so as to be unfavourable treatment.

128. Was the claimant treated unfavourably in instigating a capability process in November 2019 to terminate the claimant's employment despite having alternative policies that could have been used to support her? Further was the claimant treated unfavourably by Kyle Conway taking the decision to dismiss the Claimant in January 2020 despite having policies that enable long term sick employees keep their employment?

129. The claimant has identified as an alternative policy that the respondent could have applied the sick pay policy (applicable where there is an accident at work) and the income protection policy in the claimant's case. However, the evidence that has been provided by the respondent and not contested by the claimant is that the sick pay policy did not apply because the claimant was not injured in a work-related accident and the claimant was assessed by the income protection insurer as not eligible for income protection.

130. The respondent's Management of Attendance and Restricted Duties Policy is the correct policy in the claimant's situation. While it is unfavourable treatment of the claimant in terminating the claimant's employment the reason for terminating her employment was because of the claimant's continuing absence and not having a foreseeable return to work.

131. The conclusion of the Tribunal is that it is a proportionate and legitimate for the respondent to decide that the circumstances in the claimant's case there is a decision to terminate the claimant's employment. This was a proportionate means of achieving a legitimate aim. There was a need to find a long-term solution for the claimant's work and this needed a decision on her employment. The decision to dismiss the claimant was only made when the claimant had been off work for nearly a year, the claimant had not given any indication of when she might be able to return to work. The claimant had been informed that she was not entitled to income protection insurance and the sick pay policy (as related to accidents at work) did not apply.

132. The claimant's complaints of discrimination arising from disability are not well founded and is dismissed.

133. The claimant also makes a complaint of failing to make reasonable adjustments. Section 20 EA (read together with section 39 (5)) provides that the duty to make reasonable adjustments comprises (so far as relevant to this case) the requirement that, where a provision, criterion or practice (PCP) of an employer's puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison with employees who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21 EA provides that a failure to comply with the requirement is a failure to comply with a duty to make reasonable adjustments. An employer discriminates against a disabled employee if he fails to comply with that duty in relation to that employee.

134. The claimant states that the respondent applied the provision, criterion or practice (PCP) of applying the respondent's absence management policy during her sickness absence and in the dismissal process. The conclusion of the Tribunal is that this was a PCP that was applied in the claimant's case, that this was the case emerges from the clear evidence of Lisa Roger and Kyle Conway.

135. Did this PCP put mentally disabled employees at substantial disadvantage? The claimant states that as a disabled employee she is disadvantaged by virtue of the unforeseeable return to work date nature of her illness; the request for a clear and specific prognosis; and the difficulty to communicate directly and interact with stressors of the mental health disability including work colleagues who caused or worsen the mental health disability condition. The last of these alleged substantial disadvantages has not been proved in our view. The claimant's evidence does not prove that there was a disadvantage to the claimant in difficulty to communicate directly and interact with stressors. The Tribunal are able to accept that the claimant has shown that in her case there was a disadvantage as suggested in respect of the unforeseeable return to work date and not having a clear prognosis. The Tribunal is satisfied that the consideration of the claimant's evidence allows us to conclude that the claimant would be at a substantial disadvantage compared to someone without the claimant's disability.

136. In section 2(c) of the list of issues the claimant lists a number of matters which the claimant states put her at a substantial disadvantage our conclusion on each are as follows:

(i) *"Being forced to provide a prognosis when medical experts were not able to give a clear prognosis for the condition"*. The Tribunal do not consider that the claimant was forced to provide a prognosis, the evidence was that the claimant could have stated that she did not have a clear prognosis and that would have been sufficient.

(ii) "*Being forced to provide a return-to-work date when her recovery time could not be determined due to the nature of the claimant's disability.*" The claimant was not forced to provide a return-to-work date.

(iii) "*Being forced to provide a return-to-work date when her recovery was being hindered by the respondent's failure to carry out Occupational Health's recommendations that could have aided her recovery.*" There are no recommendations in the occupational health report that were required to be completed before the claimant returned to work that were not carried out. The stress risk assessment was something that would need to be completed either on the claimant's return to work or when the claimant was ready to return to work.

(iv) *"Being forced to communicate directly with the specific work stressor colleagues thereby constituting harassment and worsening the disability".* When the claimant objected to communicating with Kyle Conway, her line manager, he agreed to step back and Lisa Roger communicated with the claimant to manage her sickness absence. The claimant subsequently objected to Lisa Roger and began to communicate with Kyle Conway.

(v) "*Loss of income*". This arose as a result of the claimant's dismissal for capability not as a result of the application of the absence management policy.

(vi) *"Loss of career and associated opportunities".* This arose as a result of the claimant's dismissal for capability not as a result of the application of the absence management policy.

(vii) *"Loss of sickness pay".* This arose as a result of the claimant's dismissal for capability not as a result of the application of the absence management policy.

(viii) *"Loss of pension"*. This arose as a result of the claimant's dismissal for capability not as a result of the application of the absence management policy.

(ix) "*Loss of employment benefits".* This arose as a result of the claimant's dismissal for capability not as a result of the application of the absence management policy.

(x) "*Worsening of mental health, making recovery difficult".* There is no independent evidence that the application of the absence management policy worsened the claimant's health beyond the claimant's assertion of that.

(xi) "*Being subjected to a capability process for not having a prognosis and a foreseeable return to work date*". The fact that the claimant did not have a return-to-work date was a relevant factor for the employer to take into account. The claimant would not be at a substantial disadvantage in comparison with a non-disabled person in this regard. This disadvantage arose a result of the claimant being unable to work.

(xii) *"Being subjected to a capability process for inability to communicate with her line manager, a stressor of the disability."* This disadvantage arose a result of the claimant being unable to work.

(xiii) "*Being dismissed"*. This disadvantage arose a result of the claimant being unable to work.

(xiv) "*Being unable to return to work*." This disadvantage arose a result of the claimant being unable to work.

137. We did not find that there was any substantial disadvantage to the claimant arising from the PCP. However if there was any substantial disadvantage to the claimant, are there ways to have prevented the substantial disadvantage and detriment to the claimant? The claimant must show that there was an adjustment that could have made a difference that would allow the claimant to return to work.

138. The respondent states that there was not and therefore the duty to make reasonable adjustments does not arise. The respondent states that based on the medical evidence that was presented to the respondent there was no adjustment that could have been made which would enabled the claimant to be able to return to work. The respondent relies on the claimant's own evidence which states that she was not in a position to provide the respondent with a prognosis because of the nature of her condition.

139. Further the respondent states that it took such steps as were reasonable to avoid the disadvantage to the claimant. The respondent states that the claimant's evidence makes it clear that the claimant objected to any communication from the respondent and therefore there was no further steps that the respondent could have taken to effectively reduce any disadvantage.

140. The claimant states that she requested "*non-direct contact and not no contact at all*." The claimant says that she should have been "*given time and space before being forced to provide prognosis*". The claimant wanted contact through her husband. The claimant wanted a neutral person to maintain contact with the claimant. The claimant states that there is a policy that allowed employees to

retain employment for 5 years. The claimant states that there was no stress risk assessment. The claimant speaks of the option of taking up an alternative role. The respondent could have continued to pay the claimant. The respondent could have employed a contractor to cover the claimant's absence and so "*prevented the constant and regular hounding*" from her manager. The respondent could have not applied the capability process.

141. The respondent relied on the HM Prison Service v Johnson UKEAT/0420/06, Doran v Department for Work and Pensions UKEATS/0017/14 and Conway v Community Options Limited UKEAT/0034/12 for the proposition that the duty to make reasonable adjustments is not engaged where there are no adjustments which could be made to enable to the claimant to return to work. The Tribunal have considered the matters relied on by the claimant and note that the claimant has not, in the evidence she has given in writing or orally, set out adjustments that would, in our view, have resulted in the claimant being able to return to work. The claimant during the hearing pointed out that she remained unable to work due to ill-health. In those circumstances we agree with the respondent's contention that the duty to make adjustments in the claimant case was not engaged and therefore there was no breach of the duty.

Direct discrimination, race, religion and belief

142. An employer must not discriminate against an employee by dismissing her or subjecting her to any other detriment. An employer discriminates against an employee if because of her protected characteristic, in this instance race, and or religion or belief, he treats the employee less favourably than he treats or would treat others.

143. Race includes colour, nationality ethnic or national origins. Where the employee seeks to compare his treatment with that of another employee there must be no material difference between the circumstances relating to each case. Religion means any religion and a reference to religion includes a reference to a lack of religion. Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

144. If there are facts from which the employment tribunal could decide, in the absence of any other explanation that the employer contravened the provision concerned the employment tribunal must hold that the contravention occurred. However, this does not apply if the employer shows that it did not contravene the provision.

145. On a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

146. The claimant is African and a dual British and Nigerian national. The claimant is a practising, Christian. The claimant believes in honesty, truthfulness and uncompromising adherence to strong moral principles and values.

147. The claimant in section 2.3 (a) of the list of issues seeks to compare her circumstances with a hypothetical comparator. The claimant lists a number of instance of alleged less favourable treatment at (i) to (xiii).

    (i) On 24 January 2018, Alessandro Toro expressing surprise that the claimant had handled a conversation with Natalie Ambrose in a "human way."

148. The claimant's account of this is that after dealing with her direct report, Natalie Ambrose, in her performance review Alessandra Toro told the claimant in a meeting that the claimant had dealt with Natalie Ambrose in a human way. The claimant objects to this on the basis that comment made her out to be a non-human, she calls it a "dehumanizing statement".

149. In her witness statement Alessandra Toro denies that she made such a comment. However, in answer to question from the claimant Alessandra Toro: said "*I never said I was surprised that you handed conversation in Human way. You were acknowledging strengths and opportunities and I thought very candid, human. I was giving you praise. I was recognising that conversation with Natalie was managed very well, and those conversations matter we are human. The human comment I thought the conversation was well managed."*

150. The claimant was being given positive feedback, it appears that the evidence of Alessandra Toro is that she did say "*human*" and said it not necessarily in reference to the claimant but recognising that because we are all "*human*" these conversations are important, and the claimant had handled the conversation well. The conclusion of the Tribunal is that more likely than not the comment was made but the comment was not intended as a slight against the claimant. The ordinary meaning of the words used in our view suggest that the claimant was being complimented not that she was being criticised. There was no less favourable treatment in this instance.

    (ii) On 22 February 2018, Alessandra Toro calling the claimant "African Lioness" during a formal business between the two of them.

151. The claimant states that in a one-to-one meeting, referring to the claimant at another business meeting, Alessandra Toro stated that *"I saw the African lioness in you come out".* The claimant contends that theses were the exact words used.

152. Alessandra Toro states that on this occasion: *"I commented to the claimant that "you jump to people as a lion", "don't jump to people like a lion". I did not call the claimant an African Lioness, as the claimant has alleged. The claimant did not*

respond at the time and state that she was in any way offended or upset by what I had said to her in this respect."

153. The Tribunal have not been able to agree on what words were used by Alessandra Toro. This meeting was a one-to-one appraisal meeting, and it is the majority view that at such a meeting in discussion about the way that the claimant did her job, the "How"- describing how the claimant did her job she may well have been told that she "jump like a Lion" as this fits with Alessandra Toro's form of expression. The majority view is that Alessandra Toro did not say *"I saw the African lioness in you come out".*

154. The minority view is that comment more likely than not was made as described by the claimant. The claimant describes a statement that in large measure is accepted by Alessandra Toro. The additional embellishment of adding African to the statement is in the view of the minority unlikely because the claimant in the minority view is an honest witness. A statement that the claimant" jumped like a lion" is not memorable or noticeable. The addition of the claimant's race by using African is more memorable. The minority also notes that the claimant started complaining about the African Lioness comment in 2018, in an email to Alessandra Toro dated 21 May 2018 (p1248) when she stated that "Your exact words were … *I saw the African Lioness in you come out"*.

155. Alessandra Toro states that she regularly used phrases such as "*flying like an eagle*" (to refer to high performance), "*jumping like a lion*" (to refer to people being reactive toward other colleagues) and "*running like chickens*" (to refer to a disorganized approach to multitasking). Alessandra Toro states that the claimant would therefore have been aware that she used such terminology to other colleagues and team members of differing racial/ethnic backgrounds.

156. Whether the majority view or the minority view is correct Tribunal accept that the intention was to describe how something was done, the use of any race specific term (such as African) was only as part of a descriptor of the action and not intended as a description of the claimant. The Tribunal unanimously accept the explanation given for the comment.

(iii) Alessandra Toro carrying out a racial profiling exercise in March 2018.
(iv) On 19 April 2018, Alessandra Toro using the profiling exercise to justify a negative pattern of behaviour towards the claimant.
(v) Alessandra Toro commenting to the claimant that the way she was treating the claimant in certain way was due to the stereotypical traits of Nigerians.

157. This is accepted by Alessandra Toro, save that she objects to the description of racial profiling and prefers to describe it in the following terms:

> "The claimant has referred to the profiling as racial profiling however this is not a correct description of the profiling tool. Rather than looking at race, the tool looks at working cultures in various countries; e.g. the tool will describe working preferences for those culturally aligned with working styles in the UK which might be the correct profile for UK nationals but also foreign nationals working in the UK. In order to use the tool, you do no need to know the race or ethnicity of a colleague but rather know which country they align their working style with the most."

158. Alessandra Toro did use the profile she obtained on the claimant; "*I used the Nigerian profile for the claimant rather than the United Kingdom one because, whilst it was the case that the claimant was currently working in the United Kingdom, she had often referred t her working practices being influenced from her childhood in Nigeria and her time working there with Procter and Gamble.*" The purpose was so that Alessandra Toro could 'flex' her 'workstyle preferences.

159. The claimant states that she was told about the profiling document by Alessandra Toro during the course of a one to one meeting during which Alessandra Toro spent 2 or 3 minutes speaking about the profiling document (p3152-3185). The claimant says that the document contained generalisations about Nigerians and referred to stereotypes such as Nigerians "not keeping time". The claimant also complains that speaking about the profile Alessandra Toro referred to the document as setting out differences between her and the claimant with comments like, "*I'm fixed you are fluid*", "*I'm different from Nigeria*". The claimant also states that Alessandra Toro said that the negative traits in the document were the reason why she had been treating the claimant in the manner that she had been treating her. The claimant states that Alessandra Toro spoke in a negative manner referring to 'Nigerian traits' and stereotyped the claimant with these negative 'Nigerian traits' which she stated were the reason why colleagues don't want to work with the claimant.

160. The claimant discussed the profiling issue with Pavi Gupta and Alessandra Toro on 21 May 2018 when Pavi Gupta says that the claimant was complaining that Alessandra Toro had been "insensitive to her in conducting a profiling exercise". Pavi Gupta states that he did not consider that it was an issue of race discrimination.

161. The claimant discussed the issue of the profiling document in her grievance and stated that she "*suspected Alessandra of racism, was furious but had to put brave face.*" In the grievance the claimant made it clear that she considered that Alessandra Toro had made racial comments, one of the matters she complained of in the grievance was reference to the "African lioness" comment. In the grievance the respondent found that the "African lioness" to be "inconclusive". As to the profiling issue the grievance found that this was not company policy or procedure, that the document was specifically focused on workplace styles of

Nigeria. It was found that while Alessandra Toro went outside company policy by carrying out the analysis, but she had the right intentions in doing so, while this allegation was not upheld as part of the grievance it was stated that "*I will ensure that this kind of profiling analysis does not take place in the future as it is not how the company operates."*

162. The Tribunal find that the claimant was subjected to a detriment as a result of the profiling exercise. It aligned the claimant with a Nigerian workstyle in a manner which contained some lazy stereotypes such as references to "African time", and which the claimant found to be insensitive and upsetting. The manner in which this profiling exercise was communicated to the claimant involved Alessandra Toro stating to the claimant that the differences between their working styles "*this is why I have been poking you*". In communicating the findings of this document, it was stated to the claimant that she possessed "Nigerian traits". We are satisfied that the claimant could reasonably consider that she was disadvantaged in the workplace by reason of being told that this exercise had been carried out and was being actively used to manage her.

163. The evidence before us is that only the claimant was treated in this way by Alessandra Toro. We note that the document that the claimant was shown made no reference to any other nationality despite Alessandra Toro stating that she carried out similar analysis using other nationalities. This was not the case on the occasion that the profiling exercise was shared with the claimant.

164. The Tribunal has come to the conclusion that the claimant was in respect of the complaint about the profiling document subjected to a detriment and treated less favourably on the grounds of her Nigerian nationality.

165. This incident in our view polluted not only the claimant's relationship with Alessandra Toro but her relationship with other colleagues as it was said to her that her 'Nigerian traits' adversely affected her working relationships with her colleagues who did not want to work with her. The effect of this discriminatory act in our view continued to impact on the claimant. The claimant first complained about this issue in May 2018 and raised it during her grievance meeting in August 2018. The impact on the claimant of this issue was one of the factors that she continued to return to it clearly had a significantly adverse have an effect on her. The respondent is not in our view prejudiced in being able to address this issue in the evidence before us. We have concluded that it is just and equitable to extend time for the presentation of complaints in respect of this issue.

(vi) Alessandra Toro neglecting to perform her managerial duties toward the claimant in the ways listed at 2.3 (vi)1-17

166. The claimant complains about various events that she says are instances of direct discrimination on the grounds of race. They are matters which reflect on

the carrying out of managerial duties by Alessandra Toro. We have considered whether individually or collectively these matters are detriments and if detriments whether they are less favourable treatment on the grounds of the claimant's race, religion or belief. In respect of each of these matters Alessandra Toro has given her explanation of events as she recalls them. In no instance is there any matter that the Tribunal considers points to race, religion or belief being a factor in the decisions made in the management of the claimant. Some of the complaints are a matter of perception and lack tangible evidence capable of pointing to discriminatory effect, the claimant complains about a lack of objective feedback, failure to provide objective, unbiased year end performance conversations without, and failure to provide support. The claimant might disagree with the appraisal made by Alessandra Toro but in our view there is no evidence that supports a conclusion that she was tainted by the claimant's protected characteristics in reaching her conclusions, or in influencing the actions she took. Alessandra Toro has given an explanation for how she dealt with the claimant's workload issues and we accept that she counselled the claimant on her workload and have not been able to conclude that the claimant was allocated an excessive and crushing workload. Alessandra Toro did not consider that there was any false or malicious allegation that required investigation, and such has not been shown by the claimant. There was no reason for Alessandra Toro to instigate an investigation into the claimant's health during the time that she was managing the claimant. There is nothing in the manner in which the issues around Brandscapes were dealt with those points to the claimant's protected characteristics being a factor. Alessandra Toro did not mislead Pavi Gupta in April 2018. Alessandra Toro denies that she ostracised the claimant after 21 May 2018, we have not been able to conclude that this has been proven by the claimant. Alessandra Toro denies that there was a failure to provide stakeholder feedback, we are not satisfied that the claimant has proven that this was the case. Alessandra Toro has had unconscious bias training.

(vii) Alessandro Toro making unfounded criticisms and fault finding to undermine the claimant by the matters listed at 2.3 (a) (vii)1-7.

167. Alessandra Toro denies the matters referred to at 1 and 2. We are satisfied that the claimant has not proved these matters. Alessandra Toro stated that if she considered that some research was not suitable for the business it was her role to make such an assessment, challenge and intervene as needed. We see no detriment or less favourable treatment on the basis of protected characteristics. The claimant and Alessandra Toro discussed the events in Jacksonville this included criticism of the claimant in respect of the failure to obtain a taxi to the airport. There is no indication of claimant's protected characteristics being a factor in the discussion, we do not consider that the evidence shows that Alessandra Toro was malicious in her dealings with the claimant about the taxi incident. The claimant was not criticised in respect of Branscapes or the Germany P2P research in 2018, or the Virtual ECP. The Tribunal have not been able to conclude that this was proved by the claimant.

(viii) Alessandra Toro making regular negative statements toward the claimant during 1 on 1 meetings as set out in list of issues at 2.3 (a)(viii)1-12.

168. Alessandro Toro told the claimant that she had handled a situation with one of her colleagues in a human way. This was denied by Alessandra Toro but even if it was said it was not as the claimant interprets an adverse comment, such a comment genuinely expressed is a compliment, there was no detriment or less favourable treatment in the statement. The claimant was not told that her mannerisms were offensive. The claimant was not told that the work she delivers does not matter in determining her performance appraisal. It has not been shown by the claimant that she was taunted on several occasions by Alessandra Toro bringing up Annie Dubois and Caroline's false accusations.

169. The Tribunal is satisfied that the claimant was told during the discussion in April 2018 about Nigerian traits. The Tribunal is also satisfied that Alessandra Toro told the claimant that she was different to Nigerians, i.e. fixed versus fluid etc. The claimant was told that as a senior manager she should be setting a better example to junior members of the team. The claimant was told by Alessandra Toro that the way that the claimant came over to people was negative, Alessandra Toro considers that this was a positive coaching discussion.

170. The claimant was not told that the GSI function post restructure did not include the claimant. The discussion about taxi to the airport in Jacksonville was not related to a protected characteristic, it was not an allegation that the claimant was technologically backward. The claimant was not told that she was an uncouth and unkempt person. The claimant has not shown that there was any gaslighting of her by Alessandra Toro.

(ix) Pavi Gupta refusing to investigate the actions of Alessandra Toro and lying he was unaware of the matters as set out at 2.3 (a) (ix)(1-4)

171. Pavi Gupta was not asked to investigate the actions of Alessandro Toro at the meeting on 21 May 2018. Pavi Gupta denies that the claimant was promised a increase in return for dropping her complaints. The Tribunal consider that what happened is that there was a discussion about the fact that the claimant thought that the promises about her salary had been reneged upon by the respondent. The possibility of an off cycle pay increase was mentioned and subject to some discussion but there was no promise of a pay increase. The claimant did not raise a complaint in July 2018 in which she asked for the Alessandra Toro to be investigated. The Tribunal do not consider that Pavi Gupta denied knowledge of the claimant's complaints, it was the case that the claimant and Pavi Gupta had different recollections of what had been agreed following the meeting on 21 May 2018.

(x) Wanda Hope failing to help the claimant on 15 August 2018.

172. Wanda Hope did not refuse to help the claimant. She made arrangements to speak to the claimant and then spoke to the claimant when she listened to the claimant's concerns and encouraged her to pursue a grievance.

    (xi) On 27 September 2018, Ross Campbell and Rabina Kajilla doctoring the grievance outcome report.

173. Rabina Kajilla and Ross Campbell both deny that the grievance report was doctored. The claimant's position is that there were a number of things which were discussed at the grievance outcome meeting but which were not reflected in the grievance outcome report that was sent to her. The report was intended to be a summary of the findings in respect of the allegations made. The Tribunal do not consider that the grievance outcome report has been doctored.

    (xii) Pavi Gupta and Kyle Conway awarding her a low performance rating in February 2019.

174. Kyle Conway awarded the claimant a "*Fully Meets/ Partially Meets*" performance rating. Kyle Conway considered that the claimant fully met expectation of the "What" but not on the "How" where he considered that there was inconsistency in the way that the claimant approached projects. Pavi Gupta's role is to calibrate the appraisals to ensure consistency across the wider team, the claimant's score did not stand out as an outlier and so was authorized without being discussed by Pavi Gupta and his manager. A fully meets/partially meets performance rating is not a low performance rating. The Tribunal do not consider that it has been shown that the claimant was awarded a low performance rating.

175. Kyle Conway taking the decision to dismiss the claimant in January 2020.

176. The Tribunal concluded that the claimant was dismissed because of her continuing absence from work and the lack of any foreseeable return to work date. The claimant was not dismissed because of her protected characteristics of race, religion or belief.

177. Although the claimant has labelled the claims she makes as including complaints about her protected characteristic of religion we have noted that there was little reference to the claimant's religion in respect of alleged detriments. The respondents witnesses did not have any particular knowledge of the claimant's religion unless the claimant made them aware of it as she states she did on some occasions. There is no evidence of anyone acting in any adverse way towards the claimant arising from her Christian religion. The evidence that the claimant has given is that on several instances she asserts that there were things that she was asked to do which she considered to be against her lived Christian values or a simple assertion that as a Christion she could not do certain things. There is in our view no evidence at all that anything that occurred in respect of

the matters complained of arose out of the claimant's protected characteristic of her Christianity. The claimant's evidence included one occasion when during a social occasion Alessandra Toro's husband in a discussion about religion expressed a bigoted view of Christians, there is no suggestion from the evidence of the claimant that Alessandra Toro herself held such view. The claimant's complaints about religion as a protected characteristic resulting in any discrimination against her in our view is not established. The claims about religious discrimination are not well founded and are dismissed.

Harassment

178. We have concluded that the matters complained of as instance of direct discrimination either were not proved, or it was the Tribunal's view that there was no detriment or no less favourable treatment of the claimant. The exception are the claimant's complaints in respect of the profiling allegation.

179. Section 212 EA provides that "detriment" does not include conduct which amounts to harassment. The effect of this is that complaints of direct discrimination and harassment are mutually exclusive.

180. The conclusion of the Tribunal is that the claimant's complaints of harassment are not well founded and are dismissed.

Victimisation

181. 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. A protected act includes making an allegation (whether or not express) that A or another person has contravened the Equality Act 2010.

182. The allegation relied on need not state explicitly that an act of discrimination has occurred, what is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer.

183. It is accepted that the claimant did a protected act for the purposes of section 27 EA in her email to Wanda Hope in August 2018, when she raised a grievance on 1 August 2018, in an email to senior managers February 2019, bringing a Tribunal claim in May 2019 and in appealing the decision to dismiss her in January 2022.

184. The claimant also complains that she did other protected acts.

    a. The email of 21 May 2018 (p1248): In this email the claimant is explaining why she does not want to share feedback with the Alessandra Toro. The email in our view contains an allegation capable of amounting to an act of discrimination. We are satisfied that this is a protected act.

b. It is contentious between the parties whether the claimant did a protected act in the meeting that took place on the 21 May 2018. Pavi Gupta had not seen the claimant's email of 21 May 2018 before this meeting. There is a record made that suggests that Pavi Gupta stated that the claimant made a complaint that Alessandra Toro was "*racial insensitive*". The claimant states that during this meeting the claimant was told by Pavi Gupta that Alessandra Toro was not racist, suggesting he understood the claimant was making a complaint about racism. On balance we concluded that the claimant did a protected act in this meeting.

c. The Tribunal has not been able to conclude that the claimant did a protected act in July 2018.

185. The claimant contends that she was subjected to a detriment in that Pavi Gupta and Kyle Conway withheld resources that the claimant needed to do her role effectively.

186. The Tribunal do not consider that there was any withholding of travel budget for the claimant. The position was that travel budgets had been significantly tightened by the respondent and there was no travel budget left due to allocate to the claimant.

187. The Tribunal is not satisfied that it has been proved by the claimant that there was a delay in withholding timely approval or disapproval of various stages of EMA growth levers etc. and withholding timely alignment of the EMA growth levers. The Tribunal accept the evidence given by Kyle Conway that it took time to agree a way forward but this was because it was necessary to make sure all stake holders were aligned with the approach and this took time.

188. We note that the claimant's account of a discussion with Kyle Conway on her return to work after sickness absence in October 2018, is that after narrating her version of events to him Kyle Conway told the claimant to stop holding on to the matter. This is disputed by the respondent who says that the claimant did not raise with Kyle Conway and Pavi Gupta any matter which related to the rude behaviour of Ines Aguas, nor did he witness such behaviour. The Tribunal concluded that it has not been established that the claimant asked for managerial support to put an end to Ines Aguas rude behaviour against the claimant.

189. The claimant complains that there was a withholding of managerial support to participate in the February 2019 EMA Strat plan preparation. Kyle Conway states that if there had been a presentation that he thought the claimant should present at the Strat plan meeting he would have put her forward, but as it was he states that there was no discussion with the claimant about this. Finally, he states that the meeting took place when the claimant was on sickness absence. Pavi Gupta

remembers things differently, he says that he initially lined up the claimant to attend but another colleague was requested and in any event in due course neither the claimant or the colleague could attend because of travel restrictions and when this was explained to the claimant she stated that she understood the situation. The conclusion of the Tribunal is that it has not been shown that the claimant was withheld any support as alleged.

190. The claimant complains about ongoing performance feedback during 2018, stating that Kyle Conway and Pavi Gupta failed to share ongoing performance feedback with the claimant. The claimant states that the "*ongoing feedback should have been situational so that I had the opportunity to prow and improve throughout the year."* Instead, the claimant says that she was berated and criticised. The respondent's case is that the claimant was given feedback in the review meetings and that any email of thanks would be shared with the claimant.

191. There is a conflict between the claimant and respondents about this. We have not been satisfied that the claimant has shown that she was denied ongoing performance feedback.

192. The claimant complains that there was a failure to carry out the necessary health and safety assessment after return from sick leave. Kyle Conway states that he is not aware of what health and safety assessment the claimant is referring to and points out that the claimant never asked him to do one. Pavi Gupta's role does not involve him being concerned with a health and safety assessment for the claimant.

193. The claimant relies on the respondent's "*Individual Risk Assessment Guideline for Psychosocial (Stress) Workplace Hazards".* This document does state that a risk assessment should be carried out when "*the individual concenrned is returning to work following a period of stress related sickness absence".* It provides a structured way of carrying out a risk assessment. There was no direction from occupational health advisors (circa October 2018) or any other time that followed the claimant's sickness absence and subsequent return to work. The claimant did not ask for a risk assessment. What the claimant appears to us to require is for us to conclude that there were a number of different occasions when her engagement with managers should have triggered in the managers a realisation of a need to carry out a risk assessment. The Tribunal has not been able to conclude that there was a deliberate failure to carry out a risk assessment after the claimant's return to work. What the respondent states about the occupational health report produced in July 2019 which advised a risk assessment is that this would have been carried out when the claimant returned to work or had a return-to-work date. This is in our view a reasonable approach. We have not been able to conclude that the claimant has shown that there was a failure to carry out a risk assessment on the claimant's return to work that amounted to a detriment.

194. The claimant complains that there was a withholding of feedback from her 2018 mid-year review. The respondent denies this saying that where feedback was available to be given it was given. There was however also feedback which was obtained on the basis of confidentiality and in t hose circumstances it was not shared with the claimant if that confidentiality was to be breached by providing it to the claimant.

195. The Tribunal recognises that there is an element of judgment to be made by a manager who has received feedback on the basis that it is done confidentially as to how much feedback is shared with the claimant. We have been unable to conclude that in the way that Kyle Conway dealt with the claimant he failed to give the claimant appropriate feedback. This allegation has not been proven by the claimant.

196. The Tribunal has not been able to conclude that it has been shown that the claimant's achievements were not acknowledged. The respondents say they were the claimant says they were not.

197. The Tribunal has not been able to conclude that is has been shown that Kyle Conway and Pavi Gupta have delayed and frustrated the claimant's EMA Gowth levers projects.

198. The claimant states that Kyle Conway criticised the claimant's work. Kyle Conway stated that he had exchanges with the claimant in the course of which he challenged and tested some of the assumptions and methodologies that the claimant made, the purpose being to get the best outcome for the business. Kyle Conway states that he does not consider that this type of exchange that he had with the claimant as criticism of her work. The Tribunal are not satisfied that it has been shown that there was a criticism of the claimant that amounts to a detriment.

199. The claimant contends that Pavi Gupta and Kyle Conway instructed her in an email on 4 December 2018 to falsify a piece of analysis by deliberately including an error in the calculation. The Tribunal is satisfied that this did not happen.

200. The claimant states that Kyle Conway refused to help or intervene on several occasions in September 2018 when the claimant made him aware that work previously done by Alessandra Toro on the Presby 5 Year plan forecast had been falsified and was causing the claimant difficulty.

201. Kyle Conway denies that he failed to help or intervene, he states that the claimant did not ask him to help or intervene. When the claimant informed Kyle Conway that she had identified a number of inaccuracies in the forecast and asked him if his team was the proper place for the forecasting to be undertaken.

202. The Tribunal do not consider that this allegation has been proved.

203. The claimant states that on 19 February 2019, Pavi Gupta and Kyle Conway said that the claimant was angry, negative and frustrated during the YE conversation when she complained to them about workplace hostility.

204. Kyle Conway and Pavi Gupta state that they did not consider that the YE review was the correct place to be raising issues which were part of the her grievance and thus should have raised on an appeal or if new matters set out in another grievance.

205. The Tribunal conclude that the response to the claimant's issues raised in the YE meeting was an understandable response because the claimant was raising issues that were not appropriate for that meeting. The description of the claimant as frustrated and negative is the view that Kyle Conway had of the claimant during this meeting. The Tribunal concluded that the reaction of Kyle Conway and Pavi Gupta was reasonable, they were not acting inappropriately in their commentary and statements to the claimant in this meeting. We do not consider that this was subjecting the claimant to a detriment.

206. The Tribunal do not consider that the claimant was given a low performance rating by Kyle Conway and Pavi Gupta.

207. The Tribunal do not consider that the appraisal of the claimant's 2018 performance was racially biased. Kyle Conway and Pavi Gupta gave clear explanations for why the claimant was given a fully met/partially met rating. The reasons were not related to the claimant's race or intended to punish the claimant for raising issues of race.

208. The claimant complains that the grievance investigation and outcome was carried out in a manner that covered up the claimant's complaints. The Tribunal heard evidence from Ross Campbell and Rabina Kajla we are not able to conclude that there was any attempt to cover up the claimant's complaints.

209. The claimant complains of a failure to investigate and address her health concerns as part of the grievance process. The claimant did not raise any issues about health concerns as part of the grievance process. The Tribunal do not consider that there was such a detriment suffered by the claimant.

210. The claimant complains of a failure to eliminate the workplace stressors after the first work related sickness absence. When the claimant returned to work in October 2018, the grievance had been concluded and the claimant had not appealed the grievance outcome. The grievance related to complaints about Alessandra Toro. Alessandra Toro was no longer the claimant's line manager in October 2018. The claimant has not identified the workplace stressors to the respondent in October 2018 that needed to be addressed. The Tribunal do not consider that the failure to carry out a workplace risk assessment in October

2018 was a detriment, the claimant did not ask for one, there was no occupational health report that recommended it at the time. We do not consider that the respondent's failure to eliminate the workplace stressors is a detriment as they were not identified other than in the person of Alessandra Toro who was no longer the claimant's line manager.

211. The claimant complains of a managerial conspiracy campaign to discredit her; cause her undue stress; and prevent her success at work by unfounded criticism, delaying and frustrating her projects, denying her resources needed to effectively carrying out her duties, and ignoring and covering up accuracies which the claimant complained of.

212. Pavi Gupta was not involved in a conspiracy to discredit the claimant. Kyle Conway was not involved in a conspiracy to discredit the claimant. The Tribunal has not been able to conclude that such a conspiracy existed.

213. The claimant complains of failure to address the racially motivated abusive and hostile behaviours carried out against the claimant by EMA GFD colleagues including the spread of malicious rumours and allegations. The Tribunal have considered all the evidence given in this case and concluded that this unspecific allegation has not been made out.

214. The claimant complains of a failure to acknowledge and recognise the claimant's achievements and contributions. The Tribunal do not consider that this allegation has been made out by the evidence presented. There is evidence of the claimant being told that she had made significant contributions.

215. Failure to register her sickness and sickness absences as work-related on several occasions including the last sickness absence. On the evidence we have heard we do not consider that the claimant has shown that he suffered a detriment.

216. Failure to initiate the work-related accident sickness and sickness investigation and remedy process. The claimant was treated more favourably in the way that the sickness absence process was followed by Kyle Conway. There is no detriment to the claimant in this respect.

217. AS to the use of the wrong policy to manage her absence and determine her pay during sick leave. The evidence does not support the conclusion that the wrong policy was used at any point in the claimant's absence.

218. The claimant has complained of loss income, loss of career and associated opportunities, loss of sickness pay, loss of pension and loss of employment benefits. The claimant has not given any evidence explaining these alleged losses. These complaints are not made out.

219. Kyle Conway using the wrong date to start sick leave and falling to amend the consequential salary loss and pension loss when informed. There was an error in recording the claimant as absent since 19 February when it was in fact 21 February. The error was corrected and correctly stated in the dismissal letter. There was no detriment to the claimant.

220. Failure to carry out a work stress assessment to identify and reduce work stressors as recommended by occupational health advisor. The time for carrying out a stress risk assessment is the time when the employee is returning to work. The claimant was never in a position where she was ready to return to work.

221. Failure to make the relevant adjustments for her during sick leave as a disabled person. There were a number of adjustments that were made to the way that the respondent's sick policy was operated during the claimant's sickness absence. The adjustments were in the claimant's favour.

222. Failure to make reasonable adjustments for the work-related nature of the claimant's ill health and disability during the absence management process that ultimately lead to her dismissal. The respondent contends that they made a number of adjustments for the claimant during her sickness absence.

> "These adjustments included: not managing the claimant in respect of her lack of contact, continuing to pay the claimant sick pay despite her non-compliance with the absence policy, reducing the number of sickness absence meetings the claimant was requested to attend, not instigating a formal capability process after 12 weeks of absence, not requiring the claimant to attend a formal capability meeting and allowing her to submit written representations, limiting contact with the claimant and agreeing to communicate with her by letter. "

The Tribunal do not consider that there was any detrimental failure to make any adjustments.

223. The claimant alleges that she suffered worsened ill health as a result of the respondent's contact with her. The Tribunal agree that the respondent had a duty to maintain some level of contact with the claimant to manage her sickness absence. The contact was maintained with a light touch by the respondent, we do not consider that there is evidence that the claimant was made worse by the claimant other than the claimant's assertion of that alleged fact. We are not able to conclude that there was a detriment to the claimant.

224. The claimant complains about instigating the capability process that ultimately led to her dismissal and the dismissal of the claimant. The Tribunal accepted the evidence of the Kyle Conway who explained that the reasons for

commencing the capability process and making the decision to dismiss the claimant.

225. While the claimant complains about the respondent not carrying out the dismissal appeal in good faith there is no evidence at all to support that contention. We reject that allegation also.

Personal injury

226. Has the claimant suffered any personal injury or illness by reason of any acts of unlawful discrimination committed by the respondent or its employees?

227. The respondent submits that the claimant has failed to prove any acts of unlawful discrimination by the respondent or its employees. Insofar as the respondent or its employees have committed any acts of unlawful discrimination, the claimant has failed to prove that any personal injury was caused by those discriminatory acts. The various psychiatric injuries, raise complex issues of causation and the claimant has failed to provide sufficient medical evidence for the tribunal to determine (i) whether any injury suffered was the result of unlawful conduct; (ii) whether any injury is divisible or indivisible: (*Hampshire County Council v Wyatt* UKEAT/0013/16). The respondent states that any claim for personal injury should therefore be dismissed or alternatively decided at a remedy hearing with appropriate directions given by the Tribunal for medical evidence if the Claimant is successful in her discrimination claim.

228. The claimant asserts that she suffered mental health injury as a result of the discrimination which she has suffered but there is no argument presented by the claimant in her submissions on this issue.

229. Whether the claimant suffered a personal injury is not capable of being resolved by us on the evidence before us. There is an assertion by the claimant but no detailed evidence or submissions from either party on the issue. We consider that this matter should be considered at a remedy hearing as submitted by the respondent. On the information before us we do not consider that it is in the interests of justice for us to attempt to resolve that issue at this stage.

Time limits

230. The Tribunal found that the claimant in the complaint about Alessandra Toro profiling. They do not form part of a continuing act that was in time.

231. The Tribunal consider that it is just and equitable because the claims for which the claimant has succeeded as they have permeated the whole case and in many respects are the trigger for the claimant's disenchantment with the respondent and underly all her thinking about the events that occurred up to the time of her dismissal.

232. The respondent has been able to respond to the complaints and was not prejudiced in its ability to reply and respond to the details of the claimant's allegations. In extending time other than the fact that the claims are out of time there is no prejudice to the respondent. However, in refusing the application to extend time the claimant would be left with a burning sense of injustice in respect of issues which go to the heart of all her complaints and further which were in our view well founded.

Remedy hearing

233. Within 28 days of the date on which this judgment is sent to the parties the parties must send to the employment tribunal (i) their dates to avoid for listing of a remedy hearing, (ii) notify the tribunal of a time estimate for the remedy hearing, and (iii) notify the employment tribunal of any case management order that they would like the employment tribunal to consider making.

_____
Employment Judge Gumbiti-Zimuto
Date: 15 December 2023

Sent to the parties on:
3 January 2024.....

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For the Tribunals Office