**Case No. 1401240/2022**

# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | | **Respondent** |
|---|---|---|
| Miss R Robson | AND | Met Office |

For and on behalf of the Secretary of State for Science Innovation Technology of the United Kingdom of Great Britain and Northern Ireland

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT** Exeter **ON** 20, 21, 22 and 23 November 2023

**EMPLOYMENT JUDGE** N J Roper

**Representation**

**For the Claimant: In person**
**For the Respondent: Mr J Braier of Counsel**

## RESERVED JUDGMENT

**The judgment of the tribunal is that the claimant's claims are dismissed.**

## REASONS

1. Introduction
2. In this case the claimant Miss Ruth Robson, who was dismissed by reason of capability, claims that she has been unfairly dismissed, and that she was discriminated against because of a protected characteristic, namely disability. The claim is for discrimination arising from disability, for failure to make reasonable adjustments, harassment, and victimisation. The claimant has been found to be disabled. The respondent contends that the reason for the dismissal was capability, that the dismissal was fair, and that there was no discrimination.
3. There was a lack of judicial resource with regard to the attendance of lay members for this hearing, and the parties have given their written consent for this matter to be determined by an Employment Judge sitting alone pursuant to section 4(3)(e) of the Employment Tribunals Act 1996.

4. The Evidence
5. I have heard from the claimant, and from Mr Gary Ofield on her behalf. Mrs Zoe Widger adduced a written statement in support of the claimant which was not challenged by the respondent, and her evidence is accepted. I was also asked to consider short statements from Mr Philip Evans and Ms Zilla McGrail on behalf of the claimant, but I can only attach limited weight to these because they were not here to be questioned on this evidence. For the respondent I have heard from Mrs Sarah Hewitt, Ms Emma Connett, Mr Simon Brown, Mr Paul Chavasse, Mr Christopher Walsh, and Mrs Claire Jeffrey.
6. I had considerable concerns about the claimant's credibility during the course of these proceedings, particularly during her own evidence. There were repeated examples where the claimant chose to construe innocent or encouraging remarks from the respondent as being unsupportive and/or even offensive on the part of the respondent when it was abundantly clear from the face of the contemporaneous documents that the opposite was the case. Just one example is that the claimant was adamant that in February 2020 her line manager Mr Richards had strongly discouraged her from returning to work by writing the following sentence: "I'm happy with this arrangement, and also to let you know that if you feel unable to return on the 16th, HR advised me that you will need to obtain a new certificate as you are covered until 29 March." The opposite to the claimant's assertion was clearly the case.
7. On another occasion the claimant asserted that she was deliberately made to feel unwelcome on her return to work because no one had reactivated her IT account and no one had prepared for her return. The true position was that her line manager had gone out of the way to check with the IT department that all was well before the claimant's return, and when an unexpected IT difficulty arose, the claimant was provided with a new laptop on the day after returning.
8. There were other occasions (when the claimant's assertions were rebutted either by the contemporaneous documents, or the evidence of the respondent's witnesses), when the claimant was willing to allege that either the documents had been fabricated by the respondent and/or that the respondent's witnesses were lying as to the content. When challenged as to these assertions it was clear that the claimant had no basis for making these serious allegations. The respondent has asserted that this was "emblematic of the irrationality of positions the claimant has taken up throughout the factual matrix in her claim", and I agree with that observation.
9. On the other hand, the respondent's witnesses were measured and thoughtful in their evidence, which was consistent with the contemporaneous documents before me. In addition, the weight of the evidence (which was both the consistency of the respondent's witnesses and the contemporaneous documents) was against the claimant. In these circumstances where there was a direct conflict of evidence between the claimant and the respondent, I therefore preferred the evidence of the respondent.
10. Bearing in mind these observations, I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties. It is also worth recording that I have heard extensive evidence on a number of matters and allegations which were simply not relevant to the agreed List of Issues, and the findings of fact are therefore limited to background matters where necessary, and the actual allegations which were agreed by the parties to be determined in the List of Issues.
11. The Facts
12. The correct name of the respondent is the Met Office for behalf of Secretary of State for Science, Innovation and Technology of the United Kingdom of Great Britain and Northern Ireland. It is commonly known as the Met Office, and it operates across 49 sites in the United Kingdom, and 11 sites overseas. Its head office is in Exeter in Devon. The respondent describes itself as a weather and climate service which works closely with governments, individuals, and organisations to share scientific meteorological knowledge and advice. It is a Trading Fund of the Department for

Business, Energy and Industrial Strategy. It operates on a commercial basis under set targets which are verified and publicised.

13. The claimant is Miss Ruth Robson. She commenced work for the respondent as a contractor in October 2015, and commenced employment with the respondent on 18 April 2016. At the times relevant to this claim she was employed as an Executive Assistant, known in brief as an EA.
14. The role of an EA is to provide support to the respondent's Directors, Non-executive Directors, and its Board. Their main job is to ensure that their principals are in the right place at the right time with the appropriate information. The EA will usually act as a filter and manage diaries and inboxes, and they will help to build effective working relationships with new and established stakeholders. EAs are expected to organise travel and accommodation, triage urgent matters, solve problems, understand priorities, and ensure that matters are dealt with in the most appropriate way, particularly with regard to the directorates of the Directors whom they support. The respondent's senior managers also generally have a private secretary to undertake other secretarial duties outside the scope of the EAs.
15. Usually an EA works for two Directors. The claimant worked for Ms Tammy Lillie, the Chief People Officer, and Mr Simon Brown, the Services Director, from whom I have heard.
16. On 15 December 2019 the claimant sustained a facial injury which caused a facial disfigurement. She was absent on certified sickness leave until she commenced a phased return to work with effect from 6 April 2020. This coincided with the Covid 19 pandemic, and the claimant was working from home along with the respondent's other employees.
17. In October 2020 the respondent commenced a review of its top two tiers of management, the Executive Directors, and their direct reports. This was known as Project Jasper. This was a wide-ranging review which also considered the support provided by the EAs. The aim of the review was to ensure that the respondent used its resources effectively. It was not a precursor to the reduction of staff or redundancies, and ultimately led to recommendations for further recruitment to the EA team.
18. As a result of this review the line management of the EAs, including the claimant, was passed to the Private Secretary to the Chief Executive with effect from January 2021. This was Mrs Sarah Hewitt from whom I have heard. She decided to commence regular one-to-one meetings and discuss with each EA how often these meetings should take place and for how long. The claimant said that she preferred minimum contact and requested that there should be a 15 minute meeting every six weeks. Other EAs preferred a more detailed meeting, and more often. Following their first one-to-one meeting on 13 January 2021, the claimant and Mrs Hewitt agreed to have a more detailed meeting lasting between 30 to 60 minutes every six weeks.
19. These meetings were undertaken remotely via Teams calls. The claimant preferred to attend these meetings with her camera facility turned off. Mrs Hewitt was aware that the claimant had suffered a facial injury, but she had not seen the claimant in person since she had suffered the injury and was not made aware that it amounted to a disability. Mrs Hewitt was content that the claimant should attend their meetings with her camera facility turned off because she was more comfortable attending that way, and Mrs Hewitt did not at any stage ask the claimant to turn her camera on.
20. As a result of the review process Mrs Hewitt was informed by the Directors that there were some concerns about the performance of two of the respondent's EAs, one of which was the claimant. The feedback was that the claimant was not operating at the same proficient level as the other EAs and that she needed support to meet the required standards. Mrs Hewitt realised that these concerns had not previously been made clear to the claimant and there appeared to be some difference between her actual performance, and the performance which was expected of her by the Directors. Mrs Hewitt was confident that this could be explored and addressed, but first she decided to establish if these expectations of the claimant were fair given that the feedback had come from Directors who were new to the organisation.

21. Mrs Hewitt also received feedback from the EAs generally. Some felt that their Directors did not appreciate their work, and others felt that the claimant was not very forthcoming in helping with teamwork which had caused some frustration.
22. On 31 March 2021 Mrs Hewitt held a virtual meeting of the EA team via Teams. She had set up an "EA roundup" which was an update which the EAs were now to send weekly to the Executive Team. Mrs Hewitt wanted the EAs to take this on as a chance to raise their profile. She asked for a volunteer to prepare the next EA roundup, but none was forthcoming. She therefore asked the claimant to prepare the next one.
23. The claimant alleges that Mrs Hewitt announced to the team that she (the claimant) was required to do the next EA roundup because the Directors wanted to see some personality from her. Mrs Hewitt denies this. She accepts that she explained that it was a chance for all of the EAs to show some of their personality in the context that the EAs needed to build some rapport with their directors, particularly as the EAs felt that they were underappreciated.
24. I prefer Mrs Hewitt's evidence on this point, and I find that she did not instruct the claimant to complete the next EA roundup because the Directors wanted to see some personality from her.
25. All of the respondent's staff are subject to an annual performance review which takes place in March or April. Line managers usually have mid-year reviews with staff as well, which normally take place in October. Following these annual performance reviews staff are given one of four ratings: "exceeds expectations"; "meets expectations"; "development required"; or "not met expectations". Once the line manager has decided on the appropriate rating, it will then be double checked through a moderation process. The third grade of "development required" is still seen as an acceptable grade but would normally result in an informal performance plan being put in place explaining the areas of improvement required and providing support to help the employee achieve an improvement. If an employee is dissatisfied with any rating, then they can request a review by a senior manager or ultimately invoke the respondent's grievance process.
26. Mrs Hewitt undertook the claimant's end of year review on 1 April 2021. This was another remote meeting via Teams at which the claimant was not required to turn on her camera. Mrs Hewitt raised with the claimant the feedback that she was getting from the Directors, and in particular Tammy Lillie for whom the claimant worked. Mrs Hewitt was trying to understand whether the claimant needed support or whether there was a personality clash between her and any of the Directors. Mrs Hewitt decided to award the claimant "meets expectations" for this end of year review. She had only been the claimant's line manager for about three months, and she did not consider it appropriate at that stage to give a different grading, but she did wish to continue to explore why some of the feedback about the claimant had been critical.
27. Mrs Hewitt and the claimant then had another one-to-one meeting via Teams on 20 May 2021. Again, the claimant attended with her camera off and was not asked by Mrs Hewitt to turn her camera on. The claimant alleges at that meeting Mrs Hewitt said to her: "We don't know what's wrong with you - is it a lack of confidence or is it personality?" Mrs Hewitt denies that she said this and says that she tried hard in all her interactions with the claimant to try to ensure that matters remained positive and exploratory. She was discussing the feedback from the Directors about the claimant, and she was trying to ascertain the claimant's perspective on this. She wanted to understand whether the claimant needed support, or whether there was a personality clash.
28. I prefer Mrs Hewitt's recollection of these events, and I find that she did not say to the claimant words to the effect: "We don't know what's wrong with you - is it a lack of confidence or is it personality?"
29. The claimant alleges that shortly thereafter, in early June 2021, that Mrs Hewitt commenced a capability process against her when there was no basis for any performance concerns. The claimant emailed Mrs Hewitt on 28 May 2021 to seek confirmation whether or not an investigation had been carried out about her. She

suggested Mrs Hewitt had referred to this at the end of a one-to-one meeting which had come “as a complete shock”. Mrs Hewitt replied to the effect: “I’m not sure what you mean by an investigation - if you mean has a formal process been started, then no, this has not happened. I’ll put some time in for us to discuss next week so that I can answer any questions you have.” The claimant replied: “Please could you let me know the details of the informal investigation that was alluded to during our one-to-one meeting on 20/05/21 (I would like to know what happened and why as you mentioned not finding anything after gathering feedback about me from the Directors and other EAs)?”

30. It seems that the claimant may have formed this conclusion because she had seen a spreadsheet document from the HR Department which had indicated in red against her name that there was a capability issue. The respondent explained that this was an internal process within the HR Department whereby they record enquiries by managers, and the reason for those enquiries. Mrs Hewitt had raised this issue and she had discussed the claimant’s performance with HR, in order to assist her in deciding how to progress the matter. The HR Department appears to have made a record of these conversations under the heading of “capability”.
31. Meanwhile Mrs Hewitt was concerned that they were talking at cross purposes. She replied by email dated 4 June 2021 to reassure the claimant that there has been no investigation, formal or otherwise, and that if she had given that impression then she was sorry. She also set out the feedback which she had received on the claimant’s performance namely (i) the claimant managed the diary well but there are ways in which it could be improved such as colour coding; (ii) she was always willing to do things when asked but it was felt that she needed very detailed instructions and that she was not proactive in looking for ways to support; (iii) there was a desire for her to be more involved in managing inboxes and responding to email; and (iv) both Tammy Lillie and Simon Brown wanted help in tracking actions they had agreed to undertake, and thought that she could play a role in that.
32. Mrs Hewitt’s clear evidence is that she had not started any capability process, either formally or informally at that stage (early June 2021). I accept that evidence, and I so find.
33. Mrs Hewitt then tried to arrange a meeting with the claimant to discuss these issues in more detail. The claimant replied to the effect that she was seeking advice and did not wish to meet with Mrs Hewitt or answer her calls. Mrs Hewitt was concerned as to the claimant’s welfare and to ensure that she provided support as a line manager. She arranged another one-to-one meeting and invited Mr Paul Chavasse, from whom I have heard, to attend as well. He is Associate Director in the Office of the Chief Executive, and he was Mrs Hewitt’s Line Manager. The claimant preferred to meet with Mr Chavasse without Mrs Hewitt, and that meeting took place on 7 remotely via Teams on 7 July 2021. The claimant attended with her camera off, to which Mr Chavasse had no objections.
34. Mr Chavasse and the claimant discussed a number of issues at that meeting, and Mr Chavasse sent an email to the claimant on 12 July 2021 which was copied to Mrs Hewitt. He confirmed the content of their discussions. He categorically confirmed that no performance investigation against the claimant had been considered or launched. He confirmed that they both thought that two team meetings a week would be the best number. He confirmed that no decision had been taken with regard to the claimant working for any other director and confirmed that she was still working for Mr Brown and Ms Lillie. He recorded that the claimant felt that her relationship with Mr Brown “had settled down and was working well at the moment”. However, the key point that he made was that it was essential for the claimant to have regular meetings with Mrs Hewitt as her line manager. He strongly recommended every three or even two weeks so that the claimant could have support especially during the current Covid 19 pandemic lockdown, and so that Mrs Hewitt would know exactly what she was doing. He wanted to ensure that her understanding was correct, and that workflow was allocated appropriately so that demands for the team would not cut across what the

Directors were asking the claimant to do personally. He stated in his email: "Talking face-to-face (or at least on Teams!) really does help remove misunderstandings (which I think may have arisen in a couple of places) and help to get to grips with things."

35. The claimant asserts that this last comment about talking face-to-face amounts to harassment which is related to the claimant's disability of her facial disfigurement. Mr Chavasse denies that this was the case, and he denies that it was a comment about the claimant having her camera off and/or about her working from home (as all the respondent's employees were at that stage). He says that "face-to-face" is a common expression and was not something which he was in any way addressing to the claimant's disfigurement. He was simply making the comment that talking to one another was a more productive way of resolving issues than sending emails. This was particularly the case because he felt it essential that the claimant and Mrs Hewitt had regular one-to-one meetings so that they could discuss issues such as the claimant's performance, whereas falling back on lengthy email exchanges often led to misunderstandings. In addition, the claimant did not complain about that comment at that time, and Mr Chevasse was unaware that the claimant had taken offence to that comment until she mentioned it in her subsequent grievance in early 2022.
36. On 17 August 2021 the Chief Executive of the respondent gave three months' notice to all members of staff that they were now expected to return to work in the office with effect from 18 October 2021, for at least 40% of their contracted hours. This was in line with Government guidance at that time. Mrs Hewitt and the claimant met at a one-to-one meeting on 27 August 2021 to discuss the areas of the claimant's performance which required improvement, and on 9 September 2021 Mrs Hewitt conducted the claimant's mid-year performance review. The claimant was concerned about the requirement to return to work in person and there seems to have been some confusion as to whether she had made an informal request not to have to do so. In any event Mrs Hewitt emailed the claimant on 10 September 2021 with guidance on how to make a formal flexible working request which the claimant then did on 27 September 2021. She requested working from home for 100% of her working time.
37. Mrs Hewitt dealt with the claimant's request. She sought feedback from the two Directors for whom the claimant worked, namely Mr Simon Brown and Ms Tammy Lillie. Mr Brown did not think the arrangement would work well, and he preferred to have the claimant in the office to "fire fight" and deal personally with any issues which might arise. Ms Lillie provided similar feedback. On 28 September 2021 Mr Brown emailed Mrs Hewitt, with a copy to Ms Lillie, providing his feedback. He made the comment: "It's quite robotic doing weekly catch up virtually at the moment, not helped by the fact that Ruth chooses not to have her camera on." That email was not addressed to the claimant, but she did have authority to check that inbox, and she saw that comment. The claimant asserts that this amounts to harassment related to her disability of facial disfigurement.
38. Mr Brown has explained in his evidence that by "robotic" he really meant that the weekly catch-up meetings were too much of a "transactional" relationship, meaning that they tended just to run through the list of items to be done, and it was not a comment which was in any way related to the claimant's facial disfigurement. Putting this comment into its context, the claimant had made a flexible working request, which unsurprisingly resulted in her senior managers considering her perceived performance were she to be allowed to work remotely, as against her perceived performance if she were to attend the office in person. Mr Brown's email was not intended or expected to be seen by the claimant. At no stage did Mr Brown discuss with the claimant whether or not she should put her camera on in meetings and neither did he pressurise her to do so. There is no suggestion that the claimant had taken offence until she referred to the comment in her grievance some four months later.
39. Meanwhile Mrs Hewitt continued to consider the matter of the claimant's midyear review grading. She met with the claimant on 9 September 2021. The claimant asserts that Mrs Hewitt gave her the grading of "meets expectations" at that meeting. Mrs Hewitt denies this, and she says that her discussions with the claimant were aimed at

understanding the claimant's expectations of her mark. They subsequently held a further meeting on 7 October 2021 to continue their discussions as to the midyear review mark. Mrs Hewitt confirmed in a contemporaneous email on 7 October 2021 that the meeting on 7 October 2021 was "to follow up an update on my thinking as I had not explicitly told her of her performance rating in the review." On balance I prefer Mrs Hewitt's recollection, which is supported by the contemporaneous documents, and I find that Mrs Hewitt did not confirm to the claimant on 9 September 2021 that she was to be given a "meets expectations" mark.

40. Following their meeting on 7 October 2021 Mrs Hewitt confirmed that the claimant's grading would be "development required". The claimant makes two further complaints: first that Mrs Hewitt was no longer her line manager, and secondly that her previously awarded mark of "meets expectations" had thus been downgraded.
41. Mrs Emma Connett, from whom I have heard, is employed by the respondent as the Private Secretary to the Chief Executive. She took over management of the EA's including the claimant from Mrs Hewitt on 1 October 2021. It is true therefore that at the time of Mrs Hewitt's meeting with the claimant and email on 7 October 2021 the claimant's line manager was now Mrs Connett. However, given that Mrs Hewitt had investigated the matter in detail over the last six months, and Mrs Connett had only been the claimant's line manager for a matter of days, it clearly made sense for Mrs Hewitt to conclude that process at that stage.
42. As for the allegation that the earlier grading had been awarded but then downgraded, I reject that assertion. Mrs Hewitt had not confirmed to the claimant that her grading would be "meets expectations", and so there was no downgrading as alleged by the claimant from the meeting on 9 September 2021.
43. As I understand it the claimant has not explicitly complained that the midyear grading of "development required" is of itself either incorrect or discriminatory (as opposed to the act of downgrading her). However, during this hearing the claimant did challenge this conclusion. Nonetheless it was clear from her cross examination, and by reference to the relevant documents, that there had been a lengthy enquiry involving a number of senior managers into the extent to which the claimant was meeting the required level of performance. The claimant failed to accept that there had been this level of critique of her performance, or even if there had, that it was accurate. She also failed to acknowledge (which I find was the case) that Mrs Hewitt had repeatedly discussed these issues with her in a reasonable and positive light in the hope of addressing the performance issues which needed to be addressed.
44. In any event, the respondent has a moderation process so that gradings amongst its staff can be compared one against the other, and reviewed and moderated if incorrect or where necessary. The claimant sought a review under this moderation process, but the grading was upheld. She also then appealed the grading to Mr Chavasse, who reviewed the matter in detail and confirmed the grading. Furthermore, the grading was found to be fair and warranted by an independent grievance investigator when the claimant subsequently raised her formal grievance. In other words, everyone who reviewed the respondent's grading within its organisation agreed that it was accurate.
45. As noted above, the claimant and Mrs Hewitt had earlier discussed the possibility of the claimant working from home which had resulted in her formal application by way of a flexible working request. The respondent's procedure mirrored the statutory scheme. Rather than return to the office in person for at least 40% of her working time, the claimant's application on 27 September 2021 sought 100% homeworking from 7 am to 3 pm each day with effect from 18 October 2021. The application made no mention of the claimant's disability of facial disfigurement.
46. The flexible working request meeting took place on 1 October 2021 remotely by Teams. Mrs Hewitt ran the meeting. Mrs Connett attended in an observational capacity because she had taken over as the claimant's line manager on that day. The claimant was accompanied by Mr Gary Olfield as the claimant's chosen companion. Mr Olfield, from whom I have heard, is a volunteer for the respondent's Dignity and Respect of Work team (referred to as DRaW). Mrs Hewitt had previously made the necessary

enquiries of the relevant Executive Directors about the practicalities of the claimant's request. She made enquiries of Ms Lillie and Mr Brown about the claimant by name, whereas emails to other directors were more general. For the record, Mr Olfield has confirmed that Mrs Hewitt was "not unsupportive" at this meeting, and he also confirmed (when interviewed for the claimant's subsequent grievance) that the decision to refuse the claimant's request for flexible working had nothing to do with her facial disfigurement.

47. The discussion at the meeting focused on the claimant's request and its practicalities with the impact of the claimant working from home whilst her directors and other EAs would be spending time in the office. At one stage the claimant suggested that she might be prepared to come to the office in person to attend team meetings as they were held outside. This indicated that her concern was more Covid related rather than her facial disfigurement, particularly as Mrs Hewitt had earlier confirmed that employees were entitled (but not required) to wear Covid protective masks when they returned to the office. The claimant was invited to discuss potential compromise all the terms of her request, but she declined to do so.
48. It was also made clear to the claimant that if she wished to work from home for medical reasons, then a different procedure was appropriate. There would then be a referral to Occupational Health who could investigate and discuss the health reasons and advise on whether reasonable adjustments should be implemented. The claimant declined that invitation, thus indicating to the respondent that her request was not related to a medical reason or her disability of facial disfigurement.
49. The claimant's flexible working request was subsequently refused, and this was confirmed in a letter from Mrs Connett to the claimant dated 13 October 2021. The reasons given were reliance on three reasons falling within the statutory scheme, namely inability to reorganise work among existing staff; detrimental impact on quality; and detrimental impact on performance. The letter confirmed that any request for flexible working for health-related reasons should first be referred to Occupational Health. In addition, Mrs Connett had suggested in a conversation with the claimant at that time that she would welcome the opportunity of discussing this further with the claimant because an Occupational Health referral seemed likely to be the next step. Mrs Connett followed this up with a meeting with the claimant on 15 October 2021 and again proposed a referral to Occupational Health in order to advise on any reasonable adjustments which might be necessary.
50. On the following Monday, 18 October 2021 (which was the day when the respondent's employees were due to return to the office) the claimant submitted a fit note certifying that for the next six weeks she was only fit to work if she worked from home. Mrs Connett spoke with the claimant the following morning and confirmed in a follow-up email that it was agreed that the claimant could work from home pending her referral to Occupational Health. The claimant signed the necessary consent forms for the Occupational Health referral on 8 November 2021. She now claims for some reason that she did so under duress. I reject that allegation. It is clear that the claimant agreed to the referral because it was necessary as a precursor to any longer-term adjustments which the claimant wanted. In any event it was a condition of the claimant's contract of employment, to which the claimant had earlier agreed, that (if required by the respondent) she would undergo a medical examination by a Doctor nominated by the respondent.
51. In any event the claimant was assessed by Occupational Health on 5 January 2022 and a report was sent to the respondent on 11 January 2022, and Mrs Connett received this on 13 January 2022. The recommendations were that the claimant should be allowed to work from home for the longer term, at least whilst accessing further intervention for her facial disfigurement (which related to the possibility of surgery). Mrs Connett followed that recommendation and emailed the claimant on 31 January 2022 to confirm that she could work from home on a temporary basis in line with that recommendation. Meanwhile the claimant had self-certified as being unfit for work, and this sickness absence continued for the remainder of the claimant's employment. This

also followed the claimant suffering from shingles, which was diagnosed in early November 2021. This subsequently resulted in the claimant suffering from post-herpetic neuralgia, and this is the second impairment which has been held to have been a disability (but only with effect from 13 September 2022).

52. On 5 January 2022 the claimant was invited by her Director Ms Lillie to a catch up Teams call. This clashed with the claimant's Occupational Health assessment and the claimant asked Ms Lillie to email her requests. She did so, and required a weekly Teams catch up as a minimum in the future. As a response the claimant emailed her line manager Mrs Connett to ask her to postpone all regular one-to-one meetings until after her current fit note was due to expire on 21 January 2022. Mrs Connett declined to do so and had a lengthy telephone conversation with the claimant. She made a detailed contemporaneous note of that call. During her cross-examination the claimant alleged that the record was untrue, and that Mrs Connett had fabricated that note, but then withdrew that serious allegation. Mrs Connett's evidence is that it was an accurate contemporaneous record of the conversation. I accept Mrs Connett's evidence to that effect.
53. During the conversation the claimant made a number of allegations against Ms Lillie. These included: (i) that Ms Lillie was pushing the claimant out of employment with the respondent as a result of the EA review (even though the result of Project Jasper was that it did not single out any EA and recommended the recruitment of two roles); (ii) Ms Lillie asked the claimant to do things verbally and then wrote to her to say she had asked for something else; (iii) that the directors lacked realistic expectations; (iv) that she had not felt comfortable working from Ms Lillie for almost two years; (v) she talked about the claimant behind her back; (vi) she wanted to be excused from any further catch up meetings with Ms Lillie; and (vii) that her relationship with Ms Lillie could not get any worse.
54. Mrs Connett formed the view that the claimant's relationship with one of her two appointed Executive Directors Ms Lillie had therefore broken down, and she raised this with Ms Lillie. Ms Lillie mirrored the claimant's loss of trust in the relationship. Mrs Connett therefore made the decision to allocate another EA to Ms Lillie and to make arrangements to appoint Mr Richard Bevan as the claimant's second Executive Director (to replace Ms Lillie).
55. The claimant relies on her conversation with Mrs Connett on 7 January 2022 as including her first protected act for the purposes of her victimisation claim. The respondent denies this. Given that there is no reference in Ms Connett's contemporaneous note (which I have accepted as accurate) to the claimant's disability, nor to any allegations of discrimination or any other breach of the Equality Act, I reject that assertion. The claimant also accepted in cross examination that this matter was not discussed.
56. Mrs Connett sent a draft informal improvement plan on 18 January 2022. This had already been considered by the respondent's managers. When Mr Chavasse wrote to conclude his decision on reviewing the grading, he told the claimant that this Mrs Connett would proceed with an improvement plan to address the areas which he had raised in his decision letter. Mrs Connett had also previously explained on 7 January 2022 that the improvement plan would be the next step, and she sent a draft plan to the Human Resources Department for review. It is clear from these interactions between the managers that the issuing of the informal improvement plan was triggered by, and a natural consequence of, the earlier grading of "development required". It followed in accordance with the respondent's normal policy in this respect.
57. The claimant raised a formal grievance on 21 January 2022, which was dealt with in detail by the respondent. The respondent appointed an independent investigator to investigate and decide upon the grievance. The claimant's grievance was rejected. She subsequently appealed against that finding but her appeal was also rejected. It is not necessary to consider this grievance in any great detail, because it does not form part of the claims to be determined as agreed in the List of Issues.

58. However, a matter arose during the grievance investigation and in particular when the claimant replied to written questions from the investigator. The claimant had made two assertions which caused concern with the respondent, namely that there had been a breach of data protection requirements, which has been referred to as a GDPR breach. The claimant's first written assertion was that Debbie Doolan, an HR Reward Manager, had been pushed out by Nicky Bevan and Ms Lillie by reason of a downgraded performance review, an improvement plan, and an Occupational Health referral, and that she had left via a voluntary exit scheme. The second comment was that Craig (Chalky) Langley, the Head of Change Management, had had a flexible working request approved, and had been sent an improvement plan and was being performance managed.
59. The respondent was concerned that the claimant had committed a GDPR breach in setting out these details. When the claimant was sent her grievance outcome letter from Mrs Harris on 15 June 2022 (which she received on 18 June 2022), Mrs Harris explained that in reviewing the investigation report there was a potential issue requiring further explanation about which the claimant would be contacted in due course. Mrs Harris sought advice from HR and also legal advice. She completed an internal form in accordance with the respondent's data breach reporting requirements and explained: "I was concerned that personally sensitive information may have been passed to a third party without the knowledge or agreement of those named and that the individual may have used their privileged access to Director email in an inappropriate way in sharing this information about colleagues."
60. Mrs Claire Jeffrey, from whom I have heard, is the respondent's Head of People Services. She and Mrs Connette invited the claimant on five separate occasions to intend an informal meeting to discuss this matter. On each occasion the claimant, either personally or through her Prospect trade union representative, declined to attend. Mrs Jeffrey decided to deal the matter informally in the claimant's absence, and she concluded that the claimant should undertake further data protection training. Although a breach of this nature might ordinarily have resulted in disciplinary action, Mrs Jeffrey preferred to deal with the matter informally.
61. The claimant asserts that the accusation that she was responsible for a GDPR breach is an act of victimisation following her protected acts of her formal grievance in January 2022 and subsequent tribunal proceedings in April 2022. I find that the investigation and accusation were entirely proper and reasonable as a direct result of a legitimate concern that the claimant may have committed a GDPR breach. The respondent would have responded in the same way to the claimant irrespective of the protected acts relied upon.
62. At the same time as raising her grievance on 21 January 2022, the claimant commenced the Early Conciliation process with ACAS (Day A). ACAS issued the Early Conciliation Certificate on 2 March 2022 (Day B). The claimant presented this claim alleging disability discrimination on 1 April 2022. The claimant was subsequently dismissed, and the claim was later amended by agreement to include allegations relating to her dismissal.
63. The claimant commenced a period of self-certified sickness absence from 24 January 2022. This continued for a number of weeks, and it was followed by absences which were covered by fit notes from her GP. There were nine fit notes between 21 February 2022 and 25 November 2022, and the claimant did not return to work at any stage following her self-certified absence commencing on 24 January 2022.
64. During this time the respondent made extensive efforts to discuss the claimant's absence, and to seek to determine how the claimant could be supported and assisted to return to work. The claimant repeatedly refused to engage with these efforts. The claimant was invited to a meeting via Teams on 3 May 2022, but the claimant declined because she wished any meeting to be postponed pending the grievance investigation. Mrs Hodge of the HR Department tried to arrange a meeting with the claimant to discuss communication during her absence, but the claimant's trade union representative refused to attend any such meeting whilst the grievance investigation

was continuing. Mrs Connett wrote to the claimant on 29 June 2022 to invite her to an informal meeting via Teams. The claimant's trade union representative again declined on the claimant's behalf (even though the grievance outcome had been received by this stage). On 1 July 2022 Mrs Connett invited the claimant to an informal meeting and suggested as an alternative that the union representative might attend on the claimant's behalf. Both of these offers were declined.

65. The claimant then declined to attend her own appeal hearing in connection with the grievance appeal on 18 July 2022. On 6 August 2022 Mrs Hodge of HR informed the claimant that she and Mrs Connett wanted to have an informal meeting in the week commencing 5 September 2022. That offer was declined, and the claimant's trade union representative suggested that the claimant wished to meet with Mrs Hodge only. Mrs Hodge replied to the effect that this Mrs Connett needed to be present for a return-to-work meeting to have any purpose, and she suggested a meeting in the week commencing 12 September 2022. That offer was not accepted.
66. In addition, the respondent made extensive efforts to persuade the claimant to agree to an updated Occupational Health referral, but without success. On 27 March 2022 the claimant refused to permit her details to be provided to the respondent's new Occupational Health provider. There was further conversation about whether verbal consent was required but in any event Mrs Hodge wrote on 18 August 2022 asking the claimant to attend a referral. The claimant's trade union representative replied to the effect that the claimant declined to consent to another referral and referred again to the reasons why she had earlier declined on 27 March 2022.
67. The respondent then commenced the formal capability process under its sickness absence procedures, and on 31 August 2022 invited the claimant to a meeting on 14 September 2022. As at that stage the claimant had repeatedly declined to attend informal meetings about her to return to work, informal meetings about the GDPR breach, her appeal hearing, and had repeatedly declined to consent to an updated Occupational Health referral.
68. The capability hearing took place on 14 September 2022. The claimant declined to attend the capability hearing. She provided a written statement for the purposes of that hearing, but the claimant's statement did not provide any information relating to her state of health, any medical information, and whether she might ever return to work, and if so when. The information which the claimant did provide related only to complaints which she had previously raised in her grievance, which had already been investigated and rejected.
69. To assist this chronology, Employment Judge Smail determined that the claimant was a disabled person by reason of the impairment of post-herpetic neuralgia (and not work-related stress) with effect from 13 September 2022.
70. Mr Christopher Walsh, from whom I have heard, is the respondent's Head of Warnings and Guidance. Mr Walsh chaired the panel for the capability hearing on 14 September 2022. The panel declined to make the decision at that stage and decided to try to ascertain why the claimant continued to refuse to give consent to another Occupational Health referral in order to inform them with an updated position. The panel wanted to know what the claimant felt would help her return to work and when she thought she would be able to do so. The panel then put a number of questions in writing to the claimant to address these issues.
71. The claimant provided a response on 5 October 2022. She stated that her previous consent to an Occupational Health referral in January 2022 had been given under duress with the objective of deeming her unfit for work. She concluded that a further referral would be used for that basis as well. The claimant did not provide a substantive answer as to what could be done to assisted to return to work, but rather repeated her submissions to the first capability hearing which was effectively a repeat of her grievance complaint. The claimant did not confirm whether she felt able to return to work and only commented that she was still signed off work until 28 October 2022.
72. Even at this stage, the panel were reluctant to dismiss the claimant without giving her a further chance to engage with the process. The panel attempted to persuade the

claimant to consent to a further Occupational Health report, and they wrote to the claimant to the effect that without a further report, the panel were unable to understand her underlying health condition, her prognosis, and when she might be able to return to work. The panel asked the claimant to attend an Occupational Health appointment so that an up-to-date report to be obtained. They provided three alternative dates upon which the appointment could be made.

73. The panel also provided the claimant with details of three current job vacancies in case the claimant wished to be considered for alternative roles. The claimant declined to explore these on the basis that one was at a lower pay grade, and she felt that the other two appeared to be unsuitable engineering roles.
74. In reply to this approach the claimant's trade union representative wrote to Mrs Hodge on 12 October 2022 to the effect that the previous Occupational Health report should be considered because the claimant believed that her circumstances had not changed, and the earlier recommendations had not been acted upon. The claimant then provided a written response to the panel on 21 October 2022. She again attached information relating to her earlier grievance and appeal. She again failed to address when she was likely to return to work, what was the probable prognosis, and failed to indicate that she was willing to undertake a further Occupational Health assessment. She also provided a further fit note declaring her unfit for work until 25 November 2022.
75. The capability panel reconvened on 7 November 2022 and determined that it was appropriate in the circumstances to dismiss the claimant. This was confirmed by letter dated 9 November 2022. The panel noted that there was a complete lack of any indication as to whether the claimant might return to work following such a lengthy absence. The panel also noted that given the lack of such information redeployment did not appear to be suitable, and in any event the claimant had not engaged in an attempt to explore any roles which were currently available. The reason given for the claimant's dismissal was her extended ill-health, but the panel also noted her inability to accept the grievance outcome, and the difficulties which that was likely to cause if the claimant were to try to return to the workplace and rebuild relationships.
76. The claimant was afforded the right of appeal, but she did not exercise that right. The panel originally considered that the claimant was not entitled to be considered for ill-health retirement. That was a mistake which was rectified shortly thereafter. On 15 November 2022 the claimant was invited to apply for ill-health retirement and asked to confirm within a week whether she intended to do so. The claimant did not respond to that letter and has since confirmed that she did not wish to do so.
77. Having established the above facts, I now apply the law.
78. <u>The Law</u>
79. The reason for the dismissal was capability which is a potentially fair reason for dismissal under section 98(2)(a) of the Employment Rights Act 1996 ("the Act"). The respondent had earlier indicated that in the alternative the respondent relies on some other substantial reason such as to justify dismissal under s98(1)(b) of the Act because of an irretrievable breakdown in the working relationship. Although the respondent asserts that this gives relevant background to the factual matrix, this is no longer pursued as a potentially fair reason for dismissal.
80. I have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
81. This is also a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination arising from a disability, failure by the respondent to comply with its duty to make adjustments, harassment, and victimisation.

82. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
83. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA 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. Under section 15(2), 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.
84. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.
85. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
86. The definition of victimisation is found in section 27 of the EqA. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The following are all examples of a protected act, namely bringing proceedings under the EqA; giving evidence or information in connection with proceedings under the EqA; doing any other thing for the purposes of or in connection with the EqA; and making an allegation (whether or not express) that A or another person has contravened the EqA. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
87. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
88. We have considered the cases of (s15 EqA): Pnaiser v NHS England [2016] IRLR 170 EAT; Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14; City of York Council v Grosset [2018] IRLR 746 CA; Sheikholeslami v University of Edinburgh [2018] IRLR 1090; Homer v West Yorkshire Police [2012] IRLR 601 SC; Hardy & Hansons plc v Lax [2005] IRLR 726 CA; O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145; (Reasonable Adjustments) Royal Bank of Scotland v Ashton [2011] ICR 632 EAT; Linsley v HMRC [2019] IRLR 604; Newham Sixth Form College v Sanders [2014] EWCA Civ 7; Environment Agency v Rowan [2008] IRLR 20 EAT; General Dynamics Information Technology Ltd v Carranza [2015] ICR 169 EAT; Project Management Institute v Latif [2007] IRLR 579 EAT; (Harassment) - Warburton

v Chief Constable of Northamptonshire Police [2022] EAT, applying Chief Constable of West Yorkshire v Khan [2001] 1 WLR 1947 HL; Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham [2018] EWCA Civ 564 Betsi Cadwaladr University Health Board v Hughes and Ors EAT 0179/13; Ahmed v the Cardinal Hume Academies EAT 0196/18; Grant v HM Land Registry [2011] EWCA Civ 769; and Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT: (Victimisation) Nagarajan v London Regional Transport [2000] 1 AC 501; Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425 (Unfair Dismissal) Spencer v Paragon Wallpapers Ltd [1976] IRLR 373 EAT; GE Daubney v East Lindsey District Council [1977] IRLR 181 EAT; BS v Dundee City Council [2013] IRLR 131 CS; O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145; Topps Tiles Plc v Hardy [2023] EAT 56; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. I take these cases as guidance, and not in substitution for the provisions of the relevant statutes.

89. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015) ("the ACAS Code").
90. Decision
91. The claimant's claims to be determined by this Tribunal were agreed at a case management preliminary hearing and set out in a List of Issues at the end the Case Management Order of Employment Judge Smail dated 10 March 2023 ("the List of Issues"). The claimant's claims are for disability discrimination, (being discrimination arising from disability, an alleged failure to make adjustments, harassment, and victimisation), and for unfair dismissal. We deal with each of these claims in turn
92. The Claimant's Disability:
93. The disabilities relied upon by the claimant are facial disfigurement and post-herpetic neuralgia (following shingles). The respondent has conceded that the claimant was a disabled person by reason of facial disfigurement and Employment Judge Smail determined that the claimant was disabled by reason of both facial disfigurement and post-herpetic neuralgia in a Judgment dated 10 March 2023. This Judgment determined that the claimant was disabled by reason of the impairment of facial disfigurement at all times relevant to this claim, and that the claimant was disabled by reason of the second impairment of postherpetic neuralgia with effect from 13 September 2022.
94. Discrimination Arising from Disability s15 EqA:
95. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
96. In Basildon & Thurrock NHS Foundation Trust v Weerasinghe the EAT held that the fact that unfavourable treatment might be loosely related to a person's disability, or the context in which the disability was manifested, is not the same as showing that the treatment was the result of something arising out of the person's disability.

97. In assessing the legitimate aim defence, the tribunal must consider fully whether (i) there is a legitimate aim which the respondent is acting in pursuance of, and (ii) whether the treatment in question amounts to a proportionate means of achieving that aim (McCullough v ICI Plc). As noted in O'Brien v Bolton St Catherine's Academy in cases involving capability dismissals, the aim will almost inevitably be legitimate. The central issue for the tribunal in the majority of cases, and particularly in this, is whether dismissal was a proportionate means of achieving that aim.
98. In Hensman v Ministry of Defence Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based upon a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.
99. In addition, the defence of justification does not fail merely because there is a less discriminatory means of achieving the legitimate aim in question (Kapenova v Department of Health). Budgetary considerations may justify discrimination if they are in combination with other reasons (Cross v British Airways plc and Redcar and Cleveland Borough Council v Bainbridge). It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter (Hardys & Hansons Plc v Lax).
100. The test of proportionality is an objective one. A helpful summary of the proper approach is provided in Bolton St Catherine's Academy v O'Brien UKEAT/0051/15/LA: "[109] - A leading authority on issues of justification and proportionality is Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601 in which Lady Hale quoted extensively from the decision of Mummery LJ in R (Elias) v Secretary of State for Defence [2006] 1WLR 3213. Lady Hale cited a passage in his judgment when Mummery LJ said: "151 … The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."
101. The allegations of less favourable treatment as agreed and set out in the List of Issues are these: 4.1.1 - on 7 October 2021 Sarah Hewitt, when no longer the claimant's manager, informed the claimant that her performance review score was being reduced from "meets expectations" to "development required"; 4.1.2 - refusing the claimant's request to work from home on 13 October 2021, and continuing; 4.1.3 - on 11 January 2022 having 50% of her role removed when the claimant was removed from supporting the Chief People Officer; 4.1.4 - issuing the claimant with an Improvement Plan on 18 January 2022; and 4.1.5 - dismissing the claimant on 9 November 2022.
102. The first allegation 4.1.1 is that on 7 October 2021 Sarah Hewitt, when no longer the claimant's manager, informed the claimant that her performance review score was being reduced from "meets expectations" to "development required".
103. As a matter of fact, this allegation is not true. For the reasons set out above I accept Mrs Hewitt's version that she had not given the claimant the grading of "meets expectations" which was subsequently downgraded on 7 October 2021. This allegation of less favourable treatment therefore fails for that reason.
104. If and to the extent the allegation is a complaint that the claimant suffered less favourable treatment because her actual grading was unfairly low, then it is also rejected. It was a reasonable grading based on extensive evidence and discussion which was subsequently confirmed as accurate by the review process, on appeal to Mr Chavasse, and by the independence grievance investigator. The grading cannot be said to have been unreasonable or capricious, and it was clearly based on the evidence before the respondent's managers. I accept that receiving a grading of "development required" could be perceived to be less favourable treatment, but even so, in this case it cannot be said to be as a result of something arising in consequence of the claimant's disability of facial disfigurement. It was an accurate and reasonable grading based on

the claimant's historical performance and it had nothing to do with the claimant's facial disfigurement. This first allegation is therefore rejected.

105. The second allegation of discrimination arising from disability is 4.1.2 – "refusing the claimant's request to work from home on 13 October 2021, and continuing." I reject that allegation because it is not factually correct. Although the flexible working request was rejected, it was made clear to the claimant throughout the process that the respondent was prepared to consider a request to work from home 100% of the time provided that she went through the correct policy process. It is also a fact that the requirement applied to other employees to work 40% of the time in the office was never applied to the claimant. The respondent made adjustments allowing her to work from home throughout the relevant period. It cannot be said that the claimant suffered less favourable treatment in consequence of her disability of facial disfigurement because the less favourable treatment relied upon did not happen. This second allegation is also therefore rejected.

106. The third allegation is 4.1.3 – "on 11 January 2022 having 50% of her role removed when the claimant was removed from supporting the Chief People Officer." I also reject this allegation because it is not factually correct. 50% of the claimant's role was not removed. The decision taken by Mrs Connett was to change one of the Executive Directors for whom the claimant worked from Mr Lillie to Mr Bevan. Even if the allegation were put as one of changing one of the Executive Directors to whom the claimant reported, which does not appear to be the case, it is very clear that the reason for this was because of the breakdown in the relationship between the claimant and Ms Lillie. The claimant conceded at the time that that relationship could not get any worse. It is difficult to see how appointing the claimant to a different Executive Director in these circumstances could be less favourable treatment, but in any event the move to Mr Bevan was obviously because of the breakdown in the relationship, and cannot be said to be something arising in consequence of the claimant's disability of facial disfigurement.

107. The fourth allegation is 4.1.4 - issuing the claimant with an Improvement Plan on 18 January 2022. This allegation is factually correct. However, for the reasons explained in the findings of fact, it is clear from the interactions between the managers that the issuing of the informal improvement plan was triggered by, and a natural consequence of, the earlier grading of "development required". It followed in accordance with the respondent's normal policy in this respect. The claimant's grading was not given to her because of something arising in consequence of her facial disfigurement, because the matter is wholly separate from that disability. The plan was issued because the respondent's policy dictates that such a plan must follow a grading of "development required". Whereas I accept that being issued with an informal improvement plan can be perceived to be less favourable treatment and a detriment, in this case it cannot be said that the claimant suffered any less favourable treatment as a result of something arising in consequence of her disability. I therefore also reject this allegation.

108. The fifth and final allegation is 4.1.5 - dismissing the claimant on 9 November 2022. The respondent concedes that the claimant was dismissed, and it concedes that this was less favourable treatment. I agree with those concessions.

109. One question which arises is whether this less favourable treatment was because of something arising from the claimant's disability. The claimant's fit notes had certified the claimant as being unfit for work for work related stress. This was not because of the first disability of facial disfigurement. Employment Judge Smail determined that the claimant was a disabled person by reason of the impairment of post-herpetic neuralgia (and not work-related stress) with effect from 13 September 2022. It is only the final fit note presented by the claimant on 28 October 2022 which refers to post-herpetic neuralgia. The claimant has provided no evidence to suggest that the work-related stress was a symptom of the post-herpetic neuralgia. To the extent the unfavourable treatment was because of something arising from the claimant's disability it would

appear to be very minor only, and relating arguably to only the last 12 days out of a total period of absence of about 10 months.

110. As at the time of her dismissal the position was as follows: (i) the claimant had been off sick for nearly 10 months; (ii) she had refused repeatedly to cooperate with the respondent to enable the respondent to obtain up-to-date medical information; (iii) the respondent had difficulty in fulfilling the EA team's requirements to support the Executive Directors; (iv) the claimant had been given numerous opportunities to engage with the respondent to assist the respondent to support her to return to work, but she had refused repeatedly to engage in that process; (v) the capability hearing panel had afforded the claimant a number of opportunities to engage and to provide the information which they needed to try to understand whether it was likely the claimant would return to work and if so when, but without success (because the claimant declined to engage); (vi) the panel had tried to explore with the claimant the possibility of potential redeployment but this was rejected; (vii) the panel also sought to explore ill-health retirement as an alternative, and again the claimant declined. This was all against the background of the respondent being a government funded organisation which requires justification of its expenditure.

111. Against this background the respondent had to consider its legitimate aim which is relied upon for the purposes of this claim, namely that of ensuring the effective management of sickness absence of its staff. Every effort had been made to explore the alternatives which might have led to a different outcome from dismissal. The respondent been unable to make progress given the claimant's lack of cooperation and refusal to engage with a number of processes. The claimant's impact on the team's performance and her failure to engage was such that it would not be reasonable to expect the respondent to wait any longer. There was no indication that the claimant would ever engage in the process and even if extra time had been afforded for the claimant to engage it was not clear that anything would change.

112. I therefore agree with the respondent's submissions that its decision to dismiss was objectively justified. It was a proportionate means to achieve the respondent's legitimate aim. The claimant's claim under section 15 EqA for discrimination arising from disability is therefore dismissed.

113. <u>Reasonable Adjustments</u>

114. The constituent elements of claims in respect of an alleged failure to make reasonable adjustments are set out in <u>Environment Agency v Rowan</u>. Before considering whether any proposed adjustment is reasonable, the Tribunal must identify: (i) the provision, criterion or practice applied by or on behalf of the employer; (ii) the identity of the non-disabled comparators (where appropriate); and (iii) the nature and extent of the substantial disadvantage suffered by the claimant.

115. <u>Environment Agency v Rowan</u> has been specifically approved by the Court of Appeal in <u>Newham Sixth Form College v Sanders</u> - the authorities make it clear that to find a breach of the duty to make reasonable adjustments, an employment tribunal had first to be satisfied that there was a PCP which placed the disabled person at a substantial disadvantage in comparison with persons who were not disabled. The tribunal had then to consider the nature and extent of the disadvantage which the PCP created by comparison with those who were not disabled, the employer's knowledge of the disadvantage, and the reasonableness of proposed adjustments.

116. As per HHJ Richardson at para 37 of <u>General Dynamics Information Technology Ltd v Carranza</u> UKEAT/0107/14 KN: "The general approach to the duty to make adjustments under section 20(3) is now very well-known. The Employment Tribunal should identify (1) the employer's PCP at issue; (2) the identity of the persons who are not disabled with whom comparison is made; and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the Employment Tribunal is in no position to find what, if any, step it is reasonable for the employer to have to take to avoid the disadvantage. It is then important to identify the "step". Without identifying the step it is impossible to assess whether it is one which it is reasonable for the employer to have to take".

117. Where an adjustment is chosen by the employer it must address the disadvantage, and not necessarily the claimant's preferred solution. The EAT held in Linsley v HMRC [2019] IRLR 604 [para 38]: "An employer is not required to select the best or most reasonable of a selection of reasonable adjustments, nor is it required to make the adjustment that is preferred by the disabled person. The test of reasonableness is an objective one: see the case of Smith v Churchill's Stairlifts Plc [2005] EWCA Civ 1220 at [44], in which it is said that: "So long as the particular adjustment selected by the employer is reasonable it will have discharged its duty"."

118. The claimant relies on one PCP in the agreed List of Issues, namely the practice that the respondent required employees to work at the workplace from October 2021. It is correct that this PCP was in place, because from October 2021 respondent did require its employees to return to the office at least 40% of the time in line with government guidance.

119. The claimant asserts that this put her at a substantial disadvantage when compared to someone without her disability (her facial disfigurement), in that the claimant perceived that she needed to work from home pending restorative surgery to her facial disfigurement.

120. It is somewhat unclear why the claimant says that she was put to a substantial disadvantage by reason of her facial disfigurement in the requirement to return to work as compared with others without that disability. This is particularly the case given that the claimant said that she was willing to return to work outdoors if she was allowed to wear a mask. However, even if we assume that this requirement did cause a substantial disadvantage to the claimant by reason of disability, and the statutory duty for the respondent to make adjustments is engaged, the adjustment which the claimant asserts should have been taken by the respondent to avoid that disadvantage is being permitted to work from home (as had previously happened during the Covid pandemic).

121. As a matter of fact this adjustment was put in place. The PCP of working 40% of the time in the office was never applied to the claimant. The respondent made adjustments for her which allowed her to work from home throughout the period of the PCP, first as a response to her fit note from her GP, secondly as a continuation that adjustment pending receipt of the Occupational Health report, and then subsequently in accordance with the recommendations of that report. There was therefore no failure of the respondent to comply with its duty to make a reasonable adjustment to ameliorate the substantial disadvantage relied upon. It does not matter that the process by which the reasonable adjustment was made may not have been precisely what the claimant requested, because there is no requirement to make any adjustment in the manner preferred by the disabled person (applying Linsley).

122. I therefore find that the statutory duty to make adjustments to ameliorate the substantial disadvantage of the PCP relied upon was engaged, but that the respondent did make a reasonable adjustment as required. Accordingly, the claimant's claim that the respondent failed to make a reasonable adjustment in the circumstances is dismissed.

123. Harassment s26 EqA:

124. Turning now to the claim for harassment, A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).

125. Detriment is to be interpreted widely: see Warburton v the Chief Constable of Northamptonshire Police [2022] EAT - it is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in

the view taken by the ET itself. The ET might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.

126. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham: "In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.

127. Whether unwanted conduct has the proscribed effect is matter-of-fact to be judged objectively by the Tribunal. Although the claimant's subjective perception is relevant, as are the other circumstances of the case, it must be reasonable that the conduct had the proscribed effect upon the claimant Betsi Cadwaladr University Health Board v Hughes and Ors. If it is not reasonable for the impugned conduct to have the proscribed effect, that will effectively determine the matter Ahmed v The Cardinal Hume Academies. It is well established that not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land Registry at para 47 "Tribunal's must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment." Similarly, Langstaff P emphasised in Betsi at para 12: "The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc ..."

128. The intent behind unwanted conduct will not be determinative. However, it will often be relevant, per Underhill P in Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT at para 17: "one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."

129. The allegations of harassment set out in the agreed List of Issues are as follows: 6.1.1 - On 31 March 2021 Sarah Hewitt said in a Teams meeting of the Executive Assistants team that the claimant was required to go first in the production of a subsequent EA update because in respect of the claimant "the Directors wanted to see some personality"; and 6.1.2 - On 20 May 2021 (and not 1 April 2021 as suggested in the List of Issues) Sarah Hewitt said to the claimant that "we don't know what's wrong with you; is it a lack of confidence or is it personality?" and 6.1.3 - In June 2021 Sarah Hewitt instigated a capability process with no basis for performance concerns; and 6.1.4 - In July 2021 with reference to the claimant, Paul Chavasse emailed that talking face-to-face in Teams meetings removes misunderstandings; and 6.1.5 - On 28 September 2021 Simon Brown, the Services Director, wrote that "it's quite robotic doing weekly catch up virtually at the moment, not helped by the fact that Ruth chooses not to have her camera on"; and 6.1.6 (which is the same as 4.1.1 under s15 EqA above) on 7 October 2021 Sarah Hewitt, when no longer the claimant's manager,

informed the claimant that her performance review score was being reduced from "meets expectations" to "development required".

130. For the reasons explained in the findings of fact above, I have found that the first three allegations at 6.1.1, 6.1.2 and 6.1.3 are factually incorrect and simply did not happen, and they are therefore all dismissed as allegations of harassment.

131. With regard to allegation 6.1.4, it is correct that Mr Chavasse stated in his email of 12 July 2021: "Talking face-to-face (or at least on Teams!) really does help remove misunderstandings (which I think may have arisen in a couple of places) and help to get to grips with things."

132. The claimant asserts that this last comment about talking face-to-face amounts to harassment which is related to the claimant's disability of her facial disfigurement. Put simplistically she has taken offence at the use of the words "face-to-face" taking that to be a criticism of the fact that she had her camera off because of her facial disfigurement. Mr Chavasse denies that this was the case, and he denies that it was a comment about the claimant having her camera off and/or about her working from home (as all the respondent's employees were at that stage). He says that "face-to-face" is a common expression and was not something which he was in any way addressing to the claimant's disfigurement. He was simply making the comment that talking to one another was a more productive way of resolving issues than sending emails.

133. Taking account of the full context of this exchange, and bearing in mind the mental processes of Mr Chevasse in writing that sentence, I do not accept that the sentence complained about relates to the claimant's facial disfigurement. Neither do I consider it reasonable for the claimant to have concluded that this comment had the prescribed effect. I therefore dismiss this claim of harassment as well.

134. The fifth allegation of harassment (6.1.5) is that on 28 September 2021 Simon Brown, the Services Director, wrote that "It's quite robotic doing weekly catch up virtually at the moment, not helped by the fact that Ruth chooses not to have her camera on".

135. Mr Brown has explained in his evidence that by "robotic" he really meant that the weekly catch-up meetings were too much of a "transactional" relationship, meaning that they tended just to run through the list of items to be done, and it was not a comment which was in any way related to the claimant's facial disfigurement. Putting this comment into its context, the claimant had made a flexible working request, which unsurprisingly resulted in her senior managers considering her perceived performance where she to be allowed to work remotely, as against her perceived performance if she were to attend the office in person. Mr Brown's email was not intended or expected to be seen by the claimant. At no stage did Mr Brown discuss with the claimant whether or not she should put her camera on in meetings and neither did he pressurise her to do so. There is no suggestion that the claimant had taken offence until she referred to the comment in her grievance some four months later.

136. Bearing all of this in mind I do not accept the Mr Brown's comment was in any way related to the claimant's disability. Further, I do not consider that it was reasonable for the claimant to conclude that the comment had the prescribed effect. I therefore dismiss this claim of harassment as well.

137. The final allegation of harassment is 6.1.6 (which is the same as 4.1.1 under s15 EqA) that on 7 October 2021 Sarah Hewitt, when no longer the claimant's manager, informed the claimant that her performance review score was being reduced from "meets expectations" to "development required".

138. As a matter of fact, this allegation is not true. For the reasons set out above I accept Mrs Hewitt's version that she had not given the claimant the grading of "meets expectations" which was subsequently downgraded on 7 October 2021. This allegation of harassment therefore fails for that reason. If and to the extent that the allegation is a complaint about the actual grading being too low, then it is also rejected. In the first place it was a reasonable grading based on extensive evidence and discussion which was subsequently confirmed as accurate by the review process, on appeal to Mr

Chavasse, and by the independence grievance investigator. The grading cannot be said to have been unreasonable or capricious, and it was clearly based on the evidence before the respondent's managers, and it was in no way related to the claimant's disability of facial disfigurement.

139. The claimant's claim for harassment related to disability under section 26 EqA is therefore dismissed.

140. Victimisation s27 EqA:

141. Under section 27 EqA, a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The burden of proof will shift if the worker proves that the employer has done a protected act, and that the worker has been subject to a detriment. The test for detriment is comparable with the test for direct discrimination, in that a worker suffers detriment if he or she would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An unjustified sense of grievance is not enough (Shamoon). However, detriment is to be interpreted widely: see Warburton v the Chief Constable of Northamptonshire Police - it is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the ET itself. The ET might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.

142. Similarly to direct discrimination, whether a detriment is because of a protected act should be addressed by asking why A acted as they did, and not by applying a but for approach. The protected act must be a real reason for the treatment (Chief Constable of Greater Manchester v Bailey). Put another way, the correct legal test to the causation or "reason why" question is whether the protected act had a significant influence on the outcome - see Warburton v Chief Constable of Northamptonshire Police, applying Chief Constable of West Yorkshire v Khan; Nagarajan v London Regional Transport and Chief Constable of Greater Manchester v Bailey.

143. The claimant relies on three protected acts as set out in the List of Issues, namely 7.1.1 - raising an informal grievance on 7 January 2022; and 7.1.2 - raising a formal grievance on 21 January 2022; and 7.1.3 - issuing this Employment Tribunal claim on 1 April 2022. The respondent disputes that the first protected act was a protected out for the purposes of s27 EqA, but it concedes that the second two instances did amount to protected acts.

144. As for the first alleged protected act, the claimant relies on her conversation with Mrs Connett on 7 January 2022 as an informal grievance. The respondent denies this. Given that there is no reference in Ms Connett's contemporaneous note (which I have accepted as accurate) to the claimant's disability, nor to any allegations of discrimination or any other breach of the Equality Act, I reject that assertion. The claimant also accepted in cross examination that this matter was not discussed then.

145. I therefore find that there was no protected act for the purposes of the claimant's victimisation claim until the second and third protected acts relied upon, namely 7.1.2 - raising a formal grievance on 21 January 2022 (which included allegations of discrimination); and 7.1.3 - issuing this Employment Tribunal claim on 1 April 2022. These were clearly protected acts, and they have been conceded as such by the respondent.

146. The allegations of less favourable treatment relied upon by the claimant and set out in the List of Issues are these: 7.3.1 (which is the same as 4.1.3 under s 15 EqA) - on 11 January 2022 having 50% of her role removed when the claimant was removed from supporting the Chief People Officer; 7.3.2 (which is the same as 4.1.4 under s 15 EqA) - issuing the claimant with an Improvement Plan on 18 January 2022; and 7.3.3

- Accusing the claimant of a GDPR breach on 18 June 2022; and 7.3.4 (which is the same as 4.1.5 under s 15 EqA) - dismissing the claimant on 9 November 2022.

147. I reject the first allegation of victimisation which is that on 11 January 2022 having 50% of her role removed when the claimant was removed from supporting the Chief People Officer. Not only this is this factually incorrect, for the reasons explained in my findings of fact above, but in any event it predates any protected act, and cannot therefore be said to be detrimental treatment because of a protected act.

148. The second allegation of victimisation is 7.3.2 - issuing the claimant with an Improvement Plan on 18 January 2022. This allegation is factually correct. However, for the reasons explained in the findings of fact, it is clear from the interactions between the managers that the issuing of the informal improvement plan was triggered by, and a natural consequence of, the earlier grading of "development required". It followed in accordance with the respondent's normal policy in this respect. In addition, this plan was issued on 18 January 2022, before the protected act relied upon of the claimant's grievance on 21 January 2022. The claimant's grading was therefore not given to her because of a protected act. I therefore also reject this allegation.

149. The third allegation of victimisation is 7.3.3 - Accusing the claimant of a GDPR breach on 18 June 2022. This allegation is factually correct. I accept that an accusation and investigation of this nature can amount to a detriment or less favourable treatment (even when it was dealt with so leniently as in this instance and resulted only in a recommendation of further training). However, I find that the investigation and accusation were entirely proper and reasonable as a direct result of a legitimate concern that the claimant may have committed a GDPR breach. The respondent would have responded in the same way to the claimant irrespective of the protected acts relied upon. I reject the allegation that this accusation was made because the claimant had done either of the two protected acts relied upon. I therefore also reject this allegation of victimisation.

150. The final allegation victimisation is 7.3.4 - dismissing the claimant on 9 November 2022. The respondent accepts that the claimant was dismissed, and it also accepts that the dismissal amounts to less favourable treatment. I agree with those concessions.

151. However, the claimant is unable to show that her dismissal was because she had done either of the two protected acts. The claimant was dismissed because of her extended absence for ill health. The claimant's two protected acts of her grievance and for issuing these proceedings were wholly irrelevant to the panel's decision to dismiss her. It cannot be said therefore that the claimant suffered the less favourable treatment or detriment of dismissal because of either of the protected acts. I therefore also reject this allegation of victimisation, which means that the claimant's claim for victimisation under section 27 EqA is dismissed.

152. Unfair Dismissal s98(4) of the Act

153. I have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

154. The starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to a set of factual circumstances within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of

reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

155. In general terms there are two important aspects to a fair dismissal for long term illness or for injury involving long-term absence from work. In the first place, where an employee has been absent from work for some time, it is essential to consider whether the employer can be expected to wait longer for the employee to return (see Spencer v Paragon Wallpapers Ltd). In S v Dundee City Council the Court of Session held that the Tribunal must expressly address this question and balance the relevant factors in all the circumstances of the individual case. Such factors include whether other staff are available to carry out the absent employee's work; the nature of the employee's illness; the likely length of his or her absence; the cost of continuing to employ the employee; the size of the employing organisation; and, balanced against those considerations, the "unsatisfactory situation of having an employee on very lengthy sick leave".

156. The second important aspect is that a fair procedure is essential. This requires in particular consultation with the employee; a thorough medical investigation (to establish the nature of the illness or injury, and its prognosis); and consideration of other options, in particular alternative employment within the employer's business. An employee's entitlement (if any) to enhanced ill health benefits will also be highly relevant.

157. The importance of full consultation and discovering the true medical position was stressed by the EAT in East Lindsay District Council v Daubney. Mr Justice Phillips stated: "Unless there are wholly exceptional circumstances, before an employee is dismissed on the grounds of ill-health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done … Only one thing is certain, that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done"

158. As noted above, as at the time of her dismissal the position was as follows: (i) the claimant had been off sick for nearly 10 months; (ii) she had refused repeatedly to cooperate with the respondent to enable the respondent to obtain up-to-date medical information; (iii) the respondent had difficulty in fulfilling the EA team's requirements to support the Executive Directors; (iv) the claimant had been given numerous opportunities to engage with the respondent to assist the respondent to support her to return to work, but she had refused repeatedly to engage in that process; (v) the capability hearing panel had afforded the claimant a number of opportunities to engage and to provide the information which they needed to try to understand whether it was likely the claimant would return to work and if so when, but without success (because the claimant declined to engage); (vi) the panel had tried to explore with the claimant the possibility of potential redeployment but this was rejected; (vii) the panel also sought to explore ill-health retirement as an alternative, and again the claimant declined. This was all against the background of the respondent being a government funded organisation which requires justification of its expenditure.

159. Against this background it is clear that the respondent was entitled to conclude that it had waited long enough, and it could not be expected to wait any longer for the claimant to return. In addition, it is clear that the respondent made repeated efforts to consult fully with the claimant, who had access to advice throughout from her independent trade union representative. She was afforded the opportunity of a fair hearing in circumstances where she knew it might result in her dismissal. She engaged only minimally with that process, and the respondent was patient in its determination

to try to assist the claimant by seeking to gather all relevant information to hand. The claimant declined to explore the opportunity of redeployment, and she declined to apply for ill-health retirement as an alternative to dismissal. The claimant was offered an appeal against the decision to dismiss which she declined to exercise. There was a full and fair and reasonable process. In addition, for the reasons explained above, the decision to dismiss the claimant was not tainted by any act of discrimination on the grounds of either disability.

160. This tribunal is not permitted to substitute its view for that of the respondent. There is a band of reasonable responses to a set of factual circumstances within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

161. In the circumstances I find that dismissal was within the band of reasonable responses which were open to the respondent when faced with these facts. Accordingly, even bearing in mind the size and administrative resources of this employer, I find that the respondent's decision to dismiss the claimant was fair and reasonable in all the circumstances of the case.

162. The claimant's claim for unfair dismissal is accordingly dismissed.

163. Out of Time Issues

164. It is also worth recording that the claimant faced difficulty with a number of her claims which had arguably been presented out of time (to the extent that they relate to matters which are said to have arisen before 22 October 2021). These are all the harassment claims, and the first two allegations under section 15 EqA. These matters were always to be considered in the List of Issues, but they were not addressed by the claimant in her evidence. I have not considered these issues in this judgment because these claims have been dismissed on their merits in any event for the reasons set out above.

165. Conclusion

166. In conclusion therefore the claimant's claims are all dismissed.

167. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 11 to 76; a concise identification of the relevant law is at paragraphs 79 to 89, 95 to 100, 114 to 117, 124 to 128, 141 and 142, and 153 to 157; and how that law has been applied to those findings in order to decide the issues is at paragraphs 101 to 112, 118 to 122, 129 to 139, 143 to 151 and 158 to 162.

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Employment Judge N J Roper
Dated 24 November 2023

Judgment sent to Parties on 13 December 2023

For the Tribunal Office