



EMPLOYMENT TRIBUNALS

Claimant: Miss L Gilhooly

Respondent: Kelly Rushton (1)
Secretary of State for Justice (2)

Heard at: Birmingham (by CVP)

On: 31 July 2023
1, 2, 3 & 4 August 2023
22 & 23 November 2023 (panel)

Before: Employment Judge Maxwell
Ms Forrest
Mr Howard

Appearances

For the Claimant: in person
For the Respondent: Ms Gardiner, Counsel

RESERVED JUDGMENT

1. The Claimant's claim with respect to the steps taken (or not) by Governing Governor Carl Hardwick following a meeting with her in January 2022 is dismissed on withdrawal.
2. The Claimant's remaining claims of direct discrimination, failure to make reasonable adjustments and harassment are not well-founded and are all dismissed.

REASONS

Procedural Matters

1. At the beginning of day 1, we discussed the agreed list of issues, which were said to arise on the Claimant's claims. There were 3 alleged detriments for the direct discrimination complaint:

(5a) Subjecting the Claimant to heavier workloads on her return from scans, biopsies or other medical appointments. The Claimant relies upon Alison Baker as her comparator;

(5b) Not allowing the Claimant to remain in the office on an occasion in July 2021 when she was waiting her a phone call from the hospital in relation to her father and telling the Claimant that she should not bring her home life into work. The Claimant relies upon Alison Baker as her comparator;

(5c) Subjecting the Claimant to excessive stress. The Claimant relies upon Alison Baker and a hypothetical comparator.

2. The first two alleged detriments were relatively straightforward. They had been identified in clear enough terms for the Tribunal and parties to engage with sensibly. The third detriment was, however, hopelessly vague, as it did not identify any conduct which was alleged to have caused the stress complained of. Our concerns about this were compounded when we read the Claimant's witness statement and noted an apparent disconnect between the matters complained of in that document on the one hand and the list of issues on the other. The Judge asked the parties about this.
3. Ms Gardiner said it had been difficult to clarify the Claimant's claim. The Respondent had initially provided a holding defence and sought further information from the Claimant. That information was provided in October 2022. In response to this, the Respondent amended its grounds of resistance and prepared witness statements. With respect to the third detriment, Ms Gardiner said this was "an umbrella", intended to reflect the effect caused on the Claimant by the other matters about which she complains. This was unsatisfactory. A list of detriments in a direct discrimination claim should comprise the things allegedly done by the Respondent which are said to amount to less favourable treatment because of a protected characteristic. These should be specific, identifying what was done, when and by whom. Whilst the effect of such conduct upon the Claimant might be relevant to remedy, it would not comprise less favourable treatment in and of itself.
4. The Judge asked the Claimant to identify the occasions on which she was alleging something was said or done by the Respondent, which amounted to it subjecting her to excessive stress. She found this a difficult question to answer. The Judge referred the Claimant to her witness statement and we took an adjournment. Following further discussion on this point, the Claimant identified a large number of paragraphs in her witness statement which she said set out the direct disability discrimination she had been subject to.
5. Ms Gardiner disagreed with the Claimant's approach. She said the witness statement included many new matters which had not been raised previously, permission to amend would be required and this was opposed.
6. We noted the original claim form particulars were very brief. The Respondent had been unable to respond to this in a meaningful way. As such further information was requested. Once in receipt of this, the Respondent did respond to what it understood was the Claimant's claim. We have approached this matter

on the basis that the further and better particulars document involves no more than the appropriate particularisation of her original claim form and no permission to amend was required. Further and alternatively, if permission to amend to rely upon the further information had been necessary, we would have granted this as the document was provided at a relatively early stage in the proceedings, went unopposed and the Respondent has prepared its defence to the claim on the basis of its contents. There can be no unfair prejudice in requiring the Respondent to answer the complaints that emerge from it.

7. Having crossed referred between the further information provided in October 2022, the Claimant's witness statement setting out the matters she now wished to complain about and the existing list of issues, we came to the conclusion there were some matters in the further information that, properly construed, appeared to amount to complaints of direct disability discrimination and which had not found their way into the list of issues. We added these as further detriments to a final list of issues. We were not persuaded to exclude factual matters appearing under the heading of "introduction" as it appeared to us these were substantive complaints. Under the heading direct discrimination, the Claimant referred back to the "first incident" which was the matter set out in the introduction. Some dates were changed. We did not add further detriments for the direct disability discrimination claim where the factual complaint was already included in the existing list of issues as part of the conduct complained of as amounting to harassment. We did not, however, add to the list of issues the additional matters included by the Claimant for the first time in her witness statement.
8. Having spent much of day 1 ruling upon the scope of the Claimant's claims and the issues before the Tribunal, we then explored how the case would be managed and conducted going forward. We were mindful of the time spent resolving this point, when the original timetable only allowed 2 hours for preliminary matters and Tribunal reading.
9. Ms Gardiner raised two practical problems affecting the availability of witnesses. Mr Bailey was going on holiday from Wednesday (day 3) and, therefore, needed to give his evidence by the end of Tuesday (day 2). Mr Hardwick was not, however, available at all. Whilst Ms Gardiner did not seek to go behind our ruling on the scope of the Claimant's claim, she explained the witness statements had been finalised and exchanged after agreement on the list of issues was reached and since no claim against Mr Hardwick was then identified, he had not been included amongst the Respondent's witnesses. Ms Gardiner was concerned about time. She thought the pace of proceedings would be slow as a result of the need for additional breaks to accommodate the Claimant.
10. The Claimant was very concerned about her ability to conduct the hearing and ask questions of the Respondent's witnesses, in particular Ms Rushton who is also the first Respondent. The Judge discussed the possibility of him reading out her questions or her "cutting and pasting" them into the CVP sidebar. The Claimant did not think she would manage the latter because she was using a tablet rather than a laptop. Whilst the Claimant said her mental health and angina symptoms made it difficult for her to participate, she did not want a postponement because she thought she would get worse rather than better with more delay. Her preference was to proceed with the hearing and get it over with.

11. As far as Mr Bailey was concerned, his holiday could be accommodated by calling him as a witness out of sequence. The issue with Mr Hardwick was more difficult to overcome. Whilst we were satisfied the complaint about him was part of the Claimant's claim and criticised the Respondent for vagueness in the list of issues at 5c, nonetheless this is a document the Claimant agreed to and it included no express complaint about Mr Hardwick. His absence from the Respondent's witnesses was, therefore, to some extent understandable. We invited the Respondent to take instructions on his availability. We also invited the Claimant to consider the relative importance of that particular complaint and whether she would wish to continue to pursue it, if that became the only potential obstacle to the hearing proceeding this week. We adjourned overnight to allow for reflection by the parties and the Respondent to take instructions.
12. On day 2, the Respondent indicated that it was endeavouring to secure the attendance of Mr Hardwick but it was difficult given the short notice, he was covering additional duties this week and there had been a death in custody the night before. The Judge explained to the Claimant the importance of Mr Hardwick having a reasonable opportunity to contest an allegation of discrimination made against him. There was a need to be fair to both parties. The lack of clarity over the issues to be determined meant his nonavailability would be relevant to whether not it was in the interests of justice to proceed this week, if the claim against him was pursued. The Judge indicated that if this claim were withdrawn, the Claimant would still be able to proceed with all of her other complaints, in particular as against Ms Rushton, and she would still be able to give her evidence about Mr Hardwick as part of the background. It was also explained that we could postpone the hearing to a later date, in which case arrangements would be made for Mr Hardwick to attend. The Claimant said she wished to withdraw the specific Claim against Mr Hardwick. The withdrawal was noted. The Judge indicated the claim would not be dismissed until judgement was given on the other claims.
13. As far as the Claimant's questions were concerned, the Judge suggested he would read these to the Respondent's witnesses, breaking them down if they were multi-part and attempting to simplify them if they were unclear. It would be unduly cumbersome and defeat the object of the Judge reading the questions out, if he reverted to the Claimant on each occasion for an oral follow-up. The Judge suggested the Claimant could make a note as she listened to the answers and then at the end of her questions being put, she could raise any additional questions she wished the Judge to put. The Claimant was content to proceed in this fashion.
14. Ms Gardiner indicated she would need to ask supplemental questions, where her witnesses did not address claims or background matters in their witness statements. The Judge indicated this would be permitted albeit questions about the background should be limited, as we would be focusing on the issues as ruled upon.
15. In the circumstances, the Claimant wished to proceed and the Respondent did not pursue a postponement application. We adjourned for a short time and then decided to proceed in the fashion discussed with the parties.

Issues

16. The liability issues as ruled upon are set out below.

Time Limits

1. Whether the Claimant's claims were presented within the applicable statutory time limit.

Direct Discrimination

2. Did the Respondent do the following things:
 - 2.1 [former 5a] Subjecting the Claimant to heavier workloads on her return from scans, biopsies or other medical appointments. The Claimant relies upon Alison Baker as her comparator;

[former 5c deleted]
 - 2.2 [March 2021] I requested a days leave for test results for a scan that I had, this was denied by CM Rushton as there was no one in the office, I then had to contact my Consultant and request that it took place via the telephone instead of face to face.
 - 2.3 [March 2021] a meeting in the CMs office, where CM Mackie And CM Rushton was present, I informed them of the results, that they had found a node on my lung and no iron or iron stores, that I would have to have another scan, Security Governor Bill Davies then instructed that I took the following day off and rest, once the meeting had concluded Security Governor Bill Davies and CM Mackie went home, I returned to my office, CM Rushton then came to my office and stated that she was not happy and as she is my line manager only she can authorise the day off.
 - 2.4 [August 2021] I was in the office CM Rushton was constantly belittling and moaning at me with regards to the work, I started getting pains in my chest, Arm, back and jaw this started to become increasingly uncomfortable, at first I thought it was indigestion. I stood up to walk out of the office as CM Rushton was becoming more aggressive with me, I was stopped in the corridor by Paul Sprouston, he stated that he did not like the colour of me or how I was presenting, I was holding my chest CM Rushton came out of the office with the other analysts to go to the kitchen, she did not ask if I was ok, she just walked past.
 - 2.5 In January 2022 I had a meeting with the Governing Governor Carl Hardwick and advised him of the ongoing situation of bullying and discrimination I was receiving from

CM Rushton. He stated that he would speak with the Security Governor and CM Rushton. This did not appear to happen as I did not receive any feedback [withdrawn by the Claimant].

2.6 [8 February 2022] At this point I started to get pains in my chest, arms, jaw and back and tried to remove myself from the stressful situation which was on previous advise from Security Governor Paul Bailey CM Rushton then started shouting louder "good if your going to Paul it saves me from reporting you later, I will come with you", CM Jack Allen came out of the office to enquire what the shouting was about, he then took me to another office away from CM Rushton.

2.7 [former 5b] Not allowing the Claimant to remain in the office on an occasion [8 February 2022 not July 2021] when she was waiting her a phone call from the hospital in relation to her father and telling the Claimant that she should not bring her home life into work. The Claimant relies upon Alison Baker as her comparator;

3. Did the Respondent's treatment amount to a detriment?

3.1 If so, was it because of disability?

Reasonable Adjustments

4. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

5. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

5.1 Requiring that the Claimant's manager would not be reallocated.

6. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?

7. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

8. What steps could have been taken to avoid the disadvantage? The Claimant suggests:

8.1.1 Move her to Stafford or the Women's Directorate.

9. Was it reasonable for the Respondent to have to take those steps and when?

10. Did the Respondent fail to take those steps?

Harassment

11. Did the Respondent do the following things:

11.1 On 7 February 2022, CM Rushton instructing the Claimant to clear up the Mercury reports, and when the Claimant queried why they had not been done in her absence, CM Rushton raising her voice and stating it had nothing to do with her. Then later challenging why the Claimant was making drinks for the dog team and telling her to stop what she was doing and get on with work;

11.2 On 17 March 2022, CM Rushton contacting the Claimant at home and shouting that she could contact the Claimant whenever she liked;

11.3 On 7 January 2022 being handed a letter with regards to her poor performance.

12. If so, was that unwanted conduct?

13. Did it relate to disability?

14. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

15. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Evidence

17. We were provided with an agreed bundle of documents running to page 416. Some additions were made during the course of the hearing.

18. Witness statements and oral evidence were received from:

18.1 Lisa Gilhooly, the Claimant;

18.2 Jack Allen, Custodial Manager;

18.3 Rebecca Wyatt, Acting Deputy Governor;

18.4 Nathan Scanlan, Custodial Manager;

18.5 Paul Bailey, Acting Head of Security and Operations;

18.6 Kelly Rushton, Custodial Manager and first Respondent.

Facts

Parties

19. The Claimant has been employed in HM Prison Service since December 2007, in recent years as an Intelligence Analyst at HMPYOI Drake Hall. The second Respondent Secretary of State is responsible for the Prison Service. From 2020, the first Respondent was Custodial Manager in Security and Operations. She was responsible for the team in which the Claimant worked. In the decision set out below we will refer to the first Respondent as Ms Rushton and the second Respondent, simply, as the Respondent.

Disability

20. The question of disability was determined by EJ Dean at a preliminary hearing on 14 December 2022. The Claimant was a disabled person:

20.1 by reason of Fibromyalgia from February 2021;

20.2 by reason of Stress related Angina from February 2022.

Witnesses

21. We were satisfied all witnesses did their best to give an honest and accurate account of events, according to their recollection and perception. Where necessary to resolve a dispute, we preferred the evidence called by the Respondents over that of the Claimant. Ms Rushton and her colleagues gave clear and direct answers to questions. Their accounts were credible and consistent with the contemporaneous documentary evidence. Whilst we do not doubt the Claimant's honesty, we are less certain about her reliability. In a number of respects she put forward an account that was either inherently implausible or contradicted by written records made at the time. She was also somewhat muddled on dates and mistakenly conflated certain incidents.

2019

22. In October 2019, the Claimant studied for a diploma, which was relevant to her work as an Intelligence Analyst. The course comprised various modules and at this time, the Claimant asked Ms Rushton to look at the work she had done. In her evidence at the Tribunal, the Claimant was adamant she had never sought any such support from Ms Rushton. Relevant emails were subsequently put in evidence and it is plain that notwithstanding the strength of her current belief, the Claimant is mistaken.

2020

23. In 2020 Ms Rushton became Custodial Manager in Security and Operations. On the Respondent's systems, Ms Rushton appeared to be the Claimant's line manager. In practice, however, the Claimant was allowed to continue to report to Ms Rushton's predecessor, Mr Mackie, for a time. This accommodation was made because the Claimant objected to being line managed by Ms Rushton. The basis for this objection did not emerge from the documents in the hearing bundle or the parties' witness statements. This did not appear to be a case

where the two had at one time got along well and then a particular adverse event caused a sudden deterioration. When the Claimant was asked, she said it was because in their previous dealings, Ms Rushton did not ask about her health. We did not find that to be a persuasive answer. The Claimant was exceedingly reluctant to discuss any health issues or medical appointments with Ms Rushton and it seems most unlikely that the Claimant would have taken against her because she didn't ask about such matters. Having considered the evidence in this case, it appears to us the Claimant's attitude stemmed from her concerns about changes in working methods. The Claimant had enjoyed a considerable degree of autonomy under previous managers. She feared, correctly as it turned out, that Ms Rushton would adopt a less passive approach than her predecessors in her day to day management. The Claimant had been used to getting on with things as she saw fit. She was apprehensive about and then resented in practice what she saw as Ms Rushton's interference.

June 2021

24. Unsurprisingly, the tripartite arrangement, with the Claimant in Ms Rushton's department but not reporting to her, did not work well. When Ms Rushton made work-related enquiries of the Claimant, she was not forthcoming and said Mr Mackie was her manager. In or about June 2021, Mr Mackie ceased to be involved and thereafter, the Claimant was required to report to Ms Rushton.

Leave Requests

25. When considering requests for annual or flex leave, Ms Rushton would take into account the needs of the business and in particular, whether there would be sufficient cover. She sought to avoid a situation where both the Intelligence Analysts, the Claimant and Ms Baker, were off work at the same time. In the event of the Claimant requesting leave when Ms Baker was already due to be off, Ms Rushton would not give permission. On occasion, the Claimant used annual or flexi leave in order to attend medical appointments. Whilst we now know that to be the case, the Claimant did not tell Ms Rushton about that at the time. The Claimant preferred to keep such matters to herself. She was reluctant to reveal personal information about her health to Ms Rushton.
26. In the course of her evidence at the Tribunal, Ms Rushton said and we accept, had she been told that leave was sought to attend a medical appointment it is likely she would have given permission for this even if the result was the Department being understaffed. The position would be different if Ms Rushton understood leave was being sought for a less pressing reason, such as a "duvet day". The Claimant's lack of communication meant that Ms Rushton could not take into account the underlying (and undisclosed) reasons behind leave requests.
27. On 18 June 2021, Ms Rushton circulated an email to various employees asking about the leave they wished to take over Christmas and New Year. She began her message by explaining that she had been asked to look at this. The Claimant replied on 21 June 2021 in the following terms:

As I am not an officer, I have requested my leave and booked it. I will not be changing it as I do not do this anymore. Also as a civilian we can book leave up to 24hrs prior to what leave we require.

Mine is on the board. If you are now changing leave to be pre booked can I see the change in my contract.

28. This was a strong response by the Claimant to a modest general enquiry from Ms Rushton.
29. On 30 June 2021, Ms Rushton wrote to the Claimant about two days of flexi leave she wished to take off work because the first coincided with a colleague's annual leave and the second was a day Ms Rushton had already approved for someone else. Ms Rushton asked when and by whom the Claimant's leave had been approved, as the resulting lack of staff cover would have led her to decline this request. The Claimant replied:

My Friday 9th July has been booked for over two months, as I have appointments on that day.

[...] is not off on the 14th as there is nothing on the board, unless we now have two boards running?

This is a private flex day, and I do not need or require to inform you why I want flex or leave. I have been in the office for three years and we have never had to ask for time off, why is this now an issue.

As for [...] and her block leave, you didn't mind [...] have the same time off as me in June, which was also her block leave..

30. Once again, the Claimant's response was somewhat stronger than might have been expected in the circumstances. Ms Rushton had a duty to manage staff resources and ensure sufficient cover in her department. She wrote to the Claimant for this reason. Her actions were in accordance with the Respondent's policy on flexi leave, which required management approval be obtained.

Workload

31. Given the lack of information provided about the reasons for taking days off work, it would have been difficult for Ms Rushton to target the Claimant with an increased workload following her having scans, biopsies or attending other medical appointments. In any event and separately from whether Mrs Rushton learned of the reason for the Claimant taking a particular day off work, there was no occasion on which her return was met by more work being allocated. Nor was there any obvious mechanism by which this might have been effected. The two analysts did not have discrete workload streams. Rather the intelligence tasks came in unpredictably and both were expected to attend to them, subject to urgency and their existing commitments.

Iron Deficiency

32. There was an occasion whilst Ms Rushton was with the Security Governor, Mr Davies, when the Claimant came in and reported the results she had just received following a recent medical test. We cannot be sure when this

happened. Ms Rushton does not recollect the date and we are unwilling to rely upon that asserted by the Claimant, given she has erred with respect to several other dates.

33. This was not, as the Claimant had alleged, a meeting to which she was summoned. Rather Ms Rushton was meeting with her senior colleagues and the Claimant arrived unexpectedly. Nor was this preceded by the Claimant having requested Ms Rushton approve a day of leave, so she might receive test results. Whilst it is possible the Claimant had sought leave, she did not tell Ms Rushton about any test results.
34. It seems likely, the Claimant chose this gathering to disclose the results of recent medical tests because she did not wish to do so to Ms Rushton alone. The Claimant said she had no or low iron stores (i.e. a deficiency). Mr Davies said the Claimant could take the following day off work to relax and feel better. Following this, Ms Rushton went to speak with the Claimant. She reiterated it was important the Claimant took time to look after her health and recuperate. She also said the Claimant could come to her to request days off for reasons such as this, she did not need to go to the Governor. Ms Rushton was not unhappy because the Claimant had raised this with the governor and nor did Ms Rushton say that only she could authorise such requests, which was not the case. Ms Rushton had merely sought to remind the Claimant that she could bring matters of this sort to her own manager.

Key Talk

35. The Claimant's claims include a complaint about being required to give a "key talk". In the agreed list of issues, the Claimant had said this incident occurred in July 2021. More recently, in her witness statement, she said this occurred on 8 February 2022. We find the Claimant is now mistaken about the date and it is more likely this event took place in July 2021, as she had said originally.
36. Whilst there are no contemporaneous documents relating to the key talk (the Claimant did not complain about it until much later) there is an email of 8 February 2022 sent by her to Mr Bailey, from which it is apparent she was not at work. She told Mr Bailey she had been admitted to hospital the previous day and only discharged that morning. Furthermore, the email chain suggests a different event precipitated her departure from work on 7 February 2022 and we return to that later in this decision. We also note that in her email of 8 February 2020, the Claimant says nothing about the key talk. If this had just happened, we think she would have done.
37. Key talks were held for new starters and transferees. They would be given information about security and key holding at the prison. The Respondent's policy requires that such talks were delivered by a band 4 or 5 security employee. As at July 2021, only Ms Rushton, the Claimant and the other Intelligence Analyst, were able to present these important sessions.
38. On an occasion in July 2021 when the Claimant was due to give a key talk, she told Ms Rushton she could not do this because she was waiting for a phone call. For security reasons, those working at the prison are not allowed to bring in their

personal mobile phones. The Claimant was, in effect, asking to stay at her workstation to wait for the call.

39. Ms Rushton was about to go into a different meeting and could not cover the key talk herself. The other analyst was not at work. The Claimant was, therefore, the only person who could conduct this session. Ms Rushton instructed the Claimant to give the key talk, she said other members of the intelligence team could listen out for the Claimant's phone and go to get her in the event of a call. The key talk session was being held in the Respondent's boardroom, which was only some 20 metres away.
40. The Claimant did not say who the caller would be or provide any other information about it. As such, Ms Rushton did not know that which the Claimant later disclosed, namely she was waiting for information about her father, who had recently been taken into hospital.
41. Ms Rushton did not say anything to the Claimant about not bringing her home life into work. There would be no reason for her to make this remark because the Claimant did not bring such matters to work, or at least not to Ms Rushton.

28 July 2021

42. The Claimant's claim includes a complaint about an incident In August 2021. We find the matter to which she is referring in fact occurred on 28 July 2021.
43. The Claimant was reluctant to engage with Ms Rushton and sought to resist her management. There was a particular incident in this regard on 28 July 2021. Ms Rushton recorded the event in an email (she sent to herself, as a note):

This morning, I was the orderly officer and as such I was really busy and couldn't get to the do the triage until 0930hrs approx. There was a fire alarm to deal with.

When I got here, Sarena was out at SIM so I sat in with Lisa and Ali. Lisa didn't turn around so that we could speak, she carried on typing, what I could see was a parole report.

I talked through the IR's and other jobs that were on going with Ali. I asked Lisa, she replied "anything that comes in", I asked what that means? What are you doing till then? She said "everything".

I asked about the parole report she was doing, and gave Lisa a low down on the email I had received. I asked if Lisa had the template. She told me that it was something that she had been doing for so many years now, and until today she didn't know she was doing it wrong and then she went on to say if that's what I want, that's what I can have.

I started to talk about next week with the LTA and the LTB, and that given that Ali is producing them for the first couple. Lisa cut me off and said that she is still in talks with Bill. She has told him that she won't ever be doing them as they are just another thing that makes it possible for her to be a target everyday, for people to target her and get at her. She won't have (me) or the Dep coming and challenging her work on them. I said are you saying that I target you? She said that was exactly what she was

saying. She said you're asking me to go to IMRT, I said yes. She said ok, just put that on any other work and tapped her desk, on here and i@ll do it. I said that this is not what this is, are you telling me you are too busy? What is it you are struggling with? Lisa said nothing, and walked out.

I went to fetch a kettle full of water and found Lisa stood in the corridor talking to Elliot and Nic Smith, and was clutching her chest and panting. I went to see Becky Wyatt to offer Lisa support as if I am her stressor than it is not appropriate that it is me.

44. We find this email to be an accurate reflection of the events recorded. It is an example of circumstances in which the Claimant perceives she was being bullied and picked upon by Ms Rushton. We do not accept that was so. As line manager, Ms Rushton was entitled to ask the Claimant about the work she was doing. The Claimant did not provide a meaningful response. She was unwilling to adopt an up to date template, preferring to complete parole reports in the same way she had been doing for many years. A little later in the conversation, the Claimant was even more direct in saying she would not accept Ms Rushton's instructions. It is difficult to construe this exchange as anything other than a blatant refusal by the Claimant to accept the authority of her line manager. Ms Rushton was attempting to do her job and manage the Claimant. The Claimant would not, however, accept her managers' instructions. Plainly, this was a difficult and stressful interaction for both the Claimant and Ms Rushton. It concluded with Ms Rushton asking the Claimant to explain what she was struggling with and in response, the Claimant walked out. Given the tension, Ms Rushton did not think it appropriate to immediately follow the Claimant.
45. The Claimant went into the corridor. She was very upset and had begun to feel unwell. Colleagues approached her, as she was obviously distressed. A short time later, Ms Rushton came out and saw what was happening. Whilst she was concerned about the Claimant's well-being, she feared a direct approach was likely to be inflammatory. This appears to us to be a realistic assessment.
46. Ms Rushton went into Ms Wyatt's office and asked her to check on the Claimant, explaining the relationship between them was difficult and she did not wish make matters worse.
47. Ms Wyatt went into the corridor. She had not wanted to draw attention to herself and so headed toward the toilets. The Claimant was talking with one of her colleagues in an animated fashion. As she went by, Ms Wyatt asked the Claimant if she was okay. The Claimant replied that she was fine. Ms Wyatt continued onto the toilets.
48. Later on the Claimant went to hospital and various tests were carried out to ascertain whether or not she had suffered a heart attack.

Grievance

49. On 18 October 2021, the Claimant presented a grievance:

There has been a long standing issue with my line manager and I feel this came to a head when I felt that I was very ill (heart attack symptoms) at

work and my manager saw my distress and obvious symptoms did not care or seem concerned. Just walked away.

Prior to this there have been numerous issues in which I have felt targeted and treated unfairly and this over time had led to my illness. I have brought this to the attention of my managers manager and we have taken part in mediation but this has made little/no difference, in some cases this made things worse as the behaviour continued out of sight of my colleagues and other managers. Some examples are;

Flex - not treated the same as other analyst with regards to notice required and putting on leave board.

48hrs notice when others ask on the day and it is authorised.

A/L - same as above. Being questioned regards my entitlement and reasons for leave. Feeling like I have to justify and have good reason for any leave I take when others do not.

Suspicion regarding actual medical appointments/appointments. Accused of not being genuine i.e having a duvet day when attending Hospital. Manager stated she could cancel any booked leave as and when she felt necessary, I took this as a threat. Also that other analyst would be given priority with leave over me.

Manager listening in on my calls and then challenged/asked me about call content, even when this was an external call regards my health.

Manager slamming doors and taking out her issues on people in the office, we knew when she was having a "bad day" because of the way she spoke/treated others in the office. I always have the feeling of not being in control in the way I work. Consistently being given short deadline work from manager to the detriment of existing time bound work, then being criticised for not completing tasks after being taken off it. All of his has made me feel underappreciated and feel like I am being forced out of a role I enjoy and am fully able to do. I don't feel as though my manager appreciates my experience and ability to complete tasks without interference.

Accused of not training/helping others in our office to the point where the Deputy Governor challenged me when this is simply untrue. I am always ready and willing to help others in any way I can and accept help when I need it. I am constantly being accused of not being approachable and being abrupt. Others actually approach me as I am open and friendly and consider myself very supportive of anyone who needs it.

50. There is no evidence of the Claimant being treated differently with respect to annual or flexi leave. We are satisfied Ms Rushton adopted the same approach to all of those she managed. We noted that at least one of the emails the Claimant took exception to, as set out above, was not sent to her in particular but rather was addressed to Ms Rushton's various line reports. It is also notable the Claimant complained that she was challenged over leave taken for medical appointments, when it is clear (she accepted this when giving evidence) she did not tell Ms Rushton about needing time off for such reasons. Significantly, in the last 2 paragraphs we note the Claimant complained about "feeling of not being in

control in the way I work” and “I do not feel as though my manager appreciates my experience and ability to complete tasks without interference”. We are reinforced by this in our finding that the substantial cause of difficulty between the Claimant and Ms Rushton was the Claimant’s reluctance to accept supervision.

November 2021

51. Mr Bailey was appointed Acting Head of Security and Operations in November 2021. Soon after taking up his position, Mr Bailey observed what he considered to be childish behaviour by the Claimant. On or about 16 November 2021, he went into the office where the Claimant worked. Ms Rushton was also present. During a discussion, the Claimant kept her back to Ms Rushton and rather than addressing her directly, attempted to do so through Mr Bailey, saying “can you tell Kelly that if we do that...”. Mr Bailey was taken aback. He closed the office door and made clear his view that this was not a professional way of behaving. Mr Bailey challenged the Claimant over behaviour. The Claimant said she did not like the way Ms Rushton spoke to her or criticised her work. Mr Bailey said the situation was ridiculous and had to change. It was making others in the office feel uncomfortable.

Stress Risk Assessment

52. On 17 November 2021, Mr Bailey conducted a stress risk assessment with the Claimant. The precise circumstances which prompted this exercise are unclear. It may have stemmed from an occupational health report, although we did not see this.
53. The document produced in this regard is dated such as to suggest it was originally completed in September and then updated by Mr Bailey in November, whereas in fact although the need for an assessment was identified in September this was not actioned until he became involved in November.
54. Various potential stressors were identified, including workload, a lack of control and a lack of support. The main problem appeared to be the Claimant’s relationship with her line manager, with stress being caused by:

Current Manager treats others better and more respectfully. Listens and supports their decisions. Belittling me at meetings and in front of others. Accused of not being approachable and being abrupt. Others actually approach me as I am open and friendly.

55. This assessment form included a column for the employee to add the steps they would take to help themselves, which was to a large extent populated by the Claimant with complaints about Ms Rushton rather than anything she would do herself. The assessment also included in opportunity for the employee to raise any other issues and again the Claimant responded with complaints about Ms Rushton.
56. Whilst Mr Bailey had understood there to be an issue around the Claimant’s workload, during the assessment she told him this was not the case.

SRA Review

57. On 7 December 2021, Mr Bailey reviewed the stress risk assessment with the Claimant. Again, she confirmed there was no issue with workload. As to the relationship with Ms Rushton, the Claimant believed there had been an improvement, they were now getting along better and this had led to a much more inclusive environment.

Grievance Outcome

58. On 15 December 2021, Mr Bailey responded to the Claimant's grievance:

I met with Ms Gilhooly this morning in my office to discuss this matter. The GRV1 was raised some time ago but due to long term absence of functional head I received this on 7/12/21 and informed Ms Gilhooly I would respond by tomorrows date, she has accepted this as an unforeseen and unavoidable delay and accepted my explanation for this.

On 16/11/21 I held a meeting with Ms Gilhooly & CM Rushton to address the atmosphere and working conditions in the department, making clear professionalism and courtesy was mandatory and that the behaviour I had been witnessing had to cease immediatley.

We discussed since I have moved into the departments I completed her stress risk assessment on 17/11/21 and made some alterations to the way she works, such as having an inclusive team meeting each morning, introduction of a tasking board to create structure to everybodys day and allowing free time to complete time bound tasks such as I R's each morning until 09:30 approx, following which she can move onto her other tasks. We reviewed her stress risk assessment on 7/12/21 and she did feel that a lot of improvements had been made against the complaints raised in her grievence and herself and CM Rushton are now getting on much better and working very well together, Ms Gilhooly commented that she would probably not raise a grivence had things been like this at the time of writing.

The one static issue Ms Gilhooly has raised concerning her care from CM Rushton when she became unwell, Ms Gilhooly felt the duty of care was not present from CM Rushton at the time, I did make that clear that although Ms Gilhooly felt this way, CM Rushton did request [...] attend to check if she was OK and CM Rushton felt that due to the negative relationship they both shared at the time she did not wish to exhasabate this.

Ms Gilhooly feels that the working relationship is now positve and many of the points raised above no longer apply.

I do feel mediation would be beneficial but Ms Gilhooly does not feel that it would be, however, this is my only reccomnedation.

I do not recommend or support moving of line manager from CM Rushton at this time and Ms Gilhooy agreed with this.

59. We are satisfied Mr Bailey's response represents an accurate summary of recent events and what the Claimant said to him at the time. Mr Bailey did not

uphold any of the complaints the Claimant made about Ms Rushton. He was pleased there appeared to have been an improvement in their relationship. He did recommend mediation but the Claimant did not wish to take part in this.

Performance

60. Separately from a general reluctance to follow line management instructions, Ms Rushton had concerns about various aspects of the Claimant's performance. An example of this was the completion of parole reports. Ms Rushton had received feedback from a colleague about problems with those being generated by her department. As a result, she looked at the relevant framework and guidance documents. In light of this, she sought to give advice to the analysts. The Claimant's response was dismissive, she said she knew how to complete parole reports and would not change her approach.
61. Given this obstruction, Ms Rushton had looked to her own managers for support. Unfortunately, Mr Bailey's predecessor had not been inclined to provide this. He told her not to challenge the Claimant, so as to avoid conflict and potential absence from work. The result of this was, however, that unsatisfactory reports were being produced by the Claimant and Ms Rushton (who was responsible for the output of her department) felt it necessary to correct them before they were sent out.
62. Following the appointment of Mr Bailey, Ms Rushton raised her concerns about the Claimant's performance again. Mr Bailey did not consider this situation to be a satisfactory one. It appears he was less inclined simply to accept the Claimant's refusals for the sake of a quiet life.
63. By letter of 5 January 2022, the Claimant was required to attend a performance management meeting. Attached to this were notes of previous discussions the Claimant and Ms Rushton had about performance, along with a copy of the Respondent's performance policy. The letter also advised the Claimant of her right to be accompanied by her trade union or a work colleague.
64. On 11 January 2022 the performance meeting took place, with Mr Bailey, Ms Rushton, a notetaker and the Claimant in attendance. All parties appear to have proceeded on the basis the invitation letter was itself a warning and had, therefore, already been issued. We note the document does not on its face, objectively, support such a construction. Mr Bailey said that a stage 1 warning was not a written warning and this was just a discussion.
65. The Claimant said there had been no previous discussion with Ms Rushton about performance. Ms Rushton said there had been, although she was unable to document every occasion on which she had pulled the Claimant up. Reference was made to the notes of their earlier discussions. The Claimant's position on these notes was they "were all wrong and completely out of context".
66. Our finding is that Ms Rushton had previously spoken to the Claimant about various performance issues. The relationship between the two was a poor one and the Claimant rejected any criticism levelled.

67. Ms Rushton proceeded to work through the evidence she relied upon to demonstrate the performance concerns, identifying three areas, namely “speed, accuracy and quality”. As before, the Claimant did not accept any of the matters raised. The Claimant also said she didn’t “like to be micromanaged”. We pause to note, yet again, the real issue between these two was the Claimant’s rejection of Ms Rushton’s line management. The Claimant had enjoyed the free hand allowed by previous managers and was not inclined to accept any change. Consistent with this, the Claimant said she wanted a new line manager. The meeting closed in the following way:

PB - Know that this wasn't a pleasant conversation but needed to be had, believes that there is benefit in a written warning on this occasion. KR will complete quality assurance over the next 4-6 weeks. We will keep this as a verbal warning at this stage. If there is no improvement then we will address this at the next meeting and if the same issues are highlighted then we will progress to a written warning.

RM - We need to look at what LG is doing wrong as she believes she is doing it right and KR believes it is wrong and not up to her standard, so for this to work we need to understand what is expected of LG. Happy to facilitate a meeting to go through what is expected of LG.

PB - Did not want a 3rd party involved and believes that KR and LG should be able to sit down and go through this together, however if LG and KR are happy for this to happen then PB will allow this.

RM - It is the best option to stop defensible behaviour from both parties. I will only be there to sort out the measurable targets.

PB - Is confident in the next meeting and the progress that it will show. Happy to speak to LG separately if she requires it. Thanks all for coming to the meeting and wants to reiterate that this is NOT A WRITTEN WRNING.

68. The Respondent’s concerns about the Claimant’s performance were explained in clear terms. Whether she accepted them or not, the Claimant’s managers outlined where an improvement was required and the period over which it would be reviewed.

69. Mr Bailey also made a file note that day:

Meeting held and minuted ref poor performance. Verbal given and review in 6 weeks to allow training and guidance to be given

70. In her witness statement, the Claimant said Mr Bailey agreed no further action would be taken on alleged poor performance and this would be removed from her record. She says this did not happen and it was a failure for which Ms Rushton was responsible. We do not understand how the Claimant can have arrived at this understanding. It is quite clear from the evidence of the Respondent’s witnesses and contemporaneous documents that the Claimant was, at least, given a verbal warning for poor performance and told of the improvement expected. Nothing was said to her about such a warning being removed from her record.

February 2022

71. On 7 February 2022, Ms Rushton asked the Claimant to provide support managing intelligence on the Respondent's Mercury system. This involved a change in what the Claimant would otherwise have been doing that day. This was necessitated by the Respondent being short staffed. The Claimant objected to this, she became agitated and began to shout. The Claimant told Ms Rushton to get out. The Claimant then got up and left the office herself.
72. Following events of the previous July, Ms Rushton had been instructed to inform her own line manager immediately in the event of a recurrence (i.e. a disagreement and the Claimant suddenly walking out of the office).
73. Shortly after the Claimant had left, Ms Rushton went out into the corridor, intending to find Mr Bailey and tell him what had just happened. On doing so she encountered the Claimant again. Ms Rushton asked the Claimant if she was going to see Mr Bailey. The Claimant said she was. Ms Rushton responded that was okay as she herself was going to report this matter to him.
74. Whilst there was a disagreement about work on this occasion, we do not accept (as the Claimant says) it included the key talk (that incident occurred in July 2021) Ms Rushton shouting or the Claimant being criticised for making tea for the dog team. Whilst these matters are referred to in the Claimant's witness statement, they are not reflected in the contemporaneous documentary evidence and we have not, generally, found the Claimant to be a reliable historian.
75. After having spoken with Ms Rushton in the corridor, the Claimant did go to see Mr Bailey. She was very distressed and appeared to be having difficulty breathing. Immediate medical assistance was sought. Mr Bailey made a file note:

7/2/22 - 11:20 approx, asked to speak to me, she was clearly distressed and having issues breathing, said she felt unwell and KR was micromanaging her, only asking her about her work and picking on her. As a duty of care I sent her to HCC immediately and asked them to check her over, ambulance called and taken to A&E. Offered care team and chaperone and declined.

76. Notably, the Claimant did not tell Mr Bailey of any concern about a key talk, Ms Rushton shouting at her or say she had been criticised for making tea for the dog team.
77. Having been discharged from hospital, the Claimant emailed Mr Bailey on 8 February 2022:

The hospital let me out early hours of this morning. I am very washed out and tired, I keep dozing off. That's why I am emailing.

I am being referred to heart consultant, the hospital asked what triggered it and have I not been well, I told them what led up to it and again Kelly triggered it.

This cannot go on, 1st time I went out in a car, 2nd time in an ambulance next time may be a hearse. Something has to be done now, as

no one took the stress risk assessment seriously, or my grievance. No duty of care was given to me to stop this from happening again, now it's happened again, and again my family and I are in bits.

78. Mr Bailey replied the same day:

I am pleased to hear you are out of hospital and have been referred for the help & examinations you need.

I do not agree that either your stress risk assessment or your grievance were handled inappropriately, as you know I managed both and you agreed with both outcomes when we discussed these last.

I understand your frustration but again, I do not agree with your comment that 'Kelly triggered it', I have spoken to Ms Rushton and staff present and it does not sound like she was unprofessional or challenging and rather asked you to support managing intelligence in mercury as we were short staffed.

I agree that this cannot go on like this and we both agreed progress had been made since the end of last year. Once you are fit to return to duty we will support your return to work and will again discuss the prospect of mediation and develop new ways in which to move forward.

As always please let me know if you need anything from myself or the prison and should you wish to contact employee support (PAM Assist) please let me know and I can furnish you with the contact details.

79. In her evidence at the Tribunal, the Claimant said her stress-related angina had been caused by Ms Rushton. We have no difficulty accepting that her perception of the work situation may have been a stressor. Indeed, support for this is provided by the occupational health report. It does not follow from this, however, that Ms Rushton was guilty of any wrongdoing.

Sickness Absence

80. The Claimant began a period of sick leave. Mr Bailey spoke with her on 14 February 2022. His file note, which we accept is an accurate reflection, provided:

Called at 14:30 approx, very negative about considering mediation, would not take part in it as it 'doesn't work'. Stated she could not work with Kelly again as she made her unwell and was convinced she will eventually kill her. Challenged about stress risk assessment not been taken seriously, I replied and made clear that it was taken seriously as was her grievance. Challenged about our duty of care towards her and made clear that she felt she was being let down by us and not keeping her safe. She stated I should read previous grievances about KR and see that she was the issue.

No intention of coming back to work while KR is in the department and also reflected that KR's mood makes everybody uncomfortable in the unit.

LG then stated she couldn't cope and even thinking about work or discussing it was making her shake and feel upset. We moved the conversation onto her plans for the rest of today and aside from the doctors app this afternoon she has nothing planned.

Again advised about PAM assist support available and declined.

81. On 15 February 2022, Mr Bailey wrote to the Claimant advising her that he would be making a reference to occupational health.
82. On 16 February 2022, Mr Bailey spoke with Ms Rushton. He told her to phone the Claimant in her capacity as line manager for the purposes of maintaining contact during sickness absence. Ms Rushton was very concerned about the wisdom of this course. Given the history and recent events, she was worried about how it would be received. Ms Rushton explained her concerns to Mr Bailey and Ms Wyatt, several times that day. They were, however, unmoved and the instruction to Ms Rushton stood.
83. The call did not go well. Almost immediately thereafter, Ms Rushton wrote to Mr Bailey and Ms Wyatt about this:

I wanted to raise my concerns about me being in contact with Lisa during her absence. I am concerned that Lisa is reportedly absent with a heart attack cause by me. She has made this very clear to a lot of people both inside the prison and outside it. I am concerned that it not the best option for Lisa to be contacted by me if she thinks I am stressful. I think it leaves me open to the suggestion that I am badgering (etc) her and continuing to upset her through line management channels.

I am not shying away from work, and am reluctantly asking for more confirmation that this is the right thing to do for both Lisa, Myself and the prison.

Kelly

Notes from the phone call.

16th February - Paul told me that it was appropriate for me to call Lisa and resume line manager contact. I raised my concern about how this may be perceived by Lisa and the potential for future allegations to be made against either of us, given the fact that Lisa is reportedly off work suffering from a heart attack that she says I caused. Paul told me again that it was appropriate and that I had to call this afternoon and create a OHMH referral first.

I went to see Becky Wyatt to talk about the allegations that Lisa is making against me and Becky said that due to the grievance being dismissed and there appears to be no suggestion of evidence that I am to have caused Lisa to be off work with "Work related stress" that as Lisa's line manager I should be the one to contact her. I made a list of things to say to Lisa - Is she ok? OH Referral, Annual Leave carried over, Is there anything I can do now or in readiness? I noted that I can call again on Tuesday 22nd at 1400hrs.

I called Lisa, she answered, I said Hello Lisa, It's Kelly. There was a long pause. Lisa said "I didn't think you were allowed to call me?" (I asked her to repeat it because I didn't hear all her words clearly - the allowed bit. She clarified. I said that the Attendance management committee had met and clarified that I was to resume control of Lisa's contact during her absence. Lisa said that it's not appropriate as she is off work due to a

heart attack that I caused. Lisa said she wanted to speak to Paul. I said he'd gone home. She said she'd had an email just. I said Paul did a night visit and told me just he was going home. Lisa asked me if I'd called her to aggravate and argue with her. I said my intention was to check she was ok and not to argue. I was only explaining her question. Lisa repeated that she was beginning to get upset and stress and that it wasn't appropriate for me to call as she is at home on her own and doesn't want to get ill. I said I was only calling to check she was ok, Lisa talked over me and said it wasn't appropriate for me to call and put the phone down.

84. We accept Ms Rushton's account of the call is accurate. She had not wanted to make this call at all, for the reasons explained by her to Ms Wyatt and Mr Bailey. She made the call only as a result of a direct management instruction. She had thought about it a great deal beforehand. She anticipated, correctly, the call would be a very difficult one. She had made notes of what to say to assist her in conducting it. She recorded her recollection in this email very soon thereafter.
85. Later that same day, the Claimant wrote to Mr Bailey:

Due to the reason why I am off, with regards the constant bullying from Kelly. You informed me that you would be dealing with me via contact etc, until you hand over to [...].

However, Kelly Rushton did ring me today 16th February 2022 at 13:58, this caused undue stress to the point my partner had to come out of work, to monitor me in case I have to go to the hospital again.

Kelly informed me that she is my line manager and will be contacting me, and dealing with me. Her attitude, behavior and tone is unacceptable, this does not help my recovery, she started to raise her voice, I said you have rang to have a go at me, this is inappropriate as you are the reason I have had another heart attack, only gs spray has helped.

I have requested constantly verbally and written that I require a new line manager, for my mental health or removal from the establishment, to stop Kelly Rushtons constant bullying harassment and victimation. I feel that I have no support by my governors to help me, I feel I have been left to deal with it on my own, as the establishment is not taking it seriously and brushes it under the carpet. Proven with my grievance and stress risk assessment in 2021.

86. Notably, the Claimant's account, written less than 3 hours after she spoke with Ms Rushton, did not include the matters now alleged in these proceedings, namely Ms Rushton shouting that she could contact the Claimant whenever she liked. We do not accept Ms Rushton shouted or raised her voice, in an inappropriate way. She certainly did not say that she could contact the Claimant whenever she liked. It is quite obvious that Ms Rushton was most apprehensive about making a phone call to the Claimant at all that day. She sought to avoid doing so. She explained her concerns to her managers. It appears that in this, Ms Rushton was far more perceptive and realistic than Mr Bailey or Ms Wyatt. It is wholly implausible in these circumstances to suppose that Ms Rushton would then start shouting at the Claimant and asserting her right as manager to call whenever she liked.

87. Nor do we find there was any telephone call that day from Mr Bailey to the Claimant. There is no reference to it in the Claimant's own email and Ms Rushton's contemporaneous account includes the Claimant telling her she had just received an email from Mr Bailey (as opposed to a phone call). Unfortunately, there appears a tendency for the Claimant's recollection of events to develop and change over time.

88. In response to the email from Ms Rushton detailing her call with the Claimant, Ms Wyatt advised that an independent case manager should be appointed to maintain contact. Mr Bailey agreed. He also wrote:

we have a duty of care to protect both Kelly and Lisa in this scenario [...] Its about the protection of both and to avoid any further stress when someone is absent.

89. Scott Manson, Custodial Manager Residential, was appointed to maintain contact with the Claimant during her absence.

90. On 28 February 2022, the Claimant wrote to Mr Manson, providing an update on her health:

The hospital have advised that as no duty of care has been put in place, that I should be signed off further. Due to it being highly likely that I could have a further angina attack brought on by stress.

This is due to having four lots of gs spray and aspirin to control the angina, with Kelly also contacting me, which brought on pains in my chest, which showed on the ecg.

That is why I had to return to hospital again on Friday 25th for further ecg's at the angina clinic. As this is not the first time that this has happened, which in three occasions Kelly has been linked to.

91. This was the first time the Claimant told her employer about suffering with angina.

92. The Claimant was assessed by an occupational health practitioner. A report was prepared on 1 March 2022, addressing her health issues, fitness for work and recommendations for support:

I cannot comment on physical health matters however, in my clinical opinion, Miss Gilhooly is currently considered psychologically unfit for work. She informs me that her current fit note is due to expire 2/3/22, though, I am unable to give an indication of a return date at this stage due to the extent and severity of symptoms reported. I envisage this may become clearer upon completion of her counselling sessions via PAM Assist. As the recent decline in Miss Gilhooly's mental health has seemingly been triggered by feeling harassed at work and the relationship with her current line manager, I recommend she be granted a change of manager as this will likely significantly reduce her current symptoms. If operationally viable, a possible change of working location/office may also be beneficial at this time. Given the circumstances, it may be helpful for a member of the management team outside of Miss Gilhooly's line manager maintain periodic contact during her absence to observe this situation and more accurately assess a possible return date with Miss

Gilhooly when appropriate. Management may wish to consider completing a stress risk assessment with Miss Gilhooly to help identify any additional perceived stress factors within the workplace and try to mitigate them where possible. I recommend that management meet with Miss Gilhooly informally and periodically to monitor her progress and review any support needs. Should management become aware of any difficulties, they may wish to offer practical support such as a temporary adjustment in duties, reduction in workload, additional breaks etc. as this may help prevent further related absence. Finally, management may also wish to discuss support options regarding Miss Gilhooly's physical/heart health prior to her return.

93. A GP fit note provided the Claimant was not fit for work because of "stress at work" from 2 to 28 March 2022.

Adjustments

94. Ms Rushton, Ms Wyatt and Mr Bailey were involved in the preparation of a detailed table addressing the adjustments it appeared the Claimant might benefit from and the extent to which, the Respondent might be able to make these. Red, amber and green traffic light colouring was utilised. Various matters could be accommodated, including a change in reporting line whilst the Claimant was absent from work, completing or updating a stress risk assessment, affording her additional breaks and offering her support by way of the Respondent's counselling service. A reduction in the Claimant's workload was identified as something which could be reviewed. There were, however, certain matters the Respondent decided it could not accommodate.

95. With respect to changing the Claimant's line manager, the adjustments table included:

Lisa is a specialist role (a Band 4 Intelligence Analyst), currently at Drake Hall there is only one Band 5 manager with the skills, knowledge and experience to oversee the work that is done within the Intelligence Team.

Jack Allen (the Operations CM) is the second CM in the department, however he is currently new to the team and does not have the necessary qualification to support and quality assure the intelligence systems

96. As for changing the Claimant's location or office:

Lisa's work is reliant on use of the Mercury system. This software is restricted to those computers that are locked into the Intelligence Office Suite. Moving Lisa to an alternative office would render her use of mercury to nil, and thus being unable to support the workload of an Analyst.

97. The problems identified by Respondent boiled down to the need for the Claimant to be managed by a band 5 manager with the appropriate skills and qualifications in intelligence, coupled with the use of an intelligence IT system that was physically locked down and available only at particular Prison Service locations.

98. Whilst another band 5 CM could manage the Claimant in non-work-related matters, such as administering annual leave requests, there was no-one else qualified to supervise her intelligence work. We pause to note that although the Claimant would have been happy to be unmanaged in her work, the Respondent was, reasonably, not prepared to proceed in that way. The limited physical locations at which the Claimant could access the necessary IT system also reduced geographical flexibility.
99. Although not stated expressly, it is apparent the Respondent was unwilling to remove Ms Rushton from her position as band 5 manager in intelligence at Drake Hall, in circumstances where she had been found to have done no wrong and appoint a new person to that post, simply to accommodate the Claimant's unreasonable objections to Ms Rushton's line management.
100. An email of 9 March 2022 attaching a copy of the table, included advice that the Claimant should be invited to a meeting to discuss the analysis of possible reasonable adjustments. It also suggested discussing return to work in alternative role with pay protection.
101. Mr Bailey met with the Claimant on 17 March 2022. Their discussion is accurately reflected in his email, written a few days later:

We met with Lisa to discuss on 17/3/22, she refused to RTW unless K Rushton is removed as line manager as she states she has been advised by her doctor due to the stress caused by such contact and the angina attacks she is likely to have if she sees Kelly again. It was explained to her that as K Rushton is business critical and her expertise are in that area she will remain in place and Lisa cannot work elsewhere in the prison due to her job role.

We discussed re grading and she is adamant she will not do so, this may form part of a decision makers decision via FARM which we cannot achieve until he OHP is returned if no RTW has been achieved.

Currently we are at a standstill which is what we anticipated and Scott is speaking to her this week to maintain contact.

Ongoing Absence

102. A further med3 citing stress at work was issued on 28 March 2022 for the period until 2 May 2022.
103. In April 2022, Nathan Scanlan took over as Head of Security and Operations, replacing Mr Bailey.
104. The Claimant was again assessed by occupational health. A report was prepared on 20 April 2022. The Claimant told the adviser of a two-year history of work-related issues, following a change in her line manager (i.e. the appointment of Ms Rushton) which is said had resulted in stress-induced angina. The report included the Claimant's view that previous stress risk assessments and grievances had all been ignored. Whilst a return to work was possible, a relapse was anticipated if the work situation remained unresolved

105. On 4 May 2022, Mr Manson wrote to the Claimant proposing a phased return to work, indicating the adjustments the Respondent would and would not make:

Due to having a lengthy period of time away from the establishment I agree a phased return is necessary to ease you back into work, therefore I ask that you only come in one day next week for a short visit in which you can meet with the new Head of Function Gov Scanlan, I ask that you attend on Friday 13th May 11am to 3pm.

The following week I ask that you attend Monday 16th, Wednesday 18th and Friday the 20th 10am to 3pm, upon completion of this you will be back to normal working hours.

During this time, I am away from the establishment on Nights and Rest week but in my absence Gov Scanlan will arrange for someone to discuss a stress management plan with you that we can review periodically moving forward.

Regarding a change of line manager, you are employed as a Band 4 specialist in your role, CM Rushton is employed as the custodial manager in Security (Intel) so naturally you fall under her line management as this is also her area of speciality. In your current specialist roll CM Rushton is the only person able to manage your ongoing workload and performance due to it being a single CM post, no one else in the dept. has the knowledge / skill required to manage the important work you do as a team of intel analysts. So at this time your line management in the respect of your work load and performance will not change.

Regards location, as explained previously only certain workstations within the establishment have access to the Software you require for your specialist post, you will remain at your current workstation however moving forward CM Allen will be joining you in that office.

Whist I understand this may not be the answer you had hoped for, we have to be realistic in our care of staff and the need of the business, it is important that we manage your level of stress via an ongoing Stress management plan but also keep you in your specialist role within your area of expertise.

106. The Claimant replied on 10 May 2022, asking who she could escalate the matter to as her health was being ignored notwithstanding occupational health reports and her sickness falling under the Equality Act.

Return to Work

107. On about 13 May 2022, the Claimant returned to work. Mr Scanlan met with her to welcome her back. They discussed and agreed what her phased return to work would look like. He suggested she go to her desk and begin looking at her emails, so as to ease herself back into work. Mr Scanlan had arranged for the office to be empty so that she could work peacefully.

Desk

108. Unfortunately, the Claimant immediately discovered that her desk drawers had been broken into whilst she had been away from work. The Claimant became

very upset. She left work and commenced a further period of sick leave. She was signed off work again by her GP.

109. In a letter of 16 May 2022 sent to Governor Hudson, Mr Bailey explained the circumstances relating to the Claimant's desk. Essentially, a full security audit was due to take place on 21 March 2022. It was necessary to collate a vast amount of documentation, for provision to the auditors. It was believed that the Claimant may have some of the relevant material in her desk drawers. She was on sick leave and could not provide access, "works" were called to come and open this. The operative who had done so was asked to prepare a report and Mr Bailey attached this.

Further Sickness Absence

110. Mr Scanlan referred the Claimant to occupational health again. A report was prepared on 16 June 2022, which included:

She reported that her current absence was triggered by her locker at work being broken into and this upset her but she states she did not have a panic attack.

She has now been signed off work until the end of July 2022. In my professional opinion which is based on the information available and my discussions with Miss Gilhooly today, she remains unfit for work. I will strongly recommend that management meets with her again to listen to her and address any outstanding concerns she may have. She indicated that a number of the recommendations put forward by occupation health have not been addressed. I have reviewed the recommendations and I believe they are reasonable however I have advised that it is your decision to determine what you can or cannot accommodate as a form of adjustment.

Further Grievance

111. On 4 July 2022, the Claimant raised a grievance about her desk being broken into. She said this was bullying and victimisation by Ms Rushton.
112. A grievance meeting took place with the Claimant on 19 July 2022. The decision-maker was Tracey Sargeant, Project Lead. The grievance was not upheld. Ms Sargeant found the desk had been broken into for legitimate reasons and this had nothing whatsoever to do with Ms Rushton. Ms Sargeant did, however, partially uphold the grievance on the basis that procedures had not been put in place to inform the Claimant about what had happened.
113. The Claimant appealed against that outcome on 1 August 2022. In addition to challenging the finding about her desk, the Claimant also complained about being told she would either have to return to work with Ms Rushton, be demoted to a band 3, moved to an operational instruction officer post, move to HMP Berwyn or move to the Hub. She said none of these were appropriate as she was the victim.

Attendance Management

114. On 9 August 2022, an attendance management meeting took place with the Claimant and Mr Scanlan. He began by asking about her current health. The Claimant responded there had been no change and Ms Rushton was a significant trigger for her stress-related angina.
115. The Claimant also said she was suffering with “extremely painful fibromyalgia”. Whilst managers, including Ms Rushton and Mr Bailey, had been aware of the Claimant having fibromyalgia, the impression she had always given was that it was well-managed and did not cause any significant problems. The Claimant had attended appointments with occupational health and said nothing about fibromyalgia. At this meeting, however, the Claimant identified the condition not only as a cause of pain but something that would limit her ability to drive, including to either of the proposed alternative prison service sites where Intelligence Analyst roles were available.
116. Mr Scanlan expressed his sympathy for the Claimant’s circumstances. He summarised the options open to her, namely returning to her current role on a phased basis under Ms Rushton, a different role within Drake Hall, regrading, or moving to alternative prison service premises.
117. The Claimant made numerous complaints about Ms Rushton, including that she had been micromanaged. The Claimant said she could not return to work with Ms Rushton and did not consider any of the alternative roles that have been offered to be suitable, including those at the Hub, Berwyn or as an Instructional Officer. There were no band 4 admin vacancies. The Claimant could not contemplate coming to work in the vicinity of Ms Rushton.
118. A phased return to work was discussed. The proposals included Mr Scanlan (rather than Ms Rushton) managing the Claimant directly during the phased period. She would also be able to share a room with Mr Allen, rather than the other Intelligence Analyst. The meeting concluded with a discussion of her upcoming medical appointments.
119. The meeting was summarised in an email written by Ms Wyatt following day:

She came in for the FARM yesterday with Nathan, it was a lengthy meeting and everything was covered, including what we could offer re the intermediary structure which would be Nathan directly line managing her for the period of her phased return with line management then gradually phasing back to Kelly. She refused this at the meeting. She also again refused any other offers of the same job role at a different location or a different B4 role in the prison at no detriment to her pay.

120. By her email of 16 August 2022, the Claimant told Mr Scanlan she had been admitted to hospital with a suspected heart attack due to their meeting.

Grievance Appeal

121. The Claimant’s grievance appeal was chaired by Darren Hudson, Deputy Governor. He spoke to the Claimant on 11 August 2022 by telephone and invited

her to meet with him. The Claimant told him she did not wish to meet and was content to proceed on the basis of her written narrative.

122. Mr Hudson made various enquiries, including of those involved in her desk being broken into, along with Ms Sargeant. On 22 August 2022, Mr Hudson partially upheld the grievance. Whilst he did not find the Claimant had been targeted, he recommended new procedures to be followed in the event it was necessary for the Respondent to force entry to a locker in the future. Mr Hudson also touched on the efforts made to keep in touch with the Claimant and explore alternatives for her, without finding fault in this regard.

Ongoing Attendance Management

123. A further attendance management meeting took place on 12 September 2022 with the Claimant and Mr Scanlan. The Claimant referred to and there was discussion of a recent medical report, which included her suffering stress, angina, a small heart attack and fibromyalgia, along with low mood, poor sleep and fatigue. The Claimant said her doctor had not confirmed she was fit to return to work. She, however, declared herself fit to do so. Mr Scanlan said he was reluctant to go against medical advice. The Claimant said she did not want stay at home any longer. She denied that her position was influenced by financial considerations. The Claimant complained that OH recommendations had not been implemented.
124. There was a discussion of the alternative roles and sites that had been offered. The Claimant did not consider any of these to be suitable, indeed she regarded them as a detriment. The Claimant was asked about returning to work with her “trigger”. This prompted various complaints about Ms Rushton and the Respondent’s failure to deal with her grievances. She wanted the Respondent to move Ms Rushton and Mr Scanlan explained the Respondent’s reasons for not doing that. The Claimant said that people had left the security department because of Ms Rushton. Mr Scanlan observed there had been complaints from others about the Claimant. The Claimant was asked about mediation and indicated she would agree if it was conducted by someone external to Drake Hall but did not expect Ms Rushton to be genuine in looking to resolve the situation.
125. Notwithstanding the to-ing and fro-ing, proposals for a phased return to work were agreed, to begin on 14 September 2022. These included Mr Scanlan managing the Claimant during the phased period, reduced working hours, rest breaks (which Mr Scanlan would ensure she was taking) all with a view to the Claimant resuming full hours on or about 3 October 2022.

Return to Work

126. As agreed, the Claimant did return to work on 14 September 2022.
127. During the phased period, Mr Scanlan had occasion to speak to the Claimant about a number of matters, including her booking flex leave on a day he had arranged for her to attend and “upskilling” session, which she had herself requested. Mr Scanlan also raised her management of mercury requests and sharing of intelligence with another team, in circumstances when he had closed the report and requested no further action be taken.

Alternative Work

128. Various efforts were made to identify roles the Claimant might undertake, whether at Drake Hall or elsewhere. This was done when she was absent on sick leave and also following her return to work.
129. Enquiries were made of other establishments, which were thought to be within reasonable travelling distance for the Claimant, to see whether there might be suitable vacancies. There were relatively few locations at which the Respondent's intelligence systems could be accessed. The Respondent did find band 4 Intelligence Analyst roles at both HMP Swinfen Hall (20 miles from the Claimant's home) and HMP Berwyn (46 miles away). The Claimant said these were too far away. The Respondent also looked at HMP Foston Hall (23 miles away) and HMP Werrington (21 miles away) but there were no vacancies.
130. Other alternatives were proposed, including as a band 4 instructional officer at Drake Hall. The Claimant rejected this because she wished to remain an Intelligence Analyst. There was also discussion of the Claimant taking a band 3 role with a period of pay protection but she would not accept that either.
131. The Claimant had asked about working at HMP Stafford or the Women's Directorate (which were very close to her home) but there was no local intelligence function at either site as they both used the intelligence Hub, which was in Swinfen. Working in Stafford would, therefore, necessitate a change in role, which the Claimant had said she was unwilling to consider.
132. In her evidence, the Claimant denied ever having said she wished to remain as an Intelligence Analyst. We do not accept that, it is a wholly unrealistic proposition. The Claimant's primary position at the time was that she should be able to stay in her existing role. This was the job she had been trained for, gained experience in and knew well. The Claimant's only other suggestion was a Safer Custody role. This was, however, a band 5 role, there was no band 4 role in that function.

Mediation

133. On 9 November 2022, mediation took place between the Claimant and Ms Rushton. The Respondent had arranged for someone from the Tackling Unacceptable Behaviour Unit to come in and conduct this session. Unfortunately, it was not successful.

Complaints about the Claimant

134. The Respondent received a number of complaints about the Claimant, accusing her of bullying others. These were investigated. Following this, a decision was made by the Respondent to move the Claimant to another department in November 2022.

Law

Direct Discrimination

135. In the employment field and so far as material, section 39 of **the Equality Act 2010** ("EqA") provides:

(2) An employer (A) must not discriminate against an employee of A's (B) -

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

136. As to the meaning of any other detriment, the employee must establish that by reason of the act or acts complained of a reasonable worker might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. An unjustified sense of grievance cannot amount to a detriment for these purposes; see **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL**.

137. EqA section 13(1) provides:

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

138. The Tribunal must consider whether:

138.1 the claimant received less favourable treatment;

138.2 if so, whether that was because of a protected characteristic.

139. The question of whether there was less favourable treatment is answered by comparing the way in which the claimant was treated with the way in which others have been treated, or would have been treated. This exercise may involve looking at the treatment of a real comparator, or how a hypothetical comparator is likely to have been treated. In making this comparison we must be sure to compare like with like and particular to apply EqA section 23(1), which provides:

(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

140. Evidence of the treatment of an actual comparator who is not close enough to satisfy the statutory definition may nonetheless be of assistance since it may help to inform a finding of how a hypothetical comparator would have been treated.

141. As to whether any less favourable treatment was because of the claimant's protected characteristic:
- 141.1 direct evidence of discrimination is rare and it will frequently be necessary for employment tribunals to draw inferences from the primary facts;
- 141.2 if we are satisfied that the claimant's protected characteristic was one of the reasons for the treatment complained of, it will be sufficient if that reason had a significant influence on the outcome, it need not be the sole or principal reason;
142. In the absence of a real comparator and as an alternative to constructing a hypothetical comparator, in an appropriate case it may be sufficient to answer the "reason why" question - why did the claimant receive the treatment complained of.
143. The burden of proof is addressed in EqA section 136, which so far as material provides:
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision occurred.**
144. When considering whether the claimant has satisfied the initial burden of proving facts from which a Tribunal might find discrimination, the Tribunal must consider the entirety of the evidence, whether adduced by the claimant or respondent; **see Laing v Manchester City Council [2006] IRLR 748 EAT.**
145. Furthermore, a simple difference in treatment as between the claimant and his comparators and a difference in protected characteristic will not suffice to shift the burden; see **Madarassy v Nomura [2007] IRLR 246 CA.**
146. The burden of proof provisions will add little in a case where the ET can make clear findings of a fact as to why an act or omission was done or not; see **Martin v Devonshires Solicitors [2011] IRLR 352 EAT**, per Underhill P:
- 39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head "the devil himself knoweth not the mind of man" (per Brian CJ, YB 17 Ed IV f.1, pl. 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law [...]**

Harassment

147. Insofar as material, EqA section 26 provides:

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
 - (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
 - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

148. Whilst the unwanted conduct need not be done 'on the grounds of' or 'because of', in the sense of being causally linked to, a protected characteristic in order to amount to harassment, the need for that conduct be 'related to' the protected characteristic does require a "connection or association"; see **Regina (Equal Opportunities Commission) v Secretary of State for Trade and Industry [2007] ICR 1234 QBD**. Notwithstanding it was decided under the prior legislation including the formulation "on the grounds of", the observations made by the EAT in **Nazir v Asim [2010] ICR 1225** may still be of some relevance:

69 We wish to emphasise this last question. The provisions to which we have referred find their place in legislation concerned with equality. It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law—such as a person's race and gender.

149. In relation to the proscribed effect, although C's perception must be taken into account, the test is not a subjective one satisfied merely because C thinks it is. The ET must reach a conclusion that the found conduct reasonably brought about the effect; see **Richmond Pharmacology v Dhaliwal [2009] IRLR 336 EAT**.

150. Guidance on the threshold for conduct satisfying the statutory definition was given by the EAT in **Betsi Cadwaladr University Health Board v Hughes [2014] 2 WLUK 991**; per Langstaff P:

10. Next, it was pointed out by Elias LJ in the case of Grant v HM Land Registry [2011] EWCA Civ 769 that the words “violating dignity”, “intimidating, hostile, degrading, humiliating, offensive” are significant words. As he said:

“Tribunals 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.”

11. Exactly the same point was made by Underhill P in Richmond Pharmacology at paragraph 22:

“..not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

12. We wholeheartedly agree. 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. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

Reasonable Adjustments

151. EqA sections 20 and 21 provide, so far as material:

20 Duty to make adjustments

[...]

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

152. Pursuant to EqA schedule 8, paragraph 20(1)(b), a person is not subject to the duty to make reasonable adjustments if they neither knew nor could have been reasonably expected to have know of the claimant's disability and that they were likely to be placed at a disadvantage by the relevant provision, criterion or practice (“PCP”):

20 Lack of knowledge of disability, etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

[...]

(b) [in any case referred to in Part 2 of this Schedule]1 , 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.

153. The Equality and Human Rights Commission (“EHRC”) EqA Code of Practice identifies factors which may be relevant to the reasonableness of a proposed step:

6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- **whether taking any particular steps would be effective in preventing the substantial disadvantage;**
- **the practicability of the step;**
- **the financial and other costs of making the adjustment and the extent of any disruption caused;**
- **the extent of the employer’s financial or other resources;**
- **the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and**
- **the type and size of the employer.**

154. Pursuant to the decision in **Secretary of State for Work and Pensions v Wilson [2009] UKEAT/0289/09** the Employment Tribunal must have regard to:

154.1 the extent to which it would be practicable for the employer to take the steps proposed;

154.2 the feasibility of the steps proposed.

155. When considering the reasonableness of an adjustment the practical effect, objectively assessed is key; see **Royal Bank of Scotland v Ashton [2011] ICR 632 EAT**, per Langstaff J:

24 Thus, so far as reasonable adjustment is concerned, the focus of the tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not - and it is an error - for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer’s thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons.

156. A claimant does not, however, need to go so far as to show a ‘good’ or ‘real’ prospect, it is sufficient if there is ‘a’ prospect the disadvantage will be removed

or reduced; See Leeds Teaching Hospital NHS Trust v Foster [2011] UKEAT/0552/10/JOJ, per Keith J:

[17] In fact, there was no need for the tribunal to go as far as to find that there would have been a good or real prospect of Mr Foster being redeployed if he had been on the redeployment register between January and June 2008. It would have been sufficient for the tribunal to find that there would have been just a prospect of that. That is the effect of what the Employment Appeal Tribunal (Judge McMullen QC presiding) held in Cumbria Probation Board v Collingwood (UKEAT/0079/08/JOJ) at 50. That is not inconsistent with what the Employment Appeal Tribunal (Judge Peter Clark presiding) had previously said in Romec Ltd v Rudham (UKEAT/0069/07/DA) at 39. The Employment Appeal Tribunal was saying that if there was a real prospect of an adjustment removing the disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one, but the Employment Appeal Tribunal was not saying that a prospect less than a real prospect would not be sufficient to make the adjustment a reasonable one. When those propositions were put to Mr Boyd, he did not disagree with them.

Conclusion

Direct Discrimination

Subjecting the Claimant to heavier workloads on her return from scans, biopsies or other medical appointments. The Claimant relies upon Alison Baker as her comparator

157. The Claimant was not made subject to a heavier workload than Alison Baker at any time. Ms Rushton approached the allocation of work in even-handed manner. There was no reliable evidence to show a differential approach had been adopted. In addition to accepting the evidence of Ms Rushton on this point, she was supported by Mr Bailey and Mr Scanlan, both of whom gave credible evidence consistent with the contemporaneous documentary records. Mr Bailey had been under the impression the Claimant was complaining about her workload but in the course of discussing her grievance, she did not say this was unsatisfactory. Subsequently, Mr Scanlan had an opportunity to look at workload and he was satisfied there was no unfairness or disparity. The vast majority of the work undertaken by both Intelligence Analysts came from the same pool. They would be expected and required to draw from this, subject to their existing commitments and work priorities. Separately, there would be little or no opportunity for Ms Rushton to seek to increase the Claimant's workload following scans, biopsies or medical appointments, given she was not made aware of them. As we have set out above, when the Claimant took leave from work with a medical reason behind this, she was most reluctant to disclose that to Ms Rushton. Finally, there was no evidence of any connection whatsoever between the way that work was organised and the Claimant's disability. Indeed, in the course of cross-examination, the Claimant agreed, repeatedly, that the treatment she complained of had not been done because of her disability.
158. This claim is not well founded and is dismissed.

March 2021 I requested a days leave for test results for a scan that I had, this was denied by CM Rushton as there was no one in the office, I then had to contact my Consultant and request that it took place via the telephone instead of face to face.

159. The Claimant did not make a request of Ms Rushton for leave so that she might receive the results of a scan, whether in March 2021 or at all. As set out above, when the Claimant sought leave, she would not tell Ms Rushton the reasons for this, indeed she resented any such enquiry believing it was unjustified. Whilst she may have asked for a day of leave in or about March 2021, she did not accompany this with any information about scans. Ms Rushton's approach was to seek to approve leave requests in a fashion which did not leave the intelligence department understaffed. This alleged detriment was not done. There was no occasion on which leave was refused by Ms Rushton for reasons that had any connection whatsoever with disability.

160. This claim is not well founded and is dismissed.

March 2021 a meeting in the CMs office, where CM Mackie And CM Rushton was present, I informed them of the results, that they had found a node on my lung and no iron or iron stores, that I would have to have another scan, Security Governor Bill Davies then instructed that I took the following day off and rest, once the meeting had concluded Security Governor Bill Davies and CM Mackie went home, I returned to my office, CM Rushton then came to my office and stated that she was not happy and as she is my line manager only she can authorise the day off.

161. There was an occasion when Ms Rushton was meeting with her colleagues including Mr Davies, during which the Claimant came in and told them about an iron deficiency that had been identified in recent medical tests. Mr Davies said she should take the following day off work in order to rest. Ms Rushton did speak to the Claimant afterwards, saying she could come to her as line manager with such matters. Ms Rushton did not say that as she was the Claimant's line manager only she could authorise a day off.

162. To the extent this detriment occurred, it did not amount to a detriment per **Shamoon**. The Claimant could not, reasonably, consider she was at a disadvantage by reason of Ms Rushton saying what we found she did. To the extent the Claimant has a sense of grievance about this matter, it is unjustified.

163. Separately, Ms Rushton did not say what she did because of the Claimant's disability. It had nothing to do with angina or fibromyalgia. The Claimant's request was unrelated to her disability. Ms Rushton's remarks were simply a reminder that If the Claimant needed time off work, she could ask her line manager. This would so whether the day off was for health or other reasons.

164. This claim is not well founded and is dismissed.

August 2021 I was in the office CM Rushton was constantly belittling and moaning at me with regards to the work, I started getting pains in my chest, Arm,

back and jaw this started to become increasingly uncomfortable, at first I thought it was indigestion. I stood up to walk out of the office as CM Rushton was becoming more aggressive with me, I was stopped in the corridor by Paul Sprouston, he stated that he did not like the colour of me or how I was presenting, I was holding my chest CM Rushton came out of the office with the other analysts to go to the kitchen, she did not ask if I was ok, she just walked past.

165. This is a reference to events on 28 July 2021. Ms Rushton did not belittle and moan at the Claimant about work. On a busy morning, she discussed the work being done by members of her team. The Claimant ignored Ms Rushton, keeping her back toward her and continuing to type. Ms Rushton asked questions about the work being done. Ms Rushton also sought to ensure the Claimant was using an up to date template for the parole reports. These were reasonable steps for a line manager to take. Nonetheless, the Claimant resented what she perceived as interference in her work and was obstructive. The Claimant became upset and went out into the corridor. Ms Rushton did not think it was sensible to chase her out and waited a short time before going into the corridor herself. On seeing the Claimant in a distressed state she feared exacerbating the situation and rather than approaching directly, she asked Ms Wyatt to check on the Claimant.
166. No detriment is shown on the facts as we have found them. The Claimant's sense of grievance is unjustified. Separately, none of this was done because of the Claimant's disability.
167. This claim is not well founded and is dismissed.

8 February 2022 At this point I started to get pains in my chest, arms, jaw and back and tried to remove myself from the stressful situation which was on previous advise from Security Governor Paul Bailey CM Rushton then started shouting louder "good if your going to Paul it saves me from reporting you later, I will come with you", CM Jack Allen came out of the office to enquire what the shouting was about, he then took me to another office away from CM Rushton.

168. This is a reference to events on 7 February 2022. On that day, Ms Rushton had asked the Claimant to provide support managing intelligence reports on the Mercury system. This involved changing what the Claimant would otherwise have been doing, necessitated by the team being short-staffed. The Claimant objected to this, she became agitated, started shouting and then walked out.
169. Ms Rushton had been instructed to inform her own line manager immediately if there was another event of this sort and she went to find Mr Bailey. On so doing, she encountered the Claimant again and asked if she was going to Mr Bailey. When the Claimant said she was, Mr Rushton responded that was okay as she was going to report this matter to him herself.
170. Once again, the matters we have found were done do not amount to a detriment. The Claimant's sense of grievance is unjustified. Ms Rushton made reasonable requests in light of the circumstances in the department at the time and the Claimant reacted badly. Given the history, it is difficult to see how the Claimant can have thought it unreasonable for Ms Rushton to let her own line manager

know what had just happened. Separately, none of this was done because of the Claimant's disability to any extent whatsoever. Ms Rushton was doing her best to manage a difficult situation and comply with the instruction she had been given.

171. This claim is not well founded and is dismissed.

Not allowing the Claimant to remain in the office on an occasion [8 February 2022 not July 2021] when she was waiting her a phone call from the hospital in relation to her father and telling the Claimant that she should not bring her home life into work. The Claimant relies upon Alison Baker as her comparator

172. This is the matter that became known as the key talk incident. The Claimant asked to stay at her desk to await a phone call. She did not tell Ms Rushton what the call was about nor anything of her father being unwell. The Claimant was required to carry out a key talk, as she was the only qualified person available that day. Ms Rushton offered to have a member of staff come and get her if the phone rang.

173. We do not find this amounted to a detriment. The Claimant was required to carry out her duties. She did not provide Ms Rushton with any particular pressing reason to be allowed to sit by the phone. Separately, this had nothing whatsoever to do with the Claimant's disability.

174. This claim is not well founded and is dismissed.

Reasonable Adjustments

175. The Respondent did apply a PCP that the Claimant's manager (i.e. Ms Rushton) would not be reallocated (removed from the department and sent to work elsewhere). Whilst the PCP has been framed in terms of how the Claimant's circumstances were addressed, this is an approach which could and in all likelihood would have been applied to others for whom Ms Rushton was line manager, which is to say she would not be removed from her position because of complaints from a line report that had not been upheld.

176. The PCP did put the Claimant at a substantial disadvantage. Because her angina was stress-related, the requirement to work under a manager to whom she strongly objected would be an obvious stressor.

177. The Respondent did know or could, at least, be reasonably expected to know the Claimant was likely to be placed at a substantial disadvantage, from 28 February 2022, when the Claimant wrote to Mr Manson. She told him of her angina and the likelihood of a further attack being brought on by stress. The difficult situation arising from the Claimant's rejection of line management by Ms Rushton was, obviously, likely to be a source of ongoing stress.

178. We do not, however, find that it would have been reasonable for the Respondent to move the Claimant to HMP Stafford or the Women's Directorate. At this time, the Claimant would not accept any position apart from that of Intelligence Analyst. There was no such role at either premises because they used the Swinfen Hub.

179. Moreover, the premises from which the Claimant might carry out her Intelligence Analyst role were limited. It was necessary to have access to the Mercury system. This was physically locked down and available only at certain sites. Intelligence Analyst roles were found beyond Drake Hall but the Claimant objected to these on the basis of travelling distance. The Respondent also looked at other band 4 roles, offering the instructional officer role, which the Claimant rejected. Nor was she open to a band 3 position with pay protection.
180. Separately from Ms Rushton being the only suitably qualified person able to carry out the security role at Drake Hall, it would not be reasonable to expect the Respondent to remove her from this position in order to satisfy the Claimant, in circumstances where Ms Rushton had done no wrong.
181. This is very far from a case in which the Respondent either failed to explore the adjustments which could be made to accommodate the Claimant or did so only in a superficial way. On the contrary, the Respondent adopted a careful and methodical approach. Many enquiries were made. Various solutions were considered. None were acceptable to the Claimant.
182. In the circumstances, it was not reasonable for the Respondent to have to take the step contended for by the Claimant and nor were there any other reasonable steps they failed to take.
183. This claim is not well founded and is dismissed.

Harassment

On 7 February 2022, CM Rushton instructing the Claimant to clear up the Mercury reports, and when the Claimant queried why they had not been done in her absence, CM Rushton raising her voice and stating it had nothing to do with her. Then later challenging why the Claimant was making drinks for the dog team and telling her to stop what she was doing and get on with work

184. On 7 February 2022, the Claimant was asked to support managing intelligence on the Mercury system. This was necessary because the team was understaffed that day. The Claimant objected to a change in what she would otherwise have been doing. Ms Rushton did not raise her voice to the Claimant or in response to an enquiry, say it had nothing to do with her. Whilst Ms Rushton did not begin to shout, the Claimant did. Once again, she objected to interference by Ms Rushton in what she was doing and became upset. The Claimant was not challenged over making drinks for the dog team or told to stop.
185. To the extent Ms Rushton gave the Claimant an instruction to undertake different duties that day, her strong reaction against this demonstrates it was unwanted.
186. There was, however, no connection whatsoever between Ms Rushton's actions that day and the Claimant's disability.
187. Separately, Ms Rushton's conduct did not have the purpose and nor could it, reasonably, have caused the proscribed effect within EqA section 26. Ms Rushton was endeavouring to carry out her duties in a proper way. As is sometimes the case in many workplaces, faced with a lack of staff on a

particular day, a manager might ask someone to cover a different task from that they would otherwise have been doing. Mrs Rushton did no wrong. Unfortunately, not for the first time, the Claimant's reaction was excessive.

188. This claim is not well founded and is dismissed.

On 17 March 2022, CM Rushton contacting the Claimant at home and shouting that she could contact the Claimant whenever she liked

189. On 17 March 2022, despite her misgivings and on the instruction of her managers, Ms Rushton did telephone the Claimant at home while she was absent on sick leave. She had thought carefully about what she was going to say beforehand because she anticipated, correctly, the call may not be well received. Ms Rushton did not shout at the Claimant at all during this call. Nor did she say that she could contact the Claimant whenever she liked.

190. The fact of Ms Rushton making this call was, quite obviously, unwanted by the Claimant.

191. There was also a connection between the call being made and the Claimant's disability. The Claimant was absent on sick leave for reasons relating to disability and this was an exercise in maintaining contact during sickness absence.

192. Ms Rushton's conduct in making the call did not, however, either have the purpose or, reasonably, cause the effect in EqA section 26. Whilst the mere fact of contact from Ms Rushton during her absence was likely to be objected to by the Claimant, it would not be reasonable for that to cause the proscribed effect. We are reminded by the case law of the strong words in subsection (1)(b) and the importance of not find them satisfied too easily. Ms Rushton made an unwelcome call. She did not, however, conduct herself unprofessionally during that. She did not shout. She did not use rude language. She did not make threats. In response, she was shouted at. That which Ms Rushton did comes nowhere near amounting to conduct which would, reasonably, cause a violation of the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her.

193. This claim is not well founded and is dismissed.

On 7 January 2022 being handed a letter with regards to her poor performance

194. The Respondent's letter of 5 January 2022, which will have been received by the Claimant on or about 7 January 2022, summarised a number of performance concerns and required her to attend a meeting to discuss this.

195. This letter was unwanted by the Claimant.

196. The letter had no connection whatsoever with the Claimant's disability. It was not sent because of the Claimant's disability. The Claimant had not and does not suggest that any lack of performance was related to her disability. Indeed, the Claimant's position was and is a denial of any underperformance.

197. Separately, the Respondent's letter did not have the purpose and nor could it, reasonably, have caused the proscribed effect. The Claimant's line manager and indeed others, had genuine concerns about the level of her performance. Particular issues were identified in this regard. Ms Rushton had attempted to deal with these matters informally, without success. The Claimant was not much interested in Ms Rushton's views. The Claimant had a strong belief that she knew how to do her job, was doing it properly and should be left alone. This was not a reasonable position. Managers are entitled to manage. Ms Rushton had a duty to ensure the Claimant, as with all others who reported to her, was performing to the required standard. Where a deficit had been identified, then it was appropriate to address this with the Claimant. Ms Rushton had the support of her own line manager, Mr Bailey, in this. Legitimate line management such as was undertaken here, cannot reasonably cause the proscribed effect. The Claimant's reaction was unreasonable.

198. This claim is not well founded and is dismissed.

Time

199. Given that none of the Claimant's complaints are well-founded, the question of whether there was a continuing act or a just and equitable extension of time does not arise.

Employment Judge Maxwell

Date: 23 November 2023