EMPLOYMENT TRIBUNALS

Claimant: **Miss W L Scott**

Respondent: **Morrisons Data Services Limited**

HELD in person at Leeds **ON:** **5 to 9 February 2024**
Deliberations and Judgment: 12 February 2024

BEFORE: **Employment Judge Wade**
Members: **Mr D Wilks**
Mr M Taj

REPRESENTATION:

Claimant: **In person**
Respondent: **Mr S Davis, solicitor**

Note to the parties: A summary of these reasons was provided orally in an extempore Judgment delivered on 12 February 2024, which was sent to the parties on 14 February 2024. A request for written reasons was received from the respondent on 14 February 2024 and a request for a transcript was sought by the claimant, which was understood to be a request for reasons. After typing, the parties were invited to comment on whether any Rule 50 application was to be made given that the Tribunal had indicated there would be that opportunity at the conclusion of the hearing. On 17 April 2024 the claimant confirmed she did not seek anonymity, by which time I was engaged in a lengthy case. I am able now to approve these reasons to be sent. With apologies for the time it has taken.

The reasons below are provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the unanimous Judgment given on 12 February 2024 is also repeated below:

JUDGMENT

1 The claimant's Equality Act complaints of direct sex discrimination, Section 15 disability discrimination and victimisation are dismissed.

2 The claimant's unfair dismissal complaint is not well founded and is dismissed.

REASONS

Introduction

1. The claimant was a meter reader for the respondent company. She brought Equality Act complaints (victimisation, direct sex discrimination, a failure to make reasonable adjustments, and Section 15 disability discrimination) after her dismissal following ill health absence. She also pursued an unfair dismissal complaint.

Issues

2. The complaints and issues were clarified in a case management order sent to the parties on 11 July 2023. The issue list ran to seven pages. The questions we have determined are apparent in our conclusions and headings below. A previous age discrimination complaint was withdrawn and dismissed.

Hearing and Evidence

3. We heard evidence and submissions over five days and gave extempore judgment on the sixth day after deliberations.

4. The Tribunal had a hearing file of around 500 pages The claimant acted as a litigant in person and permission was given for additional documents which she provided by email, including transcripts of recordings. The Tribunal heard from the claimant, and arranged its timetable to be able to hear from Ms Fitzsimmons, her trade union representative, who had provided a short statement.

5. From the respondent we heard from Mr Crabb, the claimant's line manager and subject of many of her allegations, Ms Lynch, employee relations/HR, Mr Bell, also a field delivery manager who dismissed the claimant, Ms Tate, also HR, who was involved in the claimant's grievance, Mr Kiffin who decided the claimant's grievance, and Mr Cousins who decided the claimant's appeal against dismissal.

The Law

6. The relevant provisions are Sections 94 (right not to be unfairly dismissed) and Section 98 of the Employment Rights Act 1996. In capability dismissals case law has established that there must be a belief on reasonable grounds that the employee was no longer capable of performing the duties, that there had been a

reasonable investigation including the up to date medical position, that there was reasonable consultation with the employee, that the employer could not reasonably be expected to wait any longer, and that dismissal was within the range of reasonable responses. From the Equality Act 2010 the relevant sections are: Sections 6 and Schedule 1 (determining disability), Sections 39, 13, 15, 20-21, Schedule 8, paragraph 21, Section27 and Section 136. The content of these sections and developed principles in applying them are reflected in the reasoning below.

7. At paragraph 6.28 of the Employment and Human Rights Commission Code of Practice on Employment (2011) ("the Employer Code") says: whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular to:

    the extent to which taking the step would prevent the effect in relation to which the duty is imposed;
    the extent to which it is practicable for him to take the step;
    the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;
    the extent of his financial and other resources
    the availability to him of financial or other assistance with respect to taking the step;
    the nature of his activities and the size of his undertaking.

Findings of fact
Relevant Background

8. The claimant commenced employment with a national energy supplier on or around 1 February 2016, completing a personal details form in which she confirmed that she had no disabilities. She was employed as a meter reader and her job could involve walking many miles a day entering people's homes to read their meters.
9. She had started this role as an agency worker before becoming a permanent member of staff, and then transferring to the respondent on or around 1 September 2020 by virtue of a TUPE transfer. There was only one other female colleague in the claimant's team by 2022.
10. Her terms and conditions incorporated collective agreements, and were historic, arising from several restructurings. The recognised unions were UNISON and GMB. In a consultation exercise for the transfer to the respondent the claimant again confirmed that she did not have any disabilities.
11. The claimant's contractual hours were Monday to Friday 8am to 1pm. The respondent's "prime time" for being successful in collecting meter readings were typically around 8am to 10am and then 4pm until 8pm. The claimant typically covered York postcodes, but that could include driving to rural villages.
12. In late 2020 the claimant sought an increase in her hours from 25 hours per week to longer hours, but with a removal of the requirement to work on Mondays. That was not permitted at that time.
13. The claimant rode a bicycle for leisure and in the Summer of 2021 she fell and sustained a hand or wrist injury. Earlier that month she had also suffered an

adverse reaction to a Covid vaccination, and had taken a few days off sick as a result.

14. With her previous employer the claimant had been permitted to work from home on a phased return to work following absence. That energy supplier had direct retail customers. Part of its work involved calling those customers and assisting them to undertake their own meter readings. The claimant was allocated that telephone work.
15. In contrast, the respondent was a contractor to a number of different energy suppliers. Its contracts included the requirement to undertake a particular number of on site meter readings – it had no retail telephone operations. It was subject to financial penalties should it fail to meet the "meter read" performance targets.

The August 2021 return to work

16. The claimant's line manager on transfer to the respondent was Mr Crabb. He discussed with her a need to undertake a required, or target number of meter reads. He was dismayed that she was not prepared to alter her hours or work more flexibly around customer "prime time". That would have involved working perhaps two hours in the morning and three hours later on the afternoon – split shifts, in effect. The claimant's position was that she had commitments and activities in the afternoons.
17. The claimant's initial absence for her hand injury in the Summer of 2021 was around 40 days from 7 June to 30 July. The claimant was referred for an occupational health review. That review clarified that the claimant was at that time unable to drive because of a wrist splint.
18. The respondent's absence management procedure provided for regular welfare calls from managers to staff, absence "triggers" which required managers to complete a "capability form", referrals to occupational health and other usual steps including warnings to be imposed in circumstances of persistent short term absences which met the respondent's triggers.
19. On 1 August 2021 the claimant was due to return to work from her wrist injury and Mr Crabb was not available. She completed a return to work form with different managers at a venue near her home. When Mr Crabb returned from holiday he too was due to complete a form with her. The claimant was unhappy because Mr Crabb said he would be needing to attend at her home to complete that form; he then called her expecting to be able to attend her home to complete that form that day. The claimant's response was to refuse his attendance at her home. They then met at a nearby venue.
20. There was no issue with the claimant sharing her occupational health report from her wrist injury. The claimant also confirmed that she did not have any underlying conditions when discussing her return to work with Mr Crabb.

The claimant's first complaint to her union

21. The claimant sought to discuss alleged bullying by two colleagues with a Unite union representative in August 2021 – Mr Crabb and the other manager involved in the wrist return to work. She indicated that the substance of the complaint was her manager wanting to attend her home for a return to work meeting. She considered that to be harassing by ringing from nearby to say he was near and the claimant's evidence to the representative was that he insisted on coming. In fact, the claimant stood her ground and they met elsewhere.

22. In her union complaint, the claimant also described that Mr Crabb appeared to be making up policies and procedures. It was around that time that he was seeking to discuss with her the respondent's need for performance targets to be met and the hours she might sensibly adopt to help her meet those (and in respect of which she was unwilling to change her hours). The claimant did not take forward that grievance albeit she had union advice about it. She then had further absences that Autumn.
23. The claimant's entitlement to company sick pay was, in simple terms, six months full pay and six months half pay. The standard respondent entitlement was 12 weeks' full pay. Transferred colleagues, of whom there were many, had the claimant's more generous entitlement. That caused a degree of unhappiness amongst colleagues, but the respondent's management of absence was broadly the same irrespective of sick pay entitlement, and phone contact was required to inform of sickness absence.

Absence from February 2022

24. On 1 February 2022 the claimant began a further Covid related absence sending Mr Crabb a text message in the early hours of the morning to say she would not be at work or words to that effect.
25. Mr Crabb's response was the following: "NOW WE HAVE TO MOVE ALL THE WORK AROUND AT 7.45. YOU NEED TO SEND PHOTO OF TEST PLEASE." : YOU MUST RING IN SICK EVERY DAY YOU ARE SICK. INCLUDING NEED PHOTO OF LATERAL FLOW TEST. NO PROOF NO PAY. HR RULES. NOT MINE. He also said "as I have told you before texting in sick is a no no."
26. On February 11th, Mr Crabb began the first of many welfare calls in connection with this Covid related absence and the claimant regularly liaised with her doctor in order to obtain fit notes.
27. It was clear at that time that the claimant was also seeking some holiday or lieu time. The claimant asked questions about carry over of holiday into 2022. She was told that she had five days or so left. Mr Crabb's' preferred method of communication was to call the claimant by telephone. Sometimes his calls went unanswered.
28. There was also discussion about the need for a doctor's certificate and for communication after the claimant had seen the doctor. It was clear that Mr Crabb was seeking to comply with the sickness absence procedure requirement - for him to be in telephone contact with the claimant - and at times she did not respond, nor did she welcome that contact.

The claimant's medical records and welfare contact with the respondent

29. The claimant's position with her GP was straightforward. The claimant described to her GP that she had tested positive on a PCR test having returned from abroad. She described her job as walking several miles a day and meeting up to a 100 customers and requested a fit note because she didn't feel physically or mentally strong enough to return to work. When the claimant saw her GP on 21 February she described previously having polyneuritis in pregnancy. She described having tingling pains since the Covid positive test.
30. On examination her power was fine, she was walking fine and her reflexes were fine with normal sensation. There were no signs of sepsis or diverticulitis. The claimant was given a diagnosis of post Covid/neurological symptoms. She had also

told a doctor about having an MRI scan in 2013. Various tests were undertaken at that time. The shorthand used on fit notes thereafter was "post Covid".

31. The claimant had also been diagnosed with longstanding depression and she took Mirtazapine in relation to that. Her description to her doctor of her physical symptoms was that Covid had attacked her nervous system. She considered that she was not well enough to do her job in mid-March 2022.
32. The claimant's medical certificate was extended to 28 March 2022. Ms Salvesen, in HR, wrote to the claimant and invited her to discuss matters with her and Mr Crabb by telephone. Ms Salvesen had been asked to provide support to Mr Crabb because the claimant considered Mr Crabb's contact with her in February to amount to bullying and had said so. On the call on 11 March 2022, it was agreed that an occupational health report would be sought. The claimant mentioned nerve damage historically, and she consented to the sharing of that occupational health report. She indicated that her condition was unlikely to be subject to treatment. The claimant reported that blood test results had shown normal. Ms Salvesen kept notes of that call and included the information about the claimant's neurological condition. The claimant also audio recorded the call. It was the neurological condition information which immediately prompted the referral to occupational health.
33. Ms Salvesen's notes were faithful and accurate to the discussion which took place when describing the claimant's health conditions. The Tribunal makes this finding because the claimant had produced a transcript of her recording of the call and the correct health information was included. A matter which was not included was a seemingly innocuous comment from the claimant to the effect that it was against the law to drive if wearing a splint when discussing her previous period of absence with a hand injury. This omission was no basis to infer that Ms Salvesen was not doing her best to faithfully reflect the notes of the discussion. It was not a relevant matter given it was a discussion of a historic absence the previous year. The notes were expressly not verbatim, but they were accurate in containing the relevant information about the claimant's then current sickness absence in March 2022.
34. At or around the end of March the claimant indicated that she was not content for her occupational health report to be released and she had withdrawn consent for it to be forwarded to the employer in her welfare call with Mr Crabb. She was clear that she had been much happier with her previous employer and did not like working with the respondent because of the management of targets. She wanted to print and edit the report from occupational health.
35. Two lines within that occupational health report described longstanding depression and treatment with medication and anxiety symptoms. It was those parts which the claimant did not wish the respondent to see.
36. There were a number of calls from Mr Crabb to the claimant in April. For example they spoke on 12 April, when the claimant's sick note expired. They spoke again on 27 April. These were apparent from the claimant's call records but had not been included in Mr Crabb's log of contact with her. No adverse inference arises against him for that – his evidence was that he had overlooked entering those calls in the record but was required to make the calls nonetheless.
37. The doctor's notes of a consultation on 12 April referred to the claimant: 1) having had Covid, 2) having had polyneuritis in 2013, 3) having no weakness or other neuro symptoms and 4) that her "only issue is tiredness." Again a fit note was issued for post Covid on 12 April 2022. The claimant had described not driving because she was sleepy, but with a stable mood. She was also wishing to reduce

her Mirtazapine to see if it improved her tiredness. She was offered a neurology referral but declined.

38. The claimant subsequently contacted her surgery and indicated she had changed her mind and she did wish a neurology referral. That was done on or around 20 April 2022. The claimant described to Mr Crabb being prescribed Amitriptyline to help with her pain. At that time it was an acute prescription for nerve pain. The claimant raised on 11 May that she was still in a lot of pain with her nervous system and she sought a repeat of that prescription, having also contacted her trade union representative.
39. On or around 9 May 2022 the claimant's pay had reduced to half pay in accordance with the respondent's pay policy and a letter was sent to let her know of that. Welfare calls were then undertaken by a colleague of Mr Crabb's as Mr Crabb was on holiday.

The arrangement of a formal capability hearing

40. On or around 19 May when Mr Crabb called and there was no answer from the claimant and a letter was sent inviting the claimant to a capability hearing. The claimant had been off work or three and a half months and she was informed of her right to be accompanied by a trade union representative at that hearing. She was also advised that termination of her employment could be an outcome of that meeting, subject to any steps that could be taken to assist her in returning to work such as a phased return, amended duties and so on.
41. The claimant was also invited to consider any vacancies and given a link to the job vacancy list to see whether that could help with a return to work. The letter was also clear that because access had been withdrawn to the occupational health report the meeting would be conducted without access to it.
42. The claimant was advised by her trade union representative to make sure that her doctor reported a diagnosis of existing neurological condition in her fit note and in the consultation on 17 June the claimant reported to her GP that "two years ago changed job – dreadful boss – abusive". The GP did not change his diagnosis as a result of that comment. Her Amitriptyline was increased. She reported in that discussion that because occupational health had indicated her anti-depressant medication Mirtazapine would prevent her driving, because of drowsiness, she had switched to Amitriptyline.
43. By July of 2022 the claimant had been given a neurology appointment for May 2023 and was also taking Mirtazapine at night. She was further seeking Amitriptyline to be increased due to pain. At the resumed capability meeting with Mr Crabb and Ms Salvesen, undertaken by Teams and relatively short, with Miss Fitzsimons the union area organiser present with the claimant, it was agreed that the claimant had had a copy of the capability procedure and Ms Salvesen confirmed the meeting was being held in accordance with "the grey book" - containing that procedure.
44. Ms Fitzsimons and the claimant were clear that they had not seen the procedure and the meeting was not successful. It was agreed that a copy was to be provided to the claimant's representative and the meeting was again adjourned.
45. The meeting was then reconvened on 5 July 2022 by which time Ms Lynch had taken over the HR support role from Ms Salvesen, and she was present supporting Mr Crabb. The claimant's union representative and the claimant attended a hotel in York to undertake that meeting. It was agreed that there would be no recording devices and Mr Crabb went through the key dates of the claimant's five month

absence. It included reciting that there had been no answers and missed calls, but the claimant also considered that report not entirely accurate.

46. Mr Crabb also commented that he was led to believe that the claimant was having ongoing Covid symptoms on the fit notes, whereas the claimant pointed out that she had been suffering from nerve pain. There was a discussion with Mr Crabb about the times at which he had called the claimant and that this had not been necessarily agreed times and it was noted that the occupational health report had not been provided. An Agenda for the meeting was set out including discussing the condition in detail, discussing treatment, discussing the role and what support could be given to enable the claimant to return to work.
47. Ms Lynch asked if there was a willingness to release the occupational health report and there was an adjournment to discuss it. Parts of the occupational health report were blanked out - the parts referring to depression. There was then a request from Ms Lynch after another adjournment that there was a need for an updated occupational health report and that was then agreed. Mr Crabb acknowledged that there was a need to understand if there were any changes to the condition and the claimant agreed she would consent to that being made available.
48. The meeting went on to discuss matters and the claimant was clear that her condition was pre-existing and her representative made the point that it was a condition covered by the Equality Act in the occupational health report. There was a discussion about the impact on the claimant's day to day life and memory being impacted on a short term basis. The claimant was asked for how long she could walk before needing to stop due to pain and she described Amitriptyline and Temazepam as the medications taken, and that she was driving because the dosages were not too high.
49. She described intense pain after walking for 40 minutes and being unable to drive for four hours, which she said was part of her working life, but could get from A to B. There was a discussion of the respondent's performance targets and her union representative indicated that the claimant would wish to come back on a phased return and the respondent suggested a buddy system and mentors would be in place on a phased return.
50. As far as the alternative roles within the business, the claimant had said that she had looked on the jobs website but there were no jobs in Yorkshire apart from full time jobs and other jobs were too far away and the conclusion to the meeting was that there would be a referral back to occupational health and any decision on the claimant's future employment was postponed.
51. The claimant then had a fit note describing pre-existing neurological condition from 30 July to 3 September 2022.
52. Mr Cryton, another manager, had four missed calls to the claimant on 2 August seeking to maintain welfare contact in Mr Crabb's absence. Mr Crabb then left a voicemail and called her on 3 August in the afternoon, again several times on the 4th of August in the context of arranging the occupational health assessment and other matters, and then roughly once a week in August although on several occasions his calls were missed by the claimant.
53. The claimant had an occupational health assessment on 11 August and by that stage her Statutory Sick Pay entitlement had also expired. In the occupational health referral form Mr Crabb described the following "W.S has been off work since 1 February 2022 originally with Covid and then her doctor signed her off as pre-existing neurological condition and neuropathic pain". It was clear Mr Crabb

understood that matters had progressed from Covid and Ms Lynch also liased with the claimant's representative on the contents of that referral to occupational health.

54. The occupational health report was shared with Ms Lynch and ultimately the claimant agreed to it being also provided to Mr Crabb. The report advised the respondent that the claimant was likely to be considered a disabled person by reason of physical impairment. The report also said that because of the claimant's reported brain fog, it would be helpful for the claimant to arrange somebody to be with her in meetings, A reconvened capability hearing was due to take place on 8 September. The claimant then explained that she was due to be on holiday for her 60th birthday which was on 12 September 2022.
55. Occupational Healh review meeting with MC in 1 September (the commencement of allegations of sex discrimination)
56. Having received the August occupational health report, Mr Crabb prepared a script to discuss it with the claimant and he called her on 1 September to do so. The call lasted about 30 minutes. The claimant had had an appointment with her doctor on 25 August 2022, in which she had described an MRI in 2010 due to pain below the waist. She described the Amitriptyline being some use and that her symptoms of IBS were fine. The claimant had described that she could not afford the side effects (of medication) because she drives for a living and that resulted in a change to her medication. Amitriptyline was suspended and replaced with Gabapentin, whereas her Mirtazapine continued. She reported the gist of this GP consultation on her call with Mr Crabb, although in a very summary way.
57. The claimant also said to Mr Crabb that the occupational health report was out of date, because she now had heart burn and the change in medication meant her pain was worse than ever. She explained that her blood tests were normal and that her doctor had said he would provide a sick note for four months because of the pain. She had indicated she did not want one for that long, but she did not know how long the next fit note would be for.
58. There was then a discussion about driving and whether that had been discussed with the GP and there had also been a provision of some guidelines from the DLA. Mr Crabb commented that it was apparent that the pain was no longer under control. The claimant indicated she had requested another fit note and he noted that the current one ran out on 3 September.
59. The claimant made a request to Mr Crabb that she not receive any emails from Ms Lynch whilst away and asked Mr Crabb if she could have a work email address. They also discussed the claimant's holiday request from 7 to 22 September and that the claimant was having a fit note for that period, but Mr Crabb confirmed that he was not saying the claimant could not go away. They said their goodbyes and wished each other well. On 2 September the claimant was advised that she was entitled to choose not to read any information from work during her holiday.
60. The claimant's had arranged a holiday for her 60th birthday, which involved booking holidays from Monday 7 September until 22 September inclusive, a total of two and a half weeks. Ms Lynch had advised her by email that the respondent did not permit holiday to be taken during sickness absence if in fact the member of staff was to then be sent on sick leave on return or was not able in fact to return to work.
61. Ms Lynch had also explored the possibility of a work email address for the claimant and discovered that it was not the respondent's policy to allocate work email addresses for meter readers and the request was refused. There was then an email to the claimant copying in her trade union representative and confirming the

position in relation to her holiday 7 to 22 September and that an email address was not to be provided.

62. The claimant was then very unhappy because on 7 September, the first day of her holiday, Mr Crabb had attempted to call her. The purpose of the call had simply been to ask the claimant about her fit note because a new one had not been received. The claimant was unhappy to have received that missed call during her holiday.
63. The capability meeting that had been hoped to be undertaken at the beginning of September was postponed to allow for the claimant's trip and convened for 27 September. The respondent's policy indicated that if meetings were postponed they would then be rescheduled within five working days but these circumstances required a departure from that.
64. On or around 7 September the claimant emailed Ms Lynch to complain about a conversation with the HR department on 2 August. She complained that in regards to pay, having received a letter to confirm that the claimant's SSP had expired, an HR representative had been rude to her by saying that she had been absent for too long.
65. On 20 September Mr Crabb wrote to the claimant with the invitation to a meeting on 27 September enclosing the notes taken on the last occasion commencing on 5 July, the occupational health report, the timeline of the absence and the occupational health review meeting undertaken by Mr Crabb on 2 September.
66. The claimant indicated that she would not be able to attend on 27 September indicating that she had had more blood and urine tests and was awaiting results, but was not well enough.
67. The meeting was postponed to 5 October, Mr Crabb was not available and a new manager Mr Bell was appointed to undertake that meeting. The claimant gave permission for Mr Bell to be able to read her occupational health report. There was also telephone contact between Ms Fitzsimons and the respondent directly about the meeting.
68. On 27 September Mr Crabb texted the claimant to let her know that he would call her for a catch up on the 28th. Mr Crabb did call on 28 September at 10.07am and made notes of that call. He noted that "Nimbuscare", was involved in sponsoring the claimant for additional blood tests and screening in connection with her condition.
69. He asked her if there had been any improvement since her holiday and she indicated that she was feeling worse and was now suffering from insomnia and only getting two hours sleep. Mr Crabb asked if the test results were back and did the claimant know what the results were for. She indicated that she did not and was struggling with her memory and Mr Crabb asked if there was an appointment coming up with her GP and she said, yes, the next day at 2 o'clock.
70. Mr Crabb then asked if they could have a call after that to hear any update on her health and the claimant said, no, "its all of you keep harassing me". She said "I asked for no emails to be sent during my holiday period and that woman in HR sent me four". That was a reference to the emails exchanged with Ms Lynch. Mr Crabb suggested that there was no intention to harass claimant, that they simply wanted to see a way to getting her back to work safely and the claimant indicated that she would not be turning up to anything. Mr Crabb then asked her about her medication and the claimant explained that it had been cut and she said again that she was very tired and her pain was too much. Mr Crabb said he would be on leave the following week and wished her well.

71. It was Patricia Lynch who first engaged in email correspondence with the claimant in copy to her union representative and to Mike Crabb around August 31st. It was Mike Crabb who discussed the matter of the provision of a fit note with her on 1 September and he relayed that to Ms Lynch. At the time Mr Crabb called her on 7 September and emailed her seeking her fit note to replace the one that had expired on 3 September, there appears to have been some difficulty at the GP with that fit note and the claimant had to ask for it again.

The capability hearing on 5 October

72. Towards the start of that meeting, chaired by Mr Bell, the claimant's union representative asked about the possibility of an exit package, but that was a surprise to the claimant and she suggested it was something to talk about "after they had gone through this". It was later confirmed that that was not company policy, and the representative pressed the point but it was clear the respondent did not want to engage in that discussion.
73. The claimant had indicated that she felt bombarded and badgered by the frequency of Mr Crabb's calls. She later said that during Covid there had been no bullying on the phone- implying that the respondent's practice was to bully staff during absence. She also alleged bullying by Mr Crabb and another colleague when contacted for a sick note on the first day of her holiday. The claimant and Ms Fitzsimmons read out the February text messages from Mr Crabb. Ms Fitzimmons said the claimant "will be raising a grievance" linked to the stress caused by Mr Crabb contacting the claimant more than was agreed in August.
74. Although the claimant had previously said that everything had changed in terms of her pain, the claimant said at this meeting that she was happy with the occupational health report, but was awaiting further tests and an MRI scan. There was discussion of work alternatives and the claimant confirmed that the posts available appeared to be not in York and/or full time. Ultimately when asked how long the claimant thought before she was well and could return to work her reply was "how long is a piece of string". Mr Bell had said he hoped November might be a likely return date.
75. There was no positive assertion by the claimant or her union representative as to adjustments that could be made or any discussion of the ways in which the claimant's post could be done subject to her then physical limitations. In simple terms, she was unwell and in too much pain to return to work at all at that meeting.
76. Ms Lynch and Mr Bell considered further information was likely to be needed from Mr Crabb to address the calls/text message issue, given the claimant was complaining about his conduct albeit informally at that stage. It was important to hear his side, they said. He was requested to attend a reconvened meeting and the claimant and her representative were told he would be present for the relevant part of the meeting. A request was then made by the union representative on receipt of the invitation to the reconvened hearing, for its cancellation, given that a formal grievance was to be presented. Ms Lynch refused that request.
77. On 11 October, Mr Crabb called the claimant by mistake while on holiday - he had sent a text a minute later saying, "sorry rang by mistake".
78. At 17:22 on 12 October the union representative emailed a grievance and it was passed to Ms Dickson in HR. The claimant was told on receipt of that grievance that it had been passed to an HR representative to address with her.

The claimant's grievance

79. The content of that grievance was about alleged bullying and harassment by Mr Crabb and alleged discrimination arising from disability. It relied on the "grey book" handbook for grievances and the claimant considered that the matter should not be dealt with informally.
80. The claimant's position was her manager's behaviour had had a detrimental affect on her health and disability, prolonging her sickness absence from work. She also considered that stress was exacerbating her disability and that Mr Crabb was having an influence on the capability process. The substantive concerns were that Mr Crabb had repeatedly throughout her employment criticised and shouted at the claimant and behaved in an aggressive manner towards her.
81. The particulars were very similar to the allegations in this case. The claimant said that a year ago – which would have been October 2021 - Mr Crabb had demanded to come to her home, phoned to say he was outside and that he should be let in. The claimant also alleged that Mr Crabb did not like women or part time staff, made comments putting down other women and that she felt he was targeting her and was unwilling to consider reviewing working days. She alleged that he had been rude and aggressive by text on 1 February 2022 and that he was rude and abusive at that time and that he had allegedly been screaming at the claimant by telephone and that that was overheard by her friend.
82. The claimant further alleged that on 5 July it had been agreed that the welfare calls were not positive for her and that weekly calls would be arranged. She alleged that Mr Crabb had called her three times on 18th, 19th and 23rd August both on her work and personal phone. The claimant also suggested that the occupational health review meeting was not notified as such to her or that it would be submitted in the capability process and that the notes of that 1 September call were not shared with her at the time and that she hadn't approved those notes and did not agree with them. The claimant identified that HR had refused a work email address for her, but that phone calls would not be made, but she had received such contact during her holiday on 7 September and with an invitation to the next meeting. Again she complained about the notes of 28 September not having been agreed or shared with her and she also repeated her complaint about the HR colleague on or around 2 August 2022. She also complained that there should have been earlier reviews before a capability hearing pursuant to the respondent's handbook.
83. She complained that the whole process had had a detrimental affect on her health, disability and that she had developed insomnia and felt anxious and worried. She considered the behaviour needed to stop. She also requested that the capability process be put on hold and requested an independent decision maker. The grey book procedure provided for the initial stages of sickness absence management being completed by a line manager but that in respect a final warning or dismissal, it would be expected that a more senior manager would be the decision maker. The same handbook referred also to the head of HR, a post which did not exist within the respondent.

<u>The 13 October hearing</u>

84. On 13 October Mr Bell indicated that the capability hearing would not be paused for the grievance, but that Mr Crabb was present and could answer questions given the nature of the grievance that had been submitted. Ms Lynch had previously indicated that he would have the right to respond.
85. At the end of the hearing on 13 October Mr Bell took the decision to dismiss the claimant, having discussed all the relevant matters and concluded that there was

no prospect of the claimant being able to return having heard that she could not work given the pain that she was in. Mr Crabb was not present when Mr Bell delivered his decision to the claimant and her representative. Full notes were taken of the discussions in that meeting.

The grievance and dismissal appeal processes

86. Mr Kiffen was appointed to investigate the grievance and on 25 October 2022 he met with the claimant to undertake the first grievance hearing.
87. On 28 October Ms Fitzsimons, the claimant's union representative, advised the respondent that a letter confirming the outcome of the meeting had not been provided within 10 days and the notes of the meeting on the 13th had not been provided. She emailed Ms Lynch on or around 28 October and Ms Lynch confirmed that Mr Bell had been on holiday and the letter would be with them shortly.
88. On 31 October Mr Kiffen indicated that he was ready to provide an outcome to the grievance.
89. Mr Bell provided his written confirmation of dismissal on 31 October. The letter recited all the matters discussed including: the claimant's initial Covid diagnosis which then became nerve pain symptoms; the medication the claimant had described including Mirtazapine; the occupational health report which described the claimant as unfit for work and that the claimant also had a cognitive difficulty in being forgetful and having some difficulties with speech. It went on to describe that the claimant had confirmed that she was unable at that time to complete her job as a meter representative and that a phased return would be a reasonable adjustment, which she would welcome, but that she did not know when she would be able to return. As to alternative roles the claimant had said that they were male orientated and when it was confirmed they were open to everybody and time was provided to consider them, there was no job available on the website which was expressed by the claimant and her representative as being something which she could take up. The outcome was to terminate the claimant's employment on the grounds of ill health capability, which was delivered at the time. There was no requirement for her to work her five weeks' notice and payment in lieu was said to be payable in the October payroll. In that outcome letter the claimant was notified of her right to appeal and indeed in Ms Lynch's apologetic email it was confirmed that the delay in providing the outcome letter would not affect that right of appeal.
90. On 7 November the claimant's company sick pay would have come to an end, had her employment not been terminated with notice on 13 October. Mr Kiffin met the claimant with her union representative and a note taker to discuss her grievance on 25 October 2022.
91. The claimant also appealed her dismissal on 8 November, setting out failings in policy, the presence of Mr Crabb, the failure to share information with her in a timely way and a lack of up to date medical advice.
92. The appeal letter repeated the complaint about Mr Crabb's involvement in the process and complained of a lack of sensitivity and a failure to consider reasonable adjustments including medical re-deployment to a different post and she complained of an expectation she was to work her full hours.
93. After an investigation Mr Kiffen confirmed on 28 November that he had concluded his grievance investigation, having spoken to Mr Crabb and put to him the claimant's allegations. He convened a meeting by telephone with the claimant and Ms Tate, who had recently joined the respondent as an HR advisor. Ms Tate had

advised him, which had been the reason to delay his grievance outcome, that it might be sensible to combine his grievance outcome with considering the claimant's appeal against dismissal, but when that was discussed with the claimant and her union representative, the claimant's union representative objected.

94. During that telephone call on 19 December 2022, although it was an hour long to explain the gist of Mr Kiffen's grievance findings, it was decided that the outcome to the grievance must be given separately because the claimant and her union representative were not willing to let Mr Kiffen also deal with her dismissal appeal. No minutes were taken of that meeting but Ms Tate confirmed that Mr Crabb would be dealt with by way of support or training in connection with his use of capitalisation in text messages, but otherwise the grievance was not upheld or words to that effect.
95. The claimant immediately emailed another work colleague saying that Mr Crabb had been found guilty of harassment and bullying with a laughing emoji. The grievance letter outcome was then provided which did not uphold the claimant's grievance that she had been bullied by Mr Crabb, but indicated his use of capitalisation in a text message was not appropriate and that would be addressed with him.
96. It was clear on receipt of that letter that proceedings were envisaged and the claimant commenced ACAS conciliation on 20 December 2022. That was the day of a dismissal appeal hearing before Mr Cousins, a regional operating manager and head of data collection. In that meeting the claimant's union representative indicated that they were not seeking reinstatement but seeking compensation. They indicated it would be preferable to come to an agreement at the end of that hearing. Mr Cousins indicated that he would investigate and he did so providing an outcome that the dismissal was upheld on 10 February 2023.
97. The claimant was not granted an extension of time to submit her grievance appeal and she did so on 26 December 2022. The claimant's appeal centred on an inadequate investigation and unnecessary delays in that grievance process.
98. On 13 January Mr Cousins indicated that he was hoping to provide his outcome to the claimant by next week. That would have been in the third week of January. In fact it was not provided until 10 February 2023. The claimant specifically alleged that his delay was in an attempt to ensure that her claim to the Tribunal was presented late. The claimant presented her claim on 11 February 2023.
99. An outcome letter from Mr Stay, a contract manager who was appointed to consider the grievance appeal, was drafted on 5 March 2023 and there had been a hearing before him on 26 January 2023 by a Teams call. Having rehearsed the chronology he indicated that he did not consider that there were unnecessary delays in the grievance. As to its investigation he simply rehearsed that the material was intrinsically linked to the capability dismissal and that was discussed on 20 December with Mr Cousins and was explained in a call between Mr Kiffin and Ms Tate on 19 December and he considered that matters had been fully investigated.
100. Mr Kiffin had not had formal training in Equality Act grievances and he did not conduct any investigations with the claimant's friend who had been said to overhear the call with Mr Crabb nor with the female colleague who was indicated to have complained about Mr Crabb's behaviour.
101. Mr Cousins' dismissal appeal hearing addressed the following points and his decision was confirmed in his outcome letter. The headings were:

    Point 1 Failure to follow process.

Point 2 Mr Crabb had been leading the capability meetings initially.

Point 3 That although Mr Crabb was asked to attend to answer questions he was present for the whole of the meeting and his presence on 13 October caused additional stress. He was not asked about describing a phone call at an occupational health review meeting.

Point 4 Information not being shared in good time. This was in relation to the notes of 28 September.

Point 5 A reasonable time frame for her return to work. The claimant complained that it had never been made clear to her what that was because there were no trigger points or timeframes within the policy.

Point 6 The decision was asked to be deferred until the grievance had been determined because the claimant had made the point that return to work was being hampered by bullying concerns.

Point 7 Mr Crabb had had significant input into the process.

Point 8 Lack of up to date medical evidence in that at the point of dismissal the occupational health report was two months' earlier in August and that medication had been changed and there was a new insomnia symptom but there was no referral back to occupational health.

Point 9 Lack of support and sensitivity given that there was an acknowledgement that the claimant was vague at times and yet meetings went on for a long time.

Point 10 There was questioning about medication unrelated to her nerve condition which was said to be intrusive and insensitive and that those issues ought to have been referred to a doctor.

Points 12 and point 13 concerned the making of reasonable adjustments which the occupational health report had indicated would be a possibility and that those matters were requested during the meeting but there was little progress made.

Point 14 was that medical re-deployment was not considered because re-deployment was said to be applicable only to redundancy situations.

Point 15 was said to be lack of understanding of reasonable adjustments because there was a discussion of a requirement to work particular hours in the meeting on 13 October.

Finally and this was a catch all, the claimant considered that the respondent had not considered alternatives to dismissal, had not requested up to date medical information, had not considered reasonable adjustments and had not followed its own procedures.

102. Each of these points were addressed by Mr Cousins in his decision letter which was careful and considered and he closed by indicating that at the point the claimant became capable of working as a metering representative any application from her would be considered. He confirmed that a financial settlement was not something which the business would be taking up.

103. The reply from Mr Cousins in relation to the claimant's allegation that bullying by Mr Crabb had worsened her health, was contained within his comments about

the implementation of company's policy. Mr Cousins referred to the claimant's fit notes attributing ill health only to either Covid or to the claimant's nerve pain and not to any work related factors, stress, her manager or anything else and that the claimant had not discussed these allegations with occupational health. His decision rejected that suggestion saying that the respondent's overriding objective was to return staff to work if they were able to do so, but in the claimant's case she was unwell and unable to return to work and that remained the position at the point of which a dismissal decision was taken. The appeal did not succeed.

Conclusions – applying the law to the facts and answering the questions posed in the case management order

104. It is convenient to address Equality Act allegations first, because it is frequently said that a dismissal is rarely, if ever, fair if an employer has discriminated against a person in connection with it.

Disability

105. The first issue for the Tribunal is in relation to disability. We had to decide whether the claimant had a disability at the time of the events complained about. We have found that the claimant was a disabled person. She had a physical impairment of lower body nerve damage. That physical impairment, had, at the material times, a substantial adverse effect on her ability to undertake day to day activities.

106. We note and record for the purposes of these findings that when the claimant was asked to set out those effects in her impact statement (upon which she was not cross examined) she included the following: *I had excruciating shooting pains from my spine to my toes… It affected my sleeping. I couldn't do anything, I could not concentrate due to the pain and lack of sleep.* She went on to describe that she had to write lists, and would forget things due to brain fog, implicitly caused by the pain. She also described not showering on a daily basis and so on.

107. The effect that she described in February 2022 is an effect which is plainly more than minor or trivial. We have to consider whether the effect was likely to last a year or more. We also know from the evidence that she gave to the Tribunal and her answer to EJ Knowles' order 11.3, that she "nev*er fully recovered from my illness in 1989"*, living with pins and needles from her knees to her toes. She describes that this is now 17 months since her second attack and that the consultant has stated, that is in May 2023, that she has permanent nerve damage.

108. The claimant herself described, and we accepted, that she was hospitalised in 1989. We must ask whether the substantial adverse effect on day to day activities that she describes is long term. We consider that having had a significant episode in 1989, such that she was hospitalised for more than a year, she has established that the 2022 episode is the second such episode. Even if she were to have recovered at the material time - February to October 2022 - and we consider matters without the lens of hindsight from May 2023 - we consider it was likely in October 2022 that the substantial adverse effect would recur (whether or not it was likely it would last 12 months).

109. That is the basis on which we find her to be a disabled person at the material times.

110. Alternatively, or in addition to that, the claimant was having treatment throughout the period. In addition to Mirtazapine she commenced on Amitriptyline

to treat her nerve pain. It is clear that her GP was referring her on and encouraging her in May 2022 for a neurology referral.

111. Again, applying the deduced effect provisions in the Equality Act, it seems to us that had she not been in receipt of pain relief medication the adverse effects on her day to day activities, to the extent that they were not present at all times, would have been worse and met the threshold – disrupted sleep (which is a day to day activity, difficulty dressing and showering). We were without expert medical evidence, but we emphasise that the claimant was not challenged on any of the evidence in her disability impact statement. She complied with the order. She provided full disclosure of her medical records, she was not cross-examined on their contents. The Tribunal had the records in front of us (although they surprisingly had not been included in the bundle). Medical records are essential when a party disputes disability. The parties have known that we would need to have regard to them. We are content that there has been a fair hearing of the disability issue because the respondent has been professionally represented, the claimant is a litigant in person who has complied with orders, and the Tribunal has sought to put the parties on an equal footing.

Section 15 treatment, discrimination arising from disability.

112. There are two allegations: pressure to return to work and dismissal. These were said to be because of absence from 1 February 2022 and the requirement to pay the claimant's sick pay entitlement.

113. Allegation 1: that Mike Crabb during his management of the claimant from February onwards pressured the claimant to return to work in welfare meetings, and that Mr Bell did the same on 5 and 13 October. For example telling the claimant to look on the website for alternative jobs, asking her when she'd be ready to return and asking her when her doctor was to advise that she would be able to return.

114. It is clear on our findings that Mr Crabb "shouted" at the claimant by text in his 1 February message. That was frustration for the reasons in the text, the claimant having not complied with the respondent's policy on sickness absence relating to Covid. Thereafter Ms Salveson from HR assisted and Mr Crabb fully understood he should not have texted in that way. He moderated his behaviour thereafter and sought guidance as appropriate.

115. In his welfare meetings by telephone or in person from February 2022, he was seeking to comply with the respondent's absence management policy. He was endeavouring to keep in contact with the claimant weekly, to understand from her the medical position, to understand when she might be returning to work, and all that in relation to absence for a condition which the claimant, subsequently having been diagnosed, described as very rare. This was not a condition about which the reasonable employer could be expected to have some sort of innate knowledge of the condition itself, or the effects from it, or the treatment that might be followed or the likely absence timescales.

116. In that context Mr Crabb throughout the material time was seeking to understand the position with the claimant and apply the respondent's policies. He did not pressure her to return to work in welfare meetings. She has a wholly illegitimate sense of grievance about his contact and treatment of her during that period. His 1 February text was an isolated "shouting" and inappropriate in a moment of intense frustration, but that does not mean her factual case of pressuring her to return succeeds.

117. That is equally the position concerning Mr Bell on 5 and 13 October during the meetings that he held. He was, with the claimant's union representative present, simply trying to understand the relevant matters that were necessary for him to consider whether the respondent employer could support the claimant with further absence going forward. He was doing so in accordance with the respondent's policies and with the claimant having the full support of her union representative. He did not treat the claimant unfavourably.
118. The first allegation therefore fails because these are not facts from which we could conclude unfavourable treatment, and certainly not because of the two things the claimant alleged were the "somethings".
119. Before addressing the Section 15 dismissal allegation, it is convenient to deal chronologically with the sex discrimination allegations, because these are also a list of complaints about the way matters were handled and may go to "appropriate and reasonably necessary" on dismissal.
120. The evidential basis for alleging sex discrimination was simply that the claimant was only one of two female meter readers in Mr Crabb's team, and the bare allegation that, "he did not like women" and that one other colleague/friend (from whom we did not hear) considered this to the position. We also note that the claimant considered Ms Lynch, another female HR colleague, and another male colleague all to be harassing her or rude to her by contact with her – but it was not alleged they were influenced by gender.
121. Allegation 1. Not telling the claimant in advance that on 1 September 2022 Mr Crabb was reviewing the occupational health report rather than a normal welfare catch up. The claimant had not arranged to be accompanied and the occupational health report had recommended that she needed help in meetings because of her cognitive difficulties or brain fog.
122. It was said by the occupational health practitioner that because of the claimant's symptoms, it would be helpful for the claimant to arrange somebody to be with her in meetings. To do so she would need advance notice. The 1 September call was a welfare call to discuss the occupational report with the claimant. Mr Crabb knew that for formal meetings the claimant's representative would be involved. It may well have been helpful for her to have her representative present or joined in for this call, but this was a complaint about form rather than substance. There was nothing in Mr Crabb's discussion with the claimant on 1 September that the claimant identified as something on which she had given wrong information or otherwise had been dealt with in a wrong way by Mr Crabb. Our lengthy findings about it are clear there was no prejudice to her in that conversation about an occupational health report which was going to be important in matters going forward. The fact that she was able to say to Mr Crabb that everything had changed and that her pain was dramatically worse, at that stage demonstrated that she was able to deal with matters with him on the telephone on that occasion. She robustly explained matters to him.
123. She may have a legitimate sense of grievance about not being informed in advance that Mr Crabb would call so that she could arrange her representative to dial in, but the reason why Mr Crabb did not do so was because he was conducting matters in the way he ordinarily did. He was expecting to have an ordinary discussion, and he did not generally involve third parties in welfare calls. He did not see this call as any different. It was a call to see how the claimant was, what she thought about matters at the time, what her doctor had said, what she thought about the occupational health report, and so on. This was a discussion that was

substantively no way different from those other ordinary discussions. There are no facts from which we could conclude Mr Crabb would have proceeded more favourably towards a comparable male colleague.

Telephone call/email from MC on 7 September 2022

MC called the claimant at home while she was on holiday during her sick leave even though she had requested on 2 or 3 of September that she should not be contacted.

MC emailed the claimant about her fit note while she was on holiday during her sick leave even though she has already sent the respondent her request to the doctor for another fit note and had requested not to be contacted.

124. The claimant was very much looking forward to her 60th trip. She had taken about two weeks of leave from midweek to midweek. She had dialogue both with Ms Lynch and Mr Crabb about it. She had requested a work email address. Ms Lynch could not provide that but was very clear in her communications that if the claimant chose not to communicate with the respondent whilst away they would know the reasons why, or words to that effect.

125. The previous fit note had been due to expire on 2 or 3 September and the claimant was without fit note cover by 7 September, even though she had requested it from the GP and was expecting it to be provided. The consequences of being without a fit note on the payroll cut off date, which was likely to occur during her holiday, would be that her company sick pay (for she had exhausted SSP) would be stopped unless there was some sort of manual override. It was in the spirit of seeking to make sure the claimant was paid properly that Mr Crabb had sought to contact her on 7 September in relation to the provision of that fit note. There was nothing untoward about that. The claimant has a legitimate sense of grievance about being contacted, having asked for no contact, but the reason why is clear. This had nothing whatsoever to do with gender. It was all about managing the claimant's absence and pay in a sensible way at this time. There is no basis to infer that a comparable male colleague would have been treated more favourably – that is, would not have been contacted. It is instructive that Ms Lynch's contact was not alleged to be discriminatory.

28 September 2022 - MC asked if he could call the claimant the next day about her blood results. The claimant asked him not to. He did not listen to her and asked again later in the same call.

126. Our findings are above. Mr Crabb had a catch up call with the claimant, he contacted her first to let her know (and she did not secure the attendance of Ms Fitzsimmons or anyone else). The call took place, they discussed ordinary things. During the course of that call, which was not recorded, Mr Crabb took notes, and there was nothing untoward in the discussion of the claimant's medical position. The claimant has a wholly unjustified sense of grievance about it; Mr Crabb clearly listened to her when she communicated her feelings about contact from the respondent. Again, there are no facts from which we could conclude Mr Crabb

would have treated a comparable male colleague more favourably – there was nothing unfavourable, let alone less favourable in his treatment of the claimant.

5 Oct 2022

MC should have emailed his minutes of meeting on 28 September to Patricia Lynch who would have emailed it to the Claimant and her union representative in advance of the meeting on 5 October 2022.

MC's minutes of the meeting on 28 September were not accurate. They did not include the claimant's explanation of her conduct.

127. The claimant's position was that she and her union representative should have had prior access to the notes from the 28 September call in the 5 October meeting. The notes were also alleged to be inaccurate. The claimant accepted that in the call on 28 September she had become unhappy, recorded as "aggressive" by Mr Crabb. Her words , were, "she lost it". At the time the claimant was unwell and in pain. She had returned from a holiday during which, in her description, she was still unwell when she returned and her symptoms were worse. Those matters are recorded in the notes.
128. It is not surprising perhaps, that she reacted in the way that she did and nobody would think the worse of her for that, whether described as "aggressive" or "losing it". She was not clear in her evidence about how the notes were inaccurate but they recorded her mitigation – namely her deteriorating health.
129. It was reasonable for those notes to be phrased in that way, given the claimant's description of "that woman in HR" and "losing it". It was also reasonable for them to be available to Mr Bell, and for him to have the full and up to date picture in relation to the claimant's absence. These are not facts from which we could conclude less favourable treatment because of sex on the part of Mr Crabb – he was simply being diligent in making sure his contact with the claimant was available to the person taking the meeting which, had he not been on holiday, he would have taken anyway. Again, the claimant has a wholly unjustified sense of grievance about this, but particularly in circumstances where the 5 October meeting was then adjourned.
130. It is also convenient to note here that we accepted Mr Bell's compelling oral evidence to the effect that had there been any date for likely return, be it November or otherwise, available from the claimant at his meeting on the 5th or the 13th he would have been very content to engage in a discussion about phased return and to arrange for the claimant to come back to work, and would not have dismissed her. The only thing in his mind, whatever the notes from Mr Crabb, whatever other material was in front of him, was simply an assessment as to whether the claimant was, in a reasonable time frame, going to be able to return to work and carry out her duties, and/or whether there was some other adjustment that could be made or other duties that could be arranged, to aid that return. Even if it could be said that to fail to provide the notes of the meeting in advance to the claimant and her representative was a detriment, and we are wrong that it was not corrected by adjournment, these facts and matters are not such that we could conclude there was "less favourable treatment" or that sex played any part in Mr Crabb's provision of notes.

11 Oct 2022

MC rang the claimant during her sick leave while he was on holiday. He had no reason to contact the claimant while he was on holiday.

131. We accepted Mr Crabb's evidence that this was simply a mistaken call - of the type we have all done at one time or another – and he texted immediately afterwards to explain that and put the claimant's mind at rest.
132. Again the claimant has a wholly illegitimate sense of grievance about this mistake, and there are no facts from which we could conclude less favourable treatment, real or hypothetical. It was simply a mistake.

12 Oct 2022

Either MC or Geoff Bell (GB) made the decision to continue with the capability proses rather than pausing it until the grievance process was concluded.

The claimant was told that there would be a meeting combining grievance and capability. She assumes this decision was made by MC or GB.

The claimant was told that both managers (GB and MC) would be in the capability meeting at the same time, which was difficult for her because she struggles with cognitive process. She assumes this decision was made by MC or GB.

133. Our findings are clear that there had been intimated on 5 October that the claimant was unhappy about contact from Mr Crabb and that there would be a grievance from or on behalf of the claimant. It still had not been sent the day before the adjourned capability hearing - the 12th but arrangements had been made to address the informal observations in any event by Mr Crabb's attendance. There was then a request that the capability process be paused. It was Ms Lynch's decision, and nothing to do with Mr Crabb, that the follow up meeting was not paused in those circumstances. Her reasons were simply there was no reason to do so when the matters were to be discussed as part of the capability hearing and there was no formal grievance.
134. Just after 5 o'clock that day the grievance was received. Again the following morning there was a request to postpone the meeting. It was refused by Mr Bell, in consultation with Ms Lynch. Again, nothing to do with Mr Crabb. The receipt of that grievance was acknowledged promptly and a different manager was arranged to address it.
135. Mr Crabb's attendance had been arranged because the respondent had a responsibility to seek to understand relevant matters from all sides. The claimant was to have that opportunity if she and her representative wished to take it. There was no representation from the claimant or her union representative that her cognitive ability was affected by Mr Crabb being available in that meeting or otherwise it was inappropriate to seek to address matters in that way, save that they wished to pause the capability process wholesale.
136. None of these are facts from which we could conclude less favourable treatment – in effect that a male colleague in similar circumstances would have

had the meeting put on hold, and the grievance addressed first, and that Mr Crabb would not have been permitted to attend the meeting.

13 Oct 2022

The minutes of meeting on 5 October 2022 were not provided to the claimant in advance of the meeting on 13 October (The claimant assumes this decision was made by GB or MC, probably GB because he was chairing the meeting)

MC and GB were both present in the meeting (this decision was probably made by MC and GB)

In the meeting MC denied knowledge of being informed by the claimant in March 2022 about the claimant's pre-existing nerve damage.

137. The notes of the 5th were not available because they had not yet been typed, and the meeting was adjourned. The claimant's representative may have wished otherwise, but that was the position and she and everyone else present could have taken their own notes (and indeed reasonable attendees would do so) to assist them later. We repeat the conclusions above. Mr Crabb was present for a good deal of the discussions, and Mr Bell had to be present as he was chairing the meeting. If the suggestion is that had a male colleague been taking part in a similar situation, this would not have been the arrangement, this is fanciful. Ms Lynch was also present and would have been whatever the gender of those involved

138. As to the alleged comment by Mr Crabb, our findings include that there was a discussion when Ms Salvesen was present in March of 2022 and the nerve damage matter was minuted by Ms Salvesen. There was no doubt about it and those papers were available for the capability meeting. Mr Crabb was reflecting his memory of what the fit notes had said during this time, namely Covid. There was no doubt from the occupational health report from August and the earlier minutes in March that the nerve damage issue was a substantial cause of the absence by this stage – in October. However, the picture had been less than clear in the early stage because the claimant did not give consent for the March occupational health report to be provided to Mr Crabb. The claimant has, again, an unjustified sense of grievance about this.

139. Further Ms Fitzsimons did not provide any compelling corroborative evidence in relation to the 13 October meeting in terms of the tone or contents of what was said. Her evidence was mainly directed at the bare facts in the chronology and the process and what she considers to be unfair about it. In the round these are not facts from which we could conclude detriment, let alone less favourable treatment in anything Mr Crabb said in that meeting - Mr Crabb was simply recounting his understanding of the fit notes at the time when questions were asked of him.

140. None of these facts are such that we could conclude less favourable treatment because of sex.

25 October 2022 Ian Kiffin in a raised voice asked if that claimant had issues with the company and asked where was all this going?

141. The claimant was accompanied by Ms Fitzsimons at the 25 October meeting. Ms Fitzsimons makes no such allegation, nor does she record the allegation

anywhere. One would have thought that if that had happened Ms Fitzsimons would have been the first person to request it be minuted or otherwise protest or document it and also include it in her witness statement. She did not.

142. It also strikes the Tribunal as an unlikely allegation – a raised voice at the start of a grievance meeting. We can quite understand that Mr Kiffin might have asked a question about what this is about or something along those lines, but to give it the sinister implication that the claimant gives it, we simply do not accept that happened at the beginning of such a meeting when others were present and it was taking place by video.

143. The claimant's perception of sinister motive where there was none was also evident in a great deal of discussion in the hearing about the placing of a laptop screen near her during another meeting, when the explanation which we wholly accepted was the need to have cables connected in a particular way. This allegation of sex discrimination against Mr Kiffen strikes us in a similar vein - it is an exaggeration or perception of the claimant which does not bear any sort of objective assessment.

144. It follows that none of these are facts from which the Tribunal can conclude less favourable treatment because of sex. If the facts amount to undesirable treatment - and we can see that not having the minutes of a meeting might be regarded as such - the simple explanation was because the minutes were not available. There was nothing untoward in any of these alleged failings and much more significantly there is no evidential basis whatsoever for the Tribunal to conclude that this treatment amounted to less favourable treatment related to gender.

145. In simple terms we accepted compelling and likely evidence from Mr Crabb and Mr Bell that they proceeded as they would in any sickness absence case whether the person was male, female or any other protected characteristic and it is simple as that. These allegations have to be dismissed.

146. Returning to Mr Bell's decision to dismiss the claimant, about which the claimant suggested that her treatment should be assessed against a comparator, that was not an allegation of sex discrimination in the issue list, but for completeness, in case it might affect assessment of the earlier matters we address it.

147. The claimant's case included that a male colleague in a division of the respondent in the East of England, who had an arthritic condition, was dismissed after 12 months. Her suggestion was that had she been male, Mr Bell would have waited another three months before dismissing her (and if he had waited three months she would not be in the Tribunal). That allegation is wholly without merit, resting as it does on a difference in sex and a bare difference in treatment by the respondent.

148. There are a whole raft of matters which render that colleague, even on the face of it , a very unsafe comparator – his treatment by a different manager tells us nothing about what was going on in Mr Bell's mind; arthritis is a commonly understood condition; and who knows what alternatives, adjustments or otherwise were considered in his case. Even taking account of this late entry to the claimant's case, the sex discrimination case bears no scrutiny and is dismissed.

149. In the claimant's unfair dismissal case, and Section 15 case, and throughout her evidence, it was alleged that the real reason for the claimant's dismissal, was her entitlement to full and then half sick pay in comparison to colleagues with lesser terms.

150. Our chronological findings are such that the claimant had used up about half of her full pay allowance for the wrist injury absence in June 2021, when the Covid related absence started in February 2022, and she used up the remainder of that company sick pay such that half pay and was about to come to an end on 7 November of 2022.
151. She had the sick pay benefit - it was not in dispute that she was entitled to it and she was paid in accordance with it. In our judgment the need to comply with the claimant's contract played no part whatsoever in the respondent's treatment of her absence or its ultimate decisions in relation to absence continuing.
152. It is plain that the only matter that was driving the behaviours of the respondent was an ongoing absence which started on 1 February 2022 against a background of an attendance record which was unremarkable. Failure to attend work from 1 February 2022 in the context of an illness which was not readily understood was the reason, and the only reason, for the respondent's treatment of the claimant.

The victimisation case

153. The claimant raised a grievance which alleged breaches of the Equality Act - she established a protected act in her written grievance presented after 5pm on 12 October. We do not consider the verbal indication in the 5 October meeting was a protected Act because it was, in terms, about bullying without reference to any particular characteristic by Mr Crabb.
154. The alleged acts of victimisation commenced with the alleged raise voice by Mr Kiffin, which is the same as the allegation of sex discrimination, and it has not been established in fact and is dismissed.

Allegation 2: IK did not conduct the grievance investigation properly in that:

He did not ask MC all the right questions

He did not make sure that MC answered the questions that were put to him.

Despite this he put his report forward to the dismissal appeal manager.

155. As far as Mr Kiffin's investigation is concerned the claimant has established that in the round the investigation was poor - the Tribunal's characterisation of it. The claimant had set out in writing a detailed list of matters about which she was complaining. The questions that were asked of Mr Crabb and answered were without sufficient rigour. In simple terms (and we found) he had made more calls to the claimant's number than were documented in his log, and that was apparent from her call records.

156. Mr Kiffin had not undertaken any particular training in Equality Act investigations. The claimant having referred to two potential witnesses to the matters alleged against Mr Crabb - a female colleague and a female friend - at the very least that should have been explored as an avenue for investigation and it was not. Mr Kiffin took Mr Crabb at his word. The example of his thinking was this. Harassing and bullying was alleged in August because there were more calls to the claimant's number, when once a week contact had been agreed in July. Mr

Kiffin looked at the records and saw two missed calls, and then because contact had been made on the third occasion when the claimant had answered the call, quite understandably perhaps Mr Kiffin took the view that it was plain and obvious from that chain of events that Mr Crabb was not engaging on that occasion in any sort of harassment or bullying, he was just trying to contact the claimant as arranged and if she did not answer he had to call again.

157. Mr Kiffin then took the view that the other allegations were likely to be exaggerated or misconceived as well, but nevertheless in our judgment the claimant was entitled to have those matters investigated thoroughly.

158. Whilst it might appear to be a criticism directed at Mr Kiffin, let us say that throughout these events there has been support from HR. It seems to us that the sort of HR support that might have been helpful was to indicate just what is required to investigate the grievance at that stage, in light of the amount of detail within it and to help unpack what evidential sources might be interrogated.

159. A poor investigation does not amount to an act of victimisation – the reason for it was clear – lack of training. Mr Kiffiin believed he was doing his best to conduct a reasonable grievance investigation – he did not conduct a poor investigation because the claimant had submitted a grievance. This allegation fails.

<u>Victimisation 3: IK made the decision to hold the grievance meeting at the same time as the capability dismissal appeal.</u>

<u>Victimisation 4: IK communicated that decision inappropriately by email late in the day on a Friday.</u>

160. These allegations are without foundation in light of our facts above. Ms Tate was new to the company; having observed the allegations the claimant was making in her grievance - particularly that Mr Crabb's conduct towards her had contributed to her illness and length of absence – she identified that this might be something that should properly be considered within the capability dismissal appeal. She said that to Mr Kiffin and he suggested it in a meeting with the claimant and her union representative.

161. This is not a development about which either the claimant or her union representative could have a legitimate grievance. This course of action, namely to consider the grievance allegations as part of the dismissal process, was what the union representative had advised and had wanted from the outset. This cannot be detrimental conduct.

162. The fact that it was then considered by the claimant and her representative to be unwelcome because it would reduce the number of "stages" or opportunities for appeal, does not make it detrimental treatment for which Mr Kiffin can be criticised. Similarly to confirm matters in relation to his outcome on the grievance appeal by email late on a Friday - he was simply communicating at the point at which it was clear that because of the claimant and her representative's objections, there was not going to be a delay on the grievance outcome to take in the dismissal appeal as well. Our factual findings deal with what was said in that meeting, but it is not a victimisation allegation. These two allegations are also dismissed.

<u>Victimisation 5: Tony Stay delayed in producing the grievance outcome.</u>

Victimisation 6: Darren Cousins delayed producing the outcome of the dismissal appeal until12 February 2023.

163. As far as the delays from Mr Stay and Mr Cousins are concerned, Mr Stay's letter was March 2023; and Mr Cousins' grievance appeal outcome was 12 February.
164. The ACAS code on disciplinary and grievance procedures is very short. It has some founding principles that employers and employees should raise and deal with issues promptly and should not unreasonably delay and that necessary investigations should establish the facts of the case. It includes that employers should allow employees to be accompanied.
165. Throughout this timeline there have been occasions when the claimant has said I cannot attend, my union representative cannot attend, can we please delay, and there have been other occasions particularly in relation to the delivery of outcomes when there has been some time taken, weeks in relation to the disciplinary appeal outcome. The Tribunal has to make a finding about whether there has been unreasonable delay or not. Given the length of allegations in matters that the claimant had raised, and given the 16 point outcome that Mr Cousins produced, it is not surprising to the Tribunal that investigating those matters took the time it did.
166. The delay in both outcomes are not, in our judgment unreasonable of themselves, particularly when the claimant chose to maintain the two separate processes, and hence extend those involved and the time to be taken, when Mr Kiffin offered combination in the meeting above. She cannot then, in our judgment, complain about the consequent time, in this case, that it took to conclude those two processes.
167. Mr Cousins' outcome letter had to address the matter which was at the heart of the relationship of grievance to dismissal, namely the allegation that the claimant's absence and illness had been adversely affected by Mr Crabb's treatment of her.
168. Mr Cousins' decision about that was that the allegation was not made out for the simple reason that there was no reference to any such treatment being a cause of illness in the fit notes, or in discussions with occupational health. He also had made findings about whether in fact Mr Crabb had engaged in bullying conduct, and so in that sense, by the time he had investigated those matters there had been a full investigation of the claimant's allegations, albeit that at the Kiffin grievance stage Mr Crabb, and other witnesses, had not been asked all of the questions that they might have been asked in relation to all the material, but particularly the allegations of sex discrimination.
169. In the round, allegations 6 and 7 are dismissed; the claimant cannot reasonably complain about this delay and it was not because the claimant had raised her grievance, it was because that was how long it took to address the matters she had raised.

Victimisation 7: dismissed the claimant

170. The claimant was dismissed just after her grievance - the protected act - had been - submitted. It is clear from the contents of the meeting with Mr Bell and we have found that the only reason, the reason for her dismissal, was her inability to return to work within a reasonable timeframe as a result of, very sadly, her ill health. In the round we accepted Mr Bell's compelling oral evidence and found that in no sense whatsoever was the dismissal because of, or influenced by, the claimant's

grievance about Mr Crabb. There was a preparedness to discuss and consider his management of her absence in the round. The dismissal was absolutely not influenced by, or because of, the protected act. This allegation is also dismissed and the victimisation complaint is wholly dismissed.

Section 15 Allegation 2: dismissal

Failure to make the following adjustments:
Allowing the claimant a longer period in which to return to work before dismissing her.
Giving her part-time employment to facilitate a return to work.
Unfair dismissal

171. The claimant's dismissal was because of something arising in consequence of her disability – her sickness absence and only that, in circumstances where she was unable to give any date for a likely return. We then turn to the respondent's Section 15 defences.

172. The second occupational health report in August gave the respondent sufficient information for Mr Bell to understand that the claimant was a disabled person, and indeed it advised the same, albeit at an earlier stage Mr Crabb did not have that understanding.

173. The only issue remaining in the section 15 complaint is the justification defence: we ask whether a dismissal for ill health absence which arose because of disability is one which is proportionate to achieve a legitimate aim - that is, is it appropriate and reasonably necessary in all the circumstances of the case including balancing the discriminatory effect on the claimant against the respondent's legitimate aim and asking whether something less discriminatory could reasonably have been done.

174. As to legitimate aim, the respondent said its aim was to ensure that all staff attend work and perform their required duties on behalf of the respondent as per their contracts of employment, and it will be apparent in our findings above that the management of the claimant's absence by Mr Crabb, Ms Lynch, Mr Bell and others was in pursuit of this aim.

175. After 12 weeks' continuous absence this employer might ordinarily need to consider whether it could maintain the employment of any member of staff, male or female, or with any other protected characteristic for the simple reason that it was incentivised to deliver meter readings by two targets in its contract with energy business customers. To fail to do so would involve financial penalties for the business. If one member of staff was unable to complete their allocated work it put additional strain on colleagues and/or it involved the payment of overtime to those colleagues, or the rearrangement of their work. In simple terms, others were expected to do more.

176. The consequences of a colleague being unable to attend work for a long period were therefore significant and the respondent has made out its legitimate aim.

177. In respect of less discriminatory measures, the claimant has made her suggestions in her reasonable adjustments case. It is helpful for us to address those.

178. We proceed on the basis that it is self evident that at the time of her dismissal, the requirement to do the normal requirements of the role put the claimant at a disadvantage in compared to those without her disability because she could not do the full requirements because of pain. She could not walk sufficiently to attend homes to meter read, and she could not drive for long enough to undertake a more remote shift in the villages. In those circumstances she said that the respondent should have: allowed her a longer period in which to return to work before dismissing her and/or given her part time employment to facilitate a return to work.

179. Assessing whether it was reasonable for the respondent to do either of those things brings us back to the context and content of the discussions on both 5 October and 13 October.

180. At all material times when the possibility of adjustments have been discussed the claimant was assisted by her union representative – we have made findings about the separate one to one discussions she had with Mr Crabb. The respondent had provided a phased return after the wrist injury absence and there is no basis to suggest it would not have done so again.

181. The discussions on the 5th and the 13th were not, in the Tribunal's assessment particularly helpful in terms of their focus from the claimant and her union representative on how it might be feasible for the claimant to return to work. We make no criticism, but a union representative asking an employer if an agreed exit can be arranged in circumstances where their member is very unwell and unable to return to work, but without the member having given specific instructions to that effect to the union representative, is not necessarily a good basis to discuss adjustments.

182. It perhaps reflected the overarching theme of the claimant's evidence that she was unhappy after her employment transferred to the respondent. There had been a necessary change in performance management (given the commercial circumstances facing this employer, which were not present for the energy suppliers when they read meters themselves), and she found contact during her absence similarly unwelcome.

183. Parties, through the Employment Rights Act Section 111A, are able to have conversations about agreed exit confidentially, but that was not the case here. The employer's reluctance to do so, for which it cannot be criticised because it wanted the claimant to return to work, may explain matters which came to light in this hearing were not aired in the parties' direct discussions. In reality the claimant was not interested in remaining employed by this employer.

184. The fact that she had worked from home calling customers in the past, or her skills in previous roles, were not explored at the time because there was no engagement by the claimant and her union representative in the ways in which she could fulfil roles that the respondent might have, within a period, or with appropriate adjustments. That was not because the respondent did not provide all reasonable opportunity for such discussions.

185. It also emerged in this hearing, but was not discussed at the time, that the respondent adopted a rather rigid approach that medical redeployment was out with its policy toolkit and reserved for redundancy situations – the idea of creating a role for a disabled employee was not within its contemplation in October 2022, for example.

186. We return to the matters which were known at the time. The immovables were not in dispute. There was no expectation communicated by the claimant that her pain symptoms would reduce such that she could return to any work imminently or within a matter of weeks or months. This was an unusual condition, without any clear treatment pathway that could offer any relief to the claimant. The state of her health was so poor and so unknown at this point that in our judgment the employer was in real difficulties in continuing employment.

187. The two adjustments that were proposed - being allowed a longer period in which to return to work before dismissal and/or being given part time employment to facilitate a return to work - would not alleviate disadvantage in circumstances where the claimant was not in a position to return to work at all and within three weeks or so would wholly exhaust sick pay. To do so would have been an open ended anticipation of improvement. There was no indication from the claimant that she could, for example, within a period expect to manage 10 hours a week of local work, or 20 hours of remoter work, or some other reduced workload from her previous commitment. The simple and sad position was that she was not in a position to return at all at that time or in the foreseeable future.

188. That brings us back to the balance required for the section 15 complaint. The claimant's entitlement to company sick pay was about to expire in less than four weeks at the time that this decision to dismiss her was made. The discriminatory effect on her in losing stable employment, which for anyone with disability is to be avoided, but, we note, the former congeniality of this employment was it fitted with the claimant's other afternoon activities, and the main benefit was being paid and seeing customers. Latterly she had not been enjoying her role, post transfer, because of added performance pressures, and she was clear about that. Her disenchantment was mainly that she considered Mr Crabb was against her, and she did not see Mr Crabb was just doing his job to manage performance.

189. In summary, the discriminatory effect of losing a post for an employer with which the claimant was already disenchanted and was about to run out of pay was less than in circumstances where those factors do not apply. In the Tribunal's assessment, and taking account of the way in which the respondent's absence policy was adopted and undertaken across this period of sickness absence, with care and reasonable and appropriate investigation in which the claimant was not a willing participant, it was and appropriate and reasonably necessary course to dismiss the claimant at this time in pursuit of the respondent's legitimate aim.

190. It was also, a decision which a reasonable employer could reach in all the circumstances, given the matters which were known, the investigation of the medical position and consultations and discussions with the claimant and her representative. The main difference between a section 15 and an unfair dismissal complaint is that the Tribunal can substitute its own view in a section 15 complaint - if we had decided that the less discriminatory means of maintaining the claimant's employment for a further period of time (for example the three months that had

they been accorded to her she would not have presented this claim) then we can so declare.

191. We have not come to that conclusion, in all the circumstances of this case and the Section 15 dismissal allegation and reasonable adjustments complaints are also dismissed.

192. As to applying Section 98(4), the reason for dismissal was plainly and only ill health absence. Mr Crabb's consultation with the claimant after the involvement of HR in March 2022 were appropriate and measured. His consultation with her did not contribute to the claimant's ill health – or at least there is not medical evidence to so infer. If it did affect her emotional state because she considered it unwelcome, as was clear from her evidence, her perception of his conduct was not reasonable.

193. As to whether it was reasonable to dismiss for the claimant's ill health absence, the procedural points which the claimant and her union representative have made in relation to the way in which her absence was managed across this period, and in particular in the latter part concerning provision of notes, and delay, and so on, are a deflection from the lengthy and reasonable overarching investigation of the medical position, consultation at length with the claimant (which she disliked) and preparedness to agree a phased return had the claimant been able at all to return to work within a month or two.

194. Sadly their joint reluctance to engage with helpful information about health, information about what other possibilities might there be, and an honest and co-operative dialogue about substance, renders the application of the Section 98(4) determination – "in accordance with equity and the substantial merits of the case" straightforward in this case. The unfair dismissal complaint is not well founded.

195. We hope that having taken the parties through the issue list it will be apparent that the claimant has pursued some arguable points. A review of the evidence, including hearing oral evidence from Mr Crabb and Mr Bell in particular, has been necessary to reach the conclusions that we have reached. The chronological review of the records is such that her factual case is right on some matters - for example in April and August there were calls which did not form part of Mr Crabb's welfare call summary. Nevertheless, on a detailed review of the facts, applying the law, the complaints are not upheld. That does not mean the case was not arguable.

196. This decision, will, in summary, be included in a Judgment signed by me tomorrow and will come in short form to the parties in due course. I should announce that if the parties would like written reasons then our rules are such that those reasons will only be provided if a party requests them and that request is received by the Tribunal within 14 days of the short decision being sent to them. It is very important that if a request for written reasons is made it is copied to the other side. In disability cases in particular it may be that one or other party makes a request and as soon as that is done there is no mechanism for the Tribunal to prevent the reasons being published on the public website unless an application for a privacy order is made and granted. The claimant is entitled to apply for an Order in a disability case such as this. If a request comes in from either party then I will deal with it and probably give some more directions. I hope that gives the parties the decision in a form that they can understand. I appreciate it is lengthy but the allegations were lengthy.

Employment Judge Wade

Date 9 May 2024

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