EMPLOYMENT TRIBUNALS

Claimant: Mrs Alison Bickerstaff

Respondent: Commissioners of His Majesty's Revenue and Customs

Heard at: Liverpool **On:** 11–15 December 2023

Before: Employment Judge Aspinall
Mr D Williamson
Mr M Stemp

Representation

Claimant: Mr Finch, her partner
Respondent: Mr Bunting, Counsel

JUDGMENT having been sent to the parties on 20 December 2023 in the following terms and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant entered ACAS early conciliation on 13 May 2022 and achieved a Certificate on 13 June 2022. By a claim form dated 28 June 2022 the claimant brought her claim. The claimant had worked as complaints officer from 13 June 1994 until she was dismissed for reasons relating to long term ill-health absence on 27 May 2022. The respondent defended the claims in a response form dated 4 August 2022.

2. A case management hearing took place before Employment Judge Johnson on 3 February 2023. A complaint of breach of contract was dismissed on withdrawal by a judgment dated 6 February 2023 and case management orders were made to prepare for the final hearing. A draft List of Issues was attached to the case management order with direction for the claimant to add to it. The List evolved so that the List for the final hearing had 74 paragraphs and contained duplication of factual complaints under sections 15 discrimination arising from disability and 19 indirect discrimination and 20/21 failure to reasonably adjust and 26 harassment and section

27 victimisation Equality Act 2010. At the opening discussion of the hearing the claimant withdrew her complaints under section 19 in their entirety, each of the 9 PCP's complained of in the section 19 complaint was also a PCP in the section 20/21 complaint. She also withdrew aspects of the section 26 complaints where there was duplication and withdrew entirely some factual allegations relied on, having had sight of the respondent's witness statements. During the hearing the claimant clarified that she did not rely on stress and anxiety as a disability but that she said the stress and anxiety the respondent caused her (particularly Cathy Kinlock in refusing SPPR in September 2021) exacerbated her CRPS and impeded her recovery. Amendments were made to the List and it was agreed that the numbering, which had been relied on in preparation, should not be changed. The List below, with withdrawn complaints removed but original numbering retained, is the final agreed List.

3. The claimant was represented by her partner Mr Finch. He is not legally qualified. He is employed by the respondent. He is also a witness as to the impact of the discrimination on the claimant. The claimant and her representative were supported in accordance with guidance in the Equal Treatment Bench Book. The Judge explained the law in simple terms and supported the claimant and Mr Finch to make sure that the points from her Claim Form were covered in the List of Issues. The claimant agreed that her case was fully set out in the amended List of Issues.

4. The claimant did not require any reasonable adjustments to participate in the hearing. The claimant planned to call herself and her partner as witnesses and the respondent planned to call 6 with one further statement produced. It was clear that five days would be insufficient time to hear all the evidence and submissions, deliberate and give a decision. The parties were given the option of postponing to a longer listing date, probably in 2025, or proceeding this week on the basis that time for cross-examination would be constrained. The claimant was adamant that she did not wish to wait any longer. A tight timetable was agreed to be able to hear the case this week. Mr Finch agreed to edit the questions he had prepared, with support from the Tribunal and focus on the new List, and to limit his cross-examination to one and a half days in total. The respondent's representative had one day to cross-examine the claimant. Closing submissions were limited to 45 minutes each and it was agreed they must finish by 12 noon on Wednesday so that the Tribunal had one day deliberation time and delivered its judgment on Friday afternoon. It was agreed that the hearing would address liability only.

5. The claimant's case was that she ought not to have been dismissed for her absences and that when considering her ability to return to work the respondent wrongly took into account a performance target of 20-25 telephone calls per day which did not apply to the claimant, a reasonable adjustment being in place that because of her ENT disability she did not do telephone work. What she wanted was to remain employed and in receipt of Sick Pay at Pension Rate (SPPR), a discretionary benefit that had been paid to her until January 2022. The respondent says it dismissed for incapability (or in the alternative some other substantial reason) and that it took into account all relevant factors and had to make a decision as to whether or not the claimant would return to work in a reasonable time frame, and decided in February 2022, having regard to occupational health reports and information provided by the claimant which gave an estimated return in November 2022, that she would not.

The List of Issues

6. The issues for the Tribunal to decide were as follows:

Jurisdiction: Time limits

1. Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

    a. Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

    b. If not, was there conduct extending over a period?

    c. If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

    d. If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

        i. Why were the complaints not made to the Tribunal in time?

        ii. In any event, is it just and equitable in all the circumstances to extend time?

Unfair Dismissal, Employment Rights Act 1996

2. The parties agree the Claimant was dismissed.

Reason for dismissal

3. Has the Respondent shown the reason or principal reason for dismissal?

4. Was it a potentially fair reason under section 98 of the Employment Rights Act 1996? The Respondent relies upon the claimant's **capability**.

Fairness of the dismissal

5. If so, applying the test of fairness in section 98(4), did the Respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

6. If the reason was capability, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

    a. The Respondent genuinely believed the Claimant was no longer capable of performing her duties;

    b. The Respondent adequately consulted the claimant;

c. The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

d. The Respondent could reasonably be expected to wait longer before dismissing the claimant;

e. Dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

7. What basic award is payable to the Claimant, if any?

8. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

9. If there is a compensatory award, how much should it be? The Tribunal will decide:

a. What financial losses has the dismissal caused the Claimant?

b. Has the claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?

c. If not, for what period of loss should the claimant be compensated?

d. Has the Claimant already received compensation from the Respondent? If so, should this be offset against any award?

e. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

f. If so, should the Claimant's compensation be reduced? By how much?

g. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

h. If so, did the Respondent or the Claimant unreasonably fail to comply with it?

i. If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

j. If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

k. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

l. What is the effect of the application of the statutory cap?

Equality Act 2010

Disability Discrimination (s.6 and Schedule 1 of the 2010 Act)

10. The Respondent has admitted the following disabilities:

    a. Complex Regional Pain Syndrome, from October 2021 and at all material times after that date.

    b. Ear, Nose and Throat (ENT) condition, at all material times for the purposes of this claim.

    The claimant relies on ENT only in relation to 14q, the section 15 dismissal. Otherwise ENT is a background condition and is not relied on in her disability discrimination complaints.

Discrimination arising from disability (Equality Act 2010 section 15)

12. The Respondent admits that it knew the Claimant had the following disabilities:

    a. Complex Regional Pain Syndrome (the Respondent was aware from October 2021; and

    b. ENT condition (the Respondent was aware at all material times).

13. Did the Respondent know, or could it reasonably have been expected to know that the Claimant was disabled by stress/anxiety? From what date?

14. Did the Respondent subject the Claimant to the following treatment?

    a. On 07 May 2021 the Respondent decided not to pay the Claimant three months' Sick Pay at Pension Rate (SPPR) despite being advised by the HR Expert Advice Service (EAS) that this was an option.

    b. On 16 September 2021 the Respondent failed to refer the Claimant to occupational health in line with HR EAS advice.

    c. On 16 September 2021 the Respondent failed to disclose all relevant information about the Claimant's sickness/disability to the HR EAS when seeking their advice about how to manage the Claimant's absence.

    d. On 20 September 2021 Cathy Kinlock decided not to pay the Claimant Sick Pay at Pension Rate.

e. On 02 November 2021 the Respondent decided not to pay the full 12 months' Sick Pay at Pension Rate.

f. On approximately 5 December 2021, the Respondent contacted the Claimant by way of telephone during her sickness absence when it had been agreed contact would be via email.

g. On 30 November 2021 and 5 December 2021, the Respondent failed to follow advice from occupational health, clinicians, and orthopaedic surgeons in relation to the Claimant's estimated recovery time, in that the OH report of 30 November 2021 recommended:

   i. a review in 3 months' time to assess the Claimant's condition and re-refer, which would have coincided with the Claimant's next appointment with her consultant;

   ii. a conversation between the claimant and her line manager should take place to articulate any concerns and agree a way forward;

   iii. that the Respondent utilise the HAE six Management Standards approach; .

h. On 5 December 2021, the Claimant sent a letter from Dr Redfearn dated 22 October to Cathy Kinlock which stated that a full recovery should take 12-18 months' but the Claimant would be fit for a return to work before that time. It had also been arranged for the Claimant to see Dr Redfearn again in 3 months' time. (The claimant had to wait for the written letter from the Dr but had informed Cathy Kinlock of this information in October 2021). Despite knowing this the claimant was referred for dismissal by Respondent.

i. On 22 December 2021 Cathy Kinlock referred and/or recommended the Claimant for dismissal.

j. On 22 December 2021 and 24 December 2021, the Respondent informed the Claimant four times of the referral for dismissal, twice by email and twice by letter.

k. On 17 January 2022, the Respondent rejected the Claimant's application to extend Sick Pay at Pension Rate.

l. On 18 February 2022 the Respondent, in its interim decision, offered the Claimant the opportunity to remain in employment until October 2022 but on nil pay.

m. On 18 February 2022 the Respondent told the Claimant that a flexi time deficit of 17 hours would be deducted from her final salary payment.

n. On 22 February 2022 the Respondent declined the option of referring the Claimant to occupational health and paying six months' Sick Pay at Pension Rate in line with EAS guidance and the OH report.

o. On 22 February 2022 the Respondent failed to refer the Claimant to OH for a further OH report when recommended by OH and in line with HMRC Supporting Your Attendance policy.

q. On 25 February 2022 the Respondent dismissed the Claimant.

r. On 25 April 2022 the Respondent upheld the decision to dismiss.

15. In respect of each of those allegations, does that amount to unfavourable treatment?

16. Did the following things arise in consequence of the Claimant's disability:

    a. The Claimant's absence from work.

    b. The Respondent's concerns about the ability to perform her role because she was unable to answer 20 to 25 calls per day.

17. Has the claimant proven facts from which the Tribunal could conclude that any of the asserted unfavourable treatment was done because of any of those things?

18. If so, can the Respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

19. If not, was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were those set out in the Amended Response including:

    a. to take management decisions fairly and expeditiously and to use public resources effectively;

    b. to summarise key information for the purposes of taking advice;

    c. to maintain contact with employees on sickness absence, obtain and impart information, and provide support;

    d. award discretionary benefits fairly and consistently in accordance with the Respondent's established policy criteria/target and allocate relevant taxpayer-funded resources to cases where there is (for example) a prospect of a return to work in a reasonable timeframe;

    e. combat absenteeism, maintain effective levels of service and maximise staffing levels, meet the Respondent's operational objectives (i.e. ensure the Respondent can deliver key public services to the taxpayer); and protect scarce public resources.

20. The Tribunal will decide in particular:

    a. was the treatment an appropriate and reasonably necessary way to achieve those aims;

    b. could something less discriminatory have been done instead; and

    c. how should the needs of the Claimant and the Respondent be balanced?

Duty to make reasonable adjustments (sections 20 and 21 of the Equality Act 2010)

39. The Respondent admits that it knew the Claimant had the following disabilities:

    a. Complex Regional Pain Syndrome (the Respondent was aware from October 2021; and

    b. ENT condition (the Respondent was aware at all material times).

40. Was the Claimant disabled by stress/anxiety (see above)? Did the Respondent know, or could it reasonably have been expected to know that the Claimant was disabled by stress/anxiety? From what date?

Adjustments PCP 1: "Reluctance to pay SPPR beyond 3 months"

41. The Claimant alleges the Respondent applied the following provision, criterion, or practice (PCP): the Respondent is reluctant to pay Sick Pay at Pension Rate beyond three months. The Claimant says this was applied to her on 20 September 2021, 02 November 2021, and 17 January 2022.

    a. Did the Respondent apply that PCP to the Claimant?

    b. If so, did that PCP put the Claimant at a substantial disadvantage as a disabled person in comparison with persons who are not disabled? CRPS ? The Claimant says the disadvantage was that:

        i. her pay was reduced, and her health deteriorated as a result of the decision not to pay her SPPR.

    c. If so, did the Respondent know, or could it reasonably have been expected to know, of the disability and the disadvantage?

    d. If so, did the Respondent take such steps as it would have been reasonable to take to avoid the disadvantage? The Claimant says the following adjustments would have been reasonable:

i. To consider medical advice, EAS and OH advice when considering whether to exercise their discretion to pay SPPR. To treat the request for SPPR in a fair and even-handed manner.

ii. Pay the Claimant Sick Pay at Pension Rate for the full 12 months.

e. By what date should the Respondent have taken those steps?

Adjustments (PCP 3): Referral for dismissal because of sickness absence

43. The Claimant says the Respondent applied the following provision, criterion, or practice: the Respondent refers employees for dismissal because of sickness absence. The Claimant says this was applied to her on 22 December 2021.

a. Did the Respondent apply that PCP to the Claimant?

b. If so, did that PCP put the Claimant at a substantial disadvantage as a disabled person in comparison with persons who are not disabled? CRPS? The Claimant says the disadvantage was that:

i. The Claimant was unable to sustain the attendance levels required by her manager and was dismissed.

c. If so, did the Respondent know, or could it reasonably have been expected to know, of the disability (see above) and the disadvantage?

d. If so, did the Respondent take such steps as it would have been reasonable to take to avoid the disadvantage? The Claimant says the following adjustments would have been reasonable:

i. Obtain, consider, and follow up-to-date medical and OH advice in relation to the Claimant's likelihood of returning to work before referring for dismissal.

e. By what date should the Respondent have taken those steps?

Adjustments (PCP 4): Requiring employees to be managed by their line manager

44. The Claimant says the Respondent applied the following provision, criterion, or practice: the Respondent requires employees to be managed by their direct line manager (who they have made a complaint about). The Claimant says this was applied to her from 17 November 2021 to 27 May 2022.

a. Did the Respondent apply that PCP to the Claimant?

b. If so, did that PCP put the Claimant at a substantial disadvantage as a disabled person in comparison with persons who are not disabled?

CRPS and/or stress and anxiety? The Claimant says the disadvantage was that:

i. The Claimant's health deteriorated as a result of continuing to be managed by Cathy Kinlock in that it caused her stress and anxiety and it prolonged her recovery in relation to her CRPS.

c. If so, did the Respondent know, or could it reasonably have been expected to know, of the disability (see above) and the disadvantage?

d. If so, did the Respondent take such steps as it would have been reasonable to take to avoid the disadvantage? The Claimant says the following adjustments would have been reasonable:

i. Move the Claimant to another line manager per her request.

e. By what date should the Respondent have taken those steps?

Adjustments PCP 5: not responding to the Claimant's communications

45. The Claimant says the Respondent applied the following provision, criterion, or practice: the Respondent does not respond to or fails to respond to communications in a timely manner. The Claimant says this was applied to her on 12/11/21, 22/12/21, 6/1/22, 7/1/22, 3/2/22, 10/3/22, 30/4/22, 31/3/22, 25/5/22, 16/6/22, and 28/7/22.

a. Did the Respondent apply that PCP to the Claimant?

b. If so, did that PCP put the Claimant at a substantial disadvantage as a disabled person in comparison with persons who are not disabled? CRPS and/or stress and anxiety ? The Claimant says the disadvantage was that:

i. The Claimant's health deteriorated as a result of the Respondent's delay and or lack of response to her communications.

c. If so, did the Respondent know, or could it reasonably have been expected to know, of the disability (see above) and the disadvantage?

d. If so, did the Respondent take such steps as it would have been reasonable to take to avoid the disadvantage? The Claimant says the following adjustments would have been reasonable:

i. Respond to communications and deal with dismissal procedures in a timely manner.

e. By what date should the Respondent have taken those steps?

Adjustments PCP 6: Referring Employees for dismissal but only holding dismissal hearing once SPPR has ended

46. The Claimant says the Respondent applied the following provision, criterion, or practice: The Respondent refers employees for dismissal but only holds the dismissal hearing once SPPR has ended. The claimant was referred for dismissal on 22 December 2021. The Dismissal hearing was held on 1 February 2022.

    a. Did the Respondent apply that PCP to the Claimant?

    b. If so, did that PCP put the Claimant at a substantial disadvantage as a disabled person in comparison with persons who are not disabled? CRPS and/or stress and anxiety. The Claimant says the disadvantage was that:

        i. The Claimant's health deteriorated as a result of the delay between being referred for dismissal and the dismissal hearing being held. The delay caused her stress and anxiety, which in turn prolonged her recovery from CRPS.

        ii. The Claimant suffered financial loss as a result of the decision to dismiss being made after SPPR has ended as her notice pay was then based on her nil earnings.

    c. If so, did the Respondent know, or could it reasonably have been expected to know, of the disability (see above) and the disadvantage?

    d. If so, did the Respondent take such steps as it would have been reasonable to take to avoid the disadvantage? The Claimant says the following adjustments would have been reasonable:

        i. Deal with the dismissal procedure in a timely manner

    e. By what date should the Respondent have taken those steps?

Adjustments PCP 8: Dealing with dismissals and appeals within the employee's own business unit

48. The Claimant says the Respondent applied the following provision, criterion, or practice: the Respondent deals with dismissal and appeals within the employee's own business unit against HMRC policy. The Claimant says this was applied to her from 22 December 2021 to 26 April 2022.

    a. Did the Respondent apply that PCP to the Claimant?

    b. If so, did that PCP put the Claimant at a substantial disadvantage as a disabled person in comparison with persons who are not disabled?

CRPS and/or stress and anxiety ? The Claimant says the disadvantage was that:

i. The Claimant's health deteriorated during the dismissal process.

c. If so, did the Respondent know, or could it reasonably have been expected to know, of the disability (see above) and the disadvantage?

d. If so, did the Respondent take such steps as it would have been reasonable to take to avoid the disadvantage? The Claimant says the following adjustments would have been reasonable:

i. Hold the dismissal and appeal process outside of the claimant's own B&C Operational Business Unit in line with policy.

e. By what date should the Respondent have taken those steps?

Adjustments PCP 9: Maintain attendance

49. The Claimant says the Respondent applied the following provision, criterion, or practice: the Respondent requires employees to maintain an acceptable level of attendance as determined by their manager. The Claimant says this was applied to her on 25 February 2022.

a. Did the Respondent apply that PCP to the Claimant?

b. If so, did that PCP put the Claimant at a substantial disadvantage as a disabled person in comparison with persons who are not disabled? CRPS? The Claimant says the disadvantage was that:

i. The Claimant was unable to sustain the attendance levels required by her manager and was dismissed.

c. If so, did the Respondent know, or could it reasonably have been expected to know, of the disability (see above) and the disadvantage?

d. If so, did the Respondent take such steps as it would have been reasonable to take to avoid the disadvantage? The Claimant says the following adjustments would have been reasonable:

i. adjust the attendance levels to discount disability related absences

ii. Not dismiss the Claimant.

e. By what date should the Respondent have taken those steps?

Adjustments PCP 10: Requiring employees to fulfil 20-25 calls per day (25 February 2022)

50. The Claimant says the Respondent applied the following provision, criterion, or practice: the Respondent requires employees to fulfil 20-25 calls per day. The Claimant says this was applied to her on 25 February 2022.

    a. Did the Respondent apply that PCP to the Claimant?

    b. If so, did that PCP put the Claimant at a substantial disadvantage as a disabled person in comparison with persons who are not disabled? ENT ? The Claimant says the disadvantage was that:

        i. The Claimant was unable to fulfil 20-25 calls per day and was dismissed.

    c. If so, did the Respondent know, or could it reasonably have been expected to know, of the disability (see 35-36 above) and the disadvantage?

    d. If so, did the Respondent take such steps as it would have been reasonable to take to avoid the disadvantage? The Claimant says the following adjustments would have been reasonable:

        i. Not require the Claimant to fulfil 20-25 calls per day in line with the adjustment that was already in place

        ii. Not dismiss the Claimant.

    e. By what date should the Respondent have taken those steps?

Harassment related to disability (Equality Act 2010 section 26)

51. Are the following allegations true?

    c. On 22 and 24 December 2021, Cathy Kinlock informed the Claimant four times that she was being referred for dismissal (twice by email and twice by letter.

    d. On 22 December 2021, Cathy Kinlock recommended the Claimant for dismissal and referred her to a decision maker.

    f. On 22 December 2021 the Respondent delayed in responding to the Claimant's queries, in that Cathy Kinlock failed to provide all documents sent to the Decision Maker as per dismissal guidance. This was chased on 6 January 2022 with the information not being provided until 29 January 2022.

    g. On 18 February 2022, Mandy Beresford issued an interim decision not to dismiss if the Claimant agreed to go on unpaid special leave forcing her out.

j. On 25 April 2022, Dave Keane, Cathy Kinlock or Hazel Ferns divulged the appeal decision to other staff members.

52. If so, was that unwanted conduct?

53. Was it related to disability?

54. If so, did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

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

Victimisation (Equality Act 2010 section 27)

56. Did the claimant do a protected act as follows:

a. Inform Cathy Kinlock on 20 September 2021 that she believed the decision not to extend the SPPR was disability discrimination.

b. The Claimant submitted a grievance to the Respondent on 13 December 2021 alleging disability discrimination.

57. Did the Respondent do the following things:

a. On 30 September 2021 Cathy Kinlock, Shad Sheik, Dave Keane, and Rachel Moran informed the Claimant she had no right of appeal against the decision not to extend Sick Pay at Pension Rate (30 September 2021).

b. On 11, 12 and 17 November 2021, Cathy Kinlock, Shad Sheik, Dave Keane, and Rachel Moran refused to apologise for incorrectly informing the Claimant she had no right of appeal and maintaining their position.

c. On 13 January 2022, the Respondent rejected the Claimant's grievance.

d. Between 6 January 2022 and 29 January 2022, Cathy Kinlock delayed in providing the information requested for the dismissal hearing.

58. By doing so, did the Respondent subject the claimant to detriment?

59. If so, has the Claimant proven facts from which the Tribunal could conclude that it was *because* the claimant did a protected act or because the Respondent believed the claimant had done, or might do, a protected act?

60. If so, has the Respondent shown that there was no contravention of section 27?

Remedy for discrimination or victimisation

61. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

62. What financial losses has the discrimination caused the Claimant?

63. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

64. If not, for what period of loss should the claimant be compensated?

65. Has the Claimant already received compensation from the Respondent? If so, should this be offset against any award?

66. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

67. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

68. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

69. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

70. Did the respondent or the claimant unreasonably fail to comply with it?

71. If so, is it just and equitable to increase or decrease any award payable to the claimant?

72. By what proportion, up to 25%?

73. Should interest be awarded? How much?

The Hearing

Documents

7. The Tribunal had two large lever arch files of double-sided documents comprising a bundle of around 1800 pages. There was a separate file of witness statements and an Agreed Chronology.

Oral evidence

8. The Tribunal heard evidence from the claimant. Often, when asked a direct

question, for example, did she tell Cathy Kinlock that her arm was “the same” during a telephone call in August 2021, the claimant gave detailed information about her conditions and what she thought or what she said her doctors thought might happen, rather than answering whether or not she had said her arm was the same on that occasion. This happened numerous time in answering questions so that the Employment Judge was concerned that the claimant was talking about her health to avoid answering a difficult question, After consultation and with the agreement of members the Judge intervened to direct the claimant to focus on answering the question.

9. The claimant said that she had not received attachments then, when pressed and taken to documents that showed attachments, she said that things may have been attached but that she did not open them. She said she could not open them on her phone and could not use her work laptop without putting her health at risk. For her that meant that she had not received them. The Tribunal did not accept that the effect of using a laptop in tablet format to look at an email and its attachment, as opposed to a phone, would have had the effects that she claimed on her health.

12. The Tribunal heard evidence from Cathy Kinlock. She had detailed knowledge of her management of the claimant over a long period.

13. The Tribunal heard evidence from Dave Keane, Mandy Beresford, Julian Monk and Hazel Fearns. Shad Shaik was not called, nor was Katherine Whitbread.

14. Mr Finch was not called, his points would have been relevant to remedy. The Tribunal saw his statement.

The Facts

14. The claimant joined HMRC in June 1994. Between 2017 and February 2020 she had 182 days sickness absence. In 2019 the claimant chose to have six weeks per year as non working weeks on unpaid leave so as to manage her health conditions. She chose which weeks across the year to use as her non working weeks. The claimant had reasonable adjustments in place including a riser desk, two monitors and a special chair. She also had an adjustment to her duties so that she did not do telephony work because of an ENT condition. In 2020 she had special leave because she had said it was not possible to accommodate her workstation for her to work at home during the coronavirus pandemic.

15. On 1 September 2020 Cathy Kinlock became the claimant’s line manager. The claimant was still on special leave not doing any work. Cathy Kinlock asked her in a telephone call if she could have her electric desk and chair at home but she said she did not have room for them. The claimant refused delivery of them and also protested that they might be an infection risk. The claimant told Cathy Kinlock in that call that she had back pain, possibly rheumatoid arthritis or spondylosis of the spine or related to a gyny condition, not yet confirmed. The claimant said she was awaiting gyny surgery, (an investigative procedure) scheduled for April then July, which had been delayed because the claimant had said in a pre-operative discussion that she had atrial fibrillation, this was checked and was all clear and a new date set for 28 November 2020.

16. In October 2020 Cathy Kinlock asked the claimant to join the team's twice weekly meeting on camera. The claimant asked about her rate of pay on sick leave after her forthcoming operation (the investigative procedure). Cathy Kinlock said she would look into getting the claimant sick pay at pension rate SPPR to avoid hardship if this became appropriate.

17. On 5 November 2020 Cathy Kinlock emailed the claimant setting out expectation guidance for staff on special leave and again instructed the claimant to join the twice weekly team meetings and explained that she could use the Surface Pro laptop provided and use the touch screen so that this would be no different to using a mobile phone.

18. The claimant did not join any team meetings. She replied and the reply is set out in full:

"Cathy as I have already advised and explained on numerous occasions, I am unable to log onto my surface pro without specialist equipment as this will have a detrimental effect on my health conditions which are covered under the disability act.

As a manager you have a duty of care and expecting me to log onto my surface pro in any context using as a tablet) without my specialist equipment knowing full well the damaged that could do to my health, I find utterly inappropriate !! As someone who is covered under the disabilities act for my health conditions I find your actions bordering on discriminatory.

Your actions since you became my manager bordering on harassment when you are well aware of my conditions and how they are affect me, resulting in me being unable to work from home or come into the office !!

I find the time in which you sent this email to be totally inappropriate as well !!

I am also discombobulated as to why you asking me to do this again we've already addressed this issue a fortnight ago and it was agreed would keep in touch by phone on a fortnightly basis !!On this call I explained to you the reasons as to why I didn't feel comfortable or in fact it would be inappropriate for me to log onto the team meetings weekly given the sensitive and deeply personal nature of the reasons as to why I was on special leave !! I explained to you I do not want to be put in a position of answering probing questions from my work colleagues as to why I was not working this is personal information that I DO NOT want my colleagues knowing !!

I have throughout the period on special leave, which you the employer of put me on due to my circumstances, kept in regular touch. The link you sent doesn't work without a password !!

I have no problem going through the skills matrix with you next week in our fortnightly call and will continue to keep you in touch fortnightly as agreed !! However I am not prepared to go over this matter again !!!!

If you continue to harass me in regards to this matter I will no option but to take this matter further and put a grievance in against you.

19. In November 2020 the claimant had the gyny investigative procedure. On 30 November 2020 she commenced sick leave and never returned to work. On 3 December 2020 she spoke with Cathy Kinlock and informed Cathy Kinlock that she had been given antibiotics. The claimant asked about her sick pay. HR advised Cathy Kinlock, who informed the claimant, that the claimant would be due to go on half pay from 19 June 2021 and nil pay from 3 July 2021.

20. On 10 December 2020 the claimant spoke with Cathy Kinlock and told her she had an infection, migraines, hormonal issues, might try HRT, might need a hysterectomy, might be in peri-menopause and symptoms can last up to 15 years, has migraines for up to three days which are debilitating. The claimant said her back pain had got a lot worse because she has rheumatoid arthritis and the operation had put pressure on her back. The claimant was signed off due to back pain till early January. Her sick note was extended for back pain reasons.

21. The fit notes recorded as follows:

- 28 November 20 to 21 December 2020 post-operative surgery
- 12 December 2020 to 20 December 2020 post-operative monitoring
- 17 December 2020 to 21 January 2021 had a gyny procedure flareup of chronic back issue

22. On 18 December 2020, after an appointment with a rheumatologist, the claimant spoke to Cathy Kinlock and said she would not be signed back to work until after she had seen a consultant rheumatologist on 21 January 2021. The claimant told Cathy Kinlock she had not had migraine but has hypermobility syndrome and lacks collagen in her muscles and has a deformed right ankle. There was a further keep in touch call on 14 January 2021

23. On 8 February 2021 the claimant made enquiries of Cathy Kinlock about the possibility of early ill health retirement if someone was unable to travel to work and couldn't work from home because of the absence of specialist equipment. The claimant said her doctor would support ill-health retirement. Cathy Kinlock said she would ask the specialist team to look into it. Fortnightly contact continued. The claimant had ongoing gyny bleeding, migraine, back pain, ankle swelling and pain. On 23 February 2021 Cathy Kinlock asked if the claimant could return to work and she said she was not well enough. She said she was hoping, having started HRT, that once it got into her system she would feel better. The claimant said she was awaiting an MRI scan on her back. The fit notes recorded

- 21 January 2021 to 3 February 2021 flareup of chronic back issue
- 3 February 2021 two 3 March 2021 lower back pain under investigation
- 4 March 2021 to 24 March 2021 low back pain
- 24 March 2021 to 15 April 2021 back pain under investigations

24. In April 2021 the claimant fell at home and broke her elbow and advised Cathy Kinlock that her doctor had said that because of her age and menopause it might take 6-12 weeks to heal and that it could be longer sickness absence if surgery were required on the elbow. The claimant said that otherwise, she would have been ready and able to return to work at that time.

25. On 27 April 2021 the claimant saw a consultant about her elbow and informed Cathy Kinlock that she may be left with limited movement in her left arm. She said recovery time was three months or possibly longer if surgery was needed. The claimant had had her back scan but no results, and was still having gynaecological issues and heavy bleeding. The claimant asked about sick pay at pension rate SPPR. Cathy Kinlock got consent for an up to date OH referral.

26. In May 2021 Cathy Kinlock referred the claimant to occupational health. The HR report confirmed that the claimant was not fit to return to work but would be likely to be able to return within three months (so by August 2021) with adjustments in place. The fit notes recorded

- 15 April 2021 to 27 May 2021 closed fracture of radius, lower back pain under investigation
- 28 May 2021 to 6 June 2021 closed fracture of the radius

27. Cathy Kinlock was also reviewing the financial position for the claimant and considering when the sick pay would expire and if she could extend it at half pay rate for a further three months. Cathy Kinlock had also been looking into whether or not the claimant could be paid SPPR. Cathy Kinlock had first made the claimant aware of SPPR Policy in October 2020 and they had had a discussion about it then. Cathy Kinlock had also spoken the claimant's union representative about SPPR in Spring 2021. In mid May 2021 Cathy Kinlock had some annual leave. She returned on 18 May 2021.

28. The claimant wrote to Shad Sheik, Cathy Kinlock's manager on 19 May 2021 saying

I spoke to Cathy three weeks ago to advise her that the orthopaedic surgeon had advised me {might need surgery – might take a further 3-6 months} and that it was probably going to take three months to heal without an operation but if I need an operation it would be at least three to six months !! I explained to Cathy that I go on nil pay in July and that I had spoke directly to HR who said I was eligible to claim SPPR. They advised that my manager would need to act quick to allow it to have time to be processed so I didn't end up in financial hardship come July when my pay stops…..it is now three weeks on and nothing has been done and its only six weeks til I go on nil pay. I should not be in a position where I am going to be left in financial hardship due to a Manager not doing what they are meant to !!! Who is going to pay my bills come July when I have no money coming in cause I'm sure Cathy or you are not going to !!"

29. Cathy Kinlock was aware of the dates of expiry of sick pay. When she saw the letter to Shad Sheik on 19 May 2021 she worked on sending information to the claimant sooner than she would otherwise have done. She felt there was plenty of time for this yet. She sent the claimant the relevant information on SPPR on 25 May 2021. The respondent's SPPR policy provided:

> *Sick pay at pension rate (SPPR) is a discretionary award which can be considered to avoid hardship, if you have for example exhausted your entitlement to sick pay and there is a reasonable prospect of you returning to work in a reasonable timeframe. SPPR is a rate of pay equal to the pension that would be payable if you were retired early on the grounds of ill-health.*
>
> ***How do you qualify***
> *you may qualify for a discretionary award of SP PR if you have*
>
> *1. Used up your entitlement to sick pay at full and half rate*

2. At least two years of pensionable service and
3. Had occupational health advice that indicates that your return to work within a reasonable timeframe

Please note if you meet criteria one and two above and think you may qualify discuss this with your manager as soon as you think you may be going on to nil pay.

....

Action for managers

….. You should make sure the medical evidence is up-to-date and enables you to judge whether the employee is likely to return to work within a reasonable timescale

The likelihood of return should be within approximately three months this depends on the circumstances of each case

…. You will initially authorise SP PR for three months. However, in exceptional circumstances you may authorise SP PR for up to 12 months if you think it appropriate

27. Cathy Kinlock considered awarding SPPR for the claimant in late May and early June 2021. She took into account what the claimant and the most recent occupational health report had said. The award of SPPR was rare but Cathy Kinlock decided to award it to the claimant for three months. On 8 June 2021 Cathy Kinlock confirmed that HR were processing sick pay for the claimant at pension rate for three months from the expiry of half pay to October 2021. On 16 June 2021 the claimant moved to half pay, on 3 July she would have moved to nil pay but Cathy had ensured that she would be paid sick pay at pension rate (SPPR).

28. On 8 July 2021 the claimant told Cathy Kinlock that she was experiencing chronic pain as a result of the fall. The claimant's fit note recorded

- 7 June 2021 to 6 September 2021 fractured left elbow

30. On 20 July 2021 the claimant had a fit note for absence until 6 September 2021 and was due to undertake ongoing physiotherapy and hydrotherapy. On 23 August 2021 in their catch up telephone call the claimant told Cathy Kinlock that she had not had physiotherapy since 6 August and that her next session would not be until after 24 September, that she was unable to do hydrotherapy due to heavy bleeding and that her GP thought she might have fibromyalgia in the tissue in her left arm and that if she did then she was disabled because of it. She told Cathy Kinlock that she had been diagnosed with severe endometriosis. It was the cause of the pain in her back. The claimant told Cathy Kinlock that her sick note would be extended for 6 weeks from early September and then for a further six weeks.

31. Cathy Kinlock asked about returning to work and the claimant said her doctor had told her that she would not be able to return to work due to the pain in her arm

and shoulder. She told Cathy Kinlock she had been off a long time and wasn't getting any better but that her recovery will take time. They agreed to speak again in early September after the claimant's next gyny appointment.

32. On 13 September 2021 the claimant told Cathy Kinlock she was now claiming Employment Support Allowance. The claimant's SPPR was due to expire in October. Cathy Kinlock reapplied the policy criteria. She decided to seek a further OH report. Cathy completed the referral on the online portal and copied the text to her own file. She asked for referral in relation to the broken elbow, endometriosis and chronic back condition. On 20 September 2021 Cathy Kinlock informed the claimant that SPPR cannot be extended beyond the end of September. Cathy Kinlock's email informing the claimant said:

> "*In order for me to continue to authorize SPPR I need to be confident that you will return to work within a reasonable time frame. This is on the guidance that I am following and that I have discussed with EAS."*

Cathy Kinlock set out the information she relied on, being: the OH report from 24 May 2021 with an expected return to work within two to three months, being by 23 August 2021, the follow up report from July 2021 that said a return was not currently practicable, a fit note to 6 September 2021, the conversation on 23 August in which the claimant had said she had been told that she would be off for 6 weeks then a further six weeks after 6 September 2021, the fit note to 19 October 2021. Cathy Kinlock concluded that there was no clear indication of the claimant returning to work within a reasonable time frame and so did not extend the SPPR.

31. The claimant emailed Cathy Kinlock on 20 September 2021 in response to the news about SPPR. She copied the email to Cathy Kinlock's manager Shad Shaik. She said: the decision was based on an out of date OH report from May, that the physiotherapy hadn't happened as planned, that she couldn't do the hydrotherapy due to excessive bleeding.

The claimant said:

> *"I have been unable through no fault of my own to progress in my recovery as much as I would have liked or hoped, due to missing 6 weeks of physio ! I feel at no point in your decision to not extend my SPPR has any of the above been taken into consideration !! Therefore you are penalising me for circumstances beyond my control !! I will be seeking legal advice...and I have forwarded your email to my union representative*
>
> *"I am not consenting to OH until I have seen my physio and been referred back to my orthopaedic surgeon.*
>
> *...after speaking to my solicitor and Mark Hendrick MP today, I have been advised that HMRC are treating me unfairly and unethically……putting me in serious financial hardship……serious consequences for HMRC…which HMRC would be held accountable for….they have both advised they will take my case on…..if my union representative is unable to resolve this matter."*

32. The claimant then contacted Dave Keane's manager Rachel Moran to challenge Cathy Kinlock's decision about not extending sick pay at pension rate. The claimant told Cathy Kinlock on 24 September 2021 that she no longer wished to speak to Cathy Kinlock on the phone, they had been having fortnightly detailed and lengthy catch up and keep in touch conversations, because Cathy Kinlock, the claimant alleged, was not relaying accurate information.

33. The claimant said that her consultant Mr Redfern (re her arm) thought her recovery time was 1 – 2 years. She said:

> *"Radial head injuries are very complex injuries and can take anything from 6 – 12 months to fully recover. However he explained that mine is more complicated as I have developed Complex Regional Pain Syndrome, which can delay recovery, …and take anything from 1 – 2 years to recover."*

34. She said her endometriosis consultant appointment was to be in January 2022. The claimant wanted to appeal Cathy Kinlock's decision about SPPR and was initially told that there was no right of appeal, there being none in the relevant policy. Rachel Moran consulted HR and EAS about the lack of appeal in this instance and informed the claimant's union representative on 30 September 2021 that a decision was awaited. In the event, there was no documented right of appeal in the respondent's policies but on guidance from HR, the respondent granted the claimant a right of appeal. Her appeal went to a decision and Denise Hynes allowed an extension of SPPR to January 2022. Cathy Kinlock actioned that decision so that the claimant was paid SPPR continuously to 3 January 2022.

35. When the claimant had received Ms Hynes decision she emailed Cathy Kinlock and Dave Keane on 11 November 2022 to say:

> *"In regards to us having a catch up I no longer have faith in you as my manager due to the way you handled my SPPR request. I feel that the trust has gone and you have not supported me in the way you should have …I therefore request that I deal with Dave Keane or another manager while I am off sick."*

36. The claimant also emailed Dave Keane that day repeating much of the content and saying that she was now suffering Ice Blast Migraine Headaches brought on by the stress that Cathy Kinlock's decision not to extend SPPR had caused her.

37. At around this time the claimant duplicated issues in emails to numerous people. Not all of the colleagues replied each time, deciding between themselves which of them was the appropriate manager to reply depending upon the issue. Dave Keane told the claimant that he had asked Shad to look into her request to move managers. Dave commented that he thought Cathy Kinlock had followed the right processes and made the right decision. He said Cathy Kinlock had been very timely in sorting out financial arrangements for the claimant.

38. In response on 12 November 2021 the claimant said she did not want to move teams just managers and that her physiotherapist had said that stress was causing all the muscles and tendons in her arm to tighten up, resulting in her going backwards in her recovery not forward. She said she should not be made to repay an overpayment

that had been made to her. She had been paid two weeks annual leave to ensure that she was not left without any pay.

39. On 17 November the claimant wrote to Cathy:

> *"I won my appeal and now I am left with financial loss (the annual leave having been paid to her) ….I will seek legal advice…..I will also be raising another formal complaint with Jim Harra and if this matter cannot be resolved I will take it to my MP and the National Papers…….this is causing me stress which is effecting my recovery……I want an ACC1 (stress risk assessment) completing ASAP for how all the stress is impacting on my health and recovery."*

40. The claimant had been writing to an HR Adviser as well as Cathy, Dave, Shad, Rachel Moran, Jim Harra and others. That HR Adviser, Ali Gardiner wrote to her on 17 November 2021 to say:

> *"I must ask that you do not keep coming to me direct as I have other customers to assist…your first point of contact…should be your manager…"*

41. The claimant was provided with sources of advice and support including a webchat link.

42. On 17 November 2021 Shad Shaik informed the claimant of his decision to leave Cathy in place as her manager. He said:

> *"Cathy has been honest with you and has considered every adjustment she could offer you in the most accommodating way possible. She kept you informed (re SPPR) and sent you all guidance and process…"*

43. He said that if the claimant felt Cathy Kinlock had not met her expectations he would arrange an independent mediation service. This was at 16.45. The claimant's reply 50 minutes later was to say:

> *"I would like a copy of all the evidence used to make the original decision of my SPPR under SARS."*

44. At this point the claimant had her SPPR in place. She said:

> *"It is up to me to say whether I felt supported by Cathy not you and I really don't appreciate you telling me how I feel and how Cathy has treated me during this very traumatic time...I found your email very insensitive considering I won my appeal….*
>
> *I find it disappointing that you are still supporting the original decision when it has been deemed incorrect with no new evidence brought forward…I find the whole situation to be immoral…*
>
> *I will be seeking legal advice…*
>
> *In regards to your suggestion of mediation with Cathy I will only consider this once I have received all documentation in relation to the original SPPR*

> *decision…only then will I have confidence that Cathy has performed her duty of care to me….*

45. On 19 November Adam Altoft replied on behalf of the chief executive Jim Harra to apologise for errors made in the original handling of the SPPR extension. Adam Altoft said that he could not see how the claimant had suffered any financial detriment. He said that her SAR would be dealt with by the HR team, that Shad Shaik would be in touch to arrange completing a stress risk assessment and he provided her with details of the employee assistance programme.

46. On 29 November 2021 the claimant's fit note was extended to 15 January 2022. On 3 December Cathy Kinlock emailed the claimant about her attendance and medical outlook. The claimant sent Cathy Kinlock on 5 December a letter from Mr Redfern dated 22 October 2021 which gave a diagnosis of chronic regional pain syndrome. Dr Redfearn said he had offered some reassurance because none of the claimant's contractures at present were irreversible. He said

> *Her wrist is a little more stiff than I would like it to be but that is all. Her shoulder is showing classic features of adhesive capsulitis which should reverse over the next 12 to 18 months. I anticipate she will be able to return to work before she completes her recovery from this…. Other than loss of extension of the elbow…. She will make a full recovery. She expressed concerns that there are discussions at work in relation to her long-term employability… I would have thought it was rather premature to be considering this.*

47. Dr Redfearn did not express an opinion about the appropriate rate of pay for the claimant yet in a letter dated 5 December 2021 to Shad Sheik the claimant said that her orthopaedic surgeon, GP and physiotherapist were all in agreement that her employer should continue SPPR until her orthopaedic surgeon deemed she had sufficiently recovered to return to work and that that payment should be made by way of reasonable adjustment. She said this would reduce the stress level which was key in dealing with chronic regional pain syndrome. She said the condition can take 12 to 18 months to recover from fully and her orthopaedic surgeon was hopeful that she would have recovered sufficiently to return to work within the next 12 months. That was not what Dr Redfern had said in his letter. He had said

- The wrist was a little more stiff that he would like it to be
- She would make a full recovery
- Full recovery could take 12 – 18 months
- She could return to work before full recovery
- It was premature to be considering long term employability

48. On 9 December 2021 the claimant submitted a formal grievance against Cathy Kinlock. On 10 December 2021 a case conference about the claimant's absence took place between Cathy Kinlock, Shad Sheik, Rachel Moran and Paul Clark. The outcome of that discussion was that there was no change in the claimant's condition and still no return date and that the employer could not sustain the absence due to the length of the absence and extended recovery time. The decision makers agreed to await a further OH report to see if any of its content would change their opinion before making a final decision.

49. On 16 December 2021 there was a further occupational health report. On 20 December 2021 Cathy Kinlock and Dave Keane met again to discuss its content. Following that discussion on 21 December 2021 Cathy Kinlock made a recommendation for dismissal. Cathy Kinlock had regard to the respondent's Supporting Your Attendance policy. It provided:

> *Where attendance pattern becomes or is likely to become unsustainable HMRC will treat you fairly and be open about the situation, taking into account all individual circumstances, and will work with you to establish whether sustainable attendance may be achievable in the future.*

The document provided guidance questions to assist a manager in deciding whether or not attendance is sustainable. They included

> *Have you spoken to the employee about their well-being ?*
> *Have you sought appropriate medical advice ?*
> *Have you considered alternative options to support the employee ?*
> *What is the impact of the employees time off on their ability to deliver the requirements of their role ? You should consider the frequency, duration and predictability of the absence pattern.*
> *Is the team or business unit able to perform in the employee's absence ?*
> *Is there an impact on operational efficiency, customer service or project goals ?*
> *What challenges are the team facing and what is the impact of these due to the employees time off pattern ?*

it went on to consider what to do in a continuous absence becomes unsustainable. That included considering options such as resignation, retirement, early retirement, ill-health retirement, downgrading or dismissal. It said:

> *Our aim is always to support you to return to work. In some circumstances the evidence available will lead your manager to decide that you're unlikely to be able to return to effective and reliable attendance within a reasonable timescale, taking into account the definition of sustainable attendance. In the circumstances your manager will refer your case to an independent decision manager at least grade H0 and a minimum of one grade above you to consider whether your absence can continue to be supported.*

The guidance went on to say that a decision manager should end employment if all of the following apply

> *The business can no longer support your level of attendance in line with the definition of sustainable attendance*
>
> *Downgrading is not appropriate or you've rejected this option*
>
> *There are no further reasonable or practical workplace adjustments which can be made that will help you to achieve sustainable attendance*
>
> *OH advice has been received recently*

An application for ill-health retirement is not appropriate or is been refused

50. Mandy Beresford was appointed to make a decision on capability dismissal.

51. On 23 December when some documents sent to the claimant arrived in an envelope with the flap open but all of the content intact she emailed Dave Keane alleging serious breach of data protection. Shad Shaik subsequently investigated this and found there was no data breach.

52. Julian Monk who was the grievance decision maker asked Cathy Kinlock to comment on the allegations the claimant had made about her handling of SPPR. Cathy Kinlock sent him her written observations on how she made the decision re SPPR. The claimant also provided information by email. The grievance meeting took place on Teams on 30 December 2021 with Julian Monk. The claimant attended by Teams.

53. In early January the claimant's discretionary SPPR expired. Cathy Kinlock arranged for holiday pay to be paid to the claimant so that she was not without income.

54. On 12 January 2022 the grievance outcome letter was sent to the claimant. Mr Monk found that Cathy Kinlock had left information out of a referral to EAS but this was not done by design or in order to manipulate. He noted that the claimant had had her appeal and achieved SPPR. He made two generic recommendations that related to EAS and OH having all of a person's conditions listed in any referral going forward.

55. On 17 January 2022 the claimant wrote to Cathy Kinlock and others saying that her arm had deteriorated because of "everything you have put me through since September" and because her case was being referred to a decision maker (Mandy Beresford) for dismissal. The claimant said she had completed and returned a Stress Risk Assessment that she had been sent.

56. The claimant advised the respondent that her fit note had been extended to 21 February 2022. On 19 January 2022 Mandy Beresford wrote to the claimant inviting her to a meeting under the Supporting Attendance Policy. The claimant was informed of her right to be accompanied. The letter warned *your employment with HMRC could be affected if your attendance remains unsustainable.*

57. The claimant protested that a decision had already been made about terminating her employment because she was not being paid SPPR for January. Cathy Kinlock wrote to say that there was no predetermined decision and that she had arranged that two weeks' annual leave was paid to the claimant in January. The claimant sent multiple emails between 21 and 24 January 2022 repeating the same point.

58. The claimant replied to Shad Sheik's decision about the envelope arriving open saying that his response was *inadequate, half hearted* and that she felt *totally let down by HMRC* because her concerns were being disregarded. She asked how she could take the matter further.

59. On 28 January 2022 in readiness for the hearing on 1 February 2022 Cathy sent the claimant an email with multiple attachments. The claimant said that she could

not open all of them and that if they were not all provided to her in Word format that day then she would assume that the respondent was deliberately withholding information to prejudice her at the hearing. Many of the documents had been authored by the claimant and were not in Word format.

60. The meeting took place on 1 February 2022. Mandy Beresford attended as did the claimant with her representative from PCS, Lynne Wallace. There was a note taker present. The access to documents issue was raised and the claimant was happy to proceed with the meeting. Mandy Beresford opened the meeting seeking to understand the timeline of attendance and absence. She went back to the claimant's special leave during the pandemic. The claimant protested that that was not relevant. Mandy was seeking confirmation that the timeline of events was correct. The meeting went through the periods of absence, the reasons for absence and the OH reports and fit notes and other medical information. The claimant was asked about a return to work and she said that the respondent could not facilitate a return as her arm should start to clear within one year from diagnosis provided that she had weekly physio but that her physio was only three weekly so it could be longer. The claimant said *I will be putting in a personal injury claim against HMRC…due to all the stress…* She accused Cathy Kinlock of lying and recited the history of the SPPR issue and her SAR and what she continued to refer to as a breach of security (the envelope that arrived open). Mandy sought to bring the meeting to an end and adjourn to make a decision. The claimant said *I have been told you and Dave Keane are very good friends so your decision might not be fair.* Mandy said that was not the case and there was no conflict. Lynne Wallace sought to argue for ongoing SPPR and Mandy again asked a prospect of return to work but the claimant said that she had to have 80% movement in her arm before she could return to work and did not have that. She said *they won't allow me to return to work*. She said *I need to keep my arm warm, as my hand goes black when it is cold, to stop any more damage or losing my arm.* She said she wanted the time she needed to recover and to remain on SPPR. The claimant again said Cathy Kinlock was trying to manipulate the situation. Lynne concluded with the submission that the claimant had 27 and a half years service and ought to be able to have time to recover on SPPR.

61. Post meeting the claimant provided further submissions on the impact of COVID on her recovery times. She protested about not getting minutes of the meeting prior to an outcome and protested that the meeting had been totally biased and unfair. The claimant said *if you fail to provide us with a copy of the minutes for our approval prior to the decision being made your decision will be invalid…* she asked for a copy of the guidance that said minutes would only be provided with a decision. Mandy explained the guidance, provided the detail of its source and said that she would be on annual leave, was consulting HR/EAS and would get her decision out as soon as possible.

62. On 17 February the claimant wrote a long letter to her MP seeking his help in retaining her employment and reinstating SPPR.

63. On 18 February 2022 Mandy Beresford issued an interim decision. She decided to suspend a decision on dismissal and refer the matter back to line management on the basis that the claimant could be offered a period of unpaid special leave to cover the recovery period. The letter set out the full reasoning and attached notes of the meeting. It referred the claimant to Dave Keane to discuss the unpaid special leave

offer with the claimant.

64. The claimant rejected that position in a letter the same day 18 February 2022 accusing the respondent of blackmail and saying the decision was *totally unacceptable and laughable*. She asked for a decision that she remain on SPPR. The claimant informed her MP that the decision was blackmail. She told him it was a deliberate attempt to get her to resign and that she was feeling suicidal.

65. Mandy Beresford made sure that the claimant who had said she was feeling suicidal had a person to keep in touch with and was provided with information on available support such as PAM assist and other support services. Mandy Beresford then consulted Dave Keane. She specifically asked for impacts of absence on business performance, impacts on other colleagues performance, how the work that the claimant usually did was being absorbed, and details of the quantitative impact of her absence. Dave Keane replied. He did not think they needed more OH evidence because they had an up to date report and prognosis and estimated date of return had not changed.

66. On 25 February 2022 Mandy Beresford gave notice of dismissal giving her full rationale in a decision making template document that was 25 pages long. Mandy Beresford recorded that as a result of the claimant's absence there was a reduction in service to customers, about 24 calls a day, over 5000 calls per annum. She recorded the absence meant that colleagues had to come off post tasks to pick up calls which, in turn, meant other tasks were impacted and there was an overall reduction in service. She recorded that other colleagues had had to be redeployed and that the business could not afford to back fill vacant posts. A key factor for Mandy was that the claimant had claimed that her consultant had said she could not come back to work until she was at 80% mobility and that she was currently only at under 60 %. Mandy concluded that it was unlikely that the claimant could return to work in a reasonable timeframe and sustain attendance at the required level. The decision gave detail as to how to appeal.

67. The claimant appealed against her dismissal in a two page letter dated 2 March 2022. She believed the decision was not supported by the information and evidence that had been provided. She argued that, because of the special leave offer, the decision had been made that the business *could sustain her absence* but that it was not prepared to pay her during that absence. The claimant said that part of the decision making rationale appeared to be the impact of her not taking 20-24 calls per day. She pointed out that this was flawed reasoning as there was an adjustment in place so that she did not take calls. She also raised that the decision should have been made by someone outside of her own business unit.

68. The claimant contacted Jim Harra, Chief Executive, The Second Permanent Secretary, Lucy Fraser MP and Myrtle Lloyd Director General of HMRC Customer Services. Myrtle Lloyd replied telling the claimant the SPPR matter was closed but that she had a right of appeal against dismissal and this would be heard by Hazel Fearns who sat outside of the claimant's business unit.

69. On 5 April 2022 the claimant told Dave Keane, with whom she had been having keep in touch meetings, that her health position was the same.

70. The dismissal appeal meeting took place on 14 April 2022. The claimant was again accompanied by Lynne Wallace and there was a notetaker. Hazel Fearns was the decision maker. Hazel Fearns wrote to the claimant on 26 April 2022 setting out the appeal outcome. The letter attached a full decision making template document. The summary reason set out in the letter was as follows:

> *Overall, the decision to send your case to a decision maker was correct and compared to similar cases of long term absence I consider the absence was sustained over a longer period of time than would be normal….*
>
> *in the circumstances the decision to dismiss you was fair and proportionate for the length of your absence and the reality of you returning to work in the immediate future.*

71. A contact of the claimant informed her that she had heard a rumour that the claimant had left. The claimant raised a grievance alleging a breach of confidence in the leaking of the appeal outcome.

72. On 13 May 2022 the claimant contacted ACAS and achieved an early conciliation certificate on 13 June 2022.

73. The claimant was informed that she had taken and been paid for more flexi time than she had earned so that there would need to be a deduction from her final pay. On 26 May 2022 Dave Keane authorised the writing off of the deficit in flexi time working in the amount that the claimed owed HMRC for 17 hours being an amount of around £204. It was written off and not deducted. The claimant's employment ended on 27 May 2022. Deductions were made from her final pay for an unrelated overpayment of £264.

74. Her grievance about leaking the outcome of the appeal against dismissal was heard and was denied on 5 October 2022. The claimant has remained unfit for work and says she may consider looking for work in 2024.

The Law

Unfair Dismissal

75. Section 94 Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed by his employer.

76. Section 98 provides:

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

(2) A reason falls within this subsection if it –

a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;

b) Relates to the conduct of the employee;

c) Is that the employee was redundant; or

d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

b. **In subsection (2)(a) -**

a) 'Capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality; and

b) 'Qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held."

77. The burden of proof lies on the employer to show what the reason or principal reason was, and that it was a potentially fair reason under section 98(2). According to Cairns LJ in **Abernethy v Mott, Hay & Anderson [1974] ICR 323**:

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

This requires the Tribunal to consider the mental processes of the person who made the decision to dismiss.

78. Where the employer does show a potentially fair reason for dismissing the claimant the question of fairness is determined by section 98(4).

> **"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> a. **depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and**
>
> b. **shall be determined in accordance with equity and the substantial merits of the case."**

79. In applying the test of reasonableness, the Tribunal must not substitute its own view for that of the employer. It is only where the employer's decision falls outside the range of reasonable responses that the dismissal should be held to be unfair. This

proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

80. In Spencer v Paragon Wallpapers Ltd [1976] IRLR 373 a sickness absence case, Phillips J said:

> "*Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all circumstances, the employer can be expected to wait any longer and, if so, how much longer?"*

81. Relevant circumstances include the nature of the illness, the likely length of the continuing absence and the need of the employers to have done the work which the employee was engaged to do.

82. In Lynock v Cereal Packaging [1988] IRLR510 the EAT considered the range of factors which may be taken into account including; the nature of the illness, the likelihood of reoccurring or some other illness arising, the length of the various absences in the space of good health between them, the need of the employer for the work done by the particular employee, the impact of the absences on others who work with the employee and the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching.

83. The EAT in Lynock emphasised that the appropriate approach for the employer to take is one of understanding and not a disciplinary approach.

84. In O Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145 the claimant was a senior teacher at the school who had been absent on sick leave for a year. She was dismissed for capability reasons, the respondent stating that there was unsatisfactory evidence as to a likely return to work date. At internal appeal the claimant adduced new evidence in the form of a fit note that she was fit to return to work. The respondent rejected that evidence and dismissed the claimant. The claimant brought claims for unfair dismissal and disability discrimination together with other claims. The Employment Tribunal rejected some of her claims but found that she had been unfairly dismissed and that her dismissal was an act of discrimination arising out of her disability. The respondent appealed the Tribunal's decision and, on the unfair dismissal and discrimination arising out of a disability arguments, it was reversed by the EAT.

85. The Court of Appeal allowed the claimant's appeal and reinstated the Tribunal's finding. The majority decision was that the Tribunal had not erred in law in its findings on the reasonableness of waiting a little longer. The Tribunal had found that it would be reasonable for the school to have obtained its own evidence to confirm the claimant's argument at appeal that she was fit to return to work, but that need only occasion a short delay and there was no real evidence that serious further damage would be done during that time. In a dissenting judgment Davis LJ considered that the issue was "how much longer did this employer have to wait".

86. The question of how long it is reasonable for an employer to wait in an unfair dismissal claim may overlap with the consideration of a proportionality defence where a claimant also brings a claim under section 15 Equality Act 2010.

87. The O'Brien case also addressed the issue of the consideration of the reasonableness (and proportionality for the Section 15 claim) of the employer's response as at the date of dismissal or the date of appeal. The Court of Appeal, by majority decision, said "as a matter of substance her dismissal was the product of the combination of the original decision and the failure of her appeal, and it is that composite decision that requires to be justified" and cited its own earlier decision in *Taylor v OCS Group Ltd [2006] EWCA Civ 702.*

Disability Discrimination

88. The disability discrimination complaints were brought under the Equality Act 2010. Section 6 defines a disability as follows:

> **"A person (P) has a disability if**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."**

89. The section goes on to provide that any reference to a disabled person is reference to a person who has a disability.

90. The word "substantial" is defined in section 212(1) as meaning "more than minor or trivial". It would be reasonable to regard difficulty carrying out activities associated with toileting or caused by frequent minor incontinence as having a substantial adverse effect on normal day to day activities.

91. There are some additional provisions about the meaning of disability in Schedule 1 to the Act. Paragraph 2 provides that the effect of an impairment is" long-term" if it has lasted for at least 12 months or is likely to last for at least 12 months, and that:

> "**If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."**

92. In assessing the likelihood of an effect lasting for twelve months account should be taken of the circumstances at the time the alleged discrimination took place. Account should also be taken of both the typical length of such an effect on an individual and any relevant factors specific to this individual for example general state of health or age.

93. Under paragraph 5 of Schedule 1,

> **"An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if**
>
> **(a) measures are being taken to treat or correct it, and**
>
> **(b) but for that, it would be likely to have that effect."**

Guidance

94. Section 6(5) of the Act empowers the Secretary of State to issue guidance on matters to be taken into account in decisions under section 6(1). Section D of the guidance contains some provisions on what amount to normal day-to-day activities, and paragraph D3 provides:

> **"In general day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. Normal day-to-day activities can include general work-related activities and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents and keeping to a timetable or shift pattern."**

Burden of Proof

95. The Equality Act 2010 provides for a shifting burden of proof. Section 136 says:

> "(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

96. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

97. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 and was supplemented in Madarassy v Nomura International PLC [2007] ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

98. If in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Time limits

99. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable …**

(2) …

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it".

100. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96 considered the circumstances in which there will be an act extending over a period.

> "The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

Early Conciliation Provisions

101. Section 18A of the Employment Tribunals Act 1996 contains a requirement that before a person (the prospective claimant) presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information in the prescribed manner about that matter.

102. The prescribed period means prescribed in Employment Tribunal procedure regulations. In relation to claims for disability discrimination the prescribed period is three months.

Discrimination arising from disability

103. Section 15 of the Equality Act 2010 reads as follows:-

"(1) a person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if (A) shows that (A) did not know, and could not reasonably have been expected to know, that (B) had the disability".

104. A Section 15 claim will not succeed if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

105. Scott v Kenton Schools Academy Trust [2019] UKEAT 0031 considered the test, under Section 15, of something arising in consequence of the disability. HHJ Auerbach said at paragraph 41 of the judgment:

> *"The test has been examined in prior authorities now on a number of occasions, as well as other aspects of Section 15. The most useful guidance to be found in one place, I think, is that in the decision of the President of the EAT, as she then was, Simler J, in Pnaiser v NHS England & Another [2016] IRLR 170 where she drew the threads together of the previous authorities, as follows:*
>
> > *31. ……the proper approach to determining section 15 claims …. can be summarised as follows:*
> >
> > > *(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
> > >
> > > *(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*
> > >
> > > *(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. ..*
> > >
> > > *(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than*

> *one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

I observe that the tenor of all of this guidance is that, whilst it is a causation test, and whilst there must be some sufficient connection between the disability and the something relied upon in the particular case in order, for the "in consequence test" to be satisfied, the connection can be a relatively loose one."

Duty to make Reasonable Adjustments

106. Section 39(5) Equality Act 2010 applies to an employer the duty to make reasonable adjustments. Further provisions about the duty to make reasonable adjustments appear in Section 20, Section 21 and Schedule 8.

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

107. The words "provision criterion or practice" (PCP) are not defined in The Equality Act 2010. The Commission Code of Practice paragraph 6.10 says the phrase "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions".

108. The importance of a Tribunal going through each of the constituent parts of the provisions relating to the duty to make reasonable adjustments was emphasised by the EAT in Environment Agency –v- Rowan [2008] ICR 218 and reinforced in The Royal Bank of Scotland –v- Ashton [2011] ICR 632. The Tribunal must consider:

a. What is the PCP ?

b. How does that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled ?

c. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage ?

d. Has the respondent failed in its duty to take such steps as it would have been reasonable to take to have avoided the disadvantage ?

109. The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in 2018 in Sheikholeslami v The University of Edinburgh UK EATS 2018 Mrs Justice Simler considered the comparison exercise. At paragraph 48:

> "*It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That*

is not a causation question…There is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances."

"The PCP may bite harder on the disabled group than it does on those without a disability. Whether there is a substantial disadvantage is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

110. In Ishola v Transport for London [2020] EWCA Civ 112 Lady Justice Simler considered what might amount to a PCP at para 35:

"The words "provision, criterion or practice" are not terms of art, but are ordinary English words…they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application."

111. And at paragraph 37:

"In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treated employee by an act or decision and neither direct discrimination nor disability -related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP."

112. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being "more than minor or trivial".

113. The Equality and Human Rights Commission Code of Practice on Employment (2011) provides in relation to reasonable adjustments at paragraph 6.24:

"There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask)".

And at paragraph 6.28:

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

- *Whether taking any particular steps would be effective in preventing the substantial disadvantage*
- *the practicability of the step*
- *the financial and other costs of making the adjustment and the extent of any disruption caused*

- *the extent of the employer's financial or other resources*
- *the availability to the employer of financial or other assistance to help make adjustment (such as advice through Access to Work) and*
- *the type and size of the employer*

114. Section 26 Equality Act 2010 provides

(1) A person (A) harasses another (B) if:

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of:

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

115. The law on victimisation is at section 27 Equality Act 2010.

27 Victimisation

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

Application of the Law

The content from the List of Issues with the relevant number from the List is presented underlined below.

Jurisdiction: Time limits

1. TheTribunal has to consider were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

116. The Tribunal accepts the Respondent's submission that any events complained of that occurred before 14 February 2022 are out of time. That is because complaints must be brought within three months less one day of the effective date of termination (the last act of discrimination complained of) and a party must have an ACAS certificate to commence a claim. Time spent in ACAS conciliation will stop the clock. Working backwards from the day the claimant contacted ACAS 13 May 2022, any acts before 14 February 2022 would be out of time.

117. The decision to dismiss the claimant was communicated to her on 25 February 2022. Her employment ended on 27 May 2022. The claimant brought her unfair dismissal complaint on 28 June 2022 in time. The time concerns related to the complaints brought under the Equality Act.

118. Using the numbering from the Revised List of Issues the matters complained of as:

- unfavourable treatment under Section 15 Equality Act 2010 at 14a, b, c, d, e, f, g, h, i, j and k; and

- failures to reasonably adjust under Section 21 Equality Act 2010 at 41, 43 (in part at 44 and 45) and at 46 (and 48 in part); and

- acts of harassment under Section 26 Equality Act 2010 at 51c, 51d and 51f; and

- acts of victimisation under Section 27 Equality Act 2010 at 57a, 57b, 57c and 57d

were potentially out of time.

119. The Tribunal had to consider whether they were each part of a course of conduct extending over a period so that the last act within that course of conduct (which must itself have been after 14 February 2022) brought the earlier acts into time and if so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the last act.

120. Where there is an omission complained about as an act of discrimination then the time runs from the date of the last day on which that failure to do something could have reasonably been expected to be done.

121. Mr Bunting referred the Tribunal to the case of Hendricks and submitted that the out of time acts were not part of a course of conduct. He submitted that the acts complained of before 14 February 2022 were of a different character to those after that date as they did not form part of the determination on dismissal.

122. Mr Bunting also submits that where the act complained of is a failure to do something the claimant is not helped by Section 123(4)(b) which says that where something is not done, a person can be taken as having decided to not do it on the expiry of a period in which they might reasonably have been expected to do it. Mr Bunting says that the law there does not help the claimant to extend time because the omissions that she complains about are things that it was never *reasonable* to have expected the respondent to have done them. The claimant submitted that all of the acts complained of taken together were part of a course of conduct that amounted to a discriminatory state of affairs throughout in which Cathy Kinlock was motivated to remove the claimant from her post.

The section 15 complaints and "course of conduct extending"

The decisions about SPPR at 14a, d, e and k

124. At 14a the respondent's decision not to pay the claimant three month's SPPR was a stand alone act and did not form part of a course of conduct extending over a period of time. It was a decision with a conclusion. The outcome was clear. There was an ongoing impact on the claimant of not receiving the pay, but not an ongoing state of discriminatory affairs. There were later decision points on SPPR too. At 14d the decision of Cathy Kinlock communicated on 20 September 2021 was also, for the same reasons, a stand alone act and not part of a course of conduct extending over time. At 14e the decision not to award 12 months SPPR was also a stand alone decision and did not form part of a course of conduct extending over a period of time. Mandy Beresford was asked, when the claimant rejected the offer of special leave as an alternative to dismissal, by the claimant on 25 February 2022 to allow her special leave with SPPR. Mandy Beresford then consulted Dave Keane and looked at whether or not SPPR would be appropriate and decided it would not. Mandy's decision

was in time and capable of making the earlier acts in time if there had been, which there was not, a course of conduct extending over a period.

125. At 14k the decision on 17 January 2022 not to extend SPPR for the same reason was not part of a course of conduct. Dave Keane and Cathy Kinlock together decided that it should not be extended in January 2022. Each of these decisions was a stand alone decision, made by different decision makers, though commonality of decision maker is not determinative, some in the claimant's favour, some not.

126. For the reasons set out below the Tribunal finds it would not be just and equitable to exercise its discretion to extend time for the claimant in relation to the SPPR complaints.

127. The SPPR complaints prior to 14 February 2022 fail as they are out of time. The Tribunal listened to the claimant's evidence and read her submissions and understands that the award and failure to keep her employed and extend SPPR to the claimant is at the heart of this case for her. For that reason the Tribunal has gone on, below, to consider whether or not if those complaints had been brought in time, they would have succeeded or not.

14b Failure to refer to OH

128. If this had happened, it would have been a one off decision and time would have expired at the end of the period in which the claimant ought reasonably to have been referred. The Tribunal finds that Cathy Kinlock did refer the claimant, the Tribunal saw the correspondence in September 2021. Cathy Kinlock obtained consent initially from the claimant on 16 September 2021 and referred her to OH for a report on her elbow, endometriosis and back pain. There was no ongoing discriminatory state of affairs of non-referral. The claimant then withdrew her consent to the referral.

129. If Cathy Kinlock had failed to refer the claimant on 16 September 2021 that would have been a one off decision, with a conclusion and not part of a continuing state of discriminatory affairs. It the Tribunal is wrong about that then the claimant was referred on 20 September 2021 so time would have run from that date, the date at which the discriminatory state of affairs ended, and the complaint would still be out of time.

130. For the reasons set out below it was not just and equitable to extend time on the failure to refer to OH in September 2021 complaint.

14c Failure to disclose all information to EAS

131. A failure to disclose all information would result in an ongoing state of affairs in discrimination. That is because the parties would be continuing to act in ignorance of that information. This was an allegation that Cathy Kinlock hadn't told HR/EAS that the claimant had been diagnosed with CRPS. If this had happened then it could have formed part of a course of conduct extending over a period of time provided that there was some later in time act to bring it in to time. There is no later act of the same nature. Cathy Kinlock included the CRPS in her referral to decision maker template document in December 2021. The HR/EAS service had the full information available to Mandy Beresford the decision maker when she made her decision in early February

2022. HR was present at the decision making meeting on 1 February 2022. At that meeting the claimant told the meeting of her CRPS diagnosis and prognosis. Any discriminatory state of affairs, which may have existed, thus ended on 1 February 2022.

132. A file note made by Neil Barker at HR on 4 March 2022 at page 971 of the bundle records that Mandy Beresford had sent him her full decision making template in early February 2022, which the Tribunal saw, which records the diagnosis of CRPS. It cannot be said that a state of affairs in which HR / EAS did not know about the claimant's CRPS diagnosis persisted beyond 1 February 2022. 14 c does not form part of a course of conduct extending over a period of time.

<u>14f out of time / course of conduct</u>

133. This is the allegation that Cathy Kinlock telephoned the claimant on 5 December 2021 when the claimant had requested contact by email only.

134. Cathy Kinlock sent an email requesting information about absence on 3 December 2021. The claimant said that Cathy Kinlock telephoned her on 5 December 2021. Cathy Kinlock disputed that. Cathy Kinlock sent an email on 5 December saying *as requested I am communicating by email*. If this happened, if there was a telephone call after the claimant had requested no telephone calls, then this would have been a one off act and not part of a course of conduct extending over time because there was no later alleged act of discrimination by Cathy Kinlock that would have brought this alleged act into time. The complaint is out of time.

135. For the reasons set out below the Tribunal did not find it just and equitable to extend its discretion to extend time.

<u>14g Failing to follow OH advice 14h and 14i</u>

136. 14g is about failing to follow OH advice and 14h and 14i are essentially the same allegation that Cathy Kinlock referred the claimant for a decision on dismissal on 22 December 2021.

137. The Tribunal finds that these acts form part of a course of conduct. They are all about not following OH advice before referring for dismissal and about the decision to refer for dismissal. The Tribunal finds that they are part of a course of conduct that extends to the in time allegations at 14o (failure to refer to OH in February 2022 before reaching a decision to dismiss) and 14q (the in time decision to dismiss).

138. Therefore the allegations at 14g,h and i are brought into time by allegations at 14o and q.

<u>14j sending an email and letter twice</u>

139. 14j is about sending an email twice and a letter twice. It is not part of a course of conduct extending over time. There is no later allegation of an ongoing discriminatory practice about mode or frequency of communication to bring this allegation into time. It is out of time.

140. The allegation at 14k was dealt with above, alongside the other extending SPPR decisions.

141. For the reasons set out below it is not just and equitable to extend time in relation to any of the out of time section 15 complaints.

142. The allegations at 14l-r all occurred after 14 February 2022 and were in time.

<u>The section 21 complaints and course of conduct</u>

142. The respondent submitted that the complaints at the following paragraphs of the List of issues were out of time: 41 – PCP1, 43 – PCP3, 45 – part of the complaints regarding failure to correspond promptly before 14 February 2022, 46 – PCP 6, and 48 – PCP 8 – part of the complaint about dealing with the dismissal within the business unit. The Tribunal had regard to the relevant statutory provisions and case authorities cited above.

143. At 41 is the PCP about reluctance to award SPPR applied on 20 September 2021, 2 November 2021 and 17 January 2021. For the same reasons as set out above in relation to the section 15 complaint this complaint is out of time and these acts are not part of a course of conduct extending over a period of time and it is not just and equitable to extend time for reasons set out below.

144. At 43 is the PCP about referral by Cathy Kinlock for a dismissal decision due to sickness absence. For the reasons set out at 14g,h and i above this PCP was part of a course of conduct extending over a period of time which was the operation of the respondent's policy to refer those with sickness absence that may have become unsustainable for a decision on that sustainability and dismissal. That policy continued to operate from the decision of Cathy Kinlock on 22 December 2021 through to the dismissal decision in February 2022 and appeal decision. It was part of course of conduct extending over a period of time which perpetuated a potentially discriminatory state of affairs. This complaint was brought into time by the last act of this kind which was the dismissal, communicated to the claimant in time on 25 February 2022.

145. At 44 there was a PCP of a requirement of ongoing management by the line manager. This too was a state of affairs which continued to the claimant's dismissal and was in time.

146. At 45 was the PCP that the respondent did not communicate in a timely manner, some of the allegations fell before 14 February 2022. This was an allegation of an ongoing practice of not responding in a timely manner and if such a practice had been in operation the earlier acts would have been part of the same course of conduct as the later acts, post 14 February 2022, and brought into time by them. This complaint was in time.

147. At 46 this was the PCP of only holding a dismissal hearing when SPPR has expired. The complaint as drafted relates to the holding of the hearing. The hearing was held on 1 February 2022 so that the complaint is out of time. Even if a course of conduct existed there would have been no later in time act on the way the complaint was drafted to bring the course of conduct into time. However, the Tribunal considers

that a litigant in person's complaint should not fail for poor drafting when it is clear to the Tribunal and must have been clear on a common sense understanding of the case to the respondent that the claimant was saying *you deliberately didn't dismiss me until after my SPPR had expired.* The Tribunal extends that understanding of the complaint to the PCP here and allows this complaint as being brought into time by the communication of the decision to dismiss, to the claimant in time. The complaint fails below for other reasons but does not fall outside of the Tribunal's jurisdiction on a technicality of drafting.

148. 48 was the PCP of only dealing with dismissals and appeals within the claimant's business unit in breach of HMRC policy which says it ought to be dealt with outside of the business unit. The Tribunal finds that if this PCP had existed then it would have been part of an ongoing discriminatory state of affairs persisting from the date of the referral for dismissal by Cathy Kinlock to Mandy Beresford on 22 December through to the dismissal (in time) and on to the appeal against dismissal which was in time. This was part of a course of conduct extending over time and brought into time by a last in time act.

<u>The section 26 complaints and time</u>

149. The respondent submitted that 51c, d and f were out of time. The Tribunal had regard to the relevant statutory provisions and case authorities cited above.

150. At 51c the allegation was that the claimant received the same email and letter twice. For the same reasons as set out for 14j above, this complaint is out of time,

151. At 51d this was the referral for dismissal allegation in December 2021. For the reasons set out above it is part of a course of conduct that led to dismissal and is brought into time by that dismissal.

152. At 51f this allegation relates to delay in getting the documents for the dismissal meeting to the claimant. This complaint was part of a course of conduct extending over a period of time, it endured from 22 December 2021 to 29 January 2022. However, it was not brought into time by an act of the same kind that was in time.

153. For the reasons set out below it was not just and equitable to extend time for the out of time section 26 complaints.

154. The other harassment allegations at 51g and 51j were in time.

<u>The section 27 complaints and course of conduct</u>

155. The detriments complained of at 57a, b, c and d all took place before the 14 February 2022 and the respondent submitted were out of time.

156. 57a related to the claimant being told she had no right of appeal against Cathy Kinlock's decision not to extend SPPR in 30 September 2021. This state of affairs, of there being no right of appeal persisted until following internal investigation the absence of a right of appeal in the SPPR policy was identified and considered inconsistent with other HRMC practices and so the respondent decided to create / grant a right of appeal to the claimant who was informed of this on 21 October 2021.

There was for that period (30 September to 21 October 2021) a potentially discriminatory state of affairs that persisted and was a course of conduct extending over a period of time. However, the last act in that course of conduct expired when on 21 October 2021 the claimant was afforded a right of appeal. There was no last act in time to bring the course of conduct into time.

157. At 57b this detriment relates to the decision makers refusing to apologise for incorrectly informing the claimant that there was no right of appeal. Above for 57a the state of refusing to apologise persisted to the claimant's termination of employment. There was never an apology. This complaint is an ongoing state of potentially discriminatory affairs. It is in time.

158. At 57c the rejection of the claimant's grievance by Julian Monks on 13 January 2022 was a one off decision, not part of a course of conduct extending over a period of time. Julian Monks made no other decisions and was independent of any decisions on SPPR or referral for dismissal, dismissal or appeal. As an act of discrimination it was not part of a discriminatory state of affairs, it was out of time.

159. The complaint at 57d relates to the delay in the provision of information and is out of time because any period of delay came to an end on 1 February when the claimt confirmed she was happy to proceed a the hearing and because there is no later act to bring the period of delay into time, as set out in the reasons for 51f above.

160. It was not just and equitable for the reasons set out below to extend time for any of the out of time victimisation complaints.

A just and equitable extension

161. The Tribunal had to decide for those complaints that were not part of a course of conduct extending over a period of time so that a later act brought the earlier acts into time, would it be just and equitable to extend a discretion to allow them to be heard. Provision for an extention of time exists at section 123 Equality Act 20210. The Tribunal may allow a claim within such other period as it thinks just and equitable. In Robertson –v- Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434] the Court of Appeal considered the extent of the discretion to extend time on a just and equitable basis under the discrimination legislation. The Employment Tribunal has a "wide ambit". At paragraph 25 of the judgment Auld LJ said:-

> **"it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."**

In the exercise of discretion the Tribunal had regard to the overriding objective.

162. In Abertawe v Morgan in 2019 CA Leggatt LJ said that there is no checklist of factors, that the Tribunal has the widest possible discretion, each case being decided on its own circumstances. The factors the Tribunal can take into account include the length of and reason for delay in bringing the complaint, the extent to which the cogency of any evidence would be affected by delay, the extent of the respondent's

co-operation in the provision of information and the promptness with which the claimant acted when she knew of the possibility of action. The Tribunal took into account the claimant's engagement in correspondence and state of awareness of her rights at the relevant time. The Tribunal also considered; potential prejudice to the respondent, availability of remedy to the claimant without the out of time elements of her complaint, the claimant's medical condition and the professional and union advice and support the claimant was receiving and the timing of the internal appeal. The Tribunal looked at all the circumstances of the case.

163. The claimant had been corresponding heavily during the relevant period from May 2021 to May 2022 and that despite not being willing or able to use a lap top she had been able to use her phone to access the internet and attend a meeting by Teams on 30 December 2021 to resolve her grievance. The claimant applied for and achieved ESA benefit during autumn 2021 to spring 2022 (no exact dates were provided) and was writing to her union representatives, her managers and their managers, her MP, the Second Permanent Secretary, the Chief Executive of HMRC and had threatened going to the national papers. She was capable of identifying issues that affected her and where breaches of what she understood her rights to be occurred she was prompt and articulate in complaining about them in writing.

164. She had submitted a grievance and an appeal against the decision not to extend SPPR in October 2021. She had applied for annual leave to be paid to her in autumn 2021. She was able to attend her physiotherapy appointments from the end of September 2021 when they resumed and to get out and about with support. The claimant referred to solicitors, union representatives and taking advice in correspondence with the respondent during this period. She used the words discrimination and harassment and referred to The Equality Act and disability and protection in law in her correspondences with the respondent and there was discussion of disability during her OH appointments.

165. Her complaints (save for those relating to appeal) were known to her at the time she commenced proceedings. She brought her complaint on 28 June 2022. Some of her out of time complaints dated back to September 2021 and so the oldest of them were approximately (subject to adjustment for ACAS early conciliation if it had been undertaken) 5-6 months out of time. The later complaints, January and February 2022 issues, were approximately (again adjusting for time in early conciliation) just a matter of weeks out of time.

166. The claimant did not give any evidence at all as to why she could not have brought her discrimination complaints in time. It was her burden of proof to establish the grounds for an extention. Without oral evidence and submission she did not meet it. The Tribunal had regard, in supporting her as a litigant in person, to its factual findings based on the chronology of events at the relevant time and the documentation. The claimant was invited and did not wish to make any closing submission on the just and equitable point. The Tribunal considered that extending time would have minimal impact on the respondent in terms of managing the final hearing because it had prepared fully to deal with all of the points at the final hearing but it would expose the respondent to liability that would otherwise have not attached to it. Her position was that she ought to be able to bring her complaints because of how badly she had been treated. The Tribunal had regard to the absence of explanation for delay and the importance of time limits and certainty in litigation

generally. The Tribunal decided it would not be just and equitable in the circumstances to extend time.

167. However, the Tribunal, in its reasoning below has set out what it would have been likely to conclude in the out of time complaints had it had jurisdiction to hear them. This is to confirm to the claimant that she has not failed solely for a technical reason, even if the Tribunal had had jurisdiction to hear the out of time complaints they would have failed, for the reasons set out below, because her complaints lacked merit.

Unfair Dismissal, Employment Rights Act 1996

168. *Dismissing officer and reason for dismissal:* At 4 of the List of Issues the Tribunal finds the claimant was dismissed by Mandy Beresford by a letter dated 25 February 2022 giving a termination date of 27 May 2022. The reason for dismissal was incapability. This was a potentially fair reason for dismissal.

169. *Sufficient to dismiss:* At 5 of the List, the respondent acted reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant. The Respondent, through Mandy Beresford, genuinely believed the Claimant was no longer capable of performing her duties. Cathy Kinlock had managed the claimant through special leave absence and sickness absence from March 2020 until the referral for dismissal on 22 December 2021. She prepared a dismissal referral template which included a detailed history of their communications, reasons for absence and prognoses. This was provided with the OH reports and letter from the claimant's consultant to the decision making officer.

170. *Factors operating on the mind of the dismissing officer:* At 5a) Mandy Beresford saw the referral documents and a folder of papers relating to the claimant's case. She held a dismissal meeting on 1 February 2022 which the claimant attended with her representative. Mandy Beresford genuinely believed, relying on what the claimant said and what the OH report from 30 November 2021 said, that the claimant would not be able to return to work to perform any duties before November 2022 and possibly not for as long as two years (to October 2023).

171. *Consultation:* At 5b) the Tribunal finds the Respondent had adequately consulted the claimant. Cathy Kinlock had held fortnightly telephone meetings with the claimant and had obtained detailed information about the claimant's conditions and her wellbeing generally. Cathy Kinlock kept notes of those calls, recording the smallest of details in which the claimant reported what her doctors had said, not just their diagnoses but speculation by the claimant as to what might be happening to her in other health related matters including references in notes on 8 July 2021 to chronic pain and 23 August 2021 to fibromyalgia. The claimant was referred to Occupational Health and discussed her conditions with the OH professional. There were reports dated 25 May 2021, 20 July 2021 and 30 November 2021. The claimant refused to continue telephone calls with Cathy Kinlock stating in a letter on 24 November 2021 that "talking to you will increase my stress levels even more". Cathy Kinlock then (save for a telephone call of 5 December 2021) communicated with the claimant by email. The claimant was writing to multiple parties within the respondent, including the Chief Executive, and on 9 December 2021 wrote to Shad Shaik setting out some of her concerns about Cathy Kinlock and referring to her CRPS condition. The claimant also had the opportunity to speak to OH professionals and HR/EAS. The claimant withdrew

her consent to Cathy Kinlock's September OH referral. Cathy Kinlock offered to refer again specifically excluding endometriosis if that is what the claimant wanted and eventually obtained further consent so that an OH referral and assessment took place in November 2021. The claimant provided a copy of a letter from her consultant to Cathy Kinlock on 5 December 2021 which was indicative to the Tribunal of the ongoing quality of communication and level of detail of information provided. The claimant saw Cathy Kinlock's referral document and the documents for Mandy Beresford were provided to the claimant's representative on 11 January 2022. The claimant attended the meeting with Mandy Beresford on 1 February 2022 and the minutes of that meeting show her being fully consulted about her conditions and possible return to work dates.

172. *Investigation:* at 5c) the Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position. The up to date medical position was set out in the referral for decision document. Mandy Beresford made some enquiries of her own in January 2022 asking had ill health retirement and other options been considered prior to referral for dismissal. She found that they had been considered and the claimant had declined them. Mandy Beresford consulted Dave Keane and Cathy Kinlock about the up to date position. Mandy Beresford conducted the meeting on 1 February 2022 and gave the claimant repeated opportunities to consider alternates to dismissal and to consider an earlier return to work. Mandy Beresford adjourned the meeting to undertake further investigation. She enquired as to the impact of the claimant's absence on the business unit and obtained detail from Dave Keane. The level of consultation of the claimant and others and investigation into this case and a possible return date went beyond what might reasonably be expected of a reasonable employer. The claimant was kept fully informed and was herself the key source of information for decision making.

173. *Reasonableness of dismissal:* At 5d) the Tribunal applied the relevant law as to how long the employer might reasonably be expected to wait. It finds the respondent could not reasonably be expected to wait longer as at February 2022 before dismissing the claimant. The Tribunal accepts the evidence of Mandy Beresford that she took into account the fact that the claimant had been supported with absence in relation to her elbow alone since April 2021. In December 2021 she had shared a letter from her consultant as recited in the facts above. The respondent had three OH reports the relevant content of which are set out above. Mandy Beresford took into account what the claimant said which was that she was only 60% recovered and that her doctor had said she could not return until she was at 80 % (even though the letter from Dr Redfern did not say that) and she could not say when that would be. Ms Bersford took into account the circumstances of the case above including the impact of absence on the business unit.

174. The Tribunal accepts the evidence of Mandy Beresford that she looked at the likely return to work date and relied heavily on the OH report of 30 November 2021 and the claimant's stated position. The context was an employee who had had a most difficult time with her health; gynaecological issues, back pain issues and a fall resulting in CRPS, had not been able to do any work at all for almost two years, had had full pay on special leave, contractual sick pay, contractual half pay, then a discretion to grant Sick Pay at Pension Rate for three months, extended on appeal to 6 months and wanted to remain on SPPR to October 2022 and possibly beyond, which would have given three years of (sickness absence related) pay for no work, and Dave Keane was explaining that delivery targets were being impacted by the claimants

absence. There was no prospect for a return within a reasonable time frame. Applying Spencer, the Tribunal finds the respondent that could not reasonably have been expected to wait any longer.

175. It had supported the claimant with sickness absence from November 2020 and in February 2022 was being asked for further support, with no return date having been given but the claimant saying it would not be before October 2022 and OH saying possibly as late as October 2023. It was immaterial that the reasons for absence changed, what mattered in assessing how long the respondent could be expected to wait was the prognosis. Dismissal was within the range of reasonable responses. It cannot be said that no reasonable employer would have dismissed in those circumstances. The respondent considered that it could not reasonably sustain absence any longer. It had to balance operational organisational needs against the needs of the claimant. Mandy Beresford considered that the point had been reached when dismissal was a reasonable response. She reached this on the good grounds of the absence of a definite return date, unacceptable delay in possible return date of October/November 2022 and possible extended date to October 2023 and in the context of the history of support afforded.

176. However, Mandy Beresford stopped short of dismissing immediately and considered mitigation. She was aware of the claimant's long service and she made what the Tribunal considers was a generous offer to extend employment to October 2022. The claimant rejected that offer. The claimant wanted to remain paid. For the respondent the decisions were separate, could employment be sustained or not and if it was sustained then what was the pay entitlement ? The claimant said that she wanted pay so Mandy Beresford agreed to consider pay and looked again at the SPPR criteria. The criteria required a return in a reasonable time frame; Mandy Beresford applying those criteria could not say that the likely return in October 2022 was a reasonable time frame.

177. This fell within the range of reasonable responses. The Tribunal finds that the decision to dismiss would have been within the range, the decision to offer ongoing special leave went beyond what a reasonable employer might be expected to do and the decision not to offer pay during that special leave period so that it was an unpaid remain employed offer to mitigate impact of dismissal was well within the range and was generous of HMRC. The Tribunal could not say that no reasonable employer would have dismissed in those circumstances.

178. The complaint of unfair dismissal fails.

179. The claimant's letter writing may have amounted to insubordination and may have been something that her managers could have chosen to deal with as misconduct. Because this was relevant to what might have happened if the claimant had succeeded in her unfair dismissal complaint, the Tribunal raised this with Mr Keane. His response was that there would have been a reset of behaviours, that is to say the respondent would not have immediately moved to disciplinary proceedings but worked with the claimant to reset her behaviours on return to work, restate standards and only intervene if any failings persisted. This was, again, a kind and moderate response.

180. Remedy was not relevant in unfair dismissal but if it had been the Tribunal formed a preliminary view, subject to hearing evidence and submission on remedy, that it would have found no loss as the claimant had no entitlement to pay beyond expiry of her contractual half sick pay in July 2021 and had achieved a discretionary benefit of SPPR for 6 months. She had no expectation of that other than that the discretion would be exercised fairly and reasonably, which it was.

181. Any losses would have been reduced, applying Polkey v AE Dayton Services Ltd [1987] UKHL 8 as a fair capability dismissal would most likely have ensued within a further month from any procedural failing (there was none) (during which time there was no entitlement to pay) and then, if any losses had been established, they may have been reduced on just and equitable grounds to take into account the claimant's blameworthy conduct in the tone of her letter writing to her colleagues. The Tribunal further notes the submission of the respondent that the claimant had no intention of returning to work at all and would have heard argument and evidence on the point (the chronology suggests that such argument may have been persuasive) that losses did not arise from dismissal at a remedy hearing.

Equality Act 2010 complaints

Disability Discrimination (s.6 and Schedule 1 of the 2010 Act)

182. The Respondent has conceded that the claimant had the following disabilities:

a. Complex Regional Pain Syndrome, from October 2021 and at all material times after that date.
b. Ear, Nose and Throat (ENT) condition, at all material times for the purposes of this claim.

The claimant relies on ENT only in relation to 14q, the section 15 dismissal. Otherwise ENT is a background condition and is not relied on in her disability discrimination complaints.

Discrimination arising from disability (Equality Act 2010 section 15)

The Respondent concedes that it knew the Claimant had the following disabilities:

Complex Regional Pain Syndrome (the Respondent was aware from October 2021; and ENT at all material times).

Did the Respondent subject the Claimant to the following treatment?

At 14a) On 07 May 2021 the Respondent decided not to pay the Claimant three months' Sick Pay at Pension Rate (SPPR) despite being advised by the HR Expert Advice Service (EAS) that this was an option.

183. The Tribunal had no jurisdiction to hear this complaint but if it had would have found that factually this did not happen. There was no decision to that effect. The claimant's pay had not expired at that point. The discretion to grant SPPR was exercised in the claimant's favour by Cathy Kinlock in June 2021, it had been on Cathy

Kinlock's radar from October 2020, on her desk from May 2021 and was actioned promptly, so that the claimant got 3 months SPPR from 3 July 2021.

At 14b) On 16 September 2021 the Respondent failed to refer the Claimant to occupational health in line with HR EAS advice.

184. The Tribunal had no jurisdiction to hear this complaint but if it had would have found Cathy Kinlock obtained the claimant's consent to referral on 16 September and referred her on 20 September, this was not a failure to refer. This complaint fails factually but if that is wrong and a fail to refer on 16th alone is the alleged act, then the failure to refer on 16th did not arise out of disability. The claimant's argument that Cathy Kinlock did not refer because the claimant was disabled did not make sense. Cathy Kinlock did refer *because* the claimant had been off sick a long time. Cathy could not have reasonably been expected to know at September 2021 that the claimant was disabled. Her condition had changed from back pain / gyny investigation to elbow fracture and CRPS. Her (short) delay in referring arose out of normal management activity delays. The Tribunal accepts that Cathy Kinlock was in the process of referring and actually completed the referral on the portal on 20th, for all three conditions, she cut and pasted the referral content into her own file and the Tribunal saw that content.

At 14c) On 16 September 2021 the Respondent failed to disclose all relevant information about the Claimant's sickness/disability to the HR EAS when seeking their advice about how to manage the Claimant's absence.

185. The Tribunal had no jurisdiction to hear this complaint as it was out of time but if it had it would have found the complaint fails because Cathy Kinlock did refer the claimant to OH and in the referral referred to all three conditions, the elbow injury was included. HR saw the OH referrals and reports. The Tribunal saw the referral to OH. In hearing the claimant's grievance Julian Monks concluded, on this point, that Cathy Kinlock did not include information about all of the claimant's health conditions but that there had been no change and that the information from the previous referral was still current and valid in relation to the elbow injury. Cathy Kinlock did not need to provide all the detail that she had had from the claimant in their telephone conversations because it was part of an ongoing narrative about the claimant, OH had the information and the claimant would speak to OH herself. HR had been consulted and kept informed. The Tribunal finds that Cathy Kinlock did not fail to disclose. There was no unfavourable treatment.

14d) On 20 September 2021 Cathy Kinlock decided not to pay the Claimant Sick Pay at Pension Rate.

186. The Tribunal had no jurisdiction to hear this complaint but if it had it would have accepted the respondent's submission that failure to exercise a discretion in someone's favour is not in itself unfavourable treatment. The Tribunal looked at the way Cathy Kinlock made the decision and factors affecting her at that time. She applied the policy criteria of "appropriate" and "reasonable time frame", based on medical advice on prognosis and prospect of returning to work in a reasonable timeframe.

187. In September 2021 Cathy Kinlock understood that the claimant had been told the sick note would be extended for 6 weeks from 6 September and then a further 6,

and she was being told that the claimant would need further gyny referral and might need surgery. The Tribunal accepts Cathy Kinlock's evidence that there was no prospect of a return to work within 12 weeks so she refused SPPR because that was not a reasonable time frame.

188. For each of the complaints at 14 a,b,c and d the respondent did not have knowledge of disability so if they had not failed for the reasons set out above they could not have succeeded in any event on knowledge.

14e) On 02 November 2021 the Respondent decided not to pay the full 12 months' Sick Pay at Pension Rate.

189. The Tribunal had no jurisdiction to hear this complaint but if it had would have found this complaint to have failed. The Tribunal repeats its reasoning from above that it was not unfavourable treatment to refuse to exercise a discretion in the claimant's favour. The respondent's decision was a proper application of the policy criteria. The Policy gives guidance that where appropriate based on medical evidence and prospect of return in reasonable time frame a manger MAY extend it for 12 months. As there was no prospect of return in reasonable time frame the respondent did not award SPPR, the issue of duration of award did not arise.

14f) On approximately 5 December 2021, the Respondent contacted the Claimant by way of telephone during her sickness absence when it had been agreed contact would be via email.

190. The Tribunal had no jurisdiction to hear this complaint but if it had would have found in the claimant's favour in the relation to the direct factual conflict here. The Tribunal finds as a fact that Cathy Kinlock did phone the claimant on 5 December 2021. The claimant's recollection of this call having taken place is more likely to be reliable than Cathy Kinlock's because, the claimant was at home, she was in pain, unwell, and feeling aggrieved that Cathy Kinlock had declined to exercise SPPR discretion and she had written on 24 November to say she did not want Cathy Kinlock to ring her. For the claimant the Tribunal finds that this was memorable because she then felt she had something on Cathy Kinlock, that she could prove that Cathy Kinlock was exacerbating her stress, ringing her when she had been asked not to. Further the email from Cathy Kinlock on 5 December recites that she has been asked to email. The Tribunal found it plausible that this was recited following a telephone call made in error. Whilst the Tribunal would have found the facts to be as the claimant recited them it would not have found that the call, as opposed to an email, arose out of the claimant's disability. The form of managerial contact was not because the claimant was off sick, and then off sick because disabled, to establish the necessary connection. Rather, the form of contact, why did Cathy Kinlock ring not email, would have been found to have been an oversight, rather than something arising in consequence of disability. This is because in the context of the voluminous correspondence and notes of contact the Tribunal saw between the claimant and Cathy Kinlock, as stated above, Cathy Kinlock was kind and professional. It would be implausible to suggest, in the face of the tone of all the other communications, that Cathy Kinlock's decision to use telephone not email arose out of the claimant's disability.

14g) On 30 November 2021 and 5 December 2021, the Respondent failed to follow advice from occupational health, clinicians, and orthopaedic surgeons in relation to the Claimant's estimated recovery time, in that the OH report of 30 November 2021 recommended:

(i) a review in 3 months' time to assess the Claimant's condition and re-refer, which would have coincided with the Claimant's next appointment with her consultant;

191. The Tribunal finds, for this in time complaint, as a fact there was no three month review because at the time the review would have been due, between 1 – 15 March 2022, the decision to dismiss the claimant had already been made. The Tribunal accepts Cathy Kinlock's evidence that she would not refer anyone, disabled or not, after a decision to dismiss had been made. The failure to follow the recommendation did not arise out of disability but out of the fact that the claimant was on notice and not going to be an employee in the near future. Further, on the facts, irrespective of any outcome of any further review the claimant had categorically stated that she would not be returning before November 2022 and might need more time even than that as she was anticipating a possible hysterectomy.

(ii) a conversation between the claimant and her line manager should take place to articulate any concerns and agree a way forward;

192. OH did recommend this conversation. There were multiple attempts by the respondent in email to engage with the claimant about return to work. The Tribunal finds that this was a disingenuous complaint pleaded by the claimant. The Tribunal had regard to what the claimant had been saying about Cathy Kinlock from the point at which the claimant found out that Cathy Kinlock was not extending the SPPR in September 2021 onwards. The claimant had said that contact with Cathy Kinlock was impeding her recovery. The claimant had lodged a grievance about Cathy Kinlock. An outcome of the grievance in the form of mediation had been offered and declined by the claimant. This complaint fails because it was not unfavourable treatment to not have a conversation when the claimant had asked on 24 November not to be contacted by Cathy Kinlock other than by email.

(iii) that the Respondent utilise the HAE six Management Standards approach;

193. The claimant's case was that the HAE approach required the respondent to follow the recommendations in the OH reports. The Tribunal finds that the respondent's actions on the OH reports did not amount to unfavourable treatment. If they did then that treatment did not arise in consequence of disability. The only OH recommendation that was not addressed was the need for a conversation with the line manager. The Tribunal has reasoned elsewhere why this was a disingenuous complaint of the claimant's given that it was she who had requested no conversations with her manager and communication with the respondent by email only. The Tribunal accepts the respondent's submission that failing to follow in this regard was not unfavourable treatment. In the alternative, it would have been a proportionate means of achieving the legitimate aim of managing attendance.

14h On 5 December 2021, the Claimant sent a letter from Dr Redfern dated 22 October to Cathy Kinlock which stated that a full recovery should take 12-18 months'

but the Claimant would be fit for a return to work before that time. It had also been arranged for the Claimant to see Dr Redfern again in 3 months' time. (The claimant had to wait for the written letter from the Doctor but had informed Cathy Kinlock of this information in October 2021). Despite knowing this the claimant was referred for dismissal by Respondent.

14i On 22 December 2021 Cathy Kinlock referred and/or recommended the Claimant for dismissal.

194. For these in time complaints, being referred for dismissal is unfavourable treatment. It arose out of the claimant's absence which arose out of disability.

195. The Tribunal had regard to the respondent's defence. The Tribunal finds it had the legitimate aim of combating absenteeism, maximising staffing and optimising service levels, meeting operational objectives and protecting public resources. These are legitimate aims because a public sector organisation needs staff present, working well and delivering service to its service users. Absence has an impact on service delivery and on the work of other colleagues who remain present. Operational objectives are affected as work is reallocated amongst a team. There is a cost of absence in that the post remains occupied but work is not performed. Payment is made for that work, in part by contractual and then statutory sick pay and by discretionary benefits but no work is achieved for sick pay. It is legitimate for the respondent to seek to maximise attendance, work performance and the delivery of its objectives. It must manage public money responsibly and that includes not continuing to pay wages where there is no realistic prospect of a return to work.

196. Was referral for dismissal at 14h and 14i a proportionate means of achieving a legitimate aim ? In considering proportionality the Tribunal balanced the needs of the claimant and respondent. It had regard to the efforts made by the respondent to support the claimant. Cathy Kinlock had had fortnightly conversations with the claimant, acted on reinstated SPPR promptly, arranged for annual leave to be paid, invited the claimant to join Teams meetings, referred her to OH, had consent withdrawn, been asked not to telephone the claimant. The claimant had been off sick from November 2020. There had been case conferences; the first with Rachel, Shad and Paul Clark on 10 December 2021 and the second on 20 December 2021, with an up to date OH report, as provide for in Supporting Your Attendance, with Paul Clark, Cathy, Dave Keane and Shad. Cathy Kinlock was following guidance on the sustainability of attendance patterns contained in the respondent's Supporting Your Attendance document. The OH report said that the claimant may take up to two years to recover.

197. The Tribunal finds that referral for dismissal was a proportionate means of achieving each of the following legitimate aims;

- to take management decisions fairly and expeditiously and to use public resources effectively;

- to combat absenteeism, maintain effective levels of service and maximise staffing levels, meet the Respondent's operational objectives (i.e. ensure the

Respondent can deliver key public services to the taxpayer); and protect scarce public resources.

It was appropriate to refer at that time because the claimant had been absence for sickness reasons for over a year. It was reasonably necessary because in order to combat absenteeism and maintain effective service levels there would need to be consideration given to whether or not there was a realistic prosect of a return to work in a reasonable time frame.

198. The Tribunal finds not to refer and allow the absence to run would have been less discriminatory but would have disregarded the needs of the respondent, compromised its ability not only to deliver service but to support other people who may be off sick too and would not have been a proportionate response. The Tribunal finds that the complaint fails because the referrals were a proportionate means of achieving its legitimate aims.

14j) On 22 December 2021 and 24 December 2021, the Respondent informed the Claimant four times of the referral for dismissal, twice by email and twice by letter.

199. Receiving the same letter and the same email twice did not amount to unfavourable treatment. The Equality Act affords protection against discrimination. Receiving duplicate correspondence might in some circumstances be part of a discriminatory campaign but in this case the Tribunal accepts the evidence of Cathy Kinlock that she just clicked too many times on the system to generate printed letters and emails. The Tribunal finds that the claimant has used this innocuous act, with others, the letter that arrived with its envelope flap open and with the December telephone call, to construct an argument that there was a discriminatory agenda against her. That argument lacks credibility and fails. The Tribunal finds the claimant was looking for things to use to protect her own position, to remain employed and on SPPR. Whilst this was not a direct discrimination complaint the claimant alleged that Cathy Kinlock wanted to remove her from her post because she was disabled. The Tribunal has found no evidence of any agenda by Cathy Kinlock or anyone else to remove the claimant because she was disabled.

200. If the duplication had amounted to unfavourable treatment then it did it did not arise out of disability. The Tribunal accepts the evidence of Cathy Kinlock that she just clicked too many times and that generated duplicates of the emails and letter. This was an innocuous act and not an act of discrimination arising out of disability. The Tribunal found that it showed the level of deterioration in relationship that the claimant used receiving duplicate copies of correspondence to allege an act of discrimination. In its reasoning on harassment below the Tribunal comments on how unreasonable it was of the claimant to see it that way.

14k) On 17 January 2022, the Respondent rejected the Claimant's application to extend Sick Pay at Pension Rate.

201. Cathy Kinlock and Dave Keane together reapplied the criteria to the claimants case and Cathy Kinlock decided not to extend the SPPR. Cathy Kinlock wrote to the claimant to explain that SPPR would not be extended and the reason she gave was that the case had been referred to a decision maker for a decision on dismissal. This

is an exercise of discretion complaint and the Tribunal accepts the respondent's submission that it cannot be unfavourable treatment to not exercise a discretion in someone's favour. If the Tribunal is wrong about that then the decision does not arise out of disability but out of proper application of the criteria. If the Tribunal is wrong about that and the causative link is made then it was a proportionate means of achieving the legitimate aims:

- to take management decisions fairly and expeditiously and to use public resources effectively;

- to combat absenteeism, maintain effective levels of service and maximise staffing levels, meet the Respondent's operational objectives (i.e. ensure the Respondent can deliver key public services to the taxpayer); and protect scarce public resources.

Awarding SPPR would have been less discriminatory but would have failed to balance the needs of the claimant and respondent. The Tribunal accepts the respondent's submission that to have awarded SPPR to the claimant would not have targetted resources for those with a prospect of return within a reasonable time frame. This was a proportionate response.

14l) On 18 February 2022 the Respondent, in its interim decision, offered the Claimant the opportunity to remain in employment until October 2022 but on nil pay.

202. Mandy Beresford made this offer as an alternative to dismissal. The Tribunal finds it is not unfavourable treatment to offer an opportunity to remain in employment, in mitigation of the decision to dismiss. The Tribunal accepts the respondent's submission that offering an advantage to the claimant cannot in law amount to unfavourable treatment. The Tribunal accepted the evidence of Mandy Beresford that she took her decisions about dismissal and the offer to remain in employment short of dismissal based on the claimant's unsustainable absence. The Tribunal finds that the offer was a generous offer. It went beyond what would be consider reasonable given the information before Mandy Beresford.

It was a proportionate means of meeting the legitimate aims

- to take management decisions fairly and expeditiously and to use public resources effectively;

- to combat absenteeism, maintain effective levels of service and maximise staffing levels, meet the Respondent's operational objectives (i.e. ensure the Respondent can deliver key public services to the taxpayer); and protect scarce public resources.

- to maintain contact with employees on sickness absence, obtain and impart information, and provide support;

- award discretionary benefits fairly and consistently in accordance with the Respondent's established policy criteria/target and allocate relevant taxpayer-

funded resources to cases where there is (for example) a prospect of a return to work in a reasonable timeframe;

203. The claimant, in her complaint, conflated the two decisions – remain employed and discretion on SPPR. She rejected the suggestion of special leave without pay. What she wanted was to remain employed *and* on SPPR. For Mandy Beresford they were separate, sequential considerations and the Tribunal accepts her evidence that she had referred the decision back to the business to consider if they could sustain the absence. She had offered to retain the claimant in employment in mitigation of dismissal. That would have had its consequences for the respondent in carrying a vacant post but Mandy Beresford was prepared to do that to meet the claimant's need to remain employed. If the claimant had agreed to remain employed the respondent would then have considered what pay entitlement, if any, was appropriate. The claimant had exhausted her entitlement to sick pay and had SPPR from June 2021 to January 2022. The criteria for SPPR required a return in a reasonable time frame; Mandy Beresford at the claimant's request considered the SPPR position again and applying those criteria could not say that the likely return in October 2022 was a reasonable time frame. Mandy Beresford had to balance the needs of the claimant, to receive pay, and the respondent to manage public money and target resource. That response was itself proportionate to meeting the legitimate aim

- award discretionary benefits fairly and consistently in accordance with the Respondent's established policy criteria/target and allocate relevant taxpayer-funded resources to cases where there is (for example) a prospect of a return to work in a reasonable timeframe;

14m) On 18 February 2022 the Respondent told the Claimant that a flexi time deficit of 17 hours would be deducted from her final salary payment.

204. The Tribunal finds that the respondent did tell the claimant that it would recover deficit. It was not unfavourable treatment to seek to recover flexi time deficit. If it had been then it would not have arisen out of disability but out of a failure to make administrative adjustments to payroll at pace with attendance. If the Tribunal is wrong about that then it would have been a proportionate means of achieving the legitimate aims

- to take management decisions fairly and expeditiously and to use public resources effectively;

- to combat absenteeism, maintain effective levels of service and maximise staffing levels, meet the Respondent's operational objectives (i.e. ensure the Respondent can deliver key public services to the taxpayer); and protect scarce public resources.

In fact, the respondent did not recover the deficit. The claimant had been overpaid but the respondent, without undermining its legitimate aim, generously, wrote that off.

14n) On 22 February 2022 the Respondent declined the option of referring the Claimant to occupational health and paying six months' Sick Pay at Pension Rate in line with HR/EAS guidance and the OH report.

205. Dave Keane decided when consulted by Mandy Beresford that there was enough up to date information to reach a decision in February 2022. The report from OH was less than three months old. The claimant herself had told Mandy Beresford that nothing had changed for her return prognosis. The Tribunal accepts Mandy Beresford's evidence that by an email dated 18 February 2022 the claimant told her that she had seen the consultant that day and he had told her that there had been no progress in her condition since October 2021. There was no unfavourable treatment in declining to refer to OH again where there was up to date OH report and contemporaneous consultant opinion passed to Mandy Beresford by the claimant herself. There was also the other condition. The claimant's CRPS was causing the absence but she also had her gyny condition and had indicated that she may need a hysterectomy and had said that she would not consent to further referral to OH until after her gyny consultant appointment. If a failure to obtain further OH report was unfavourable then it did not arise out of disability but out of management assessment that they had the information they needed to progress to a decision. They would have made the same assessment for a non disabled person where there was a report within the last three months and up to date information from that person. If the complaint had succeeded this far then it would have failed on the defence. The respondent had considered the position and decided to rely on the claimant's own update. The decision not to obtain further OH advice was a proportionate means of meeting the legitimate aims

- to take management decisions fairly and expeditiously and to use public resources effectively;

- to combat absenteeism, maintain effective levels of service and maximise staffing levels, meet the Respondent's operational objectives (i.e. ensure the Respondent can deliver key public services to the taxpayer); and protect scarce public resources.

14o) On 22 February 2022 the Respondent failed to refer the Claimant to OH for a further OH report when recommended by OH and in line with HMRC Supporting Your Attendance policy.

206. This point has been dealt with above, the facts as the Tribunal has found them to be show that there was a report from OH dated November 2021 with no change in condition and contemporaneous update information provided by the claimant on 18 February 2021.

14q On 25 February 2022 the Respondent dismissed the Claimant.

207. The decision to dismiss was unfavourable treatment. It arose in consequence of the claimant's absence. Her absence was due to disability of CRPS. The dismissal therefore arose out of disability. The reasoning in the dismissal letter which refers to 20-25 calls a day is an unfortunate error. The Tribunal had regard to the evidence of

Mandy Beresford, and refers to its findings on unfair dismissal above. Mandy Beresford did not dismiss because the claimant could not take calls, this was a shorthand way of describing the impact on the business and it was an unfortunate error because (i) the claimant was entitled when losing her employment to have confidence that the person making the decision knew what she could and couldn't do particularly when (ii) she had a reasonable adjustments in place because of her ENT condition to say she did not do telephony work. The Tribunal records the oral evidence and apology from Mandy Beresford for this oversight. The Tribunal accepts the oral evidence of Mandy Beresford and of Dave Keane which was that the reality was if the claimant had been retained and able to return to work it would then have been an operational decision as to what work she did, the roles having changed in the years she had been off, and that the reasonable adjustment would then have been looked at again and, as appropriate at the time, non-telephony duties allocated. Dave Keane explained that there are 43 different task areas required to be performed in his section many of which require no telephony, as did Cathy Kinlock who described colleagues with hearing impairment or deafness or throat conditions for whom adjustments are made. The Tribunal finds that the reference to the telephony made no difference to the decision to dismiss made by Mandy Beresford and that her reasonable adjustment for telephony was not a factor in the decision making. The Tribunal accepts her oral evidence about impact, that whether telephony or adjusted duties, the claimant's absence impacted on service delivery. The operating factor for Ms Beresford was WHEN the claimant could return and only thereafter WHAT she would return to. This point is relevant to the Tribunal's reasoning on unfair dismissal and range of response above.

208. The decision to dismiss was a proportionate means of achieving the following legitimate aims:

- to take management decisions fairly and expeditiously and to use public resources effectively;

- combat absenteeism, maintain effective levels of service and maximise staffing levels, meet the Respondent's operational objectives (i.e. ensure the Respondent can deliver key public services to the taxpayer); and protect scarce public resources.

The respondent had considered less discriminatory steps. It had considered ill health retirement but the claimant had not wanted to pursue that. It had stopped short of dismissal and offered special leave. It had considered impact, Dave Keane had provided data, his targets for delivery had not changed and he had been one full time equivalent (though the claimant had her 6 weeks leave contract) down for almost two years.

209. The Tribunal finds that the claimant's position, that she should have been retained employed *and* on SPPR would not have been a proportionate response. Whilst it would have been less discriminatory than dismissal it was not a balancing of the respondent and claimant position. The legitimate aims above relating to the use of scarce public resources outweighed the claimant's desire to remain on SPPR. In the O'Brien case the claimant argued that her position was about to change, imminently. That was not the case here. *The claimant* was the person saying that she was going to be absent for a lot longer and that she needed to be paid during that period. There

was no prospect of a return in the foreseeable future and it would not have been proportionate to retain the claimant on pay because of the respondent's need to meet its legitimate aims of staffing and service delivery. The claimant has argued that by offering to retain her employment without pay the respondent cannot succeed in an argument that it is proportionate to dismiss. The Tribunal rejects that submission. It accepts Mandy Beresford's evidence. She was willing to offer retention, not indefinitely, because she had regard to the claimant's length of service. Whilst this would have still affected the respondent's ability to meet its needs of maximising staffing and service delivery it would be cost neutral. This would have been an imbalance of needs to the respondent's detriment that it was prepared to countenance for a short period in view of the claimant's length of service. It would leave open, for a little while, the possibility of a return. The claimant rejected this offer. Mandy Beresford was then asked by the claimant to consider retention with SPPR. This was not an imbalance that the respondent could countenance. It tipped the balance too far in the claimant's favour. The Tribunal rejects the claimant's argument that because the respondent had tried to be generous in not terminating the employment of a civil servant with long service, that would preclude it from relying on a defence in a different set of circumstances because is a matter for the respondent as to how it weighs its different legitimate aims against each other. On retention, it weighed the balance of carrying the vacant post as something it could tolerate to protect the employment of a long serving civil servant. On retention with SPPR, its legitimate aim of targeting scarce public resources and managing public money outweighed the claimant's demands for the exercise of a discretion (already granted to her from June 2021 to January 2022) in her favour. The different responses on retention (with or without SPPR) were each proportionate.

14r) On 25 April 2022 the Respondent upheld the decision to dismiss.

210. The decision at appeal was unfavourable treatment because it meant the claimant lost her employment and it arose in consequence of disability because the decision was based on absence and no prospect of return in a reasonable time frame. The Tribunal accepts the evidence of Ms Fearns that she took into account;

- Ordinarily HMRC would have moved to dismissal sooner for such a long period of absence, the claimant had been absent for over a year
- OH had confirmed, and the claimant agreed, there were no reasonable adjustments that could get the claimant back into work and achieving sustainable attendance at that time
- The claimant was saying she would not be back in the foreseeable future, not before November 2022 and possibly further if she needed a hysterectomy
- The impact on the team was that, even if the claimant did not do telephony work and work allocation was changed to support that, they were carrying a reduced FTE
- Lesser alternatives had been offered and rejected
- What the claimant wanted was to remain absent on SPPR.

211. The Tribunal finds that the appeal decision was a proportionate means of achieving each of the following legitimate aims.

- to take management decisions fairly and expeditiously and to use public resources effectively;

- award discretionary benefits fairly and consistently in accordance with the Respondent's established policy criteria/target and allocate relevant taxpayer-funded resources to cases where there is (for example) a prospect of a return to work in a reasonable timeframe;

- combat absenteeism, maintain effective levels of service and maximise staffing levels, meet the Respondent's operational objectives (i.e. ensure the Respondent can deliver key public services to the taxpayer); and protect scarce public resources.

212. Hazel Fearns had considered how should the needs of the claimant and the respondent be balanced. She felt that Mandy Beresford had balanced the needs of the service with the claimant's needs and the claimant's desire to remain employed on SPPR. She concluded that Mandy Beresford had reached a proportionate decision that the claimant's needs and desire could not be sustained given that there was no prospect of return to work in reasonable timeframe. Absence to November 2022 return, at the earliest, was not a reasonable time frame. The Tribunal accepts the respondent's submission that 7 months (from February to November 2022 was 9 months then at appeal 7 months) was too long for HMRC to have to wait in this case before it could expect any performance from the claimant.

Duty to make reasonable adjustments (sections 20 and 21 of the Equality Act 2010)

40 Was the Claimant disabled by stress/anxiety (see above)? Did the Respondent know, or could it reasonably have been expected to know that the Claimant was disabled by stress/anxiety? From what date?

213. The claimant withdrew from her position that stress/anxiety was itself a disability and argued instead that it exacerbated her CRPS and impeded recovery. In any event the Tribunal would not have found it necessary to determine disabled status in relation to stress and anxiety for the failure to reasonably adjust complaints because the claimant was disabled by reason of CRPS and all complaints fail for the reasons set out below which would have applied equally to stress and anxiety as a disability.

Adjustments PCP 1: "Reluctance to pay SPPR beyond 3 months"

206. This complaint was brought out of time and was not part of a course of conduct extending over a period of time as reasoned above. If it had not been out of time it would have failed for the reasons below.

41. The Claimant alleges the Respondent applied the following provision, criterion, or practice (PCP): the Respondent is reluctant to pay Sick Pay at Pension Rate beyond

three months. The Claimant says this was applied to her on 20 September 2021, 02 November 2021, and 17 January 2021.

41a Did the Respondent apply that PCP to the Claimant?

206. The Tribunal finds no such PCP was applied; there was no reluctance to pay SPPR quite the contrary, the claimant achieved the exercise of this discretionary benefit, the respondent showed proper application of criteria. Each decision maker had regard to medical advice and prospect of return in reasonable timeframe. The discretion was exercised in the claimant's favour from July to Sept 2021, against the claimant in September 2021 and on appeal in the claimant's favour between September 2021 and January 2022, then against the claimant in January 2022. The Tribunal accepts the respondent's submission that the exercise of a discretion in someone's favour is advantageous treatment to that person and could not amount to a failure to reasonably adjust. Even those exercising the discretion against the claimant, Cathy Kinlock in September and Cathy Kinlock and Dave Keane together in January 2022 were not reluctant to exercise it in her favour. Neither Cathy nor Dave were reluctant to exercise the discretion beyond three months. The Tribunal finds they properly applied the criteria. There was no prospect of return to work in a reasonable time frame.

207. The claimant did not plead that the decision of Mandy Beresford not to allow retained employment on SPPR as an alternative to dismissal was a failure to reasonably adjust. If she had, that later act would have brought the earlier acts into time but they would still have failed on their facts. There was no reluctance by Mandy Beresford who paused dismissal, made an offer for the claimant to stay employed, and looked again at the SPPR criteria. The Tribunal finds her application of criteria was reasonable. The Tribunal accepts the respondent's submission (referring to O Hanlon v HMRC) that it would not have been a reasonable step to adjust the exercise of a discretion to award SPPR to pay the claimant to stay off work. An adjustment is made so as to enable work. Whether paid or unpaid the claimant was saying she could not return before November 2022. The claimant was seeking something that went beyond a reasonable adjustment.

41b If so, did that PCP put the Claimant at a substantial disadvantage as a disabled person in comparison with persons who are not disabled? CRPS ? The Claimant says the disadvantage was that (i) her pay was reduced, and her health deteriorated as a result of the decision not to pay her SPPR.

208. The claimant is aggrieved that Cathy Kinlock rejected her application for SPPR in September 2021. The Tribunal finds that the rejection did not put the claimant at a substantial disadvantage in comparison with persons who were not disabled. There would be the same disadvantage to an absent but not disabled person who was declined the exercise of the discretion. The Tribunal accepts the evidence of Cathy Kinlock that she applied the criteria. The Tribunal had regard to the answer Cathy Kinlock gave when answering a question on this point under cross-examination. She said she would have applied the criteria in the same way for anyone who had been off so long that SPPR became relevant. She went on to say however that it would be difficult to think of a situation of a person who was off so long that they had exhausted their sick pay entitlement and needed SPPR, who was not disabled. This answer showed the Tribunal how thoughtful and careful Cathy Kinlock was in the exercise of

discretion. Irrespective of disability she would have treated applicants for SPPR the same in application of the criteria. There was no substantial disadvantage to the claimant in the exercise of SPPR discretion.

209. The complaint fails at this point. If the complaint had not failed the Tribunal would have had to consider whether the respondent took reasonable steps:

41d (i) to consider medical advice, EAS and OH advice when considering whether to exercise their discretion to pay SPPR. To treat the request for SPPR in a fair and even-handed manner.

210. The Tribunal finds that each of the determinations on SPPR was treated in a fair and even handed manner. Each decision maker took into account the OH advice. The Tribunal finds Cathy Kinlock properly applied the criteria. She had up to date advice from OH and from the claimant direct about prognosis and likely return to work. The fact that the decision was overturned on appeal does not mean that the exercise of the discretion against the claimant by Cathy was a failure to take a reasonable step.

41d (ii) Pay the Claimant Sick Pay at Pension Rate for the full 12 months.

211. If the complaint had got this far then the Tribunal would have found that a request to pay SPPR for twelve months, during which time the claimant would remain absent, was not a reasonable step given the likely return date. A reasonable adjustment is one which enables performance. The Tribunal accepts the submissions on the respondent on this point. It did not fail to reasonably adjust.

Adjustments (PCP 3): Referral for dismissal because of sickness absence

212. This complaint was brought into time by the later dismissal decision, together they were part of a course of conduct extending from referral to dismissal.

43 The Claimant says the Respondent applied the following provision, criterion, or practice: the Respondent refers employees for dismissal because of sickness absence. The Claimant says this was applied to her on 22 December 2021.

43a Did the Respondent apply that PCP to the Claimant?

213. Yes, this PCP existed and was applied to the claimant.

43b If so, did that PCP put the Claimant at a substantial disadvantage as a disabled person in comparison with persons who are not disabled? CRPS? The Claimant says the disadvantage was that: (i) the Claimant was unable to sustain the attendance levels required by her manager and was dismissed.

214. The Tribunal finds that there was substantial disadvantage to the claimant who could not maintain attendance at that time because of her CRPS but this would have been the same substantial disadvantage for someone non disabled and absent that long. Anyone who had been off sick for as long as the claimant would have been referred by Ms Kinlock. The complaint would have failed at this point if not sooner.

43c If so, did the Respondent know, or could it reasonably have been expected to know, of the disability (see above) and the disadvantage?

215. The respondent accepts that it knew the claimant was disabled by reason of CRPS from October 2021. If the Tribunal had reasoned on stress and anxiety as a disability it would have found that (if there had been disability) the respondent could not have known or reasonably been expected to know the stress and anxiety were a disability as at December 2021 or at all during employment. The Tribunal had regard to the communications between the parties at this time and whilst the claimant was raising stress and saying that the respondent, for example Cathy Kinlock not granting the SPPR in September, was making her ill, that would have been insufficient to alert the respondent to enquiry as to a separate disability. The Tribunal finds that Cathy Kinlock was vigilant in recording what the claimant said and considering its content during their fortnightly contact calls and later emails. The claimant was referred to OH and completed a stress risk assessment. In considering what the respondent ought reasonably to have known the Tribunal took into account the fact that this claimant often wrote in highly emotive terms about the impact management was having on her health. She speculated as to conditions she thought she might have eg fibromyalgia, rheumatoid arthritis, that she might lose her arm if it got cold and went black. The claimant was also someone who overstated for example when she said that using a laptop screen in tablet form would damage her health but that she could use a mobile phone screen. The Tribunal also notes that the claimant was selective about when she said the impact of use of technology took effect for example she was able to attend a Teams meeting for her grievance hearing but when she had been asked to attend Teams meetings to keep in touch during special leave she had said it would damage her health to attend Teams meetings. The Tribunal finds that in the context of a claimant who speculates about her health, mentions conditions that she had not been diagnosed with and overstates impact on health, and is selective about what she can and cannot do depending on context, the respondent was not alerted to enquiry and could not be said to have been in a position where it ought reasonably to have known that stress and anxiety were themselves a disability during the claimant's employment.

216. The respondent could not reasonably have been expected to know that there was a substantial disadvantage to the claimant compared to non-disabled people in being referred for dismissal after significant absence. The impact would have been the same, the potential loss of employment would create the same disadvantage to disabled and non-disabled people.

43d If so, did the Respondent take such steps as it would have been reasonable to take to avoid the disadvantage? The Claimant says the following adjustments would have been reasonable:

(i) Obtain, consider, and follow up-to-date medical and OH advice in relation to the Claimant's likelihood of returning to work before referring for dismissal.

217. The respondent took up to date OH advice. It did not get up to date specific medical advice from a doctor on likely return to work date. There is a gap in what Dr Redfern's letter says. He doesn't say exactly when the claimant might return to work. The content could have been read to the effect that the claimant could return immediately. He says she can *return before full recovery* and he says taking steps to end employment, in December 2021, would be premature but he doesn't say when

the claimant will return. Arguably the respondent could have taken the step of getting more up to date medical advice in December 2021 but the Tribunal finds that it did not fail to take a reasonable step in doing that because the claimant was saying (i) that she had to be 80% recovered before she could return and was only at 60% recovered and getting worse due to stress (that was not in Dr Redfern's letter nor in an OH report but came from the claimant direct) and therefore that she could not return before October 2022. Mr Redfern subsequently wrote (after the referral for dismissal) saying the claimant would be ready for work from October/November 2022. (iii) The claimant was indicating that she might need a hysterectomy and further absence beyond October/November 2022.

218. The claimant was asked at tribunal are you really arguing that there should have been more medical evidence because evidence may have said you could return sooner ? The claimant was very clear that no matter what the medical evidence had said, if it had been obtained before her dismissal, she would have said, as indeed she did at the time, that she could not have returned before November 2022. The respondent was entitled to rely on that assertion at the time so that an adjustment to avoid referral for incapability dismissal or to obtain a medical report would not have been a reasonable step in the face of such a long period of absence and a clear expression from the claimant that she would not return before November 2022.

Adjustments (PCP 4): Requiring employees to be managed by their line manager

44 The Claimant says the Respondent applied the following provision, criterion, or practice: the Respondent requires employees to be managed by their direct line manager (who they have made a complaint about). The Claimant says this was applied to her from 17 November 2021 to 27 May 2022.

219. The Tribunal finds there that was no PCP requiring all employees who have made a complaint about a manager to be manged by that person. Each complaint would have been looked at in context, as the claimant's was. The Tribunal finds that having looked at the issues the respondent, Shad Sheik, applied a practice in the claimant's case in that they did require the claimant to be managed by Cathy Kinlcok and might do that again. On this occasion, because there was a one-off decision and it is something the respondent might do again, it qualifies as a PCP. The Tribunal supports the claimant as a litigant in person to construe the PCP in that way so as to addresses the mischief she complains of which was having to be managed by Cathy Kinlock after complaining about her. The PCP was applied to the claimant by the letter from Shad Shaik to the claimant dated 17 November 2021. Shad Shaik had investigated and decided to leave Cathy in place as the claimant's manager for reasons he set out.

44b If so, did that PCP put the Claimant at a substantial disadvantage as a disabled person in comparison with persons who are not disabled? CRPS and/or stress and anxiety? The Claimant says the disadvantage was that:

(i) The Claimant's health deteriorated as a result of continuing to be managed by Cathy Kinlock in that it caused her stress and anxiety and it prolonged her recovery in relation to her CRPS.

220. There was no substantial disadvantage to the claimant in continuing to be managed by someone against whom she had complained compared to a non disabled person. The impact would have been the same. The letter sets out reasons why there were benefits to the claimant and respondent in having Cathy continue to manage the claimant. Mr Shaik said Cathy was experienced, supportive and well aware of the claimant's health conditions. He offered mediation.

221. The Tribunal rejects the assertion that the claimant's health deteriorated because of being managed by Cathy Kinlock. The claimant did not like the determination Cathy had made about SPPR and turned that dissatisfaction with a decision into a personal complaint. The Tribunal accepts Cathy Kinlock's evidence that the claimant "was aggressive and demanding and wanting me to do stuff when it was convenient to her…she was making unfounded and unjust allegations about me"

44c If so, did the Respondent know, or could it reasonably have been expected to know, of the disability (see above) and the disadvantage?

222. If the claimant had been disabled by stress and anxiety, which the Tribunal has not determined, then it would have found that the respondent could not have been expected to know that being managed by Cathy Kinlock would be a substantial disadvantage in the situation in which Shad Sheik had considered the position and set out why he thought there were advantages to the claimant being managed by Cathy as above.

44d If so, did the Respondent take such steps as it would have been reasonable to take to avoid the disadvantage? The Claimant says the following adjustments would have been reasonable:

(i) Move the Claimant to another line manager per her request.

223. The Tribunal finds that the respondent had good justification given the prolonged period of absence, detailed medical history, multiple conditions and timescales known to Cathy Kinlock, and how difficult it must have been to manage the claimant, for retaining Cathy Kinlock as the claimant's manager. It notes the unpleasantness from the claimant in her letter writing when she didn't get what she wanted and given the resilience and experience of Cathy Kinlock and her willingness to continue managing, finds that the respondent was reasonable to retain Cathy and, even if the complaint had not failed for lack of substantial disadvantage and lack of knowledge, it would not have been a reasonable adjustment to require someone else to manage the claimant.

Adjustments PCP 5: not responding to the Claimant's communications

45 The Claimant says the Respondent applied the following provision, criterion, or practice: the Respondent does not respond to or fails to respond to communications in a timely manner. The Claimant says this was applied to her on 12/11/21, 22/12/21, 6/1/22, 7/1/22, 3/2/22, 10/3/22, 30/4/22, 31/3/22, 25/5/22, 16/6/22, and 28/7/22.

224. There was no such PCP. The Tribunal finds that the respondent replied within a reasonable time given the content, number of people copied in, sensitivity around

allegations and care needed in response, requirement to consult on replies and take advice given threats made of legal action. If there had been such a PCP it would have been applied to disabled and non-disabled alike so that the complaint would have failed for lack of substantial disadvantage. The Tribunal records the evidence of Cathy Kinlock that she had consulted HR about the claimant's correspondences and been advised "not to be threatened by staff".

Adjustments PCP 6: Referring Employees for dismissal but only holding dismissal hearing once SPPR has ended

46 The Claimant says the Respondent applied the following provision, criterion, or practice: The Respondent refers employees for dismissal but only holds the dismissal hearing once SPPR has ended.

225. The claimant was referred for dismissal on 22 December 2021. The Dismissal hearing was held on 1 February 2022. The decision to dismiss was communicated by letter on 25 February 2022. There was no such policy in operation, it was a matter of coincidence in this case and might be different in other cases. Because it happened to the claimant and could happen again the Tribunal accepts that it was a PCP.

46a Did the Respondent apply that PCP to the Claimant?

220. The dismissal meeting was, by happenstance, scheduled for after expiry of the SPPR. The timing was contingent upon availability of people and time needed to get documents out.

46b If so, did that PCP put the Claimant at a substantial disadvantage as a disabled person in comparison with persons who are not disabled? CRPS and/or stress and anxiety. The Claimant says the disadvantage was that:

(i) The Claimant's health deteriorated as a result of the delay between being referred for dismissal and the dismissal hearing being held. The delay caused her stress and anxiety, which in turn prolonged her recovery from CRPS.

221. The claimant has not shown deterioration in her health nor that the reason was the delay. Elsewhere she was asked was she arguing that the hearing, which could have led to dismissal, should have happened sooner, and she said she was not. The claimant has not established substantial disadvantage. The Tribunal finds that the time that elapsed between referral and hearing, which it would not describe as delay, was beneficial to the claimant whose employment was prolonged.

(ii) The Claimant suffered financial loss as a result of the decision to dismiss being made after SPPR has ended as her notice pay was then based on her nil earnings.

222. The Tribunal accepts the respondent's position that her notice pay would in any event have been based on her contractual earnings and not the discretionary benefit of SPPR.

46d(i) Deal with the dismissal procedure in a timely manner

223. The claimant was referred on 22 December, had documents sent to her and her representative in January, and a hearing on 1 February 2022. This was handled in a timely manner. The claimant was asked was she really arguing that it would have been reasonable to adjust to dismiss her sooner and she said that was not her case. The complaint fails for the reasons above.

Adjustments PCP 8: Dealing with dismissals and appeals within the employee's own business unit

48 The Claimant says the Respondent applied the following provision, criterion, or practice: the Respondent deals with dismissal and appeals within the employee's own business unit against HMRC policy. The Claimant says this was applied to her from 22 December 2021 to 26 April 2022.

48a Did the Respondent apply that PCP to the Claimant?

224. Yes, there was such a PCP. The claimant was dismissed by Mandy Beresford who sat within B&C business unit and the appeal was heard by Hazel Fearns who described herself as sitting in a different deputy director group outside of operational B&C functions. The Tribunal accepts the evidence of the respondent that a business unit in HMRC is not a small team and that both decision makers were removed from the claimant in terms of the organisational structure and had not worked with her.

48b Did it put the claimant to a substantial disadvantage that

(i) The Claimant's health deteriorated during the dismissal process.

48c If so, did the Respondent know, or could it reasonably have been expected to know, of the disability and the disadvantage?

48d If so, did the Respondent take such steps as it would have been reasonable to take to avoid the disadvantage? The Claimant says the following adjustments would have been reasonable:

225. The Tribunal finds that the claimant had no substantial disadvantage compared to non disabled people. Anyone facing medical incapabililty dismissal and appeal would have faced the same stress and anxiety at the loss of employment. The Tribunal notes that at the heart of this complaint about the business unit for the claimant was an allegation of bias, that Mandy Beresford and Dave Keane were friends. The Tribunal heard evidence on this point and finds that there was no bias. The decision making within the business unit was not the cause of stress to the claimant; it was the claimant's imminent dismissal that was causing stress whether that was being decided within or without the business unit so that the PCP did not cause any deterioration in the claimant's health.

226. Whilst there was potential for substantial disadvantage in being dismissed in a way that was, allegedly, in breach of procedure, this would have been the same for a disabled or non disabled person. The Tribunal finds the claimant cannot show that

having Mandy Beresford at dismissal and Hazel Fearns at appeal, high up and across the organisation chart from her so that they have not made decisions in the claimant's case before, was disadvantageous to her. It accepts the respondent's evidence that it allocated people who had had no previous dealings with the case so that there was no disadvantage. The Tribunal accepts the respondent's submission that it could not reasonably have been expected to know that appointing either Mandy Beresford or Hazel Fearns would put the claimant at a substantial disadvantage.

226. The respondent knew of CRPS and ENT but could not reasonably have been expected to know, for reasons set out above, if the claimant had relied on it, that stress and anxiety was a disability (and the tribunal has not determined whether it was or not) at this point.

The claimant says there ought to have been a reasonable step of

48d (i) Hold the dismissal and appeal process outside of the claimant's own B&C Operational Business Unit in line with policy.

227. The Tribunal accepts the respondent's position that it was usual practice to appoint an appropriate independent person from whichever unit depending on availability even though the procedure said it should be outside your own business unit. It would not have been a reasonable step to deviate from usual practice in medical incapability hearings and appeals in the claimant's case. This was a large organisation with sufficient human resource for the claimant to have had an independent and unbiased hearing within her own business unit. Neither Mandy Beresford nor Hazel Fearns had been involved in the claimant's case before.

PCP 9 The Claimant says the Respondent applied the following provision, criterion, or practice: the Respondent requires employees to maintain an acceptable level of attendance as determined by their manager. The Claimant says this was applied to her on 25 February 2022.

49a Did the Respondent apply that PCP to the Claimant?

228. Yes, this was a PCP and was applied.

49b if so, did that PCP put the Claimant at a substantial disadvantage as a disabled person in comparison with persons who are not disabled? CRPS? The Claimant says the disadvantage was that:

(i) The Claimant was unable to sustain the attendance levels required by her manager and was dismissed.

229. The Tribunal finds that the claimant was substantially disadvantaged as a disabled person as she was less likely to be able to maintain and sustain an acceptable attendance level than a non-disabled person.

49c If so, did the Respondent know, or could it reasonably have been expected to know, of the disability (see above) and the disadvantage?

230. The respondent has conceded knowledge of disability from October 2021. It also knew the actual absence data for the claimant and could reasonably have been expected to know from October 2021 that someone disabled would be at a substantial disadvantage as it would be harder for them to maintain required attendance levels.

49d If so, did the Respondent take such steps as it would have been reasonable to take to avoid the disadvantage? The Claimant says the following adjustments would have been reasonable:

(i) adjust the attendance levels to discount disability related absences

231. The respondent had shown support for the claimant. She had been absent from November 2020 for health reasons. It had not, prior to December 2021 moved to a referral for dismissal. To discount disability related absence in its entirety would mean that all disabled absent people can remain employed indefinitely. That would not be reasonable. The claimant had no prospect of a return to work in a reasonable time frame. It would not have been a reasonable adjustment to disregard, at the date of dismissal, 15 months absence in a case with a context of no prospect of return for a further 9 months (February – November 2022).

(ii) not dismiss the Claimant.

232. The respondent considered adjustment to dismissal and made the reasonable and generous offer of retaining the claimant as employed on special leave. An adjustment was offered and refused. The claimant refused this offer because it did not come with a concurrent offer of SPPR. The respondent did not fail to take any reasonable steps. The complaint fails.

Adjustments PCP 10: Requiring employees to fulfil 20-25 calls per day (25 February 2022)

50 The Claimant says the Respondent applied the following provision, criterion, or practice: the Respondent requires employees to fulfil 20-25 calls per day. The Claimant says this was applied to her on 25 February 2022.

233. This PCP was not applied to the claimant. Mandy Beresford made an error in her letter. It made no material difference to the evaluation of the impact of absence of the claimant on service delivery. The Tribunal accepts the oral evidence of Mandy Berseford and Dave Keane and Cathy Kinlock that if the claimant had returned to work (in November 2022 or at any time) there would then have been a discussion about her duties and adjustment would have been made. Her manager knew of her ENT condition. There had been an adjustment in place before her sickness absence and the Tribunal accepts that it would have been reinstated on return. Dave Keane was entirely credible when he said “we would have slotted her in”. Cathy Kinlock was entirely credible when she described adjustments for people with hearing impairment and throat conditions and the Tribunal had regard to the adjustments that had been in place for the claimant including the respondent awarding her special leave and offering to provide her equipment at home. There was a history of the respondent supporting the claimant to work. For those reasons it was not credible to suggest that the taking calls point played any part in the decision to dismiss notwithstanding the error in Mandy Beresford’s letter. The complaint fails.

Harassment related to disability (Equality Act 2010 section 26)

Are the following allegations true?
51c On 22 and 24 December 2021, Cathy Kinlock informed the Claimant four times that she was being referred for dismissal (twice by email and twice by letter.

234. This factual allegation was also addressed at 14j above. It was out of time. If it had not been then it would have failed as the Tribunal accepts the oral evidence of Cathy Kinlock that she made a mistake, she clicked twice, on the system seeking to generate a letter by post. This was not conduct with the purpose of intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Nor did that conduct have had the effect of creating such an environment and if it had then the Tribunal finds that it would not have been reasonable for it to have had that effect.

51d On 22 December 2021, Cathy Kinlock recommended the Claimant for dismissal and referred her to a decision maker.

235. This was unwanted conduct because it could have resulted in loss of employment but the Tribunal finds that it was not related to a protected characteristic. Cathy Kinlock would have referred anyone with that length of absence and that prognosis whether disabled or not. The Tribunal has, above, commented on the care that Cathy Kinlock took in answering a question on this point when she said that it would be hard to think of scenario where someone could not come back for that long and wasn't disabled. The referral did not have the purpose of creating a harassment environment for the claimant and it would not be reasonable for it to have that effect. It is not harassment for a respondent to manage attendance and where attendance cannot be maintained to consider incapability dismissal. It is not reasonable to think that the effect of attendance management such as in this case creates an environment of harassment.

51f On 22 December 2021 the Respondent delayed in responding to the Claimant's queries, in that Cathy Kinlock failed to provide all documents sent to the Decision Maker as per dismissal guidance. This was chased on 6 January 2022 with the information not being provided until 29 January 2022.

237. This complaint was also out of time. If it had not been the Tribunal would have found that it failed on its facts. The information was provided to the claimant's representative on 11 January 2022. The delay in not accessing it to 29 January was because of the claimant's decision not to open her laptop and to require the attachments to be sent to her phone. Cathy Kinlock had had annual leave in early January. Cathy Kinlock needed to check what had already been sent. Cathy then had to arrange for documents to be reformatted so that they could be opened on the claimant's phone and Cathy had to check that it was appropriate to send the documents to an address other than the secure email address at HMRC. This was not unwanted conduct related to a protected characteristic. It was Cathy trying her best to meet the requests of the claimant. The delay was not occasioned with the purpose of creating a harassment environment for the claimant. The Tribunal rejects the claimant's assertion that it had that effect on her. It was not reasonable for it to have had that effect or to perceive this delay as harassment.

51g On 18 February 2022, Mandy Beresford issued an interim decision not to dismiss if the Claimant agreed to go on unpaid special leave forcing her out.

238. Mandy Beresford made this offer. The Tribunal finds that offering to preserve employment was not unwanted conduct. It was beneficial to the claimant to avoid dismissal. The element that was unwanted was the failure to exercise discretion to award SPPR during the special leave. Neither the offer of preserving employment on special leave nor the exercise of the discretion were done with the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The purpose of the decision, Mandy Beresford's motivation, was to seek to avoid dismissal. She had no discriminatory purpose. The Tribunal found her to have been careful in the exercise of her discretion, credible as to her reasons for offering special leave because she was reluctant to terminate employment for a long serving civil servant and that this was corroborated by her conduct at the time in consulting with the business unit through Dave Keane to try and find a way to preserve employment and to consider whether or not further OH advice was needed.

239. No reasonable person would have found an offer to sustain employment, in a situation of nearly two years absence, full pay and SPPR having been awarded for 6 months where there was a prognosis of a further nine months absence, a violation of their dignity, or creating a hostile, intimidating or degrading or offensive environment for them. This generous offer did not amount to harassment.

51j On 25 April 2022, Dave Keane, Cathy Kinlock or Hazel Ferns divulged the appeal decision to other staff members.

240. The Tribunal found that the claimant adduced no evidence whatsoever that the respondent leaked the decision on appeal. This was an allegation wholly without substance. It was based on a Facebook messenger message which itself says that it is only a rumour. It was not a reasonable or logical leap having read that message to assume that there was a management leak. Further, the Tribunal accepts the evidence of Hazel Fearns that she did not leak the information.

Victimisation (Equality Act 2010 section 27)

Did the claimant do a protected act as follows:

56a Inform Cathy Kinlock on 20 September 2021 that she believed the decision not to extend the SPPR was disability discrimination.

241. The Tribunal finds that this email did not amount to a protected act within Section 27. It complains about the failure to exercise discretion to extend SPPR. It does not mention disability, discrimination, the Equality Act or accuse Cathy of being motivated by the claimant's health. It does not meet the criteria in the statute of doing any other thing for the purposes of or in connection with the Equality Act. It does not make an allegation whether or not express, and the Tribunal accepts that the claimant need not have used the language of the statute, that Cathy Kinlock had contravened the Act. The allegation was that the discretion had not been exercised in the claimant's favour because it was based on an old OH report.

56b The Claimant submitted a grievance to the Respondent on 13 December 2021 alleging disability discrimination.

If so, has the Claimant proven facts from which the Tribunal could conclude that it was *because* the claimant did a protected act or because the Respondent believed the claimant had done, or might do, a protected act?

If so, has the Respondent shown that there was no contravention of section 27?

242. The Claimant submitted a grievance to the Respondent on 13 December 2021. The height of the allegation in that grievance was that

"Cathy has a duty of care for me as a manager and she failed to provide this when making her decision. She failed to supply the correct information to EAS and she failed to follow their advice on the OH referral on my arm"

"*I believe Cathy's actions to be deliberate so she could decline my SPPR request to try and force me back to work before I'm deemed fit to do so."*

243. Again, the complaint is about the failure to exercise discretion to extend SPPR. It does not mention disability, discrimination, the Equality Act. It does say that Cathy Kinlock was motivated to get the claimant back to work. The Tribunal considers that is not enough to amount to protected act. It does not say, either expressly or impliedly, that the actions are because of a protected characteristic, just that the claimant thinks Cathy wants to get her, as a person off sick, back to work. That assertion is not enough. It is not invoking the protection due to disabled people. It does not meet the criteria in the statute of doing any other thing for the purposes of or in connection with the Equality Act. It does not make an allegation whether or not express, and the Tribunal accepts that the claimant need not have used the language of the statute, that Cathy had contravened the Act. The allegation was that the discretion had not been exercised in the claimant's favour. The claimant was saying, you have failed me in not extending my SPPR and you have done that because you have relied on the wrong information.

244. The victimisation complaint must fail at this point as the claimant, on her case as it was drafted, has not done a protected act. If the claimant had done a protected act then the Tribunal would have considered whether the factual allegations relied on happened and amounted to detriments. The Tribunal sets out below what it would have found, just as it has done for the complaints above so that the claimant can see why her complaints could not have succeeded.

Did the Respondent do the following things:

57a On 30 September 2021 Cathy Kinlock, Shad Sheik, Dave Keane, and Rachel Moran informed the Claimant she had no right of appeal against the decision not to extend Sick Pay at Pension Rate (30 September 2021).

245. This detriment would have been out of time. This was an innocuous act, not related to or materially influenced by the protected act (if there had been one). The managers rightly informed the claimant that there was no right of appeal against the exercise of the SPPR discretion. It was only after this was escalated that the

respondent reviewed the situation and granted / created a right to appeal. The Tribunal would have found there was no detriment to properly interpret policy and practice as it was at that time and to escalate and then to create a new right of appeal for the claimant.

57b On 11, 12 and 17 November 2021, Cathy Kinlock, Shad Sheik, Dave Keane, and Rachel Moran refused to apologise for incorrectly informing the Claimant she had no right of appeal and maintaining their position.

246. If there had been a protected act then this detriment would have been out of time up to 14 February 2022, but thereafter, as it was a failure that persisted to dismissal and appeal, in time. It was an innocuous act, not related to or materially influenced by the protected act (if there had been one). The decision makers had nothing to apologise for. The information given to the claimant had been correct at the time it was given. The case identified for the respondent an oversight, and they corrected it by allowing the claimant an appeal. There was no detriment in them refusing to apologise.

57c On 13 January 2022, the Respondent rejected the Claimant's grievance.

247. This detriment was out of time. If it had been in time then rejecting a grievance would have been found to be a detriment to the claimant. Detriment is given its ordinary meaning in the sense of something not favourable to the claimant. The Tribunal would have had to go on to consider whether or not it was done *because* of or materially influenced by the protected act. The Tribunal accepts the evidence in Julian Monk's witness statement and grievance outcome letter that he found that Cathy had left information out of a referral to HR/EAS but this was not done by design or in order to manipulate. He noted that the claimant had had her appeal and achieved SPPR and he made two recommendations that related to EAS and OH having all of a person's conditions listed in a referral going forward. The Tribunal would have found that the decision on the grievance was not materially influenced by any (there was none) protected act. Julian Monk had consulted Cathy Kinlock and met with the claimant. He found partially in her favour. He was not motivated by the protected act(s).

57d Between 6 January 2022 and 29 January 2022, Cathy Kinlock delayed in providing the information requested for the dismissal hearing.

248. This detriment would have been out of time. If in time it would have failed on its facts for the reasons set out above. The delay was not because of or materially influenced by a protected act. There was a period of absence for Cathy Kinlock then the respondent worked to provide documents in a format the claimant was willing to access. Information had been provided, as set out in the facts above, to the claimant's representative. There was no detriment. If there had been it was not because of a protected act.

249. The victimisation complaint fails for the reasons set out.

Unauthorised deductions

250. This complaint in relation to any arrears, and any holiday pay, was withdrawn in its entirety and recorded in the judgment as dismissed.

Conclusion

252. The claimant was a civil servant for 27 years. Julian Monk who had worked with her described her in his witness statement as being brilliant at her job. None of the respondent witnesses raised any concerns about her performance. The respondent had made reasonable adjustment for her ENT condition and if and when she had been able to return to work would have done so again.

253. Cathy Kinlock showed compassionate professionalism in her dealings with the claimant throughout and was gentle and kind in her responses at Tribunal even in the face of wholly unsubstantiated personalised allegations that the claimant had made about her. The respondent's staff remained courteous and kind to the claimant who was in her correspondences during employment often rude, demanding and unreasonable.

254. The claimant was fairly dismissed when, after 15 months absence on sick leave and with no prospect of return for a further 9 months, the respondent decided to dismiss for incapability. She was not discriminated against because of disability. The respondent supported her absence for a long time and she did not accept the generous offer to remain employed and then go back to work in around October or November 2022 or as soon thereafter as she would have been able.

Employment Judge Aspinall

Date: 13 June 2024

REASONS SENT TO THE PARTIES ON

28 June 2024

FOR EMPLOYMENT TRIBUNALS