EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Russell**

Respondent: **Student Loans Company Limited**

HELD at Teesside Justice Centre

ON: 26 to 29 February and 1 March 2024, 4 and 5 March 2024 (in chambers) and 27 March 2024

BEFORE: Employment Judge Aspden
Members: C E Hunter
E Wiles

REPRESENTATION:

Claimant: **In person**
Respondent: **Miss M Jenkins**

JUDGMENT having been sent to the parties on 29 April 2024 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

Claims and Issues

1. By her claim form Ms Russell brought complaints that:

   1.1. During her employment, the respondent contravened the Equality Act 2010 by subjecting her to harassment related to age and direct age discrimination and harassment related to sex and direct sex discrimination.

   1.2. The respondent constructively dismissed her and the constructive dismissal was:

1.2.1. unfair, contrary to the Employment Rights Act 1996;

1.2.2. in breach of contract (ie a wrongful dismissal); and

1.2.3. an act of age and sex discrimination contrary to the Equality Act 2010.

2. The complaints being made (and the factual allegations on which they were based) were discussed at two preliminary hearings before Employment Judge Sweeney.

3. At the first hearing before EJ Sweeney, it was agreed that, in alleging that she was constructively dismissed, the claimant's case is that the respondent did the following things which, individually or cumulatively, amounted to a fundamental breach of a breach of the implied term of mutual trust and confidence in her contract of employment and in response to which she resigned.

(a) Angela Gibb did not respond reassuringly when the Claimant told her that she was worried about being managed out of her job.

(b) The Claimant was advised by Angela Gibb that she needed to submit a doctor's sick-note if she was absent for one day because of menopause.

(c) The Claimant was forced down a formal grievance route regarding the things that she raised informally on 5 June 2022 in an email to Nina Farmer and Angela Gibb.

(d) The Claimant had asked not to be line managed by Angela Gibb but was told by Nina Farmer and Laura Curtis or about 21 June 2022 at the end of an informal investigation into the Claimant's complaints that she was to be managed by her.

(e) Whilst absent on sick leave, in documents obtained through a SAR on or about 14 July 2022, the Claimant saw an email from Angela Gibb that stated 'Judith went out, got drunk and forgot to take HRT'.

(f) The Claimant was told, without good reason, to report to Nina Farmer daily at the beginning and end of her working day. This required her to log into Teams and send a message to say she had logged on and then to send a message at the end of the day to say she was logging out.

(g) Two days after her return to work from sick leave on 24 October 2022, the Claimant had a return-to-work meeting with Angela McCafferty and Nina Farmer. Following the meeting, on the same day (26 October 2022) the Claimant queried with Angela McCafferty why she had to log in and out and whether she was the only one required to do this. Mrs McCafferty emailed a hostile response to the Claimant that day to say that she was required to do so and that failure to follow a management instruction would be treated as a disciplinary matter.

(h) For a period of two months from her return to work from sick leave on 24 October 2022, the Claimant was given **no** work to do.

(i) Following Angela Gibb ceasing to be the Claimant's line manager the Respondent required the Claimant to report to Nina Farmer about whom she had complained for a period of about a month upon her return to work from sick leave on 24 October 2022.

(j) In about the beginning of February 2023, the Claimant told Joanne Dixon, out of respect, that she had received a provisional offer of employment with the Department of Education. However, she said that she was unsure whether to accept it or not as it was a daunting prospect to leave a company she had been with for 14 ½ years. Thereafter Joanne Dixon asked the Claimant when she was leaving on 27 February 2023 and repeated the question in writing between that date and 7 March 2023).

4. In the course of the hearing before us, the claimant said she no longer relies on the allegation referred to at paragraph (d) in that list.

5. At the second of the two preliminary hearings that took place before EJ Sweeney, the claimant was represented by a barrister. At that hearing the parties agreed that the claimant's case is that the respondent did the following things during her employment that contravened the Equality Act 2010.

(a) Angela Gibb refused to let the Claimant work from her personal office on or about 26 January 2022.

The claimant's case is that this was direct sex discrimination and direct age discrimination.

In her claim of direct sex discrimination the claimant compares herself to Mark Cassidy and Joseph McGourlay and a hypothetical comparator.

In her claim of direct age discrimination the claimant compares herself to Mark Cassidy, Joseph McGourlay and Sarah Allen and a hypothetical comparator.

(b) Angela Gibb refused to allow or secure an Occupational Health Report for the Claimant on or about 8 February 2022.

The claimant's case is that this was direct sex discrimination.

The claimant compares herself to David McPhee and/or a hypothetical comparator.

(c) Angela Gibb intrusively questioned the Claimant about her daily routines, weekend activities, social hours, social behaviours, exercise regime and whether she would still need such flexible working if she had HRT during a Teams appointment on 8 March 2022.

The claimant's case is that this was harassment related to sex or direct sex discrimination, and harassment related to age or direct age discrimination.

In her claim of direct sex discrimination the claimant compares herself to Ian McGee and/or Declan Franklin and/or a hypothetical comparator.

In her claim of direct age discrimination the claimant compares herself to Ian McGee, Morgan Kinloch and Declan Franklin and/or a hypothetical comparator.

(d) Angela Gibb granted the Claimant a flexible working request on or about 25 March 2022 but, in so doing, imposed unreasonable terms, namely:

(i) not being allowed to see her grandchild on the half day off;

(ii) being required to rest and not to exercise on the half day off;

(iii) removing any flexibility and insisting on a hard start and finish time on working days.

The claimant's case is that this was harassment related to sex or direct sex discrimination, and harassment related to age or direct age discrimination.

In her claim of direct sex discrimination the claimant compares herself to Ian McGee and/or Declan Franklin and/or a hypothetical comparator.

In her claim of direct age discrimination the claimant compares herself to Ian McGee, Morgan Kinloch and Declan Franklin and/or a hypothetical comparator.

(e) Angela Gibb further refused to provide or secure an Occupational Health Report on or about 23 May 2022.

The claimant's case is that this was direct sex discrimination.

The claimant compares herself to David McPhee and/or a hypothetical comparator.

(f) The respondent maintained the grievance process in respect of the Claimant's informal concerns and provided outcomes that were pre-determined. The informal outcome was given orally by Nina Farmer and Laura Curtis on 14 June 2022 whilst the formal grievance was provided in writing on 24 August 2022.

The claimant's case was that this was harassment related to sex or direct sex discrimination. However, the claimant withdrew this complaint during the course of the final hearing.

(g) The respondent required the Claimant to log in and log out on a daily basis from 24 October 2022.

The claimant's case is that this was harassment related to sex or direct sex discrimination. In her claim of direct sex discrimination the Claimant compares herself to a hypothetical comparator.

(h) The respondent failed to answer the Claimant's questions when she enquired about the reason for being required to log in and log out each day and whether she was the only person to whom the requirement was being applied and instead Angela McCafferty threatened the Claimant with disciplinary action by email on 26 October 2022 if she failed to follow a reasonable management instruction.

The claimant's case is that this was harassment related to sex or direct sex discrimination, and harassment related to age or direct age discrimination.

In her claims of direct discrimination the claimant compares herself to a hypothetical comparator.

(i) The respondent failed to provide the Claimant with any material work from 24 October 2022 until about the end of January and thereafter only provided the Claimant with minimal work until the end of the Claimant's employment.

The claimant's case is that this was harassment related to sex or direct sex discrimination, and harassment related to age or direct age discrimination.

In her claim of direct sex discrimination the claimant compares herself to Ian McGee and Kevin Nolan and/or a hypothetical comparator.

In her claim of direct age discrimination the claimant compares herself to Olivia Archer, Joanne Dixon, David McPhee and Kevin Nolan and/or a hypothetical comparator.

(j) The respondent constructively dismissed the Claimant as alleged in paragraphs 3 above. The Claimant compares herself to a hypothetical comparator.

The interplay between the complaints of discrimination and constructive dismissal were discussed at the preliminary hearing. The claimant's representative, Mr Downey, confirmed that only some of the things said to have caused or entitled the claimant to resign are said to be discriminatory acts and not all of the discriminatory acts (or acts of harassment) are relied on as having caused or entitled the claimant to resign. The discriminatory acts relied on as having caused or entitled the claimant to resign are those referred to in subparagraphs (g) (h) (i) of this paragraph 5.

6. Following that hearing Mr Downey sent a revised List of Issues to the Tribunal setting out the issues that the Tribunal may need to decide to determine the complaints. That List of Issues was annexed to EJ Sweeney's Orders and is not reproduced here.

Legal framework

Unfair dismissal

Dismissal

7. A claim of unfair dismissal cannot succeed unless there has been a dismissal as defined by section 95 of the Employment Rights Act 1996. It is for the claimant to prove, on the balance of probabilities (ie that it is more likely than not), that she has been dismissed within the meaning of that provision.

8. In this case, the claimant claims she was dismissed within the meaning of section 95(1)(c), which provides that termination of a contract of employment by the

employee constitutes a dismissal if she was entitled to so terminate because of the employer's conduct. In colloquial terms, the claimant says she was constructively dismissed.

9. For a claimant to establish that there has been a constructive dismissal, she must prove that:

   (a) there was a breach of contract by the employer;

   (b) the breach was 'fundamental' or 'repudiatory' i.e. sufficiently serious to justify the employee resigning;

   (c) she resigned in response to the breach and not for some other unconnected reason; and

   (d) she had not already affirmed the contract before electing to leave.

Repudiatory breach of contract

10. Its established law that every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or serious damage the relationship of confidence and trust between employer and employee: Woods v W M Car Services (Peterborough) Ltd [1981] ICR 666, EAT; Lewis v Motorworld Garages Ltd [1986] ICR 157, CA; Mahmud v Bank of Credit and Commerce International SA (often cited as Malik v BCCI) [1997] ICR 606, HL.

11. There is a duty as part of the implied term of trust and confidence on employers 'reasonably and promptly [to] afford a reasonable opportunity to their employees to obtain redress of any grievance they may have': W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516.

12. The test of whether there has been a breach of implied term of trust and confidence is not simply one of reasonableness, nor whether the employer's actions fell outside the range of reasonable actions open to a reasonable employer: Buckland v Bournemouth University [2010] IRLR 445, CA.

13. Case-law shows that the conduct needs to be repudiatory in nature in order for there to be a breach of the implied term of trust and confidence (see Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT). This was emphasised by the Court of Appeal in the case of Tullett Prebon Plc & ors v BGC Brokers & ors [2011] EWCA Civ 131; [2011] IRLR 420. There, the Court of Appeal cited the case of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 and stressed that the question is whether, looking at all the circumstances objectively, from the perspective of the reasonable person in the position of the innocent party, the conduct amounts to the employer abandoning and altogether refusing to perform the contract.' The High Court in the Tullett case held (in a judgment subsequently upheld by the Court of Appeal) that 'conduct which is mildly or moderately objectionable will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough'; Tullett Prebon v BGC [2010] IRLR 648, QB.

14. When assessing whether conduct was likely to destroy or seriously damage the relationship of trust and confidence, it is immaterial that the employer did not in fact intend its conduct to have that effect: Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT. Similarly, there will be no breach of the implied term simply because the

employee subjectively feels that such a breach has occurred no matter how genuinely this view is held (Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA). The question is whether, viewed objectively, the conduct is calculated or likely to destroy or seriously damage the relationship of trust and confidence. The employee's subjective response may, however, be of some evidential value in assessing the gravity of the employer's conduct (see the Tullett Prebon case above in the High Court).

15. The duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually would not constitute a breach of the term (United Bank Ltd v Akhtar [1989] IRLR 507). In Lewis v Motorworld Garages Ltd [1986] ICR 157, CA, Glidewell LJ said: '… the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?'

16. In Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] IRLR 35, CA the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series, the cumulative effect of which was to amount to the breach. Those acts need not all be of the same character but the 'last straw' must contribute something to that breach. Viewed in isolation, it need not be unreasonable or blameworthy conduct but the Court of Appeal noted in Omilaju that will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfies the final straw test.

Acceptance of repudiation

17. An employee will be regarded as having accepted the employer's repudiation only if his or her resignation has been caused by the breach of contract in question. Sometimes an employee has more than one reason for leaving a job and in such cases the question is whether the breach of contract played a part in the employee's decision to leave ie was one of the factors relied upon: Nottingham County Council v Meikle [2005] ICR 1.

Affirmation

18. It is a general principle of common law that even if a party has committed a repudiatory breach of contract, the innocent party will lose the right to accept the breach and treat herself as discharged from the contract if she has elected to affirm the contract. In light of our conclusions on the breach of contract issue as set out below it is unnecessary to say any more about this matter.

Fairness of dismissal

19. If the Tribunal finds a claimant has been dismissed, the next issue to consider is whether the dismissal was fair. In a case of constructive dismissal that entails considering the reason for the treatment that led the employee to resign, whether there was a potentially fair reason for that treatment and, if so, whether the dismissal was, in all the circumstances, reasonable or unreasonable, having regard to that reason. In light of our conclusions on the dismissal issue as set out below it is unnecessary to say any more about this matter.

Wrongful dismissal

20. A wrongful dismissal occurs when an employer terminates an employee's contract of employment without giving due notice. A 'constructive dismissal' as described above will constitute a dismissal for these purposes.

Equality Act

21. It is unlawful for an employer to discriminate against an employee as to their terms of employment; in the way the employer affords them access, or by not affording them access, to opportunities for transfer or training or for receiving any other benefit, facility or service; by dismissing them or by subjecting them to any other detriment: section 39(2) and (4) Equality Act 2010.

22. A 'dismissal' includes a constructive dismissal as described above.

23. It is also unlawful for an employer to harass an employee: Equality Act 2010 section 40.

24. For these purposes, section 109 of the Equality Act 2010 provides that the acts of the employer's other employees are treated as acts of the employer provided they are done in the course of employment. Similarly, an employer is responsible for acts that are done for them, with their authority, by an agent. This is the case even if the employer neither knows nor approves of the acts in question.

Direct discrimination

25. Section 13 of the Equality Act 2010 provides that it is direct discrimination to treat an employee less favourably because of a protected characteristic than the employer treats or would treat others.

26. The protected characteristics include sex and age.

27. In determining whether there is direct discrimination it is necessary to compare like with like. This is provided for by section 23 of the Act, which says that in a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

28. If an employer treats an employee less favourably because of age, that treatment will not be direct discrimination if the employer can show the treatment was a proportionate means of achieving a legitimate aim. There is no scope to justify direct sex discrimination in this way.

29. For the purposes of section 39, a detriment exists if a reasonable worker (in the position of the claimant) would or might take the view that the treatment accorded to them had, in all the circumstances, been to their detriment: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522G, the tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. An alleged victim cannot establish 'detriment' merely by showing that they had suffered mental distress; before they could succeed it would have to be objectively reasonable in all the circumstances: St Helen's Metropolitan Borough Council v Derbyshire [2007] IRLR 540, [2007] UKHL 16.

30. For a claim of direct discrimination to be made out, the conduct complained of must be because of the protected characteristic. The protected characteristic need not be the only reason for the detrimental treatment, provided it had a material influence on the outcome.

31. There are some forms of direct discrimination in which the discrimination is inherent in the treatment. However, in the majority of cases the employment tribunal must consider the mental processes of a decision-maker or decision-makers: Nagarajan v London Regional Transport [1999] IRLR 572, HL; Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830. The test is: what was the reason why the alleged discriminator acted as they did; what, consciously or unconsciously, was their reason? The subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his or her motive: Amnesty International v Ahmed [2009] IRLR 884, EAT.

32. That causation must relate to the motivation or reason of the final decision-taker, rather than of others who might have played an earlier part in the process leading to that decision: CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439, [2015] IRLR 562; Alcedo Orange Limited v Ferridge-Gunn [2023] EAT 78.

Harassment

33. The definition of harassment is contained in section 26 of the Act. So far as relevant, section 26 provides as follows:

> *'(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.*
> *....*
> *(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.'*

34. As with direct discrimination, the protected characteristics include sex and age.

35. In deciding whether conduct is 'related to' a protected characteristic, the Tribunal must apply an objective test; the intention of the actors concerned might form part of the relevant circumstances but will not be determinative of the question the tribunal has to answer: UNITE the Union v Nailard [2018] EWCA Civ 1203, [2018] IRLR 730. As was said in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and another [2020] IRLR 495, a finding about the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Nevertheless, there must be still, in any given case, be some feature of the factual matrix which can properly lead the tribunal to the conclusion that the conduct in question is

related to the particular characteristic in question, and in the manner alleged by the claimant.

36. In Nailard the Court of Appeal allowed an appeal against an employment tribunal's decision that a failure to address a sexual harassment complaint could itself amount to harassment related to sex 'because of the background of harassment related to sex' where the tribunal had not made any findings as to the mental processes of those who were dealing with the complaint and whether they had been motivated by sex discrimination. Similarly, in Worcestershire Health and Care NHS Trust v Allen [2024] EAT 40 (unreported) the EAT stressed that it is the 'conduct' that must be 'related to' the protected characteristic. It held that if it is asserted that a failure properly to investigate a grievance alleging discrimination constitutes harassment it is not sufficient that the grievance was related to the protected characteristic; the failure properly to investigate the grievance, which constitutes the conduct, must be related to the protected characteristic. Accordingly, the EAT held, it will generally be necessary to consider the mental process of the person who considered the grievance and decide whether the failure to investigate was related to the protected characteristic, such as if the person considered that protection of the protected characteristic is of no importance and so did not treat the grievance as seriously as other types of grievance would have been treated.

37. Where a Claimant contends that the employer's conduct has had the effect of creating the proscribed environment for them, they must actually have felt or perceived that their dignity was violated or an intimidating, hostile, degrading, humiliating or offensive environment was created for them: Richmond Pharmacology v Dhaliwal [2009] ICR 724, EAT.

38. Even if the claimant did, subjectively, feel or perceive that the employer's conduct had that effect, a claim of harassment will not be made out on the basis of that effect if it is not reasonable for the conduct to have the effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee: Ahmed v Cardinal Hume Academies (29 March 2019, unreported).

39. Conduct may constitute harassment of an employee even if it was not specifically directed at that employee. However, the fact that the conduct was not directed at the claimant may be a relevant factor to take into account in deciding whether its effect was to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant: see Weeks v Newham College of Further Education UKEAT/0630/11, [2012] EqLR 788, EAT.

40. The fact that an employee is slightly upset or mildly offended by the conduct may not be enough to bring about a violation of dignity or an offensive environment. In Richmond Pharmacology v Dhaliwal, the EAT (Underhill P) held that, in assessing whether the effect of the conduct was to violate an employee's dignity or create a proscribed environment for the employee:

> 'One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it

was evidently innocently intended that if it was evidently intended to hurt.'

41. The Court of Appeal has also warned tribunals against cheapening the significance of the words of the Act as they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment: Land Registry v Grant [2011] ICR 1390, CA.

42. Furthermore, whilst a one-off incident may amount to harassment, a Tribunal must bear in mind when applying the test that an 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration: Weeks v Newham College of Further Education UKEAT/0630/11, [2012] EqLR 788, EAT.

Burden of proof

43. The burden of proof in relation to allegations of discrimination and harassment is dealt with in section 136 of the 2010 Act as follows:

> '*136 Burden of proof*
>
> *…*
>
> *(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….'*

44. Section 136 provides a two-stage test. At the first stage, the claimant has to prove facts from which the tribunal could infer that discrimination or harassment has taken place. It is only if such facts have been made out (on the balance of probabilities) that the second stage is engaged.

45. At the second stage the burden shifts to the respondent to prove (on the balance of probabilities) that the treatment in question was 'in no sense whatsoever' because of the prohibited reason: Igen Ltd v Wong [2005] EWCA Civ 142; [2005] ICR 931 CA.

46. In some cases it may be appropriate for a tribunal to effectively assume the burden has shifted, and to look to the respondent to provide an explanation for the treatment in question: Laing v Manchester City Council [2006] ICR 1519, EAT. In this respect, it is important to keep in mind the purpose that underpins section 136; as Elias P (as he then was) observed in Laing:

> *'76. ... The reason for the two-stage approach is that there may be circumstances where it would be to the detriment of the employee if there were a prima facie case and no burden was placed on the employer, because they may be imposing a burden on the employee which he cannot fairly be expected to have discharged and which should evidentially have shifted to the employer. But where the tribunal has effectively acted at least on the assumption that the burden may have shifted, and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever.*
>
> *77. Indeed, it is important to emphasise that it is not the employee who will be disadvantaged if the tribunal focuses only on the second stage. Rather the risk is to an employer who may be found not to have*

> *discharged a burden which the tribunal ought not to have placed on him in the first place. That is something which tribunals will have to bear in mind if they miss out the first stage. Moreover, if the employer's evidence strongly suggests that he was in fact discriminating on grounds of race, that evidence could surely be relied on by the tribunal to reach a finding of discrimination even if the prima facie case had not been established. The tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to let form rule over substance.'*

47. In Hewage v Grampian Health Board [2012] ICR 1054, SC, the Supreme Court stressed the need to avoid an overly technical approach to the application of section 136. Lord Hope observed:

> *'32. … it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.'*

48. The burden of proof still requires careful consideration if there is room for doubt. As HHJ James Tayler emphasised in Field v Steve Pye & Co [2022] IRLR 948 EAT:

> *'42. Where there is significant evidence that could establish that there has been discrimination it cannot be ignored. In such a case, if the employment tribunal moves directly to the reason why question, it should generally explain why it has done so and why the evidence that was suggestive of discrimination was not considered at the first stage in an Igen analysis.*
>
> *….*
>
> *44. If having heard all of the evidence, the tribunal concludes that there is some evidence that could indicate discrimination but, nonetheless, is fully convinced that the impugned treatment was in no sense whatsoever because of the protected characteristic, it is permissible for the employment tribunal to reach its conclusion at the second stage only. But … it is hard to see what the advantage is. …'*

49. As for what is required to discharge the burden at the first stage, the following principles have been established.

50. It is important to bear in mind in deciding whether the claimant has proved facts from which the tribunal could conclude that there has been discrimination that it is unusual to find direct evidence of discrimination: few employers would be prepared to admit such discrimination, even to themselves and in some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in.' The outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal: Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258; Nagarajan v London Regional Transport [2000] 1 AC 501 HL.

51. All the evidence as to the facts before the tribunal must be considered, not just evidence adduced by the claimant. However, facts and explanations should be carefully distinguished from each other since s 136(2) requires that any explanation provided by the employer should not be taken into account at this first burden-shifting stage: Efobi v Royal Mail Group Ltd [2021] UKSC 33, [2021] IRLR 811, [2021] ICR 1263.

52. There must be something more than a difference in the relevant protected characteristic and a difference in treatment: Madarassy v Nomura International plc [2007] ICR 867, CA. The 'something more' required at the first stage need not, however, be a great deal: Deman v EHRC [2010] EWCA Civ 1279.

53. A finding that an employer has behaved unreasonably, or treated an employee badly, will not be sufficient, of itself, to cause the burden of proof to shift. As Lord Browne-Wilkinson explained in Glasgow City Council v Zafar [1998] ICR 120, at 124B:

> *'… the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer, he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant 'less favourably'.'*

54. That said, whether the putative discriminator would treat all employees in 'the same unsatisfactory way' is not something that will be established by mere assertion. Sedley LJ noted in Anya v Oxford University and anor [2001] EWCA Civ 405: 'whether there is such an explanation … will depend not on a theoretical possibility that the employer behaves equally badly to employees of all [relevant characteristics] but on evidence that he does.' Absent such evidence, the inference of discrimination comes not from the unreasonable treatment, but from the absence of any (consistent) explanation for it: see Law Society v Bahl [2004] IRLR 799, per Peter Gibson LJ, and Veolia Environmental Services UK v Gumbs UKEAT/0487/12 per HHJ Hand QC.

55. In Field HHJ Taylor said: '46. Where a claimant contends that there is evidence that should result in a shift in the burden of proof they should state concisely what that evidence is in closing submissions, …'

56. In determining whether an inference could be drawn from the facts established by the complainant, a tribunal must bear in mind that the relevant protected characteristic need not be the only reason for the decision in issue, it would be sufficient that it was a significant or material influence: Nagarajan v London Regional Transport [2000] 1 AC 501 HL.

57. In deciding whether to draw an inference the tribunal should have regard to the totality of the relevant circumstances: Talbot v Costain Oil UKEAT/0283/16 per HHJ Shanks.

58. The tribunal is also required to consider any parts of the Equality and Human Rights Commission Code of Practice for Employment) that appear relevant and, where relevant, the ACAS Code of Practice on Discipline and Grievances.

Time limit

59. Section 123 of the Equality Act 2010 provides as follows:

Time limits

(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 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.

…

(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.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

60. The three month primary time limit is calculated taking into account section 140B, which provides for the extension of time limits to facilitate conciliation before institution of proceedings

61. In deciding whether there was ‘conduct extending over a period’ in cases involving numerous discriminatory acts or omissions, it is not necessary for the claimant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what he or she has to prove, in order to establish conduct extending over a period, is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs': Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686, [2003] IRLR 96.

62. In South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168, the EAT considered the authorities on this issue and held that the only acts that can be considered as part of a continuing course of conduct are those that are upheld as acts of discrimination or some other contravention of the Equality Act 2010.

63. Section 123(1) gives the Tribunal a broad discretion to extend time for claiming beyond the three-month time limit.

64. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, Lord Justice Underhill said ‘the best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. Factors that are almost always relevant are the length of, and the reasons for, the delay; and whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the allegations while the matters were still fresh).

65. The Court of Appeal has held that there is no requirement that the Tribunal be satisfied that there was a good reason for any delay in claiming and time may even be extended in the absence of any explanation of the delay from the claimant:

Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640, [2018] IRLR 1050. 24.

66. There is, however, no presumption that the ET should exercise its discretion to extend time. The burden is on the claimant to persuade the tribunal to exercise its discretion in their favour.

67. Delay caused by a claimant invoking an internal grievance procedure before making a tribunal claim may justify the grant of an extension of time but it is just one factor that must be weighed in the balance along with others that may be present: Robinson v Post Office [2000] IRLR 804. As the EAT said in Wells Cathedral School Ltd v Souter EA-2020-000801 (20 July 2021, unreported) 'It is, in principle, desirable that parties be encouraged to resolve their disputes, so far as reasonably possible, by mechanisms short of litigation. But there is also a public policy in those who may be on the receiving end of litigation benefitting, so far as possible, from the certainty and finality which the enforcement of time limits potentially gives them.'

68. In Robertson v Bexley Community Centre [2003] IRLR 434, Auld LJ observed that 'the exercise of discretion is the exception rather than the rule' it is not the case that discretion may only be exercised in exceptional circumstances.

69. A relevant factor is the relative prejudice to the parties in granting or refusing an extension of time. In this regard, if a claim is or appears to have merit, the prejudice to the claimant of time not being extended is greater than if the claim is weak. But even if a claim has very good merits (or has even been successful, if it has reached the stage of a determination at a full hearing) that does not automatically require a tribunal to extend time for it: Ahmed v Ministry of Justice UKEAT/0390/14 (7 July 2015, unreported).

70. If the respondent may have experienced forensic prejudice in defending a claim that has been brought outside the primary time limit (for example because evidence has degraded or relevant witnesses have left their employment) that will be a factor weighing against granting an extension of time.

Evidence and Primary Findings of Fact

71. We heard evidence from the claimant and, in support of her case, Mr McGee, who was one of the claimant's work colleagues. For the respondent we heard evidence from:

    71.1. Mrs Gibb, the claimant's line manager.

    71.2. Ms Farmer, Mrs Gibb's line manager

    71.3. Mrs McCafferty, Ms Farmer's line manager.

    71.4. Mrs Dixon, the claimant's line manager from December 2022.

    71.5. Mr Glover, who dealt with the claimant's grievance;

    71.6. Mrs Evans from HR.

72. We took into account documents to which we were referred.

73. Elements of this case were dependent on evidence based on people's recollection of events that happened many months ago. In assessing that

evidence we bear in mind the guidance given in the case of Gestmin SGPS v Credit Suisse (UK) Limited [2013] EWHC 360. In that case, Mr Justice Leggatt (as he was then) observed that it is well established, through a century of psychological research, that human memories are fallible. They are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. One of the reasons for that is that people's perceptions and interpretations of events differ. External information can affect how and which memories are created as can an individual's thoughts and beliefs, experiences and world view. What is remembered may also be affected by what appeared most significant to an individual at the time. Unconscious biases might also make us more inclined to embed as a memory something that reflects what we wanted or expected to see or hear or that portrays us or others we respect in a more favourable light. Also, as Mr Justice Leggatt described in Gestmin, memories are fluid and changeable: they are constantly re-written. So memories can change over the passage of time as they are retrieved. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially those who are parties to a claim or those with ties of loyalty to parties. All of this means people can sometimes genuinely recall as a memory something which did not occur, or did not happen in the way it is recalled. In short, even if a witness has confidence in his or her recollection and appears honest, evidence based on that recollection might not provide a reliable guide to the truth.

74. In light of those matters, inferences drawn from the documentary evidence (particularly contemporaneous documents) and known or probable facts can frequently be a more reliable guide to what happened than witnesses' recollections. However, we also bear in mind that even these matters suffer from fallibilities. Even if a document is written immediately after an event, it may record a perception or interpretation of the event that is itself not an accurate reflection of what happened. Furthermore, the purpose for which a document is created may influence, consciously or unconsciously, decisions by the author as to its contents and how it is written.

75. In this case we were referred to certain notes made by Mrs Gibb. We were not told exactly how soon after the events in question some of those notes were created. What is more, some of the notes (particularly those concerning matters that occurred after it would have been clear to Mrs Gibb that the claimant was unhappy with matters at work) seemed to include elements designed to justify actions or decisions taken by Mrs Gibb. It occurred to us that the notes may have been amended or added to after the date on which they were originally written but before being provided to the claimant in response to a subject access request she made during her employment. Therefore, we were circumspect about how much reliance we placed on them. Notwithstanding that caution, however, we did find certain elements of those notes of some assistance in determining the facts.

76. The claimant was born in 1973 so was aged 47/48 at the time of the events we are concerned with. The claimant started work for the respondent in October 2008.

77. Before the covid pandemic the claimant worked from SLC's Darlington office. Because of the covid pandemic the claimant along with other SLC employees began working from home full time. During lockdown the claimant started her own business running fitness related classes.

78. In July 2022 Mrs Gibb became the claimant's line manager. She managed the claimant remotely because Mrs Gibb was based in Glasgow. They had regular contact by Teams, including weekly catch ups. Because they worked together on some projects they would sometimes speak more often. Mrs Gibb's line manager was Ms Farmer who was also based in Glasgow.

79. Mrs Gibb and the claimant got on very well, certainly in those early stages. In August 2020 the claimant put in a flexible working request to change her hours so she could better fit them with her gym work. Mrs Gibb agreed to that request more or less straightaway.

80. In the latter third of 2021 the claimant started experiencing symptoms such as dizziness, interrupted sleep, feeling exhausted and forgetfulness. She went to her GP who told her that she was describing symptoms of menopause and advised her to do strength training and gym work amongst other things.

81. Around about this time the claimant was looking for new premises to operate her gym business from. She found a new place towards the end of the year and renovated it so she could use it as a gym. The gym premises also contained an office.

82. By January 2022 the claimant was experiencing hot flushes, she felt very tired due to lack of sleep, she sometimes felt she got her words jumbled up.

83. In January of 2022 the claimant wanted to start work from the office at her gym. The first day the claimant worked from the office she had a Teams call with Mrs Gibb and the claimant said to Mrs Gibb "you'll notice the décor is different, do you like it?". Mrs Gibb said "yes its great, where are you?". The claimant said she was at the gym and Mrs Gibb said "that looks great". However Mrs Gibb had some concerns about the claimant working from her business premises. Some of her concerns were to do with the security of respondent's computer equipment and data protection. She was also concerned that if she allowed the claimant to work from these premises, that that could be perceived by others as setting a precedent that might lead others to expect to be able to work from wherever they wished.

84. Because of those concerns Mrs Gibb asked the claimant to hold off working from the gym until she (Mrs Gibb) had spoken to her own line manager Ms Farmer.

85. Mrs Gibb did speak to Ms Farmer who suggested speaking with the People Team about the claimant's request. Mrs Gibb did that. She spoke to Ms Haynan in the people team and explained her concerns about data confidentiality and security of equipment. Ms Haynan suggested that the claimant submit a request to work from her office in the same way she would a flexible working request to explain what she was asking for, why she needed it and essentially put her case forward for working from her business office and then the respondent would consider it fully. Mrs Gibb relayed that to the claimant. She told the claimant to put in as much detail in the request as possible.

86. In the meantime Ms Haynan spoke with a few colleagues across the policy and security and legal teams.

87. On or around 17 January the claimant typed out in a document reasons why she should be permitted to work from her gym office and in that document (document 247 in the file of documents) the claimant set out her reasons and set out what she said were the benefits. In a number of places in that document the claimant said it would be better for her mental health to work from the gym office. In particular:

    87.1. The claimant said working from the gym office is 'better for my mental health as it gets me out of the house. Going through the menopause I am finding it hard to get out of bed.'

    87.2. She also referred to it being better for her mental health because the gym office was bright in colour.

    87.3. The claimant referred to her husband not understanding the premise of working from home, alluding to the fact that he would interrupt her when working, and she said this meant that she would argue with him, lose productivity and have worse mental health. She referred to there being fewer distractions at the gym office and referred to having more desk space. She referred again to better health and well-being and said this improve productivity.

88. In this document the claimant also addressed security issues. She explained why it was better for her to work from her gym office than at the 'Touchdown' space. Touchdown was a separate office space that employees of the respondent could use. In that context the claimant said in her document "the problems of mental health and well-being is not big enough to use the Touchdown". When the respondent's managers read that they inferred that the claimant was saying her mental health issues were not severe enough for her to feel the need to work from a Touchdown space. The claimant also said the Touchdown space was further away from her gym office, although we find that was only by about 10 minutes or so.

89. After the claimant handed that document in, Mrs Gibb forwarded it to the people team. She also checked the blended working guidance herself because she knew the company was moving to hybrid working as an option.

90. We accept Mrs Gibb's evidence to us that she thought it was the people's team responsibility to make the decision and she met with the team. The people team told Mrs Gibb the claimant should not be permitted to work from her gym office. Mrs Gibb was responsible for relaying that decision to the claimant. Before doing so, Mrs Gibb prepared a written document in which she set out her understanding of the people team's rationale and response to the points raised by the claimant in her request. She set out in that document that as she understood it, the request was refused by the people team due to concerns around conflicts of interest ie that the claimant's business interests could affect her work for the respondent and that there were other types of support options which would address the key points outlined by the claimant. Mrs Gibb sent her document to Ms Haynan for review before speaking to the claimant.

91. We find that Ms Haynan told Mrs Gibb that the reason, or one of the reasons for refusing the claimant's request to work from her gym office, was there were

concerns around a conflict of interest in that it was believed the claimant's business priorities could affect her work for the respondent. During this discussion Ms Haynan referred to the respondent's policy on disclosing interests. Ms Haynan also referred to the Working Time Directive (which contains rules about maximum working hours) and wanting to understand how many hours the claimant was working on a self-employed business. In addition Ms Haynan referred to supporting the claimant with symptoms and told Mrs Gibb the claimant would need to consider what reasonable adjustments she may need to make within her self-employed activities.

92. On 26 January Mrs Gibb had a discussion with the claimant on Teams and told her that her request to work from her business office had been refused. Mrs Gibb told Miss Russell the reasons in line with what Mrs Gibb herself had written down in her document. The claimant became very upset in this meeting.

93. The claimant subsequently claimed in an email of 6 June (at page 308 of the file of documents) that Mrs Gibb had told her in this meeting that the people team did not trust her. However, that claim was contradicted by evidence given at this hearing by both the claimant and Mrs Gibb. The claimant's evidence to us was that when Mrs Gibb told her HR had turned down the request because of a 'conflict of interest', she (the claimant) said in response 'that means that HR doesn't trust me, is that right?' and Mrs Gibb replied 'no, they don't mean that.' We find that Mrs Gibb did not tell the claimant that HR did not trust her; the claimant's email of 6 June did not reflect what in fact had been said.

94. In her witness statement, the claimant seemed to be suggesting that, at this meeting on 26 January, Mrs Gibb told her that she could not get an occupational health assessment and that she had to complete a wellness action plan instead. We do not accept that happened, for the following reasons:

94.1. The actual complaint made by the claimant in these proceedings is that the occupational health referral was refused in early February not in January.

94.2. On answering questions about this at the hearing the claimant acknowledged that she was not entirely clear about dates of events and said that initially Mrs Gibb had talked about getting an occupational health report.

94.3. The note prepared by Mrs Gibb in advance of the meeting suggests Mrs Gibb was planning to arrange an occupational health referral.

94.4. A note prepared by Mrs Gibb suggests she spoke with the claimant on 27 January and told the claimant she would arrange an occupational health referral.

94.5. Mrs Gibb's evidence, consistent with those notes, is that her first instinct was to make an OH referral.

95. We find it more likely than not that what happened was as follows. On 26 January the claimant and Mrs Gibb spoke about the possibility of getting an occupational health report. Following the meeting Mrs Gibb looked into getting an occupational health report (we accept her evidence that her first instinct was to make an OH referral). She checked the portal used for making referrals. It contained a drop down menu containing reasons for the referral; those reasons were focused on people who were off sick or had been off sick or were having performance problems. Mrs Gibb's view was that none of those reasons applied

to the claimant: there had not been an issue with absence due to menopause and Mrs Gibb had no concerns about the claimant's performance at the time. On 26 January Mrs Gibb had sought guidance from Ms Haynan in HR and Ms Haynan shared with Mrs Gibb a menopause toolkit. On 3 February Mrs Gibb went back to Ms Haynan for further guidance. Ms Haynan advised Mrs Gibb not to request an OH referral at that time but instead to complete a wellness action plan.

96. Shortly after that, on about 8 February, Mrs Gibb spoke to the claimant and asked her to fill in a wellness action plan. She gave the claimant a document produced by the charity MIND. That document explained what a wellness action plan is and contained a template plan that can be completed by an individual. The focus of that document is mental health although there was space in the template for whoever was completing it to identify anything else they wanted to share. Mrs Gibb asked the claimant to fill in the wellness action plan template.

97. Subsequently, the claimant sent a completed wellness action plan form to Mrs Gibb. In this document, the claimant said she wanted to broach the subject of working a half day on Thursdays because of what she referred to as 'either pre-menopausal symptoms or something that is happening medically.' In Box 4 of the form the claimant said:

> 'symptoms I experience are lack of concentration, the ability to prioritise workloads, no lethargy on Monday but starts to exasperate through the week and ending with extreme lethargy by Wednesday evening/Thursday morning. Continuous mild back pain along with continuous mild stomach pain, random hot temperatures followed by random extreme cold temperatures. At the moment it is unknown whether this is menopausal or due to fibroids.'

98. The claimant went on to say that she had enough support for mental well-being but would like to change her hours.

99. On 4 March the claimant and Mrs Gibb discussed the wellness action plan and certain points were recorded on it. They agreed that if Mrs Gibb noticed a change in the claimant's behaviour she would discuss it with the claimant. The claimant also had stated in the wellness action plan that new documentation may cause stress and it was recorded that Mrs Gibb and another senior business change lead, Mr Nolan, were always available to offer support. It was also agreed within the wellness action plan that if the claimant was experiencing a busy day or displaying symptoms of stress she could take five minutes to discuss it with Mrs Gibb or take five minutes to herself.

100. The claimant has alleged in these proceedings that the respondent refused to allow her to take micro breaks. We find as a fact that was not the case, in light of our finding that Mrs Gibb agreed the claimant could take five minutes to herself or to discuss matters with Mrs Gibb if she was experiencing stress. What Mrs Gibb did suggest, however, was that the claimant remove references that the claimant had included to doing laundry during breaks.

101. At that time this wellness action plan was completed, it was unclear whether some of the symptoms the claimant was experiencing were a result of the menopause or something else such as fibroids. The claimant told Mrs Gibb she was awaiting further advice from her GP.

102. At this time Mrs Gibb believed everything was fine between her and the claimant, not least because the claimant had said in the wellness action plan that Mrs Gibb had been a great support and they had an honest and open relationship.

103. Given the claimant's reference to wanting to work half a day on Thursdays Mrs Gibb was expecting a flexible work request from the claimant. The claimant did submit a flexible work request on the online system. The online form asked certain questions which the claimant answered. She said she wanted to reduce her hours on a Thursday starting on 1 April. The claimant said she was willing to do this as a trial if it helped. She said in the form she believed Mrs Gibb and Ms Farmer would deal with the request in a fair and transparent way, and she said 'whilst I would be willing to extend working hours on other days, I worry it would be counter-productive in helping manage the symptoms of lethargy but would absolutely be willing.' The claimant referred in that form to receiving counselling on Thursdays (there was already an arrangement in place for an extended lunch on that day to allow her to attend those sessions). The claimant said she did not do physical training on that day and said it would be an opportunity for her to see her granddaughter.

104. It was not clear from the information provided on the form whether the claimant was asking to reduce her hours overall (ie have part time hours with a commensurate reduction in salary) or work longer hours on other days to make up for the shorter time worked on Thursdays (ie compressed hours).

105. On 11 March there was a Teams meeting between the claimant and Mrs Gibb to discuss this flexible work request. Mrs Gibb sought clarification of whether the claimant was asking to reduce her hours or to consolidate her hours. The claimant wanted to avoid a reduction in salary and decided that consolidating her hours would work best for her and that is what she told Mrs Gibb. They discussed the practicalities of the claimant having consolidated hours. In this discussion Mrs Gibb asked the claimant various questions regarding her daily routine. She asked the claimant how many hours she spent training and when, both for herself and coaching others in her business; how much time she spent on admin for her business; what she did on a weekend; what time she got up and went to bed. The claimant answered these questions. Mrs Gibb recorded the answers on what is essentially a spreadsheet or a table setting out how the claimant spent her time. Mrs Gibb said in evidence the reasons she asked these questions was that she was concerned that consolidating the claimant's hours would exacerbate her symptoms of fatigue and exhaustion. The claimant told Mrs Gibb again that her GP had encouraged her to exercise to assist with medical concerns and she also said she had a follow up with her GP on 18 March to determine next steps. Mrs Gibb and the claimant arranged to meet again on 18 March.

106. Mrs Gibb then sent a Teams message to Ms Farmer on 11 March relaying what had been discussed and what the claimant had said about the way she spent her time. Ms Farmer responded to Mrs Gibb saying

'so Thursday is not a rest day if she is doing weights? maybe that's something she might look at to give herself a day of rest to recover as recovery is so important for the body so it doesn't burn out - if the hours are being consolidated. Will she work till 5pm to make the time up? so not eating into her

lunch as she has mentioned this in her working from the gym office that she benefits from having this hour for her mental health.'

Ms Farmer ended by saying 'lets re-group early next week.'

107. On 18 March there was a further conversation between Mrs Gibb and the claimant regarding her request to change her hours. Mrs Gibb made a note subsequent to that meeting. It is at page 286 of the document bundle. We find that in this meeting Mrs Gibb said she had concerns about the claimant working long days and not taking an hour for lunch given the claimant had talked about having fatigue and exhaustion. Mrs Gibb questioned the claimant as to whether this was the right and best thing for the claimant. She asked the claimant if there was an alternative work pattern that might work and suggested longer lunch hours. Mrs Gibb asked the claimant to think about what the action plan would be in terms of dealing with workload given that she would not be at work on Thursday afternoons; Mrs Gibb raised the possibility this might add to the claimant's pressure. Mrs Gibb asked the claimant if she was intending to reduce her self-employed working hours. The claimant replied that she was not and reiterated that her GP was encouraging good fitness. The claimant also told Mrs Gibb she had been prescribed HRT although the medication was not yet available. Mrs Gibb told the claimant she would discuss the matter with HR and Ms Farmer. They arranged that they would meet again the following week. Mrs Gibb also told the claimant they might not have a decision in time to implement it by 1 April.

108. On 18 March Mrs Gibb sent Ms Farmer a Teams message updating her about the conversation she had had with the claimant and saying she was going to speak with Ms Curtis in HR. By 22 March Mrs Gibb had spoken to the people team. They had recommended that if the claimant's request could be accommodated it should be.

109. On 22 March Mrs Gibb then asked Ms Curtis of HR whether they could restrict the claimant's ability to accrue flexi as she was compressing her hours to take half a day off on Thursdays. Mrs Gibb said when posing this question this was in the interest of ensuring the claimant was not working excessive hours. Ms Curtis replied saying 'we can yes and I wouldn't expect someone to be working compressed hours and long days especially with a half hour lunch to accrue flexi.' Mrs Gibb messaged Ms Farmer enclosing that reply.

110. On 25 March there was a Teams meeting between the claimant and Mrs Gibb. Mrs Gibb told the claimant her flexible work request was approved on a trial basis for three months. She said they would monitor her progress regarding lethargy and whether HRT was helping her. We accept the evidence of Ms Farmer that when agreeing changes to working arrangements requested by an employee it is the respondent's standard practice to have a three month trial period.

111. The claimant's case is that a condition of her flexible work being granted and a term of the flexible work arrangement was that she was not allowed to see her grandchild in the non-work half day (Thursday afternoons). Mrs Gibb denied that. Mrs Gibb's evidence on the matter was that she did not impose any such condition or term or say the claimant was not allowed to see her grandchild but did tell the claimant her request was being granted to enable her to rest and not

for childcare. We found the claimant's memory of events around this time was rather unreliable. In any event, the account given by Mrs Gibb was, in our view, more plausible. We find that Mrs Gibb did not say the claimant was not allowed to see her grandchild on her non-working afternoon. Rather, she told the claimant that the reason her request was being granted was to enable her to rest, not for childcare.

112. The claimant's case is that she it was a condition of her flexible work arrangement that she was required to rest on her non-working afternoon and required not to exercise. The claimant has not proved it was more likely than not that any such requirement was imposed. The claimant was simply told the purpose of agreeing the change in hours was to enable her to rest. She may well have also been told that it was not to enable her to do more exercise but it was not a condition that she did not do so.

113. Mrs Gibb asked the claimant to try and take any doctors appointments on the Thursday afternoons, but said if that could not be done there would be an element of flexibility and they could decide on a case by case basis.

114. In the claimant's department staff could build up 15 hours of flexi time over the course of a month. We find that Mrs Gibb advised the claimant to refrain from accruing and taking flexi time due to the fact that she was already working condensed hours. Mrs Gibb told the claimant this was because of concerns for her well being and symptoms of fatigue.

115. Mrs Gibb advised the claimant that if a meeting was running over and ran past her finish time it would not be unreasonable for the claimant to finish at her scheduled time and ensure she was not working excessive hours. Mrs Gibb explained that if a meeting ran over it was not unreasonable for the claimant to say she had a hard stop time. Mrs Gibb advised the claimant that she could put in a Teams chat with the attendees of those meetings that she had somewhere else she needed to be and.

116. The claimant's case is that the respondent removed flexibility by insisting on hard start and finish times to her working day. In light of our findings of fact above, we find that Mrs Gibb discouraged the claimant from accruing flexi time and advised her against it but did not ban it. What is more, although she told the claimant she could insist on finishing meetings on time, she did not require the claimant to do so. In the circumstances, the allegation that Mrs Gibb 'insisted on hard start and finish times' is not made out.

117. Mrs Gibb and the claimant agreed that her new working pattern would be Monday and Tuesday 8am to 5pm with a 30 minute lunchbreak and Wednesday 8am to 4.30pm with a 30 minute lunchbreak, Thursday 8am to 12.30 without a lunchbreak and Friday 8am till 5pm with a 30 minute lunchbreak. Mrs Gibb notified the people team of the changes and the changes took effect from 1 May.

118. In April the claimant returned to working from the office. Post covid, staff generally were being asked to return to work from the office. Mrs Gibb continued to have regular check-ins with the claimant and the claimant would update Mrs Gibb about her progress with HRT and how she was feeling. The claimant also told Mrs Gibb she had applied for another role in the company.

119. On 5 May Mrs Gibb checked in with the claimant and asked her how her day in the office was and how her weekend had been. The claimant volunteered that she did not feel as good as she had forgotten to take her HRT after she had drunk alcohol at a celebration over the weekend. It was Mrs Gibb's habit as a manager to keep roughly contemporaneous records of discussions as an aide memoire for her own use. Mrs Gibb made a note of the conversation, saying the claimant '…did advise that she did not feel as good as she had forgotten to take her HRT because of drinking alcohol during the celebrations.'

120. On 13 May Mrs Gibb had a check in with the claimant. Mrs Gibb said words to the effect that she had noticed Facebook updates being made on the claimant's account during working hours and said employees should not be posting on Facebook in working hours. She told the claimant that she was not the only employee who had been doing this and that Ms Farmer would be speaking to the team. The claimant was unhappy. She had previously told Mrs Gibb that somebody else did her business posts on Facebook and she reminded Mrs Gibb of this.

121. In this conversation Mrs Gibb also referred to the fact that the team was creating standard operating procedures and that whereas other team members had volunteered to create one the claimant had not. The claimant was reluctant to take one on but said she would. Mrs Gibb suggested one for the claimant to do. However, the claimant said she thought she would struggle with it; so Mrs Gibb gave her a different one to do. They also talked about a weekly report which the claimant had not produced at the time she should have done. Mrs Gibb asked the claimant why and the claimant said she had been too busy. Mrs Gibb asked the claimant what her priorities were for that afternoon and the following week.

122. After that discussion an email was sent around the team about not using social media during working hours.

123. After their conversation, the claimant blocked Mrs Gibb as a Facebook friend. Later that day Mrs Gibb checked Facebook and saw the claimant had blocked her. The same day Mrs Gibb rang the claimant and asked if she was okay. The claimant became upset on the call and said she was finding conversations with Mrs Gibb hard. Mrs Gibb said she was disappointed with that.

124. On 19 May the claimant and Mrs Gibb had their weekly check in. Mrs Gibb asked the claimant how she was feeling. The claimant said she felt Mrs Gibb's questions lately had been interrogative; she referred to the questions Mrs Gibb had asked her when considering her flexible work request. Mrs Gibb responded that she had to ask those questions and referred to the claimant having said she was exhausted and needing to make sure the claimant was getting enough rest.

125. On 23 May Mrs Gibb and the claimant had another discussion. This time the claimant felt the discussion was more relaxed. She said in this conversation to Mrs Gibb that she felt Mrs Gibb was micromanaging her. The claimant also said it may be time to do an occupational health referral if Mrs Gibb felt her performance was an issue. They talked about performance and Mrs Gibb said words to the effect that 'on balance I would not say you're underperforming but I need you to focus on deliver a little more and achievement of milestones'. Mrs

Gibb referred to delivery dates and the need for the claimant to communicating reasons if a delivery date was not going to be met. She said words to the effect that that would allow her to understand and provide support or advice where needed. The claimant said she wanted them to run through the menopause policy together and Mrs Gibb said she had looked at it in the past but it would be good to refresh on it together. Mrs Gibb questioned whether an occupational health referral was needed at that time, whereupon the claimant then agreed that she did not feel an occupational health referral was necessary just then. The claimant ended this meeting feeling more optimistic with the way things had been left.

126. The claimant's case is that Mrs Gibb refused to provide or secure a referral to occupational health on or about this date. We do not agree that is in fact what happened. We find Mrs Gibb did not refuse to make an occupational health referral. She said she did not think one was needed at this point and by the end of the meeting the claimant said she agreed.

127. Just over a week later on 1 June, Mrs Gibb and the claimant spoke to go through the menopause policy and looked together at the well being policy. The respondent's menopause policy contains a section on menopause support. Mrs Gibb went through this with the claimant, discussing what had been done already in relation to the claimant.

128. During this meeting, the claimant asked Mrs Gibb if she would get into trouble if she had absence that was menopause related. So they looked together at what the policy said about absence. The policy said 'SLC recognises that those experiencing menopause symptoms may need to be absent from work at times and we will support them by recognising any related absences as a form of exempt leave for the purposes of the attendance management policy as far as is reasonably possible.' It goes on to say individual absences can be discussed and agreed between the employee and the line manager with support from the people team where appropriate. In that context, Mrs Gibb mused on what evidence might be needed that absence was menopause related as opposed for some other reason. She wondered, out loud, whether a GP note may be needed. Mrs Gibb told the claimant she would need to ask the people team about this and that she would get back to her (and subsequently did so).

129. We find as a fact that Mrs Gibb did not, as has been alleged in this case, advise the claimant that she needed to submit a doctor's sick note if she was absent for one day because of menopause. Mrs Gibb merely, in response to a question from the claimant, mused on what evidence might be needed and said she would ask the people team and let the claimant know.

130. The claimant in this meeting asked again about an occupational health referral. Mrs Gibb decided then it was best to make a referral given that the claimant had asked again. She told the claimant either at this meeting or shortly afterwards after speaking with the people team that she would make a referral 'under the guise of performance.' In other words, in the drop down box where one is expected to put a reason for referral the performance option would be chosen.

131. In the meeting Mrs Gibb asked the claimant what the claimant was looking to learn from an occupational health referral. The claimant replied that she was

worried she would not be supported and would not perform and would be managed out. One of the allegations in this case in relation to the constructive dismissal claim is that Mrs Gibb 'did not respond reassuringly' when the claimant told her she was worried about being managed out of her job. We found the claimant's evidence as to exactly what was Mrs Gibb said on this matter unclear and contradictory. On the one hand the claimant said in her witness statement that Mrs Gibb responded 'abrasively' when she (the claimant) referred to her concerns; however, in her witness statement the claimant also said Mrs Gibb's only response was 'okay'; then on cross-examination the claimant's evidence was slightly different in that she said Mrs Gibb's response was 'aha' (rather than 'ok'). Whether the response was 'aha' or 'ok', neither response appears in itself to be apt to be described as 'abrasive.' We are not persuaded that Mrs Gibb did respond in a manner that could reasonably be described as 'abrasive'; she simply replied 'aha' or 'ok'.

132. During this meeting Mrs Gibb also told the claimant she should think about her self-employed work and whether she needed to make adjustments to that.

133. That meeting took place on Wednesday 1 June. The Thursday and Friday were bank holidays. Then on Monday 6 June the claimant sent an email to Mrs Gibb copying in Ms Farmer. In her email the claimant complained about things she said Mrs Gibb had said about her making adjustments to her business life. The claimant asked about the occupational health referral and acknowledged that Mrs Gibb had agreed to make it. She acknowledged Mrs Gibb was going to get back to her about what evidence was required if there was a menopause related absence. The claimant suggested in this email that Mrs Gibb had made it a condition of her flexible work arrangement that she not use flexi time. The claimant also asked for any verbal communications to be in the presence of the people team or Ms Farmer and that all conversations on Teams were recorded.

134. Mrs Gibb forwarded that email to Ms Curtis in the people team saying 'we can cover off the points when we meet today.' The claimant in the meantime had sent a second email just a couple of minutes after the first email on 6 June, again to Mrs Gibb, again copying in Ms Farmer. It referred to her request in January to work from her own office space at the gym. In this email the claimant alleged that Mrs Gibb had said that 'the crux of the matter' was the people team 'did not trust her to work from the office.' As recorded above, that is not actually what Mrs Gibb said at all; in her email of 6 June the claimant did not accurately represent what had been said. The claimant asked for a copy of the people teams' response to be sent and said she would make a Subject Access Request if needed.

135. Mrs Gibb forwarded this second email on to Ms Curtis. Mrs Gibb said 'I can confirm that what the claimant indicates has been stated is not true. This was her interpretation.' Ms Janodzinski in HR was made aware of this email. She sent an email to Ms Curtis in which she said, amongst other things, she was 'disappointed' that the claimant had been told HR don't trust her. It seems that Ms Janodzinski simply took what the claimant said in her email at face value notwithstanding that Mrs Gibb had said it was not true.

136. There was a meeting between Ms Curtis and Mrs Gibb that afternoon, and on the same day, Mrs Gibb emailed a copy of the notes she had been keeping to Ms Farmer and Ms Curtis.

137. That afternoon Mrs Gibb sent an email to the claimant in response to her second email about the working from personal office space request and explaining the reasons for that decision. The claimant was not satisfied with Mrs Gibb's response and replied asking Mrs Gibb to confirm specifically who had considered and refused her January request to work from her gym office.

138. The next day, 7 June, Mrs Gibb sought advice from Ms Curtis as to how to respond. Ms Curtis replied by email expressing an opinion in the following terms: 'I do not think it is constructive or worth anyone's time to provide her with another outlet as I feel that you, and the Company in that respect, have responded to her request and resolved it (albeit not to what she wanted). Therefore, if she has any further complaints or issues with it then she needs to think about raising a grievance.' Ms Curtis also suggested some wording for a response to the claimant which (if sent) would have directed the claimant to the grievance procedure if she was still unhappy with the decision. However, Mrs Gibb did not in fact send an email to the claimant in the terms suggested.

139. Ms Farmer told Mrs Gibb that she could continue to deal with day to day management of the claimant. Mrs Gibb then had a few interactions with the claimant following which the claimant sent another message to Mrs Gibb repeating what she had said about any wanting any verbal communication to be in the presence of Ms Farmer or the people team and for Teams communications to be recorded.

140. A meeting was arranged between the claimant, Ms Farmer and Ms Curtis to discuss her emails. That meeting took place on 8 June. It was a lengthy meeting in which Ms Farmer and Ms Curtis encouraged the claimant to explain her concerns. Towards the end of that meeting the claimant referred to the possibility of bringing an Employment Tribunal complaint. Ms Farmer asked the claimant what she wanted the outcome to be and the claimant said she did not know whether or not she wanted to take it formal but that she did not want to work with Mrs Gibb again and did not think Mrs Gibb could be her line manager. Ms Curtis explained to the claimant that one option was that she (Ms Curtis) and Ms Farmer could look into the matter informally by talking to Mrs Gibb after the meeting and coming back to the claimant with what they had found. Ms Curtis explained that there would be notes then produced but no report. Ms Curtis explained that the other option was for the claimant to raise her concerns formally and they could appoint an independent person to do an investigation and go through the formal process. Ms Curtis said that it was for the claimant to decide and she did not need to make a decision straightaway. The claimant said she did not want to make things difficult for everyone and so she would rather it was dealt with informally and that she was happy for Ms Farmer and Ms Curtis to look into it informally. Ms Curtis told the claimant that moving the claimant to a different line manager was not something the respondent would do lightly and it might not be feasible due to the respondent's structure and project work. She told the claimant the decision would be dependent on a number of factors. The claimant then asked if she still had the option to go through the formal grievance procedure and Ms Curtis explained that she did have that option if she was dissatisfied with the outcome of herself and Ms Farmer looking into the matter.

141. Ms Curtis sent notes from the meeting to the claimant to review. Ms Farmer then took over sorting out the occupational health referral.

142. On 13 June Ms Farmer and Ms Curtis met with Mrs Gibb to give her an opportunity to explain her version of events.

143. There followed a further meeting on 14 June with the claimant. Ms Farmer told the claimant the conclusions they had reached. She went through the concerns raised by the claimant and responded to them. The claimant said she did not want to be line managed by Mrs Gibb. Ms Farmer told the claimant that at that time, due to having a limited number of senior managers, she was not in a position to have the claimant managed by anybody else in the team and that, in any event, changing that line management role would not assist either the claimant or Mrs Gibb in the long term given that they would still need to work together on projects. Ms Farmer referred to the fact that, in the past, the claimant and Mrs Gibb had had a positive working relationship and had worked well together. Ms Farmer said that in the short term, to support both the claimant and Mrs Gibb, there would be a 'transition period' during which she (Ms Farmer) would work with both of them to support and encourage a positive working relationship. She said she was happy to sit in one to one meetings initially and was open to other suggestions for re-building the relationship in a way that the claimant was comfortable with. The claimant was asked how she felt. The claimant made it clear she was not happy. She asked a number of questions and Ms Curtis and Ms Farmer agreed to go back to Mrs Gibb and ask some further questions of her.

144. Ms Curtis and Ms Farmer met with Mrs Gibb on 15 June and asked her some further questions based on questions raised by the claimant.

145. On 16 June Ms Farmer emailed the claimant sending her the notes of the meeting on the 14th with additional questions responses added. In her email Ms Farmer reminded the claimant she could raise a formal grievance if she was not satisfied with the outcome of the informal process. Ms Farmer also arranged a further meeting with the claimant to discuss the next steps.

146. There was a meeting between Ms Farmer, the claimant and Ms Curtis on 22 June to discuss how they would move forward and the possibility of mediation. Ms Farmer also held a one to one meeting with the claimant.

147. That same day the claimant submitted a formal grievance in writing. That is at page 391 of the file.

148. On 24 June the claimant was signed off sick from work for a month. The reason given was work related stress.

149. At some point the claimant made a Subject Access Request (SAR). The documents she obtained through that SAR included the notes that Mrs Gibb had prepared about conversations she had had with the claimant.

150. In these proceedings, the claimant alleges that during her absence on sick leave, she saw in the SAR documents an email from Mrs Gibb that stated 'Judith went out, got drunk and forgot to take HRT.' However, in the documents put in evidence in this Tribunal there is no email from Mrs Gibb that said this. Had the claimant received such an email in response to her SAR request she was obliged to disclose it to the respondent during these proceedings. The

claimant has not produced any such email. We find there was no such email sent.

151. We consider it likely, however, that the claimant was sent a copy of Mrs Gibb's notes in response to her SAR request. They included the note of the conversation on 5 May 2022. That note did not say 'Judith went out, got drunk and forgot to take HRT'; it said the claimant '…did advise that she did not feel as good as she had forgotten to take her HRT because of drinking alcohol during the celebrations.'

152. When being cross-examined in these proceedings, for the very first time the claimant alleged that there had been another version of those notes sent to her in response to the Subject Access Request and it is in that other version of the notes that the comment about getting drunk had been written. That version of those notes, if it existed, had not been disclosed by the claimant ahead of this hearing. Nor did the claimant produce a copy during the course of this hearing despite us reminding the claimant of her duty to disclose relevant documents. When, during the hearing, we reminded the claimant again of her duty of disclosure and asked her why she had not yet produced a copy of the document, she said she had been busy preparing to cross-examine the respondent's witnesses. By the time we heard the parties' closing submissions the claimant suggested she had not disclosed the document because, when cross-examining Mrs Gibb, Mrs Gibb had admitted there had been a second document. That was not the case, however. When questioned, Mrs Gibb simply said she had no recollection of changing her notes. The claimant has failed to persuade us that there were two versions of Mrs Gibb's notes. We find there was only one version of those notes. That is the version the claimant was sent in response to her Subject Access Request, the contents of which we have described above.

153. On 20 July, there was an occupational health assessment by a Ms Coyne. Ms Coyne prepared a report following that assessment. In that report Ms Coyne noted the claimant was describing experiencing work related stress. She said 'In my clinical opinion work related stress has likely developed due to a lack of support in relation to menopause symptoms.' There is no evidence that Ms Coyne spoke to anybody other than the claimant before forming that opinion; so it seems that Ms Coyne simply took the claimant's word for it that she had not been supported and prepared a report based on the claimant's perception of events.

154. In that report Ms Coyne said the claimant had described experiencing symptoms of menopause including fatigue with extreme lethargy, ringing in the ears, dizziness and insomnia with reduced memory and concentration. Ms Coyne said 'It should be noted any stress can have a significant impact on the body and can further increase symptoms of menopause. Therefore it is vital stress is reduced and managed.' Ms Coyne also said 'Research shows that exercise is extremely beneficial for menopause symptoms and well-being.' Ms Coyne went on to say 'Judith is likely to benefit from workplace adjustments to support her mental symptoms.' Ms Coyne recommended the following: flexible working to allow the claimant to achieve a better work life balance and support menopause symptoms; that the claimant had access to additional 'micro breaks' which she described as 'breaks over and above standard breaks'; that

the claimant could work within a comfortable natural light environment with ability to adjust artificial light and comfortable temperatures and humidity; providing the claimant with a fan to reduce feelings of hot flushing; adjusting absence triggers to support menopause symptoms and make allowances for any sickness absence due to menopause. Ms Coyne concluded that in her clinical opinion the claimant was temporarily unfit to attend work.

155. In the meantime, Mr Glover was asked to be grievance hearing manager on 11 July. He received the various documents related to the grievance. He also received the occupational health assessment.

156. On 28 July 2022 there was a grievance hearing on Teams. Then Mr Glover took statements from Ms Farmer and Mrs Gibb and Ms Curtis in early August. He drafted an investigation report. On 28 August Mr Glover provided the claimant with a letter setting out the outcome of the grievance. We find Mr Glover carried out a thorough inquiry into the claimant's grievances.

157. On 24 August there was a further occupational health referral appointment. There was also an occupational health update in September and we note within the report following that referral occupational health said the claimant was still suffering work related stress although at that time the claimant was not at work.

158. The claimant was unhappy with the outcome of the grievance procedure because Mr Glover had not upheld the claimant's grievance. The claimant appealed. There was a grievance appeal hearing on 21 September chaired by Ms Gordon. The claimant was present as was a Ms Carey, the EDI lead, who accompanied the claimant. Mrs Evans from HR was also present. The outcome of the appeal process was set out in a letter dated 3 October 2022 which was sent to the claimant. One of the claimant's complaints had concerned the extensive questions Mrs Gibb had asked when considering the claimant's flexible work request, On this point, Ms Gordon concluded that:

> 'a different approach in terms of the questioning would perhaps have led to a different outcome. Whilst your relationship was previously strong and these types of questions may have been well received in the past, as cracks started to appear in the relationship a change of approach may have benefit the situation and eased your feelings of anxiety.'

159. The claimant also complained about Mrs Gibb not making an occupational health referral. Ms Gordon concluded that Mrs Gibb should have sought guidance earlier in the process on how to make a referral to occupational health, although Ms Gordon did not say when there should have been a referral. Ms Gordon also questioned the relevance of some of the notes kept by Mrs Gibb and recommended her notes be deleted. Other aspects of the grievance were not upheld.

160. During this period whilst the claimant was absent from work, she was effectively being line managed by Mrs McCafferty who was Ms Farmer's line manager. That is because by this time Ms Farmer was also the subject of the claimant's formal grievance because the claimant had complained about the way Ms Farmer had dealt with the grievance informally. That complaint was not upheld at either formal grievance stage.

161. During the claimant's absence Mrs McCafferty had a number of discussions with her about her absence. On 13 October was the fourth health review

meeting between the claimant and Mrs McCafferty. The claimant said she felt ready to come back to work at the end of her fit note and would take a couple of days annual leave at that point before returning. Mrs McCafferty offered the claimant a phased return.

162. On 14 October Mrs McCafferty emailed the claimant. She confirmed that the claimant would remain in her current team. She explained that Mrs Gibb had, by this time, moved to a new role and that they were recruiting a replacement and until the replacement was in place the claimant, like everybody else in the team, would report to Ms Farmer on an interim basis. Mrs McCafferty said she would support the claimant herself upon her return to work until a new line manager was appointed. She asked the claimant if the claimant wanted her to consider a phased return and if so what pattern the claimant was suggesting; she asked for that information by close of business because she herself was due to go on annual leave.

163. On 14 October the claimant replied saying she did want a phased return and that she was seeing her doctor and would ask what the doctor recommended. Mrs McCafferty replied asking the claimant to let her know as soon as possible and that she would assume the claimant was returning to work on 24 October and they could discuss it then.

164. On 21 October the claimant said her doctor had suggested a four week return to work. The claimant did not, however, say what hours she was proposing she should work. Rather, she asked what would be deemed reasonable. The claimant said she had concerns about reporting to Ms Farmer. She also said she was happy to participate in mediation (having previously declined to do so).

165. On 24 October the claimant returned to work after her absence and there was a return to work meeting between the claimant and Mrs McCafferty on that date. Mrs McCafferty agreed to a four week phased return to work. As the claimant had not suggested what number and pattern of hours she wanted in that four week period, Mrs McCafferty suggested certain hours and wrote them on a return to work form for the claimant to either agree or suggest another pattern. They also discussed a reduction in the claimant's normal working hours because the claimant had asked for one and occupational health had recommended it. Mrs McCafferty agreed on a trial period. It was written in the return to work form the claimant would start the reduced hours after her phased return ie week commencing 21 November. Mrs McCafferty told the claimant she needed to drop Ms Farmer a line on Teams when she was starting and finishing work each day. By the end of the meeting Mrs McCafferty thought the claimant was in agreement with all of that. She sent the claimant the return to work form.

166. On 25 October 2022 the claimant returned a copy of the form with comments added as set out below. The claimant said in her covering email she was 'happy to discuss this before I sign off'.

166.1. With regard to the phased return the claimant said in her comments 'the hours are incorrect as they do not take into account my half day Thursday.' Beyond that, the claimant did not say what the hours ought to have been shown as. With regard to the new flexible working request involving reduced hours,

the claimant said 'I would like to know when we can implement this.' However that is a matter that had already been dealt with on the form.

166.2. Regarding the requirement to contact Ms Farmer at the start and end of the day, the claimant: implied that Mrs McCafferty had said that was 'in case the claimant had a meltdown.' We accept Mrs McCafferty's evidence that she did not use that word; we find it highly unlikely that she would have done. It is far more likely that that was the claimant's perception of what Mrs McCafferty said.

166.3. The claimant said that having to check in every day with Ms Farmer felt like micromanagement. She asked if it was standard practice or whether it was just herself. She also said 'As my relationship with Nina is still to be restored I wouldn't I would not feel comfortable expressing to Nina any discomfort' and added 'I would like to feel trusted that I will naturally fulfil my hours and should anything occur where I cannot I will advise.'

166.4. The claimant also referred to occupational health recommendations.

167. Mrs McCafferty was frustrated by the claimant's comments. There were a number of reasons for that.

167.1. Firstly, Mrs McCafferty had explained the reasons for reporting to Ms Farmer when they had their meeting to discuss it, and Mrs McCafferty thought the claimant had appeared happy with and understood those reasons. Mrs McCafferty believed it was important for both the claimant and Ms Farmer that they had daily contact, particularly given her recent prolonged absence from work for reasons attributed to stress. Because Ms Farmer was managing the claimant remotely, it would be difficult for her to know when the claimant was or was not in the office unless the claimant told her. Also the fact that the claimant and Ms Farmer worked in different offices meant there was less opportunity for daily contact whether for health and safety and welfare reasons or other reasons. Those were Miss Cafferty's reasons for putting that arrangement in place. She had explained those reasons to the claimant during their meeting and thought the claimant had understood the rationale and agreed with the arrangement. In light of the claimant's note, Mrs McCafferty now believed the claimant was suggesting she was not willing to co-operate with that arrangement and was being obstructive.

167.2. Mrs McCafferty believed the claimant had misrepresented what she had said by using the word 'meltdown.'

167.3. Mrs McCafferty was also frustrated by the claimant's comments about the phased return proposal because although, in the way the claimant framed her comments, she appeared to be finding fault with the hours written on the form yet did not clearly state what she thought the hours should be. Furthermore, Mrs McCafferty had only put forward the proposed hours because the claimant had not herself responded to earlier requests to say what hours or working pattern would be appropriate.

167.4. Mrs McCafferty was also frustrated by the claimant's reference to occupational health recommendations when she had already confirmed they would be implemented.

168. On 26 October 2022, Mrs McCafferty sent an email to the claimant. In that email:

168.1. She said she was disappointed with the claimant's comments and that it fell short of the professional behaviour she expected.

168.2. She said 'you are misrepresenting the conversation we had and the support arrangements put in place to support your return.'

168.3. She made the point that she had asked the claimant to provide the phased return hours but the claimant had not done so, so she put forward a proposal herself in the return to work form. She asked the claimant to put forward revised proposals by the end of the day if the claimant did not agree with the proposal.

168.4. She reminded the claimant that Ms Farmer was her line manager until a new senior business change leader was appointed and she said the claimant was required to follow the instruction to check in with Ms Farmer daily. She said failure to follow the management instruction either from Ms Farmer or herself would be treated as a disciplinary matter.

169. The claimant started on a phased return with reduced hours. She then moved on to 90% of her previous hours pursuant to the flexible work request that had been agreed.

170. In December, Mrs Dixon started in a new position as the claimant's line manager. She and the claimant got on well.

171. One of the allegations the claimant has made in this case is that for a period of two months from her return to work from sick leave, the claimant was given no work to do. However, this allegation is inconsistent with the claimant's own complaint of discrimination based on an allegation that the respondent failed to provide her with any material work until early January and was then only provided with minimal work. The claimant's own evidence to us was not that she was given no work to do upon her return to work but that she was given little work to do.

172. We find that what in fact happened is that when the claimant returned to work she was not given substantial projects to work on. That was intentional. The claimant was being eased back into work gradually after a significant period of time off work. She was working shorter hours and her workload was kept light. But there was other work she could do when she was not working on projects. The amount of work the department has to complete as a team fluctuates throughout the year. Some projects were added to the Claimant's workload at about the same time Mrs Dixon became the claimant's line manager. Mrs Dixon and the claimant had regular discussions about workload and the claimant indicated she was happy with her workload and the way things were being managed. We found Ms Dixon to be a compelling witness and accept her evidence that from December the claimant's workload was slightly less than it would have been for someone who had not had a phased return to work, but that the claimant had voiced concerns about gaps in her knowledge and confidence and the claimant had said at the time she felt the right thing to do was to build up her workload gradually. We find that the claimant was allocated certain projects as described by Ms Dixon in her evidence and the workload was increased when the claimant said in one to one meetings that she was

ready to take on more work. There was less work available for the team to do over the Christmas period. However, in a one to one meeting Mrs Dixon identified a more substantial project that the claimant could work on from January.

173. Between returning to work and her resignation the claimant had regular one to one meetings. We note that in those meetings the claimant made comments such as the following:

173.1. it had been 'like starting from new' when she returned to work (at page 698 of the bundle) .

173.2. it had been 'challenging trying to absorb everything' and trying to 'get up to speed' (page 704) and she had felt 'like a new girl';

173.3. that at the moment she could not 'contribute much due to long term absence and a loss of skills' (page 717).

174. We have concluded that the allegation that the claimant was given no work to do is unfounded. Nor has the claimant proved that she was not given any 'material' work to do upon her return to work or that she was given 'minimal' work to do from January 2023.

175. In or around January 2023 the claimant told people in the office she was looking for another job. She told Mrs Dixon she had an interview for a position with the Department for Education. In early February the claimant told Mrs Dixon she had had a conditional offer of employment from the Department for Education and had provisionally accepted the job subject to their pre-employment checks.

176. A few weeks earlier, a colleague who was also in the role of business change lead had tendered her resignation. Ms Farmer was already in the process of recruiting for that individual's replacement. Given what the claimant had said about being offered another job and having provisionally accepted it subject to pre-employment checks, it was apparent to the respondent that they might now have two business change lead positions to fill.

177. On 27 February Mrs Dixon sent a message to the claimant via Teams chat. She began the message 'Morning lovely' followed by a smiley face emoji. She went on 'you ok? was your weekend good? Nina has asked if there was any news on the job sitch, just because if you go she's hoping to recruit during this round of interviews. Did you say you were having a call today about hours etc?'

178. One of the allegations made by the claimant in her constructive dismissal claim is that, on 27 January 2023, Mrs Dixon asked the claimant when she was leaving. During this hearing the claimant said it was in the Teams message we refer to above that Mrs Dixon asked the question. However, it is clear that Mrs Dixon did not ask the claimant when she was leaving in this Teams message. She asked if there was any news on the job situation and that if she was going they were hoping to recruit in the existing round of interviews. The claimant's allegation plainly misrepresents what Mrs Dixon actually said.

179. Another allegation made by the claimant is that after that, at some point between that message and 7 March 2023, Mrs Dixon asked the claimant again (in writing) when she was leaving. However, we have not been shown any documentary evidence of any message in those terms. During this hearing the claimant was clearly very reluctant to put this allegation to Mrs Dixon. Mrs Dixon

did send a Teams message on 7 March in which she asked the claimant if she had emailed the person she was going to be working for. That clearly followed on from the claimant keeping Mrs Dixon abreast of discussions she was having about her new job and saying that she was planning to email that individual. Mrs Dixon did not, in that message, ask the claimant when she was leaving. We find that Mrs Dixon did not ask the claimant on any occasion when she was leaving. That factual allegation is not made out.

180. On 8 March the claimant resigned giving notice.

Conclusions

Whether the claimant was constructively dismissed.

181. The claimant's claims of unfair dismissal and wrongful dismissal can only succeed if we conclude the claimant was constructively dismissed. Similarly, the complaint that the respondent discriminated against the claimant by constructively dismissing her depends on the claimant establishing she was constructively dismissed. Therefore we deal with that issue first.

182. The alleged conduct of the respondent that the claimant says breached the implied term of mutual trust and confidence is as set out in the introduction above. We deal below with each of the matters said to have contributed to a breach of contract.

Allegation (a) Angela Gibb did not respond reassuringly when the Claimant told her that she was worried about being managed out of her job.

183. The first matter relied upon by the claimant as causing or contributing to a breach of the implied term of trust and confidence is Mrs Gibb allegedly failing to respond reassuringly when the claimant told her that she was worried about being managed out of her job. This is a reference to what was said (or not said) in a meeting on 1 June 2022.

184. We have found that the claimant did say she was concerned she might be managed out. She did so in the context of explaining why she thought an occupational health report would be helpful. We have found that Mrs Gibb did not respond in a manner that could reasonably be described as 'abrasive', as has been alleged in these proceedings by the claimant. We have found that Mrs Gibb simply replied 'aha' or 'ok'. There was nothing inappropriate or untoward in Mrs Gibb's response. On its face, it was simply a neutral acknowledgement of what the claimant had said were her reasons for wanting an occupational health referral. Whilst the claimant might have hoped for some fulsome reassurance, we conclude that, by responding in the way she did way and not in a more reassuring way, Mrs Gibb did not conduct herself in a manner which, viewed objectively, was calculated or likely to destroy or serious damage the relationship of confidence and trust between the respondent and the claimant.

Allegation (b) The Claimant was advised by Angela Gibb that she needed to submit a doctor's sick-note if she was absent for one day because of menopause.

185. The second matter the claimant says caused or contributed to a breach of the implied term of mutual trust and confidence is being advised by Mrs Gibb that

she needed to submit a doctor's sick note if she was absent for one day because of menopause. This is also said to have occurred in the meeting on 1 June 2022.

186. We have found that Mrs Gibb did not advise the claimant that she needed to submit a doctor's sick note if she was absent for one day because of menopause. Mrs Gibb merely, in response to a question from the claimant, mused on what evidence might be needed and said she would ask the people team and let the claimant know.

187. Nothing in what Mrs Gibb said to the claimant could conceivably have been calculated or likely to damage the relationship of trust and confidence at all, let alone to do serious damage to that relationship. It follows that the respondent did not breach the implied term of trust and confidence as alleged.

Allegation (c) The Claimant was forced down a formal grievance route regarding the things that she raised informally on 5 June 2022 in an email to Nina Farmer and Angela Gibb.

188. The third matter the claimant says caused or contributed to a breach of the implied term of mutual trust and confidence is being 'forced down a formal grievance route'. Although the claimant refers to this being in respect of matters she raised informally on 5 June, the allegation in fact relates to matters raised by the claimant by email on 6 June 2022.

189. We find the claimant was not forced down the formal grievance route at all. She had a meeting with Ms Farmer and Ms Curtis on 8 June during which the claimant was told the grievances she raised by email on 6 June could be dealt with formally or informally. The claimant said she preferred the informal route. The matter was then looked into informally by Ms Farmer and Ms Curtis just as the claimant had asked. The claimant was not satisfied of the outcome. She was told she had an option to take matters through the formal route. She chose to do that.

190. During this hearing the claimant simply could not explain clearly on what ground she was asserting she was 'forced' to go down a formal grievance route. At one stage she referred to the email Ms Curtis sent to Mrs Gibb on 7 June 2022 in which Ms Curtis suggested some wording for an email to the claimant in response to her asking who had made the decision not to allow her to work from her home office and which, had the email been sent, would have directed the claimant to the grievance procedure. However, we have found that no such email was sent to the claimant. In any event, even if it had been, in no way could directing the claimant to the grievance procedure be viewed as 'forcing' the claimant to go down a formal grievance route. Nor would directing the claimant to the grievance procedure have been conduct calculated or likely to destroy or serious damage the relationship of confidence and trust between the respondent and the claimant. What is more, given that the claimant had expressed dissatisfaction with Mrs Gibb's response to her email about the decision not to allow her to use the gym, the respondent would clearly have had reasonable and proper cause to direct the claimant to the grievance procedure.

191. It follows that the respondent did not breach the implied term of trust and confidence as alleged.

Allegation (d) The Claimant had asked not to be line managed by Angela Gibb but was told by Nina Farmer and Laura Curtis or about 21 June 2022 at the end of an informal investigation into the Claimant's complaints that she was to be managed by her.

192. The fourth matter the claimant relied on in her complaint of constructive dismissal was the fact that she was required to still report to Mrs Gibb after her informal grievance despite her asking not to. During the course of the hearing, however, the claimant told us she no longer asserts that this caused or contributed to a breach of contract.

193. Had the claimant not withdrawn her reliance upon this, we would have found in any event that leaving Mrs Gibb in place as the claimant's manager did not cause or contribute in any way to a breach of the implied term of trust and confidence. The informal grievance had not been upheld, Ms Farmer had agreed to work with the claimant and Mrs Gibb to help rebuild their relationship, and no employee can reasonably expect to be able to select their own manager. In light of those matters, keeping Mrs Gibb as the claimant's line manager was not conduct that, viewed objectively, was calculated or likely to seriously damage the relationship of trust and confidence. In any event the respondent had reasonable and proper cause for saying the claimant was still to be managed by Mrs Gibb given that the informal grievance had not been upheld, the claimant and Mrs Gibb would need to work on projects together in any event, and it was a small team with limited scope for changing managers.

Allegation (e) Whilst absent on sick leave, in documents obtained through a SAR on or about 14 July 2022, the Claimant saw an email from Angela Gibb that stated 'Judith went out, got drunk and forgot to take HRT'.

194. The next matter the claimant relies on to say she was constructively dismissed is that when she was absent on sick leave she obtained documents through a Subject Access Request and saw what she said was an email from Mrs Gibb stating 'Judith went out, got drunk and forgot to take HRT.'

195. We have found that no such email existed. Therefore, the claimant's case, as it was put by her, is not made out on the facts.

196. We have found that the claimant was sent a copy of Mrs Gibb's notes in response to her SAR request. They included the note of the conversation on 5 May 2022. That note did not say 'Judith went out, got drunk and forgot to take HRT'. It said the claimant '…did advise that she did not feel as good as she had forgotten to take her HRT because of drinking alcohol during the celebrations.'

197. Although the claimant's case was not put in this way, we considered whether Mrs Gibb making that note and/or sending it to Ms Farmer or Ms Curtis could be said to have caused or contributed to a fundamental breach of contract.

198. We have found that the note was a factual record of what the claimant had told Mrs Gibb. Furthermore, it was information the claimant had volunteered. Making

a note of it was consistent with Mrs Gibb's usual habit of keeping notes as an aide memoire for her own use. The information about HRT was relevant to her role as the claimant's manager because the claimant had told Mrs Gibb she was having symptoms that were affecting her work but that HRT may ease those symptoms and they had agreed to monitor whether HRT was of any help in easing the claimant's symptoms and meanwhile the respondent had agreed to a change in working hours that the claimant had asked for to help manage her symptoms, which change had just begun and was subject to a trial period.

199. We consider it highly unlikely that, when she wrote that note, Mrs Gibb could have predicted the claimant would put in a grievance and that Mrs Gibb would then need to share that note with others. We find she kept those notes for her own purpose, not for anyone else to see.

200. In all the circumstances, we conclude that, judged objectively, by making the note in the terms Mrs Gibb did on 5 May was not conduct that was either calculated or likely to damage the relationship of trust and confidence.

201. As for the fact that the notes were shared with Ms Farmer and Ms Curtis, this came about when Mrs Gibb e-mailed all her notes to the HR team in early June. The context in which she did that was that the claimant had made complaints about the way Mrs Gibb had managed her, in particular in relation to matters relating to her menopause symptoms and her flexible work requests. It is clear that, whether HR were advising Mrs Gibb about how she should deal with matters or considering the claimant's complaints as an informal grievance, HR would need Mrs Gibb's version of events and the notes she had written herself could be of assistance in this regard. What is more, the note which the claimant appears to object to was a factual record of information the claimant had volunteered about something that was not irrelevant to her work. In those circumstances, we find that Mrs Gibb sending her notes to HR (and by extension, her line manager Ms Farmer) was not, viewed objectively, conduct that was either calculated or likely to damage the relationship of trust and confidence. In any event, Mrs Gibb had reasonable and proper cause to hand over her notes.

Allegation (f) The Claimant was told, without good reason, to report to Nina Farmer daily at the beginning and end of her working day. This required her to log into Teams and send a message to say she had logged on and then to send a message at the end of the day to say she was logging out.

202. It is not in dispute that, after returning from a period of sickness absence in October 2022, the claimant was required to send a Teams message to Ms Farmer daily at the beginning and end of her working day to say she had logged on and that she was logging out.

203. For reasons set out below, the claimant's claims of harassment and discrimination in relation to this requirement are not well founded.

204. As for whether this was nevertheless a breach of the implied term of trust and confidence, the following facts form an important part of the context in which that request was made:

204.1. The claimant was just returning from a significant period of absence from work for reasons attributed to workplace stress. Being on a phased return, the claimant had unconventional hours in the sense that her work patters was not the same every day.

204.2. An OH adviser, Ms Coyne, had recorded that the claimant had described experiencing symptoms of menopause including fatigue with extreme lethargy, ringing in the ears, dizziness and insomnia with reduced memory and concentration. Ms Coyne had advised that symptoms of menopause could be worsened by stress and that it was 'vital' that stress was reduced and managed and had recommended various steps be taken in the workplace to help with the claimant's symptoms and help her manage stress, including flexible work. She had also recommended adjusting absence triggers and making allowances for any sickness absence due to menopause. The implication of that recommendation was that the claimant might conceivably need to take further time off work related to menopause.

204.3. In order to proactively help the claimant manage stress, it was relevant for the claimant's manager, Ms Farmer, to know when the claimant was at work. However, Ms Farmer, was based in Glasgow. That meant she could not see whether or not the claimant was present in the office. The only way she would know if the claimant had not arrived on time or had left early or worked late would be if the claimant told her.

205. Viewed objectively, the requirement to check in and out with Ms Farmer on a daily basis was not conduct that was either calculated or likely to damage the relationship of trust and confidence. In any event, the respondent had reasonable and proper cause for that instruction given the need for managers to be alert to signs of possible stress.

Allegation (g) Following Angela Gibb ceasing to be the Claimant's line manager the Respondent required the Claimant to report to Nina Farmer about whom she had complained for a period of about a month upon her return to work from sick leave on 24 October 2022.

206. The claimant contends that requiring her to report to Ms Farmer (rather than somebody else) breached the fundamental term of trust and confidence.

207. We reject that submission. At this time, Mrs Gibb had moved on to another position and her replacement had not been recruited. In the interim, Ms Farmer was line managing others to whom Mrs Gibb had reported. The claimant was returning to work and therefore someone needed to line manage her on a day to day basis. It was not unreasonable for Ms Farmer to do that, especially now that the grievance process was at an end and the grievance against Ms Farmer had not been upheld.

208. Viewed objectively, requiring the claimant to report to Ms Farmer was neither calculated nor likely to destroy or seriously damage the relationship of trust and confidence. That is the case whether this matter is looked at in isolation or together with the requirement that the claimant send a message to Ms Farmer at either end of the working day to say she was logging in/out (and Mrs Gibb

previously making a note of what the claimant had said about forgetting to take her HRT and sharing that note with HR and Ms Farmer).

Allegation (h) When the Claimant queried with Angela McCafferty why she had to log in and out and whether she was the only one required to do this, Mrs McCafferty emailed a hostile response to the Claimant that day to say that she was required to do so and that failure to follow a management instruction would be treated as a disciplinary matter.

209. Another matter the claimant submits breached the implied term of trust and confidence is Mrs McCafferty's response to the claimant's query as to why she had to log in and out and whether she was the only one required to do that.

210. This is a reference to Ms McCaffrey's email of 26 October 2022 and, in particular, the statement in that email that 'Failure to follow a management instruction either from [Ms Farmer] or myself will be treated as a disciplinary matter.

211. This was undoubtedly an assertive response by Mrs McCafferty and her frustration is evident in its tone. If someone were to read it without knowing the context in which it was written, we can see how it could be perceived as hostile. But the claimant did know the context. The context included fact that requiring the claimant to check in with Ms Farmer at the start and end of the day was perfectly reasonable, for reasons we have set out above. Moreover, the rationale had been explained to the claimant in the prior meeting and the claimant had seemed to agree to it. Now, however, the claimant appeared to be challenging the requirement. Furthermore, viewed objectively and reasonably, the claimant's other comments appear to have been an exercise in finding fault and did not fairly reflect what had been said in the prior meeting. In those circumstances it was reasonable for Mrs McCafferty to form the view that the claimant may now be disinclined to cooperate with the requirement to report to Ms Farmer at the start and end of the working day.

212. For reasons set out below, the claimant's claims of harassment and discrimination in relation to Mrs McCafferty's email are not well founded.

213. It is our conclusion that Mrs McCafferty had a reasonable and proper cause to set out clearly the potential consequences of not following a management instruction. It was not detrimental to the claimant to have that spelt out to her and Ms McCaffrey doing so was not something that, viewed objectively, was calculated or likely to destroy or seriously damage the relationship of trust and confidence. That is the case whether this matter is looked at in isolation or together with the requirement that the claimant be line managed by Ms Farmer and send a message to Ms Farmer at either end of the working day to say she was logging in/out (and Mrs Gibb previously making a note of what the claimant had said about forgetting to take her HRT and sharing that note with HR and Ms Farmer).

(i) For a period of two months from her return to work from sick leave on 24 October 2022, the Claimant was given no work to do.

214. The claimant also alleges that for a period of two months from her return to work from sick leave she was given no work to do. That fails on its facts. The claimant has not proved she was given no work to do.

215. This allegation overlaps with one of the claimant's complaints of harassment and discrimination. In that complaint, rather than asserting she was provided with no work to do for two months, the claimant says alleges the respondent failed to provide the Claimant with any 'material work' from 24 October 2022 until about the end of January and thereafter only provided the Claimant with 'minimal work' until the end of the Claimant's employment. As explained above, the claimant has failed to prove that was the case.

216. What we have found is that the claimant was provided with a significantly reduced workload upon her return. That was entirely appropriate given that the claimant was returning from an extended period of sick leave due to stress and the Occupational Health advice had been that it was 'vital' that stress is reduced and managed and that the claimant should reduce her hours. The claimant acknowledged herself in comments made in one to one meetings that her return to work was challenging even with a reduced workload. She said in meetings that it had been 'like starting from new' when she returned to work, that it had been 'challenging trying to absorb everything' and trying to 'get up to speed' and that she could not 'contribute much due to long term absence and a loss of skills'.

217. As recorded below, the claimant's claims of harassment and discrimination in relation to the reduced workload are not well founded.

218. In no sense could the respondent's actions in reducing the claimant's workload be viewed as something that was calculated or likely to destroy or seriously damage the relationship of trust and confidence. That is the case whether these actions are considered in isolation or when considered alongside the other conduct that the claimant complains about). In any event, the respondent had reasonable and proper cause for reducing the claimant's workload for the reasons explained in the previous paragraph.

(j) … Joanne Dixon asked the Claimant when she was leaving on 27 February 2023 and repeated the question in writing between that date and 7 March 2023.

219. We have found as a fact that Mrs Dixon did not ask the claimant on any occasion when she was leaving. Therefore the assertion that the respondent breached the implied term of trust and confidence in this regard is not made out.

220. All Mrs Dixon did was to ask the claimant for an update regarding her job situation in a message on 27 February. It was a friendly message. At that time Mrs Dixon knew the claimant had provisionally accepted a job because the claimant had volunteered that information. The claimant had a good relationship with Miss Dixon and had been open about her job offer. Given that, by the time Mrs Dixon made this enquiry, the claimant had provisionally accepted the job offer, Mrs Dixon had reasonable and proper cause for asking the claimant about the job situation given that the respondent would need to

recruit a second person if the claimant was leaving and it would be more cost efficient to do that as part of the existing recruitment exercise that had already begun. Clearly the question was not calculated to damage the relationship of trust and confidence, nor was it likely to. There was nothing in Mrs Dixon's message of 27 February that could have caused or contributed to a fundamental breach of contract.

221. Nor we found was after that message on 27 February, we found the claimant wasn't asked when she was leaving afterwards. At most she was asked if she'd had a conversation that the claimant had herself said she was going to have with her new line manager.

222. It follows from our conclusions above that the respondent did not breach the claimant's contract as alleged by the claimant or at all, whether we look at the alleged incidents individually or cumulatively. Therefore, the claimant was not constructively dismissed.

Unfair dismissal and wrongful dismissal.

223. The claimant was not constructively dismissed. Therefore, the claims of unfair dismissal and wrongful dismissal fail.

Discrimination and harassment claims

224. The claimant began early conciliation with ACAS on 7 October 2022. Early conciliation ended on 8 November 2022. The claim form was presented on 4 December 2022. Complaints about things that happened after that date were permitted to be added by amendment subsequently.

225. The complaints made under the Equality Act about things that happened, or are alleged to have happened, on or after 8 July 2022 have been brought within the primary time limit provided for in section 123 of the Equality Act 2010. The complaints within this category are the following:

225.1. Complaint (g): the complaint that requiring the Claimant to log in and log out on a daily basis from 24 October 2022 was harassment related to sex or direct sex discrimination.

225.2. Complaint (h): the complaint that the respondent failed to answer the Claimant's questions when she enquired about the reason for being required to log in and log out each day and whether she was the only person to whom the requirement was being applied and instead Angela McCafferty threatened the Claimant with disciplinary action by email on 26 October 2022 if she failed to follow a reasonable management instruction. The claimant's case is that this was harassment related to sex or direct sex discrimination, and harassment related to age or direct age discrimination.

225.3. Complaint (i): the complaint that the respondent harassed the claimant and discriminated against her (because of age and sex) by failing to provide her with any material work from 24 October 2022 until about the end of January and thereafter only provided the Claimant with minimal work until the end of the Claimant's employment.

225.4. Compliant (j): the complaint that the respondent discriminated against her by constructively dismissing her.

226. Our conclusions on those complaints follow.

Equality Act complaint (g): the complaint that requiring the Claimant to log in and out of Teams on a daily basis and report her arrival and departure to Ms Farmer from 24 October 2022 was harassment related to sex or direct sex discrimination.

227. For the purposes of the claim of direct discrimination, we must consider whether the respondent treated the claimant less favourably than it would have treated a male employee whose circumstances were not materially different from those of the claimant.

228. A hypothetical comparator would be a man who was just returning from a significant period of absence from work for reasons attributed to workplace stress; who had previously reported experiencing extreme fatigue when working; in respect of whom occupational health had advised that it was 'vital' that stress was reduced and managed and that they had a condition with symptoms similar to those experienced by the claimant (albeit not caused by the menopause) that could be exacerbated by stress; and who was not based in the same office as Ms Farmer.

229. There are no facts from which we could conclude that a male employee in those circumstances would not have been required to log in to Teams daily and report to Ms Farmer and the start and end of the working day. In particular, there are no facts from which we could conclude that the respondent treated the claimant less favourably because her symptoms stemmed from the menopause (a process that affects only women) as opposed to a condition that affects both sexes or one that affects only men.

230. Therefore, the claim of sex discrimination fails.

231. This claim of harassment also fails, for the following reasons:

231.1. Requiring the claimant to log in and out of Teams on a daily basis and report her arrival and departure to Ms Farmer was not conduct related to sex. The claimant's menopause symptoms were part of the background context but it does not follow from that that the requirement was related to sex.

231.2. Even if this had been unwanted conduct related to sex, its purpose was not to create a hostile, offensive or intimidating etc environment for the claimant. Nor was it reasonable for it to have that effect. It was designed to help the claimant and Ms Farmer.

Equality Act complaint (h): the complaint that the respondent failed to answer the Claimant's questions when she enquired about the reason for being required to log in and log out each day and whether she was the only person to whom the requirement was being applied and instead Angela McCafferty threatened the Claimant with disciplinary action by email on 26 October 2022 if she failed to follow a reasonable management instruction.

232. This complaint concerns Mrs McCafferty's email of 26 October 2022. This was sent in response to comments the claimant had made on the return to work form the previous day.

233. In her comments the claimant did not ask the reason why she had been asked to check in every day: she had been told the reason in the earlier meeting. What the claimant said was that having to check in every day with Ms Farmer felt like micromanagement and she asked if it was standard practice or whether it was just herself.

234. In her email reply Mrs McCafferty she said the claimant was required to follow the instruction to check in with Ms Farmer daily and that failure to follow the management instruction either from Ms Farmer or herself would be treated as a disciplinary matter. Mrs McCafferty did not answer that specific question about whether this was standard practice.

235. The claimant has not shown that there are facts from which we could conclude that Mrs McCafferty telling the claimant she would face disciplinary action if she did not follow a management instruction and/or not answering the question about whether this was standard practice was anything to do with age or sex.

236. In any event, we are satisfied that it was not. We are satisfied that the reason Mrs McCafferty warned the claimant about disciplinary action is that, because of what the claimant had said in her comments on the return to work form, she believed the claimant was being obstructive and was not willing to cooperate with the arrangement that had been put in place. We are satisfied the reason Mrs McCafferty did not respond to the claimant's specific question about whether this was 'standard practice' was that she did not consider it a reasonable question given that she had already explained to the claimant why this arrangement was being put in place.

237. Therefore, the claims of direct discrimination fail.

238. The claims of harassment also fail because Mrs McCafferty's conduct in telling the claimant she would face disciplinary action if she did not follow a management instruction and/or not answering the question about whether this was standard practice was not related to sex or age.

Equality Act Complaint (i): the complaint that the respondent harassed the claimant and discriminated against her (because of age and sex) by failing to provide her with any material work from 24 October 2022 until about the end of January and thereafter only providing the Claimant with minimal work until the end of the Claimant's employment.

239. These complaints are not made out because the claimant has failed to prove that:

239.1. the respondent failed to provide her with any material work from 24 October 2022 until about the end of January; and/or

239.2. thereafter the respondent only provided the Claimant with minimal work until the end of her employment.

240. The claimant was provided with a reduced workload after her return to work on sick leave. However, the claimant has not shown there are facts from which we could conclude, in the absence of an alternative explanation, that this was done because of sex or because of age.

241. As for the claims of harassment, we are not persuaded that providing the claimant with a reduced workload was unwanted conduct. In any event, there are no facts from which we could conclude that the respondent's conduct in providing a reduced workload was conduct related to age or sex. In particular the facts do not support an inference that the respondent treated the claimant differently because the stress related symptoms the claimant had been experiencing may have been connected in some way with the menopause as opposed to some other non sex-specific condition.

Equality Act Compliant (j): the complaint that the respondent discriminated against her by constructively dismissing her.

242. This claim fails because we have determined that the claimant was not constructively dismissed, for reasons given above.

243. It follows that none of the claims made within the primary three month time limit succeed.

Equality Act complaints (a) to (e)

244. The remaining complaints were made to the Tribunal more than three months after the alleged incidents. We must therefore decide whether the claim was brought within 'such other period as the employment tribunal thinks just and equitable': s123(1)(b). In other words, we must decide whether it is just and equitable to extend the time for bringing these claims.

245. The claims are:

245.1. Complaint (a): A complaint that Mrs Gibb refused to let the claimant work from her personal office in January 2022;

245.2. Complaint (b): A complaint that Mrs Gibb refused to allow or secure an occupational health report in February,

245.3. Complaint (c): A complaint that Mrs Gibb intrusively questioned the claimant about her daily routines in March 2022.

245.4. Complaint (d): A complaint that there were unreasonable terms imposed when granting the flexible work request; and

245.5. Complaint (e): A complaint about refusing to provide or secure an occupational health report on or about 23 May.

246. The claimant withdrew complaint (f).

247. Complaints (d) and (e) could not succeed on the facts as we have found them. That is because we have found as a fact that Mrs Gibb did not impose unreasonable terms when granting the flexible work request and nor did she refuse to provide or secure an OH referral on or about 23 May 2022.

248. Taking the claimant's remaining claims at their highest, if the claims were made out and if we were to find they were part of a continuing discriminatory state of affairs, any discrimination or harassment ended on 8 March. The claimant did not bring the claim until 4 December nearly nine months later. However, she had spoken to ACAS before meeting with Ms Farmer and Ms Curtis on 14 June 2022. She knew that bringing an Employment Tribunal claim was an option and could have put a claim in time. There is no evidence before us that the claimant did not know or could not reasonably have found about time limits for bringing a claim. We acknowledge that the claimant had a period of stress related sickness absence but she was still able to deal with her grievance in time and we infer she could have dealt with an Employment Tribunal claim in time.

249. The claimant chose to deal with matters through the respondent's internal grievance procedure. We do not criticise the claimant for putting in a grievance. There is a public interest in employees trying to resolve their disputes within the workplace. However, when the claimant submitted her grievance she did not suggest at the time there had been a breach of the Equality Act: this was not a grievance about alleged discrimination or harassment.

250. There was further delay after the grievance process concluded. The grievance process was at an end by September 2022. The claimant was off work with stress at the time. However, notwithstanding her sickness absence she had been able to deal with her grievance. We do not consider that the fact that the claimant was absent from work due to stress was a factor that prevented her from making a Tribunal claim. In any event, the claimant was recovered enough to return to work in late October 2022 but it was another six weeks or so before she brought a claim.

251. The claimant has not persuaded us there was a good reason for the delay in bringing a claim. However, the absence of a good reason does not mean we cannot exercise our discretion to extend time.

252. An important consideration is the effect of extending time or not extending time. We recognise that if we do not extend time for these claims, the claimant will experience prejudice in that she will not have these matters determined and, if we were to decide the claims are well founded, would not have a remedy for unlawful acts. Some of those claims would fail in any event because of the findings of fact we have made but it is not inevitable that all of the claims would fail.

253. As for the effect on the respondent, although many of the facts were not in dispute and the respondent was able to lead evidence at the hearing, we consider that the delay caused some prejudice to the respondent's ability to defend the claims. The issues at the centre of these claims were the motivations of individuals (particularly Mrs Gibb) for doing the acts (or omissions) said to be unlawful and, in some cases, whether the alleged act or omission occurred at all, or happened in the way alleged. Whilst some facts that may have a bearing on those issues could be established by reference to documents, others were dependent on the recollections of individuals. Evidence of various factual issues

was less good than if a claim about it had been brought nearer the time and even where witnesses believed their evidence to be accurate, the passage of time left their evidence more vulnerable to being considered unreliable.

254. Weighing all of the relevant factors, including the public interest in enforcing time limits, the claimant has not persuaded us that it is just and equitable to extend time for any of complaints (a) to (e).

255. It follows that the Tribunal does not have jurisdiction to determine those complaints.

256. Therefore, none of the claimant's complaints is made out.

Employment Judge Aspden

Date 31 July 2024