EMPLOYMENT TRIBUNALS

Claimant: Ms R Sutherland

Respondent: Intesa Sanpaolo S.P.A.

Heard at: in person at the Central London Tribunal **On:** 26, 27 and 30 September and 1 and 2 October 2024 and in chambers on 6, 7 and 8 November 2024 and for a half day on 10 January 2025 and full day on 20 January 2025.

Before: Employment Judge Woodhead
Mr M Simon
Mr S McLaughlin

Appearances

For the Claimant: Mrs M Sutherland with the Claimant

For the Respondents: Ms G Hirsch (Counsel) with Miss H O'Connor (Solicitor)

JUDGMENT WITH REASONS

The unanimous decision of the Tribunal is that:

1. The complaints pursuant to Section 80H Employment Rights Act 1996 (ERA) (flexible working requests) are not well founded and are dismissed.

2. From 1 November 2022 the Claimant was a disabled person as defined by section 6 Equality Act 2010 because of her mental health impairment (it was not disputed that she was also disabled because of asthma throughout the claim period).

3. The complaints of unfavourable treatment because of something arising in consequence of disability are not well-founded and are dismissed.

4. The complaints of failure to make reasonable adjustments for disability are not well-founded and are dismissed.

5. The complaints of harassment related to disability are not well-founded and are dismissed.

6. The complaints of direct sex discrimination are not well-founded and are dismissed.

7. The complaints of victimisation are not well-founded and are dismissed.

8. The complaints pursuant to Section 47B ERA of being subjected to detriments for making protected disclosures are not well-founded and are dismissed.

9. The following complaints of being subjected to detriment pursuant to Section 48 ERA are not well founded and are dismissed:

    9.1 Section 44 ERA (Health and safety cases)

    9.2 Section 47E ERA (Flexible working).

10. The majority decision of the Tribunal is that the complaint of indirect sex discrimination is not well-founded and is dismissed.

REASONS

11. We apologise to the parties for the delay in issuing this judgment and these reasons.

THE ISSUES

12. As summarised in a case management order of 27 February 2024 (paragraphs 53-54):

    12.1 The Claimant was employed by the Respondent, the London branch of an Italian bank from 24 August 1998. She remains employed. Her role is Specialist, Middle Office, (Nostro Department). Early conciliation started on 12 June 2023 and ended on 24 July 2023. The claim form was presented on 21 August 2023.

    12.2 The claim is about the Claimant's efforts to get the Respondent to agree to flexible working arrangements which allowed her to work from home all of the time to accommodate her medical conditions and her child care arrangements. The Respondent's defence is that it acted properly.

13. At the hearing we added clarity to the issues that we were asked to determine and the agreed List of Issues LOI ("**LOI**") is set out in the Appendix to this judgment together with the additional complaint of direct sex discrimination relating to overtime payments ("**the OT Complaint**") which we allowed the Claimant to add by way of amendment on the first day of the hearing as described below.

THE HEARING

14. This claim was listed for a hearing of five days but there had been developments in the agreed list of issues subsequent to the claim being listed for this hearing.

15. We were provided with:

    15.1 An agreed bundle of 1626 pages (page references indicated by **[NUMBER]**)

15.2 A bundle of witness statements of 99 pages which included statements for the following (**WSB[]**):

15.2.1 The Claimant (48 pages) [paragraph references indicated by **CWS[]**]

15.2.2 Ms H Tout for the Respondent (24 pages) [paragraph references indicated by **HTWS[]**].

15.3 Mr P Sparano for the Respondent (8 pages) [paragraph references indicated by **PSWS[]**].

15.4 Mr M Steward for the Respondent (17 pages) [paragraph references indicated by **MS1WS[]].**

15.5 An agreed chronology

15.6 An agreed cast list

15.7 A supplemental statement for Mr Stewart with his evidence on the new OT Complaint [paragraph references indicated by **MS2WS[]**].

16. Before we started to hear evidence we sought to put the Claimant and her mother on an equal footing by explaining the process and in particular by providing guidance on:

16.1 The importance of the list of issues as defining the matters that we would be asked to determine and therefore the focus that the parties should put in cross-examination;

16.2 The process of hearing the evidence and cross-examination, tribunal questions, re-examination and the need for the Claimant's mother, when it came to her cross-examination of the Respondent's witnesses, to challenge them on things that they say in their witness evidence which are relevant to the List of Issues and which the Claimant disputed. We made clear that, as such, the List of Issues should be a useful tool for the Claimant and her mother to focus cross-examination. The Claimant's mother had already prepared her questions.

16.3 We explained that if a witness is not challenged on the evidence in their witness statement the Tribunal is entitled to accept that evidence (take it at face value) and that if the Claimant's mother did not challenge a witness on a material point then that could affect the Claimant's ability to establish her case.

17. We asked if any adjustments were needed and made clear that the Claimant could ask for breaks if she felt she needed them, particularly in light of her health conditions. We made clear that anyone could ask for a break if they needed it.

18. We reminded witnesses under oath that they were not permitted to communicate with others about the case during breaks or adjournments while they were giving evidence under oath. This included making clear, during a discussion of the timetable for the hearing, that it was likely that the Claimant would remain under

oath over the weekend and so she should ensure that she had discussed everything that she thought she might need to with her mother before she started to give evidence on Friday 27 September 2024.

19. A provisional timetable had been agreed at a preliminary hearing on 27 February 2024. However, it became clear given the volume or reading and the extent of the issues to be determined, that the timetable was not realistic. It was agreed that we would only therefore determine liability and not remedy and that we would need to reserve our decision. We kept the timetable under review during the hearing.

20. The Claimant drew our attention to an application to amend her claim to add a discrete complaint of direct sex discrimination relating to an allege discrepancy in a cap on overtime applied to her in the summer of 2022 which she said had not been applied to male colleagues ("**the Overtime Sex Discrimination complaint**"). She said that she had only received documents revealing this basis for a claim in disclosure on 2 July 2024, there had been a lot of documents to work through and she had then included the allegation in her witness statement on 6 August 2024. However, by this time not having legal representation, she had not realised the need to make an application to amend her claim. She did however make that application on 3 September 2024. The Respondent had objected to the application.

21. We took into account the submissions of the parties, the Rules (including in particular Rule 2), the Presidential Guidance and the principles set out in **Selkent Bus Company v Moore [1996] ICR 836**, the relative injustice and hardship involved in refusing or granting the amendment applications (the prejudice to the Claimant if permission is refused against that to the Respondent if it is granted) and the decision of the EAT in **Vaughan v Modality Partnership UKEAT/0147/20/BA** and other relevant authorities (including, **Abercrombie and others v Aga Rangemaster Ltd [2014] ICR 209 (CA) Underhill LJ, Galilee v Commissioner of Police for the Metropolis UKEAT/0207/16/RN**). We concluded that the balance of hardship was in favour of permitting the application to amend subject to us determining the question of time limits once we had heard all of the complaints. We accepted that the Claimant had not known about the basis for the complaint until 3 July 2024 and had then acted sufficiently promptly in making her application to amend. We accepted that need for the application and urgency was not immediately apparent to the Claimant. The new claim did not overlap with any of the existing complaints and so the Claimant would have been disadvantaged had we not allowed the amendment. In contrast it did not appear that it was likely that any significant disclosure would be needed, the Respondent had understood the nature of the allegation since 3 September 2024, the relevant witness (Mr Stewart) was in any event giving evidence and could prepare a supplemental statement and we were able to make allowances (including to the timetable) for the Respondent's counsel to take instructions and prepare cross-examination of the Claimant on the new complaint.

22. We then spent the afternoon of the first day reading the witness evidence presented to us.

23. We had a slightly delayed start on Friday 27 September 2024 (the second day of the hearing) to allow us to complete our reading. We then finalised the list of issues and started to hear the Claimant's evidence. We had warned the Claimant that she might be under oath over the weekend and that was in the event necessary.

24. On Monday 30 September 2024 (day three) we concluded the Claimant's evidence and some further clarification was made to the List of Issues.

25. We then heard the evidence of Mr Sparano. We gave guidance to the Claimant's mother and the Claimant (who sometimes took over cross-examination) during the hearing on focusing her cross-examination and using the LOI. We gave guidance on how to focus that cross-examination and the need to put her case to the Respondent's witnesses and the issues that had not been put to them. We reminded the Claimant of the passing of time and the need to think about how she managed the time available to her and prioritised her questions. At one point it appeared that that the Claimant wanted to withdraw her claim of direct sex discrimination but she did not do so.

26. Before the end of the day we discussed practicalities with respect to submissions and the timetable for the remaining two days.

27. On Tuesday 1 October 2024 (day four) we heard the evidence of Mr Stewart followed by the evidence of Ms Tout. We then discussed practicalities for submissions which we heard in the afternoon of Wednesday 2 October 2024 (day five and the last day of the trial window).

28. Both the Respondent and the Claimant made written submissions. We heard oral submissions from the Respondent before lunch and then gave the Claimant an extended lunch to give her time to prepare her response to the Respondent's written and oral submissions.

29. Before the hearing concluded we gave the parties an indication that we hoped to deliberate on the claim in early to mid-November. The Claimant remains in employment with the Respondent. Both parties said they would, if it would expedite them having the Tribunal's decision, be content for a further hearing to be listed for us to give oral judgment and reasons. However, the Claimant said that she would most likely want written reasons in any event and the Respondent said that they might, dependent on our decision. We said that we would try to update them in mid-November but could not make commitments and had to take into account Rule 2 and the overriding objective in deciding whether to list a further hearing for oral judgment or issue written reasons.

FINDINGS OF FACT

30. Having considered all the evidence, we find the following facts on a balance of probabilities.

31. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

32. Some of the facts relevant to the Claimant's direct sex discrimination complaint related to overtime are included in the analysis and conclusions section.

Flexible working policy / Smart Working

33. The Respondent's employee handbook provides as follows:

> [288 to 289]
>
> ***12. Long-Term Sickness Absence - Policy and Procedure***
>
> *a) Policy Statement*
>
> *Wherever possible, it is Intesa Sanpaolo's policy to safeguard an employee's job in cases of long-term sickness absence. Each case will be looked at individually and assessed on its merits. It is, therefore, impossible to specify an exact period of long-term sickness absence when the continuity of employment will need to be reviewed. This is because, in reviewing each case, Intesa Sanpaolo will need to take the following factors into account:*
>
> *i. the nature of the employee's job;*
>
> *ii. the nature of the employee's illness or injury and its effects on others, including their health and safety;*
>
> *iii. whether the employee's illness or injury will be temporary or permanent;*
>
> *iv. the expected duration of the employee's sickness absence;*
>
> *v. the needs of the department or Intesa Sanpaolo as a whole; and*
>
> *vi. whether, on return, the employee will be able to provide a regular and efficient service to Intesa Sanpaolo, having regard to the demands of his/her job.*
>
> *In order to uphold this policy, Intesa Sanpaolo will observe the procedure outlined below.*
>
> *b) Procedure*
>
> *i. Intesa Sanpaolo will, with the co-operation of all employees, endeavour to find out the nature of the employee's illness or injury. This will be done by maintaining regular contact with the employee to review the employee's progress.*
>
> *ii. If appropriate, Intesa Sanpaolo will ask for the employee's written permission to contact his/her doctor to find out the medical factors outlined under point 12.a) above. Employees are free to refuse such permission; however, insufficient information may result in decisions which are detrimental to the employee's interests.*

iii. If appropriate, Intesa Sanpaolo will ask the employee to be seen by Intesa Sanpaolo's own doctor for independent advice. Should this avenue be pursued, the reasons behind this decision will be discussed with the employee.

iv. In most/some cases, the vacancy will be filled by a temporary member of staff in the short term, but if it becomes necessary to fill the vacancy permanently, the employee will be notified as soon as possible and invited to discuss the implications.

v. Should a suitable alternative position be available upon the employee's permanent recovery then Intesa Sanpaolo may, subject to satisfactory performance prior to the employee's long-term sickness absence, give the employee favourable consideration for the position.

[352-353]

23. Whistleblowing Policy

An effective internal reporting system (i.e. Whistleblowing) supports the spread of a culture of legality and is an opportunity to improve the business environment both from an organizational and ethical perspective. The reporting system governed by these rules ensures the confidentiality of the informant, excluding the risk of punitive, unfair or discriminatory conduct.

These rules have been defined and approved by the Board of Directors of the Parent Company and are available through Intesa Sanpaolo's Intranet > ARCO > Head Quarter Governance Documents > Rules > Risks and Controls Management > Reputational Risks.

Without prejudice to principles/issues governed by the Group's Internal Code of Conduct, this document describes the methods and channels of communication which the informant may use, and the reporting process which take place when a report is submitted. It also indicates the various stages of the process, the persons involved, including their roles and responsibilities, as well as the cases in which the "Head of Internal Reporting System" is required to provide immediate notice to the Corporate Bodies.

Briefly, whenever an employee suspects that a violation occurred, or could potentially occur, he/she can report it by sending an email to segnalazioni.violazioni@intesasanpaolo.com to which Internal Auditing Head Office Department has an access. As an alternative, a "backup" channel of communication is available: […] which can be used when the informant feels that, because of the nature of the report, the Internal Auditing Head Office Department could potentially be in conflict of interest. In this case, the report shall be addressed to the Management Control Committee that decides on the most appropriate method to carry out the activities usually assigned to the Delegate.

Local regulators encourage first use of the Whistleblowing internal

procedures and, if there aren't any, or if you don't an employee doesn't feel able to do so, they provide opportunity to UK branch employees, if they wish to report a violation directly to UK Regulators: […]

[372 to 374]

g) Flexible Working

Intesa Sanpaolo recognises the importance of work-life balance and will consider requests for a variation in an employee's terms of employment regarding the location in which they work, their hours/days of work and times of work and their times of work, following the procedure set out below.

Employees should submit flexible working requests to their manager in writing. The request should state that it is a flexible working request, explain the change requested and the proposed start date, identify the impact it would have on the business and how that could be dealt with and state when (if ever) the employee has made a previous flexible working request.

i. Procedure for dealing with the request:

Following receipt of the request, the employee's manager will arrange a meeting with the employee. This will provide an opportunity to explore the employee's desired working pattern in detail and to discuss how best it might be accommodated. It will also provide an opportunity to consider other alternative working patterns should there be any problems in accommodating the employee's desired working pattern outlined in the employee's application. The employee may, if the employee wishes, bring a colleague who works for Intesa Sanpaolo London Branch as a companion to the meeting. (The companion can address the meeting and confer with the employee but will not be allowed to answer on the employee's behalf.)

ii. Notification of Intesa Sanpaolo London Branch's decision:

After the date of the meeting the employee's manager will write to the employee either agreeing to a new working pattern or to provide clear business grounds as to why the employee's application cannot be accepted and why these business grounds apply in the circumstances. A flexible working request may only be rejected for one or more of the following business reasons:-

(aa) the burden of additional costs;

(bb) detrimental effect on ability to meet customer demand;

(cc) inability to reorganise work among existing staff;

(dd) inability to recruit additional staff;

(ee) detrimental impact on quality;

(ff) detrimental impact on performance;

(gg) insufficiency of work during the periods that the employee proposes to work; or

(hh) planned changes.

iii. Right of appeal:

Within 14 days of being notified of the decision the employee may appeal against the decision. The employee must provide notice of the appeal in writing to the management and send a copy to the Human Resources Department (care of Intesa Sanpaolo). The employee must clearly set out the grounds of appeal.

Following receipt of an appeal, an appeal meeting will be arranged. A member of staff who is senior to the employee's manager will hear the appeal. The employee may, if the employee wishes, bring a colleague who works for Intesa Sanpaolo London Branch as a companion to the meeting. (The companion can address the meeting and confer with the employee but the companion will not be allowed to answer on the employee's behalf.) The decision of the appeal will be notified to the employee as soon as possible after the appeal meeting.

If the employee's request for flexible working is granted, the decision will be dated and include a description of the new working pattern and state the date from which the new working pattern is to take effect. If the employee's request is refused, the decision will be dated and will state the business grounds upon which the decision was made and provide an explanation as to why the grounds for refusal apply in the circumstances (see above).

A written notice of the appeal outcome constitutes Intesa Sanpaolo London Branch's final decision and is effectively the end of the formal process within the workplace.

iv. Time scales:

Intesa Sanpaolo will deal with flexible working requests in a reasonable manner and within a reasonable timeframe. In any event, the time frame between making a flexible working request and notifying the employee of a final decision (including the outcome of any appeal) will be less than three months, unless a longer period has been agreed with the employee. Please note that only one application for flexible working may be made in any 12 month period.

34. In May 2022, following the the COVID pandemic lockdowns, the Respondent introduced a Home Working Policy [HTWS41] which provided as follows [706-709]:

Intesa Sanpaolo London - Home Working Policy

1. Definition

Home working in the UK is a way of working remotely rather than from your normal/contractual place of work. The Bank supports home working in appropriate circumstances on an occasional/ad-hoc basis to respond to specific circumstances or to allow completion of specific tasks. This policy sets out the framework and minimum requirements for how we will deal with informal requests for home working. Further information and guidance can be obtained from the HR Department, Intesa Sanpaolo London Branch. Your Line Manager/Head of Department will work with you to confirm arrangements.

This policy is non contractual and any request to put in place a permanent change to working arrangements need to be made formally under the flexible working policy detailed in section 30(g) of the Employees' Handbook.

Any remote working arrangement put in place pursuant to this policy will not be a permanent change to terms and conditions, and can be withdrawn by the Bank at any time. This includes any arrangements under this policy that are in addition to, or cumulative with, any existing flexible working arrangements already formally agreed with the relevant employee.

For the avoidance of doubt, your normal place of work remains the Bank's offices as notified to you under your contract of employment.

The policy is not applicable when Business Continuity Plan is tested or activated.

2. Eligibility

All requests must be issued in writing to the Line Manager. Not all roles and not all jobs are suitable for home working. Reasons for refusing a request for home working may include, but are not limited to circumstances where:

• you need to be present in the office to perform your role (for example, because it involves a high level of interaction with colleagues or third parties or involves equipment that is only available in the office);

• your most recent appraisal has identified aspects of your performance as unsatisfactory, or your Line Manager/Head of Department reasonably believes working from home would be detrimental to your performance or the performance of the department;

• you have an unexpired warning;

• you need further training or supervision to deliver an acceptable quality or quantity of work;

• your communications (including voice calls) are subject to recording requirements and recording is not possible when working outside the office;

• your role and/or responsibilities, require enhanced monitoring and this can be performed only while working from the office.

Possible further restrictions may be provided from time to time by statutory regulation and/or guidance from the government, regulator or other supervising authorities.

3. Duration

Home working should be on an occasional basis only. Any agreement that you work from home is intended to be temporary and will be kept under ongoing review. The fact that home working may be permitted in one case does not give rise to any entitlement to work from home in the future and the Bank reserves the right to withdraw or amend the arrangements at any time including (but not limited to) any change in your role and/or duties, or any other change which means that home working is no longer suitable.

4. Structure and hours

Home working is intended to be on an ad-hoc basis only and does not constitute a change to your terms and conditions of employment.

All terms and conditions of employment continue to apply irrespective of whether you may be permitted to work remotely on occasions. In particular, your hours of work and duties remain unchanged. There is no

overtime work eligibility when working remotely and therefore there will be no overtime pay permitted.

If you wish to work from home then this should be discussed and agreed at least one week in advance with your Line Manager/Head of Department. In accordance with the temporary and ad hoc nature of remote working under this policy, whilst the Bank will seek to accommodate the request, any arrangement may be subject to change taking into account the needs of the business (for example, if a particular task/project means that it is no longer practicable for you to work from home on a particular day). The relevant Line Manager/Head of Department will not be able to accept home working requests if home working would affect the continuity and effectiveness of the Department. Home working for fractions of the day may also be requested where commuting time does not interfere with normal working hours.

As home working under this policy is intended to be occasional only, no more than 10 days per calendar month (or 46% of scheduled work days in the case of part-time workers) will be permitted. The Bank expects home working requests to be made on an 'ad hoc' and 'as necessary' basis (e.g. not every Friday or Monday).

Home working must be recorded and approved in advance on the online Mitrefinch procedure using the following code: RW.

5. Location

You will be required to work from your home address for the duration of your homeworking arrangement. If you wish to work from a different location at any time, this will need to be agreed with your Head of Department in advance and is subject to their written approval.

[…]

Background, the Claimant's role and the Nostro Team

35. The Claimant is a long serving employee having commenced employment on 24 August 1998.

36. Since 2010 and at all times relevant to her claims she worked in the Respondent's Nostro team. That team is responsible for reconciling the internal and external movements of cash in relation to the dealings of the Respondent's London branch ("**Reconciliation**"). The Claimant had previously agreed a flexible working pattern before joining the Nostro team such that she worked 9.15am to 4.45pm, Monday to Friday with a lunch break of 30 minutes. [MS1WS5-6]

37. We accept that Reconciliation is a repetitive, daily task that has to be completed on the given day, so work cannot wait until a person returns from any type of absence [MS1WS5-6]. We also accept that individual absences mean that the remaining members of the team are under pressure to complete the day's work. The Nostro team had three members during the period relevant to this claim and so one member being away meant a 33% reduction in the team's human resources.

38. Mr Kidney was the Claimant's immediate line manager but Mr Stewart had overall responsibility for the Nostro and other teams.

39. Prior to the period of time to which this claim relates the Claimant had had a significant amount of sick leave for a range of reasons [126]:

    39.1 In 2016 – 17 days with one continuous period of 15 days' absence (we were not told the reasons)

    39.2 In 2017 – 60 days with a bad back concurrent with 7 days with a chest infection and other absences for reasons unspecified

    39.3 In 2018 – the Claimant was off for the whole year for a knee operation and post operative recovery (260 days).

40. By the start of 2019 the Nostro team had been given a third member of staff and so was fully staffed. Mr Stewart thought that her return to the team would disrupt its stability and so asked HR if it was possible to move her elsewhere, as the Bank had previously done (there having been discontent in the team at the Claimant's absence). Mr Stewart did not see the Claimant as someone who

"*could be counted on*" [151]. However, the Claimant did return to the team, phasing back to full time hours by the middle of April 2019, and Mr Stewart does not recall if the option of moving the Claimant was ever discussed.

41. During the remainder of 2019 the Claimant had a further 11 days' sickness absence, eight of which are noted in her record as being for exacerbation of asthma.

42. In January 2020 the Claimant was sick for five days from 27-31 January 2020. On 12 February 2020 the Claimant asked Mr Stewart if she could take parental leave as her son was ill but this was declined by HR for short notice reasons and Mr Stewart then agreed with HR that the Claimant could take annual leave until 21 February 2020 [165]. The Claimant was due back on Monday 24 February 2020 but did not come in because she told HR she had pulled her back over the weekend and was on sick leave from 24 - 28 February. Mr Stewart expressed his concerns about the Claimant's reliability to HR.

43. Of course the COVID pandemic then hit in March 2020 and a series of lockdowns ensued. This mean that the Nostro team were required to work from home for a substantial period of time.

44. On 29 July 2020 the Claimant sent an email to Mr Stewart stating:

> "*The last 3 consecutive times I have made a comment in the Middle Office skype group meeting you have made condescending and demeaning remarks about my suggestions, all of which I consider to have been either a benefit to staff and/or the bank's business. I am most upset about your behaviour and do not appreciate being spoken to like that. While you may not have given your remarks a second thought, I am left here feeling under-valued and ridiculed*"

45. Mr Stewart responded as follows to the Claimant and Mr Kidney (the Claimant's immediate line manager):

> *[…]*
>
> *My apologies if my comments were interpreted in this way*
>
> *I appreciate your positive approach to addressing the constant lack of support from the other departments, however I am growing evermore weary of trying to 'police' them for not doing their job properly*
>
> *Unfortunately today this reached tipping point and resulted in my flippant response to your proposal, which I apologise for.*
>
> *I will ensure this does not happen again*

46. He also sent the following email to a much broader audience:

> *All,*
>
> *I apologise for my approach to today's group call, no excuse other than*

> *frustration to the constant demand to chase the other departments to ensure they 'do their job' ..still unprofessional however and not something that I will repeat.*
>
> *I am on annual leave Thursday/Friday albeit still at home, so any issues please email me and I will pick them up in due course...no need to hold the 11am which we will resume on Monday.*
>
> *Rgds*

47. Appraisals are carried out in March or April in respect of an employee's performance in the previous calendar year. Mr Stewart appraised the Claimant on her performance in 2020 (a year in which the Claimant had worked entirely from home since March) and commented:

> "*2021 has seen a significant change in the working environment with a complete switch to smart working due to the pandemic. I believe this has been fully embraced by [Claimant] and is a test case to the benefits of a flexible working environment. A marked decrease in absence coupled with [Claimant]'s proven knowledge and experience has resulted in a much improved appraisel and more importantly a strong collaborative Nostro team.*" [159]

The Claimant's health and needs of son

48. In 2008 the Claimant was diagnosed with asthma and the Respondent accepts that this constituted a disability through the period relevant to this claim. The mental impairment on which the Claimant relies (stress, anxiety and depression) developed later, as we will describe.

49. The Claimant has a son who has significant additional needs. The Claimant's husband is a lorry driver whose ability to care for their son is restricted by his work and the requirements that he has to rest when not driving.

50. On 16 July 2020 the Claimant told Mr Kidney, Mr Stewart and HR by email that her son's day care centre was going to stop providing a school pick up and drop off service (CWS12 and [220]). The Claimant sought alternative childcare and enrolled her son in his school's after school club which closed at 6pm. This was not problematic for the Claimant because she was, because of the pandemic, working from home full-time, and not making the approximately one-and-a-half-hour-long journey to the Respondent's office in London. She was able to do school drop off and pick up and meet her working hours.

July / August 2020 – the Overtime Sex Discrimination complaint

51. Intesa Sanpaolo acquired control of UBI Banca on 5 August 2020 and merged it by incorporation on 12 April 2021 [PSWS2]. Mr Stewart [MS2WS3] sanctioned overtime for the Nostro team in July 2020 as their workload increased as a result of the merger. We accept his evidence that overtime is generally not paid and that overtime has normally only been sanctioned where something out of the ordinary is happening and is increasing the demands on the team (such as mergers or significant changes to ways of working that need to be tested and implemented). Mr Stewart's evidence was that overtime payments are

submitted for the calendar month in question and that a claim for more than 30 hours in a month would be more likely to be scrutinised by the business. His evidence was that it was always better to be 'under the radar' in that respect. We accept what he says in this respect.

52. In August 2020 the Claimant and Mr Stewart exchanged the following correspondence (we mean no disrespect in using the following shorthand (Claimant = C, Mr Stewart = S):

Email chain 1

30 July 2020 18:49 C to S

Due to today s workload please confirm you will authorise my overtime for 1 and a half hours.

3 August 2020 9:26 S to C

Yes, pls claim for the O/T and send the signed form over to me.

Email chain 2

31 July 2020 19:05 C to S

Due to today's workload please confirm you will authorise my overtime for 2 hours, further to Dave's e-mail regarding the current confirmation queries there are still 10 outstanding queries being carried over to Monday at least

Email chain 3

04 August 2020 19:19 C to S

I started and 7.30am and finished just now, please authorise 2 hours Although have worked longer I appreciate not having to travel and will not claim for the full period

S to C (date and time unknown)

Yep pls claim for what you have worked as the workload is excessive

Email chain 4

4 August 2020 S to Ms Rumi (Mr Stewart's manager and the Head of Accounting and Operations)

I attach the O/T for July, [Claimant] and Nick (Nostro), have also claimed for a few days as they have been busy due to the problems with the ex-BIMI a/c s since the merger.

Email chain 4

6 August 202 C to S

[…]

Do I need your authorisation on a day basis for overtime, don't think I sent you an e-mail regarding it yesterday

Undated and untimed reply that may be incomplete S to C

Speak tomorrow

Email chain 5

24 August 2020 18:01 C to S

Please see attached overtime for August, I am on holiday until 02.09.20 and wasn't sure what date you needed the overtime in by.

53. We accept Mr Stewart's evidence that the Claimant initially claimed 32 hours for the first 3 week period of August, i.e. from 3 to 24 August (16 days over 3 weeks). She was on annual leave from 25 to 28 August 2020 and put in her claim for over time just after 6pm on 24 August 2020, the day before her leave commenced [MS2WS6-7 [232-233]]. Mr Stewart replied as follows:

26 August 2020 10:35 S to C

I think we need to be a little more pragmatic in our approach to your overtime claim as it is unlikely the management will sign off on this quantity of hours claimed under a Smart Working environment.

Obviously there are benefits to working from home regarding the flexibility of hours worked and I frequently offer to the team to log off early if and when their work is complete.

In return I believe we all work additional minutes/hours when the workload requires.

I appreciate you and the Nostro team were busy during the early part of August due to the first EOM post merger and also with David being on holiday during the first 2 weeks and Nick the third, and for this reason I agreed for O/T to be claimed.

However in order for your claim to be accepted without question I would limit it to 1-1.5 hours per day for the first 3 weeks of August this will also ensure future O/T can be worked and claimed without undue scrutiny.

Many Thanks.

54. The Claimant's position was that Mr Stewart used the phrase '*we need to be a little more pragmatic'* when he was telling someone that they could not do something. Mr Stewart said [MS2WS8] that his email (which he described as advice) was based on the fact that Mr Kidney had returned to work on 17 August

and the workload had subsided in the second half of August, notwithstanding that Mr Potter (a member of the Nostro team) and then the Claimant went away. He said that he knew overtime was being heavily scrutinised by the Bank - more so if claimed while remote working. He said he was concerned that putting in a claim for a lot of overtime would bring unwelcome scrutiny and could jeopardise future overtime claims for the Claimant and the department. We accept his evidence in this regard.

55. Emails were then sent as follows:

> **7 September 2020 08:32 C to S**
>
> *I m disappointed to have received your e-mail regarding the number of overtime hours I am claiming because it may result in the possibility of scrutiny by management.*
>
> *On 4th August (see 1st attachment) I explained to you that I had worked nearly 12 hours but was willing to only claim 2 hours overtime to which you replied Yep pls claim for what you have worked as the workload is excessive.*
>
> *This excessive workload continued for the month of August and to ensure daily requirements were met overtime was necessary. To be honest I would rather have worked a normal day. You told me to claim and not ask for authorisation (see 2nd attachment).*
>
> *You, yourself, commented on the workload on the confirmation side (see 3rd attachment), this being just one part of Nostro.*
>
> *Whilst I appreciate your offer of flexibility, until now this has not been an option for Nostro.*
>
> *You were fully aware of our workload and had ample opportunity to inform us to cap the overtime at 1.5 hours per day. To change the guidelines after I have completed the overtime is unfair.*
>
> *Nevertheless I have done, as requested (see 4th attachment).*
>
> **7 September 2020 S to Ms Rumi**
>
> *I attach the August o/t for your signature, I have authorised [Claimant] and Nick to claim for the early part of August as the workload was excessive due to the fallout from the first EOM post merger (both outstanding items and confirmations..), which also coincided with David s 2 weeks of annual leave.*

56. The Claimant claimed 1.5 hours of overtime for each of the 16 days she worked in August up to her holiday totalling 24 hours of overtime [655].

57. The Claimant asserted [CWS14]:

> *Mr Stewart advised me to claim overtime for what I had worked as the*

workload was excessive and Mr Kidney was on 2 weeks leave in August and Mr Potter on 1 weeks leave later in August. I claimed a total 32 hours for August, but Mr Stewart emailed me after I had worked it and said that I had to reduce the total to a max of 1.5 hours a day as the management was unlikely to sign off this quantity of hours claimed under a Smart Work environment.[234] […]

I have since found out from the Bundle that in July 2020 [LM] (Product Control) claimed 32.5hours overtime and this was authorised by Mr Stewart even though it exceeded the cap of 1.5 hours per day [228 and 230]

In August 2020 [NP] (Nostro) claimed 20 hours overtime and this was authorised by Mr Stewart even though this also exceeded the cap [236 and 239].

Mr Stewart allowed the two male members of staff to exceed the overtime cap but not me.

58. The Claimant continued to work from home through the remainder of 2020 and into 2021.

October 2021 Changes to policy on working from home

59. On 13 September 2021 Ms Norton (**Head of Human Resources for the UK and & MEA Region**) issued the following email to staff, including the Claimant [378-379]:

Subject: COVID 19 - Return to the Office - Important information

Dear All,

In line with the current statutory framework and current Government guidance, we are writing to confirm that working from the office (max 50% of headcount) will resume from 1st October 2021. From this date ceases the requirement to fill in the Employee Access form however all employees who are away from the office for 10 working days or more must continue to fill in the attached Questionnaire prior to returning to the; you are required however to communicate to you manager immediately if you are feeling unwell and cannot attend the office. All employees must continue to follow the requirements listed in the attached Workplace environment transformation manual.

From 1st October some remote working will be permitted (50% of working hours) and this will be subject to line managers' approval. All colleagues that are Senior Managers or Certified (within the scope of the Snr Manager and Certified Person Regime) will need to complete a Risk Assessment form, the Compliance and Financial Crime Dept will issue the relevant documentation in due course.

Home working is intended to be on an ad-hoc basis only and does not

constitute a change to your terms and conditions of employment.

All terms and conditions of employment continue to apply irrespective of whether you may be permitted to work remotely on occasions. In particular, your hours of work and duties remain unchanged. There is no overtime work eligibility when working remotely and therefore there will be no overtime pay permitted.

If you wish to work from home then this should be discussed and agreed at least one week in advance with your line manager. In accordance with the temporary and ad hoc nature of remote working under this policy, whilst the Bank will seek to accommodate the request, any arrangement may be subject to change taking into account the needs of the business (for example, if a particular task/project means that it is no longer practicable for you to work from home on a particular day). The relevant line manager will not be able to accept home working requests if home working would affect the continuity and effectiveness of the Department. Home working for fractions of the day may also be requested where commuting time does not interfere with normal working hours.

[…]

If you have any queries with the above please raise this in the first instance raise them with your line manager.

Many thanks,

60. The next day (14 September 2021) the Claimant emailed her manager, Mr Kidney, to ask who to request working from home from [385]. She referred to a conversation they had had a month or so prior about the Claimant's childcare issue. Mr Kidney confirmed that the request should go to Mr Stewart and a few minutes later the Claimant sent Mr Stewart an email (which included in its train her email of July 2020 updating on her son's school drop off and pick up changes) saying [286]:

Following on from my e-mail below, My 9 year old son s Day Nursery have permanently stopped the school run to his school.

Therefore I now have to make a formal request to continue working from home.

I will copy you and Dave into the request to HR in due course.

61. The Claimant made no reference to her asthma and Mr Stewart thanked her for the update. The first reference to asthma was in her subsequent flexible working request as we detail below.

62. The following day the Claimant then sent an email to Mr Stewart as follows [390]:

[…]

As discussed please see questions below for HR that I would like answered.

1. Does the office have an Air Purification Kit? If not, what is in place for the prevention of Covid spreading through the office?

2. If hot desking is to be in place what happens to those members of staff that use a specific chair and certain positioning of computer equipment (for health reasons) that will be constantly altered?

3. If all staff members on one or more departments are off sick having contracted Covid (on different days) what happens with the work?

4. How many members of staff returning to the office have not been vaccinated?

5. What will happen if someone returning to work is asymptomatic?

6. Why bring people back to the office during the autumn winter period when evidence shows the spread of this disease is more prevalent? In fact, The Delta variant has not been tested during these seasons.

7. Is staff travelling on public transport not a concern to the company?

8. I have highlighted the disadvantages of bringing staff back to the office but we need to know what are the advantages of bringing staff back in a limited capacity.

21 September 2021 - First Flexible Working Request ("FWR1")

63. On 21 September 2021 the Claimant sent her FWR1 to Ms Norton and Ms Della Morte (Ms Tout's manager until Ms Della Morte left the Respondent's employment in July 2022). The FWR1 said [392]:

This is a statutory Flexible Working request on 21/09/2021 to continue Remote Working from home on a Permanent basis and not return to the workplace on 01/10/2021.

This is to supersede my previous request which commenced on 01/09/2015.

During the pandemic my 9 year old sons childcare provider cancelled the school run service.

Although alternative childcare has been arranged with his school, this service is term time only and closes 1 hour earlier.

Therefore working in the office in London including travelling time will mean I will not be able to collect him by closing time nor have childcare in the school holidays.

Working from home the last 18 months has been successful. In fact, the Internal audit carried out on my department stated 100% clean bill of

health and no points of issue .

Therefore for me to continue working from home would have no adverse effect on the business.

My general health has improved greatly because I have not been travelling on public transport which affects my asthma and weakened immunity.

Working from home will mean I can do all the end of day reports, which will benefit my colleagues who can start and finish earlier (should they wish to) to miss the rush hour.

64. Mr Stewart sent the request on to Ms Rumi saying "*FYI ..This is the type of request we can expect to receive from those staff that do not want to return to the office*" [392].

65. On 28 September 2021 the Claimant chased her FWR1 and asked for a 3 month temporary continuation of work from home while her request was dealt with [395]. Ms Della Morte acknowledged the Claimant's email and said that a meeting would be arranged in a couple of days [397]. The Claimant sent her request on to Mr Saunders (the Claimant's Regional Officer at her trade union, Unite). Ms Tout (Human Resources Business Partner) on 30 September 2021 asked the Claimant if she was available on 1 October or 4 October 2021 for a call to discuss FWR1 and the Claimant then checked Mr Saunders' availability. There was some delay due to difficulties with matching the calendars of those who were to attend the meeting.

66. On 14 October 2021 Ms Tout told Mr Stewart that the Claimant would need to fill in the Respondent's flexible working request form, submit it to Mr Stewart and then he would need to have a meeting with the Claimant to discuss the request [427].

67. It was clear from Mr Stewart's reply and correspondence that followed that he was not happy making the decision on the request. He replied:

"*Thank you for the update however before we proceed with this you will need to provide some form of guidance, rather than just passing the responsibility to the line management. As I stated in my previous email, the handbook makes no mention of limitations to the time allowed to work from home, contrary to the 50% cap stated in Assunta s email. I am not prepared to carry this without specific guidance from HR. I place Paolo and Silvia in cc for their further comment.*" [427].

68. On 21 October 2021 Mr Stewart commented to Ms Della Morte [442]:

"[…] I am still of the opinion that this is not purely a line manager decision, as we are not in a position of experience to enable us to make this.I will explain my point of view regarding this in your proposed call, specifically relating to the practical aspect of [Claimant] completing her responsibilities remotely from home. As to whether her reasoning as to why she feels she can longer attend the office is valid, I will leave to HR

to make this decision.".

69. Ms Della Morte had given Mr Stewart the following guidance before this response:

> […] *HR will support you during the process as well as we can a preliminary call before you meet [Claimant]. As mentioned by Helen, [Claimant] is making a formal flexible working request. Therefore it is necessary to look at her request fairly, following the Acas Code of Practice on flexible working requests and to make a decision within a maximum of 3 months. Her request will be evaluated and can be turned down or revised with other alternative working patter. In the meantime the Bank evaluates her request, [Claimant] will be required to attend the office for 50% of her time unless there are medical reasons to not do it and they will need to confirmed by a certification provided by a doctor and occupational health assessment. I propose a brief call on Monday, 27 October when Helen is back before you schedule a call with [Claimant] in order to consider all the options available."*

70. There was some discussion between Ms Norton and Ms Rumi as to Mr Stewart's concerns about himself being the decision maker on FWR1. That was in emails written in Italian which had been translated using a translation tool and which appeared in the bundle at [464--469].

Comparator – Mr C

71. On 7 October 2021 a 'Mr C' – the Claimant's comparator in respect of her complaints, was issued with a GP fit note which said he had Bronchiactesis and had undergone a Rhinoplasty operation and commented:

> "*Patient is known to have chronic lung disease ,in addition he had recent nose surgery, given will not be able to wear mask continously and high risk of infection it would be safer to work from home.*"

72. He was therefore allowed to work from home on a permanent basis but retired from the Respondent in March 2023 [HTWS89-94]. We were provided with evidence of his fit notes to this effect for the period up to 21 November 2020 [521, 830].

21 September 2021 - completion of FWR1 form [435]

73. On 21 September 2021 the Claimant submitted the FWR1 form saying [440 – 441]:

> […]
>
> ***2a. Describe your current working pattern (days/hours/times worked):***
>
> *CONTRACTUAL - 09.15 TO 16.45 1/2 HR FOR LUNCH MONDAY - FRIDAY, AT THE OFFICE IN LONDON*
>
> *SINCE MARCH 2020 TO DATE - 09.00 TO 17.00 MONDAY TO*

FRIDAY, WORKING FROM HOME

2b. Describe the working pattern you would like to work in future (days/hours/times worked):

TO WORK FROM HOME ON A PERMANENT CONTRACT DUE TO CHILDCARE ISSUES

09.00 TO 17.00 MONDAY TO FRIDAY

2c. I would like this working pattern to commence from:

Date: TO CONTINUE WORKING FROM HOME - official date to be discussed

3. Impact of the new working pattern

I think this change in my working pattern will affect my employer and colleagues as follows:

NO AFFECT TO MY COLLEAGUES AS SHOWN BY THE LAST 18 MONTHS OF WORKING FROM HOME

4. Accommodating the new working pattern

I think the effect on my employer and colleagues can be dealt with as follows:

AS THERE HAS BEEN NO ADVERSE AFFECT TO MY EMPLOYER AND COLLEAGUES IN THE LAST 18 MONTHS I DO FEEL GRANTING THIS REQUEST WILL NOT HAVE ANY ADVERSE AFFECT ON THE BUSINESS OR MY COLLEAGUES IN THE FUTURE.

74. The focus was on childcare difficulties rather than asthma.

1 November 2021 - First meeting on FWR1

75. A meeting was held on 1 November 2021 to discuss the Claimant's FWR1 with the Claimant, Mr Saunders (the Claimant's representative – a Regional Officer for Unite the Union), Mr Stewart and Ms Tout in attendance. The notes were at [493-495] with a further copy at [500-502] which included additional comments from Mr Stewart (underlined below):

RS submitted a flexible working request on 21.9.21 and a formal request with application form on 21.10.21.

RS requested to work remotely, full-time, on a permanent basis, primarily due to childcare issues.

RS has a son, […], age 9 (and a daughter age 17).

The request related to childcare difficulties regarding [son's name].

[…]

Geoff had problems logging on to Teams.

[Claimant] agreed that the meeting could start without Geoff and that he could join when he could.

Following introductions, Mark opened the meeting and explained the purpose of the meeting was to discuss [Claimant] s formal FW request.

Mark said that he was attending as her line manager, not as a union rep, a role he also holds.

Mark mentioned [Claimant] s application was fairly sparse, but she d also sent an email prior to this with further details about her request.

Mark asked [Claimant] to explain in more detail about her circumstances and the reasons for the request.

Background

RS stated she has a son, [NAME], age [..].

Lives in [LOCATION], Essex - a commute to the office of about 1.5 hours each way.

After finishing her maternity leave, was able to return to work full-time and leave [SON] in a nursery which opened daily from 7am to 7pm.

During Covid pandemic, remote working started and the school run stopped plus home-schooling took place

School used to run a pre-school / after school childcare facility 7am to 7pm, however, this discontinued during Covid, now finishes at 6pm which means RS can t collect [SON] after work

RS would have difficulty doing the school run and attending work at the office with her contracted hours

Also has no childcare during the school holidays.

RS said she has no family support as her partner works and she has elderly parents unable to assist. Unable to rely on friends.

RS said she s worked remotely effectively for past 18 months during Covid times, successfully combining childcare and work, no issues with performance

MS agreed that he had no issues with RS s performance in the past 18 months

Request

To continue working remotely, full-time, on a permanent basis primarily due to childcare issues (and financial / health reasons)

HT checked about the health aspect of the request, RS said the request was mainly due to the childcare but her sickness record had improved in the past 18 months

Current Rota

HT asked RS to explain her current working pattern.

RS stated that a previous flexible working request in 2005 gives her a working pattern of 9.15 16.45 with 30 minutes for lunch.

RS stated that in the current remote working arrangement she starts around 8.40 and finishes around 17.45 with the school run flexibility

Past Rota

HT asked RS to explain her past working pattern, pre-Covid

RS said she left the house at 7.15 dropped [SON] off, commuted and started work at 9.15. She left at 4.45, picked [SON] up and arrived home at 18.30.

Questions

HT asked what alternative childcare RS had explored? RS replied none. (It is reasonable to believe that RS has not explored alternatives as the requirement to return to work from 1.10.21 @ 50% came as a surprise after 18 months of remote working and voluntary return to the office).

HT suggested that RS should explore other childcare options so we could have a better understanding of providers in [LOCATION].

RS said if she had to attend the office 5 days per week, she d have to work 10.30 16.00, 25 hours per week and didn t want to lose 10 hours pay per week.

HT asked RS what she thought the impact to the team / Bank would be on her working remotely full-time, permanently. RS said that remote working had been fantastic , she d achieved the job successfully and there would be no detrimental effect working from home.

HT said not to underestimate the value of attending the office and her presence in person teamwork, collaboration, training, support, RS said she d learned on the job and achieved those other things via Skype. MS/GS agreed that you lose something from never coming in.

MS said that currently the Bank doesn t enter into working from home arrangements on a permanent basis and her request was being considered on an exceptional basis. He said that from 1.10.21, there was

a requirement to return to the office 50% of contractual hours, however, RS has not fulfilled this yet.

GS suggested if ISP was unable to provide a full-time remote working pattern, would RS consider for example 2 days (40%) office and 3 days (60%) remote? (GS said he d dealt with a number of flexible working requests including Gatwick Airport and hybrid working was often about finding a compromise). RS said she didn t want to lose any pay. HT said that if her rota would be 2 days x 10.30 16.00 with half hour lunch, equals a 5 hour working day. Therefore, 2x2 = 4 hours could possibly be made up over the other 3 days. RS replied only if the work was there . GS said she could possibly do the extra hours when she got home. RS also said it would be difficult to achieve the school run and start / end at those times as she was relying on a bus to get to [STATION NAME] station and the journey going smoothly. HT asked about getting the bus to the station, RS said the car park was £6.50 per day and the traffic was heavy.

Again, RS said she had no holiday childcare and HT suggested that it was RS s responsibility to explore possible Clubs for the holidays. RS said there were only short day holiday Clubs in the area.

It was agreed that both parties would review the feasibility of the 2-day office/3-day home scenario, with reduced office hours of 10am-4pm. The additional 4 hours per week would be made up on the 3-days working from home, with extended hours put in place to formerly cover this. RS agreed to investigate whether she would be able to meet these contractual requirements. It was verbally agreed by all attendees that this was a realistic and viable solution.

76. We note here that Ms Tout commented on 9 November 2021 on Mr Stewart's addition to the notes here saying: *"Thanks for your extra comments regarding RS s flexible working request. I noted that R s possible office working pattern was 10.30 16.00, not 10.00 16.00" [499].* The notes continued:

Any Questions / Further Comments from RS?

RS said she d achieved all the training & support required for the team working remotely

RS said [SON] had issues with his learning and was having extra support from the school and he had settled much better

RS said she put the hours in and Nostro was going well

RS asked if a new pattern was put in place on a temporary basis and reviewed, would she need to submit another flexible working request for any further changes. HT said that any reviews would be deemed part of this flexible working request.

Next Steps

> *It was agreed that the flexible working request and the 2-day office/3-day home/time made up scenario proposed would be carefully considered by both RS and the bank to ensure all requirements of both parties could be fully met.*
>
> *MS to discuss with the Nostro Dpt Line Manager (D.Kidney), to determine whether the hybrid proposal is feasible.*
>
> *We would reconvene in 2 weeks to discuss the outcome of the request*
>
> *A decision needed to be made within 3 months of the request but this should be sooner.*

77. On 11 November 2021 Mr Stewart sent an email to Ms Tout as follows to confirm the outcome of a conversation he had had with Mr Kidney [498]:

> *He agrees in principle, with his only comment that the 2 days [Claimant] will attend the office should be constant (ie. every Tue & Thur, Mon & Wed etc). I am not sure if the specific days should be stated in the proposal or whether this is at the discretion of the line manager?*
>
> *Let me know if you need anything further from myself.*

78. Between 28 November 2021 and 7 December 2021 the Claimant was ill with covid [504-507]. Mr Stewart himself then caught COVID and he asked the Claimant if she was ok by text on 3 December 2021 [513].

20 December 2021 – Respondent seeks to extend the timescales for considering the Claimant's FWR1

79. On 20 December 2021 Ms Tout sent an email to the Claimant as follows: "*Given the current situation of the government guidance to work from home and the Bank's return to voluntary attendance at the office, we propose extending your flexible working request and catch up in early January 2022, can you please confirm your agreement to this?"* [518].

80. Mr Sauder's acknowledged receipt. The Claimant and a number of others had had COVID in December. Ms Tout followed up on her email on 14 January 2022 (not having heard from the Claimant). She said:

> "*I hope you're well. I sent you an email on 20th December 2021, but didn't receive a reply, I've attached the email in case you missed it. We'd like to arrange a call next week to resume the discussions about your formal flexible working request. Can you please let me know your availability and I'll arrange this? Please feel free to liaise with Geoff Saunders in cc if you'd also like him to attend. Looking forward to hearing from you*." [527].

81. On 10 January 2022 the Respondent confirmed that, with the spike in COVID infections, attendance in the office remained voluntary [516] and that was extended to 31 January 2022 [529].

82. On 17 February 2022 Mr Stewart sent an email to is team praising their work [555] saying:

> *I would just like to thank everyone for your care, diligence and attention to your jobs within the Middle Office.*
>
> *We have recently had 100% clean bills of health from Internal Audit for both Nostro and Trade Finance teams, this is very positive as to find NO points of issue on an audit is pretty rare (those of you who know Neeta and Jorida from IA will know what I mean).*
>
> *This simply reflects the excellent job you all do even in the trying times put upon us over the last year, well done to everyone in all our teams, Nostro, Trade Finance, Customer Services and Product Control as I know everyone puts in an exceptional effort.*
>
> *Many Thanks.*

83. On 24 January 2022 Ms Tout had sent Ms Norton and Ms Dela Morte an email summarising the FWR meetings undertaken and progress to date [558 – 560]:

> *[..]*
>
> *Please see below a summary of [Claimant]'s flexible working request to date.*
>
> *[…]*
>
> *• RS submitted a flexible working request on 21.9.21 and a formal request with application form on 21.10.21.*
>
> *• RS requested to work remotely, full-time, on a permanent basis, primarily due to childcare issues.*
>
> *• RS has a son, [SON], age 9 (and a daughter age 17).*
>
> *• The request related to childcare difficulties regarding [SON].*
>
> ***Meeting***
>
> *A meeting was held via Teams on Monday, 1st November 2021 to discuss her request.*
>
> *[…]*
>
> ***•Next Steps***
>
> *• RS to explore other childcare options so we could have a better understanding of providers in Canvey Island currently.*
>
> *• It was agreed that the flexible working request and the 2-day office/3-day home/time made up scenario proposed would be carefully considered by both RS and the Bank to ensure all requirements of both*

parties could be fully met.

• MS to discuss with the Nostro Dpt Line Manager (D.Kidney), to determine whether the hybrid proposal is feasible.

• D Kidney agrees in principle, with his only comment that the 2 days RS office attendance should be constant (ie. every Tue & Thur, Mon & Wed etc).

• HT sent a follow up email to RS on 20.12.21 to reconvene in early 2022 but didn't hear back.

• HT sent a further email o RS on 14.1.22, RS apologised and said she'd get back but did not.

• HT sent RS some IM messages in w/c 17.1.22 and agree to arrange a meeting w/c 24.1.22.

• A meeting has been arranged for 25.1.22 at 14.00.

Can we please discuss and agree next steps.

25 January 2022 – Second meeting on FWR1

84. On 25 January 2022 there was a second meeting on the Claimant's FWR1. IN attendance were the Claimant, Mr Stewart, Ms Tout and Ms Della Morte. Mr Sauders had difficulties joining via MS Teams but the Claimant was happy to proceed. The notes of the meeting record (as far as relevant and not duplicating the summaries and notes above) [567-569]:

Notes:

[…]

17 February 2022 MS's mother passed away.

[…]

• Following introductions, MS opened the meeting and explained the purpose of the meeting was to follow up previous meeting and discuss further RS's formal FW request.

• MS apologised for the delay (both [Claimant] & Mark had Covid in late Nov/early Dec, plus RS didn't respond to HT's email on 20/12/21.

• MS asked RS to follow up with any developments following last meeting on 1st November 2021.

Follow Up

• RS referred to the Bank's Flexible Working Policy and asked which of the 8 reasons her request was being considered.

• ADM explained that the Bank does not consider remote working as an alternative option to attending the office.

• ADM confirmed that currently (at 25/01/22) attendance at the office was voluntary.

• ADM advised that in future weeks, attendance at the office would be required 50% of working time and the Bank was finalising a Smart Working Policy to be released later in 2022, this would allow colleagues to work up to 10 days per month from home.

• RS said that she was happy to discuss her options but any suggestions would not be in line with the Bank's plan.

• ADM confirmed that the Smart Working Policy would allow colleagues the possibility to work from home up to 10 days per month, and this could be discussed with her line manager to agree the working plan.

• ADM recapped that therefore, 10 days per month equated to around 50% of working time could be worked remotely and 50% from the office.

• RS explained that this hybrid working policy was not a solution for her, that she would have to change her office working hours to allow her to do the school run and attend the office.

• RS stated that she currently worked 9.15 – 16.45 with 30 minutes for lunch.

• ADM said that if RS was seeking a different working time, it can be explored, it could be discussed with MS and David Kidney

• HT asked if there were any updates since the last call regarding childcare providers?

• RS said there had been no updates since the last call – the government advice was moved from working from home to a return to the office, but childcare services were not reintroduced.

• ADM advised that the smart working policy would at least offer an option to partly work from home, but was not meant to provide a complete replacement to working from the office.

• ADM explained that the hybrid scheme was following the Government guidance and providing some flexibility for all colleagues including working parents

• RS asked again which of the 8 reasons the Bank was following.

• ADM stated that the Bank wasn't turning down RS's request fully, the requirement was to follow the Bank's plans for hybrid working

• RS said that she had worked from home successfully for the past 2

years, she couldn't understand why the Bank was not permitting a continuation of this

• MS and ADM agreed that she had worked well from home.

• ADM explained that the contractual place to carry out was and continues to be the office and that the Bank has provided a Smart Working Policy to allow colleagues to work from home up to 10 days per month.

• ADM added that remote working was not available on a permanent basis. We are laying out 50% office attendance and 50% working from home which would meet some of her expectations.

• ADM stated again that Smart Working did not represent an alternative to working from the office.

• ADM added that the Bank needed to rebuild its colleague relationships.

• RS queried which of the 8 reasons for flexible working the bank was relying on in making its decision?

• ADM replied that the Bank will make a formal response and the outcome was more in line with part working from the office and part working from home.

• Following suggestions at the first meeting, the line manager was not impressed with the later start and early finish due to delays in the working day. For example, 10.30 – 16.30 would be difficult to manage. To lose 2 hours from the working day was not acceptable.

16.35: Geoff Saunders (GS), RS's Trade Union Rep Following issues with his internet connection.

• ADM recapped […]

• The Bank has given RS sufficient time, support and full remote working when all other colleagues were required to return to the office and childcare services should be reinstated within [LOCATION] (if not previous childcare then alternative childcare services).

• Underpinning this is the child's best interests as he needs to be accompanied on the school run and looking after when at home.

• The Bank gives RS a partial way towards balancing childcare and office attendance through the Smart Working Policy combined with some flexibility in working hours, these are currently 9.15 – 16.45 with 30 minutes lunch break.

• ADM explained that one of the 8 reasons in partially rejecting RS's flexible working request was that the Bank was proceeding with planned changes in the near future, ie. that a change in working location was

going to be implemented in the coming months.

• RS reminded the meeting that she had been working remotely since March 2020. RS has not attended the office since March 2020).

• RS then spoke about the Bank's Ethics Policy. She drew attention to the Bank doing its best to promote policies, such as flexibility, private needs etc, however her request and needs were not being fully considered.

• ADM advised RS that 100% remote working was not in line with the Bank's plan and we were working to accommodate her needs and RS would be provided with a response. She added that if the Bank does not allow remote working on a permanent basis, it would carefully consider what else could be put on the table, but currently RS was not offering any alternative suggestions.

• RS said she was not clear, her understanding was that the flexible working request was not accepted and that remote working was not being offered on a permanent basis. RS understood that 10 days per month remote working was being offered, but due to childcare services having different working times, she would also need different working times if attending the office. She said she would need further flexibility with school drop off and collecting times.

• RS reminded the meeting that there were no childcare facilities in [LOCATION], they were lost in the pandemic, she's been informed that childcare services will resume via 3rd party. but she was now on a waiting list of 1-2 years for alternative providers. She added "Boris says return to the office, but there are still no childcare services".

• A suggestion was made that RS could possibly work 10.30 – 16.00 but this would cause operational difficulty for the team and would lead to cover being required by other colleagues.

• ADM confirmed that if there was a change in working hours, these would be for the working from home hours as well as the office hours.

• RS confirmed that taking her son to school, then the journey to work was "pushing it" as transport was not 100% reliable.

• It was agreed that a 10.30 start was "off the table".

• A 50% from home and 50% office arrangement was an option however 10.30 can't work.

• ADM confirmed that the Bank would carefully evaluate all RS's views and a decision in writing would follow, if she was not happy with the outcome, she would be offered the opportunity to make other suggestions which would be suitable for RS and the Bank.

• ADM added that the Bank does not wish to reject the flexible working

request outright, but explore options and arrive at an outcome.

• RS reminded the meeting that since working remotely (and before that too) all her last appraisals were fine, her last audit was fine.

• It was agreed that a reduction in contracted hours, eg. 10.30 – 16.00 did not suit the needs of the department.

85. On 9 February 2022 the Claimant asked for an update [592]. The same day Mr Stewart sent the following email to Mr Sparano and Ms Rumi [572]:

Good Afternoon Paolo, Silvia,

With regard to the Flexible Working Request (FWR), placed by [Claimant] (a member of the MO Nostro team), I have today received the below email and attached letter. HR have requested that I sign and return this letter to the member of staff, which essentially refuses the FWR.

As previously discussed, I do not understand why such a communication should be delivered by the respective line manager and I am not comfortable in signing and delivering a letter to a member of staff that relates specifically to their contractual situation. Line management are not involved in contract negotiations for new members of staff so why are FWR s deemed an exception to this policy?

The wording of the letter generically refers to we , rather than the bank and offers no reference to HR, which can therefore be construed as being a decision I personally have taken.

I have advised HR that I do not agree with their approach and I have referred it to yourselves.

86. There were then a number of emails between Mr Stewart, HR and others seeking to resolve Mr Stewart's concerns [578, 579, 589-590, 594, 612, 622, 623]. He agreed with the decision to reject the request on the terms suggested but did not want it to appear to be only his decision.

87. On 25 Feb 2022 the Respondent, through Ms Norton, issued the following to staff :

Subject: ISP London: COVID 19 - Return to the Office - 7th March 2022

Importance: High

Dear All,

In line with the current statutory framework and current Government guidance, we are writing to confirm that working from the office for at least 2 days per week (40% of working hours) will resume from 7th March 2022.

Starting from 21st March 2022, attendance to the office will increase to at least 2.5 days per week (50% working hours). The two-metre distance must be respected at all times as well as the use of the masks as detailed in the attached Workplace Manual.

From 7th March ceases the requirement to submit the Employee Access form however, employees continue to be required to complete the attached Questionnaire before returning to the office if they test positive to Covid. All employees who test positive must not attend the office until they produce a negative test result and have informed their Line Manager and the HR Department in advance.

Within the next few days we will circulate a new Remote Working policy which will be applicable from issuance. For the avoidance of any doubts the remote working policy relates to work remotely from home in the UK only.

Attendance to the office must be planned in advance with the line manager, home working must continue to be recorded in Mitrefinch in advance using the code RW .

If you have any queries with the above please raise this in the first instance with your line manager.

88. On 28 February 2022 the Claimant sent an email to Mr Stewart and HR an email, reminding them of the time limits for dealing with flexible working requests and telling them that the delay in dealing with her flexible working request was causing her stress and anxiety [592]. On 3 March 2022 Ms Tout acknowledged the Claimant's email and said she was liaising with her manager [591].

89. Mr Stewart wrote and email to the Claimant on 7 March 2022 saying [603]:

[…]

Regarding your FWR, I am unfortunately still awaiting an update from HR.

As you are aware, the communication supposedly comes via the line manager even if the process and decision is managed and taken by HR and the branch management.

I appreciate the situation is not ideal however I will chase once again this week to hopefully obtain an update from HR.

Officially staff should attend the office pending FWR s however given as you have not been asked to return up to this point I believe it reasonable to continue to work remotely until a definitive answer is received.

As soon as I have any further update I will of course let you now.

90. Mr Sauders chased the Respondent on 8 March 2022 [608]. The internal dialogue about Mr Stewart's concerns about being presented as the decision

maker continued. Mr Stewart's line manager was brought into the discussion.

1 April 2022 – decision on FWR1

91. Mr Stewart finally agreed the wording of the outcome letter on 1 April 2022 and he sent it on to the Claimant. It read as follows [649-650]:

> *Dear Ms Sutherland*
>
> *In my capacity as line manager for the Middle Office department, I write to inform you of the decision in relation to your flexible working request.*
>
> *Following receipt of your flexible working application and the subsequent meetings held on 1st November 2021 and 25th January 2022, full consideration has been applied to your request to work remotely on a permanent basis.*
>
> *Your reason for making a flexible working request was that you have a nine-year-old son and you said that you do not have any suitable childcare in place for him any longer. You live in Canvey Island, Essex and your commute to the office in London is around 90 minutes each way. Working remotely on a full-time basis would allow you to take your son to and from school, and still perform your role to a good standard within the required contractual hours.*
>
> *During the stated meetings, you explained that you no longer had suitable childcare in place for your son due to the pre-school and after-school clubs that he attended when you were attending the office having closed during the 2020/2021 Covid pandemic and, at the time we spoke, they were yet to re-open. You also explained that due to age and health reasons you did not have any family members able to assist. You said that you were on a waiting list for other childcare providers, but you did not provide any further details about this or explain how childcare would be arranged during the school holidays. We asked you how long the remote working was required for and you stated 3 years, by which time your son would be old enough to travel to secondary school independently.*
>
> *All discussed elements and options have been taken into consideration in relation to your application, including permitting permanent, full-time remote working. Your request cannot be accommodated entirely, however you will be able to maintain some degree of home working by applying the Bank Smart Working policy which will be introduced formally in the coming weeks.*
>
> *The business grounds for turning down your flexible working request, as applied by the Bank in these circumstances, are as follows:*
>
> *- Intesa Sanpaolo has planned changes to the business and is implementing a Smart (Hybrid) Working Policy which will allow colleagues to work remotely up to 10 days per month; we anticipate this will be widely taken up, which will leave the department with fewer people 'on the ground' for internal clients who need personal support (as opposed to*

remote support) or available to answer ad hoc questions for colleagues coming to the department for a face to face consultation. We therefore require enough employees to be available day to day, otherwise we consider there will be a detrimental effect on the ability to meet internal clients' demands.

- Following the past two years of voluntary and reduced office attendance, the Bank is seeking to rebuild its corporate identity and collaborative team culture; the Bank strongly believes that this can only be accomplished through staff office attendance on a regular basis to maintain the ability to provide/receive instant feedback from colleagues and managers, train and integrate newcomers. We consider a deficit of collaborative working, and top down training and assistance, would have a detrimental impact on quality and on performance.

The new working policy will therefore provide considerable flexibility and cost savings to all staff and yet continue to allow for the Bank's ethos of collaboration, identity and togetherness to flourish.

During the stated meetings other options were also considered, including flexible start/finishing times. Having considered this request the Bank can offer to delay your start time by 30 minutes which would be coupled with reducing your lunch hour by 30 minutes.

Together with all London branch employees, you are required to return to the office by 14th April 2022 where upon you may access flexible working under the new Smart (Hybrid) Working Policy in addition to the later start time of 9.45. We believe this will give you sufficient time to make childcare arrangements such as pre-school and after-school clubs which have now returned post-Pandemic.

You have the right to appeal against this decision within 14 days of the date of receiving this letter. If you wish to appeal please place this in writing, clearly explaining the grounds of appeal and any alternative solution that you consider suitable.

92. On 12 April 2022 the Claimant appealed against the rejection of her flexible working request saying [664-665]

With regard to your letter dated 01/04/2022 turning down my request for flexible working, I am now formally submitting an appeal against this decision. This appeal should be reviewed by someone independent and more senior to decide the appeal or chair the appeal meeting, but whoever does so should have the authority to overturn the original decision. The appeal meeting must be held within 14 days of this letter.

I have successfully worked from home 100% of the time since the pandemic began and have stayed motivated and productive throughout.

Now to focus on your letter dated 01/04/2022:

Your comments refer to subsequent meetings held on 01/11/2021 and

25/01/2022.

Whilst this is correct the fact remains that my original request was sent on 21/09/2021 and your decision was received by me on 01/04/2022. The time factor shows how long I have had to wait for your decision, in fact, I had to send 2 chaser e-mails dated 09/02/2022 then 28/02/2022. Then my Unite rep sent a chaser e-mail dated 08/03/2022. HR sent me an e-mail on 03/03/2022 stating they were liaising with yourself, despite this I still had to wait another 4 weeks for a decision. This has caused me stress and anxiety.

As you are aware, the ACAS procedure states the whole process should be completed within 3 months.

Your comments regarding suitable childcare for my son. The problem was not just caused by pre-school and after school clubs closing during the covid pandemic.

It has been caused by my son's previous childcare provider no longer operating the school run on a permanent basis.

Other childcare providers on Canvey Island also have a cut off time of 6pm which is in line with my son's current after school club which also only operates during term time. By returning to the office will mean I will not be able to meet this collection time.

I kept you fully updated of this situation by e-mail on 16/07/2020 where I stated:

"I have just received a phone call from my son's Day Nursey that although children will be returning to school in September, they will not be supplying the before and after school drop off/pick up care due to the current situation.

They will inform me if/when this changes and we are on the list.

I will be reducing my childcare vouchers to £1 per month, please authorise this.

I will be seeking alternative childcare"

Then by e-mail on 14/09/2021 where I stated:

"Following on from my e-mail below, my 9 year old son's Day Nursery have permanently stopped the school run to his school.

Therefore I now have to make a formal request to continue working from home"

Your comment regarding permanent, full-time remote working have not taken into account my permitted statutory request as a mother with a childcare problem. It focuses on planned changes to the business

covered by business reason no. 8. Ironically, this planned change is in line with my request so how will my request not fit in with these plans?

Your comment regarding, internal clients coming to the department to ask ad hoc questions. Can you explain how this will work when those same internal clients are working from home at that time and have an ad hoc question?

Your comment, "Following the past two years voluntary and reduced office attendance, the Bank is seeking to rebuild its corporate identity and collaborative team culture; the Bank strongly believes that this can only be accomplished through staff office attendance on a regular basis to maintain the ability to provide/receive instant feedback from colleagues and managers, train and integrate newcomers. We consider a deficit of collaborative working, and top down training and assistance, would have a detrimental impact on quality and on performance"

The above contradicts what you commented in my appraisal in 2021 whilst I was working from home.

"2021 has seen a significant change in the working environment with a complete switch to smart working due to the pandemic. I believe this has been fully embraced by [Claimant] and is a test case to the benefits of a flexible working environment. A marked decrease in absence coupled with [Claimant]'s proven knowledge and experience has resulted in a much improved appraisal and more importantly a strong collaborative Nostro team. A deserved appraisal from a senior member of the Middle Office."

In addition to the above you also sent two e-mails regarding the Internal Audit completed on our department whilst working from home.

E-mail dated 10/10/2020:

"Hi David, [Claimant], Nick,

I have just had a call with Audit (Neeta), and Silvia to discuss the results of the latest Nostro audit and I am very happy to announce there was nothing to discuss.

Neeta was very complimentary regarding your work, specifically the electronic reporting/filing and attention to detail on all of the reporting and controls that Nostro perform. She also said the few points they raised were answered quickly and resolutely and were already being addressed, therefore the audit has passed with flying colours.

Thanks for all your hard work that you put in each day and I will buy you all a beer when we get back to the office.

Keep up the good work.

MS"

Email dated 17/02/21:

Hi All,

I would like to thank everyone for your care, diligence and attention your jobs within the Middle Office.

We have recently had 100% clean bills of health from Internal Audit for both Nostro and Trade Finance teams, this is very positive as to find NO points of issue on an audit is pretty rare (those of you who know Neeta and Jordia from IA will know what I mean…).

This simply reflects the excellent job you all do even in the trying times put upon us over the last year, well done to everyone in all our teams, Nostro, Trade Finance, Customer Services and Product Control as I know everyone puts in an exceptional effort.

Many thanks.

MS"

To further prove my point, on 27/08/2021 I raised a query with yourself via e-mail regarding 4 fex STM deals being input. I knew from my experience and knowledge that this was incorrect. You proceeded to check this with various members of staff. Your investigation proved I was correct. In fact you sent me an e-mail at 14.36 on the same day stating:

"Well done [Claimant]

If only everyone was as vigilant

MS"

Please note not only was I working from home on that day my son was also present as it was school holidays.

As a working mother with a childcare problem, caused by the pandemic, I have a statutory right to ask for flexible working. Turning down my request maybe viewed as Indirect Sex Discrimination.

I have worked for Intesa for 23 years and I am very disappointed in the way I am being treated at a time when I really need help due to my childcare problem, which has not been caused by me. It is clearly proven that allowing me to continue working from home will not and more importantly has not caused a detrimental impact on the business.

In your letter dated 01/04/2022 you suggest a start time of 09:45, but in a previous meeting I explained a later start time would be detrimental to the business needs, which you agreed.

In the meeting on 01/11/2021 I noted that you said there had been no issues with me or Nostro during the smart working, you explained there

had been no working, operational, personal or disciplinary issues and that it was only a personal view that it was better to work in the office as you couldn't argue against the fact smart working was indeed a success.

My case should be reviewed on facts and not personal opinion.

I request my working from home is extended accordingly to allow for this appeal to be dealt with.

Your sincerely

93. On 12 April 2022 Mr Stewart sent an email to Ms Della Morte and others as follows [669]:

Please advise how you wish to proceed regarding [Claimant]'s appeal letter.

As anticipated her response is directed at myself assuming I have taken the decision rather than 'the bank', a result of the requirement for such matters to be passed through the line manager.

I also presume Ms Sutherland will continue to work entirely from home during the ongoing appeal, contrary to the staff handbook.

94. This prompted further internal correspondence [674]. On 13 April 2022 Mr Stewart sent initial comments on the Claimant's appeal to Mr Sparano and Ms Rumi [667-668].

[…]

Point 1.

As discussed repeatedly, the decision was taken by the bank and not directly by myself as line manager.

This has not been recognised by RS in her appeal letter, whereby she continually refers to the text as 'your letter' and 'your comments'.

This is exactly the confusion that I wanted to avoid when re-drafting the letter provided by HR.

Point 2.

RS has focused her appeal on the ability of herself and the Nostro dpt to complete their responsibilities remotely, to a satisfactory standard. As discussed, this has never been in question as all area's have been working remotely for almost 2yrs and without incident. Work quality was not a reason used in the bank's decision to refuse the FWR.

Point 3.

The FWR refusal was based primarily on the point that the bank wants an office presence to remain to some degree. In my opinion, this is not

clearly covered by any of the 8 business reasons stated in the employee handbook other than possibly 'planned changes' however even this is ambiguous. As we discussed, the wording of the handbook is far from ideal and leaves the employee with the greater control in my opinion.

I would suggest HR consults once again with the solicitors used in re-drafting the previous letter in order to determine which element can be used to refute the appeal.

[…]

95. On 14 April 2022 Ms Della Morte invited the Claimant to an appeal meeting with Mr Sparano and the Claimant, on 20 April 2022, challenged Ms Della Morte's impartiality and involvement in the appeal saying she did not want Ms Della Morte, or any other member of the HR team, acting as a note taker [677 - 679]. Ms Della Morte then clarified the role of HR in the meeting and said that she would step aside for a Ms Mascarenhas to assist at the meeting as note taker.

26 April 2022 – Appeal meeting on FWR1

96. The Claimant's appeal meeting against the decision to reject FWR1 took place on 26 April 2022. The minutes record [697-698, 714-715]:

▪ *[Claimant] RS*

▪ *Geoff Saunders – Union Representative GS*

▪ *Paolo Sparano - Chair PS*

▪ *Shirley Mascarenhas – Note taker SM*

[…]

• PS stated while he was not present in the previous meetings the purpose of the discussion was to find a balance between RS's needs for flexible working and the needs of the bank.

PS asked if RS request is to work from home on a permanent basis and if the reason for the request is that RS has a 9 year old son and want/need to take her son to and from school?

You also mentioned that less commuting is beneficial for health reasons and obviously more cost effective, although we appreciate these were not your primary reason for making the request. Ps added, you also have a 17 year old daughter.

• RS stated my daughter is working and is not able to help, the current arrangement is that RS needs to drop off in the morning and pick her son from the after school club at 6pm. She also stated her home is very far from the office and on a good day depending on the buses, trains and walking takes her 1.5 to 2 hours one way.

• PS stated in MS response to you he highlighted the main reasons why

permanent working from home is not feasible. We acknowledge the good work in the last 2 years you're an asset to the team and the organisation. The government has taken a position to end the pandemic situation and bring normality back, and the Bank would like its employees to return to work. ISP has its presence in Italy and international presence and its corporate identity would require employees in the office. At the moment the Bank requires employees to be in the office 50% of the time.

• RS went on to explain the childcare services have decided to close down and won't be resuming leaving her no option but to work from home to do the school run. Her partner is a lorry driver and works long hours and due to the nature of his works requires adequate rest.

• PS inquired how was she managing before the pandemic situation?

• RS stated before the childcare was until 7pm which has permanently shut down, her son currently goes to after school club which closes at 6pm.

• PS checked if we rearrange the work distribution of course after checking with MS if it would be feasible, and would she able to come at least 2 days a week to the office?

• RS said she would consider and went on to give an example when David took time off along with the bank holiday if she would have be expected to come in, due to the commute time and there being only Nick and her it would not have been possible to manage the activities.

• PS checked if the Bank worked out a solution to re-organise the activities for RS to come later and leave early to do the school run would she be able to come in 2 days a week?

• RS responded she will need to see what the solution entails and if it's not detrimental to the business she also stated DK needs to be onboard besides MS.

• PS stated we will need to balance between your request and the Banks need to come up with a solution.

• RS said when everything was fine in the last 2 years why has it become detrimental now?

• PS responded we agree that everything worked well for the last 2 years but we cannot be sure it is sustainable for the Bank in the long term. Human touch is of value cannot be replaced with WFH. Besides the training on system in the office cannot be completed imparted in the same way remotely, meeting colleagues at work at the coffee vending machine increases personal interactions and cannot be achieved from home. PS also stated that the union would be in a better position to speak about the salaries for permanent WFH. PS added that while we value personal life and personal needs, physical presence is the driver to

the Bank's activities.

• RS said she agreed but was not making a permanent request, she wants the Bank to accommodate for 3 to 4 years

• PS said the question I'm addressing is how far we can go so it helps you and doesn't impact the Bank's activity either.

• RS stated at the age her son is now its unthinkable for her to let him be on his own and the request is so that she manage her child

• PS asked if she had any suggestions before we conclude?

• RS stated she needs to reiterate that last 2 years has been successful and her performance has been great, she has also spoken to her colleagues David and Nick and they are understanding of her request to WFH.

• PS stated the points are clear nobody was working from the office in the last 2 years, meeting colleagues at the office having the interaction is important. MS has been coming into the office once a week through the lockdown.

• RS stated she is just one person and it won't matter or break the Bank if one person works from home and she is not doing it for herself but her son. She added I'm not dealer, manager or IT, I'm just a Backoffice person so not sure why it's a game changer for the bank. In 15 years that I have been coming to office still not many people know me in person.

• PS stated that he is trying to explore a solution and will come back to you in 5 working days.

• RS responded it's been 7 months since I put in a request

• PS stated while I understand there has been a delay but it hasn't impacted her, as she carried on working from home in spite of the Bank's request to return to the office 50% of the time. While it's important to take care of our family we also need a job to pay our bills

• RS pointed out my performance has been great irrespective if working from home or from the office.

• PS apologized for calling her son daughter on some occasions and checked if everything was okay.

• GS added please consider the request as it's not for RS but for her to manage her child care issue.

• PS said he will come back with a response in 5 working days and closed the call after checking with all participants.

[…]

97. The Respondent sent these note to the Claimant on 4 May 2022 for her to check [713].

4 May 2022 – Appeal decision letter

98. On 4 May 2022 Mr Sparano sent the Claimant a letter setting out his decision on the Claimant's appeal [716- 718]:

> *Flexible working request: appeal*
>
> *On 21 September 2021 you made a request for flexible working to work remotely on a full time basis. Your request was refused for the reasons set out in Mark Stewart's letter dated 1 April 2022.*
>
> *Your appeal against that decision was considered at the meeting with me on 26 April 2022, also attended by your companion Geoff Saunders and Shirley Mascarenhas.*
>
> *At our meeting you confirmed that your reason for making the request was so that you had the flexibility to drop your 9 year old son at his school and pick him up from the 'after school' club at 6pm. You explained that childcare responsibility fell to you as your daughter works and your husband cannot do a drop off or a pick up as he is a long distance lorry driver and requires rest. You also explained that there were no childminding services available to you in Canvey Island.*
>
> *Your request to work remotely on a full time basis is refused. However, we will put in place an alternative working pattern which will address both your need for flexibility to do the school run and meet the Bank's requirement to have all staff attending the office at least 2-3 days a week, as follows:*
>
> *• You may work a minimum of 10 days' per month in the office.*
>
> *• The days you attend the office are at your discretion but should be agreed in advance with your manager. We suggest 2-3 days per week in the office, but this is up to you and your manager.*
>
> *• On the days that you are in the office you may arrive later and leave earlier than the Bank's usual core hours to enable you to do the school run.*
>
> *• You are required to work 35 hours per week (excluding your lunch break). You can make up any shortfall in working hours on your working from home days or by logging on from home later in the day on your office working days.*
>
> *• We will trial the new arrangements for 6 months to evaluate how well this is working.*
>
> *I know that you have reservations that a short working day in the office would be less efficient, however, having discussed this with your managers we agree that the benefits of attending the office outweigh the*

disadvantages. You will note I have suggested a 6 month trial period before this is made permanent and I encourage you and your managers to discuss any issues as they arise and work to resolving them, for this reason I am not precluding you from suggesting any modifications during this period, for example, if you wanted to reduce your contractual hours, or if you found childcare during this time and wanted to increase your office hours. I appreciate that this will involve compromise on both sides and the Bank is committed to making this work.

Your new working arrangements outlined above will begin on 23 May 2022 and this month we expect you to work 2 days in the office. With the exception of these changes, your current employment terms remain unaffected.

Please sign and date the enclosed copy of this letter and return/scan it to me as soon as possible and in any event before the 13 May 2022 to confirm your agreement to this variation of your contract terms.

In reaching this decision the following factors have been considered:

• Your wish/need for a flexible working pattern to allow you to pick up and drop off your son

• The Bank's wish to give all colleagues the opportunity to work flexibly while still keeping the culture, interaction and mutual professional and personal support that comes with having a minimum period for 'face time' in the office.

If you have any questions please do not hesitate to contact me.

99. This was the ongoing situation that applied to the Claimant until after the claim period (when on, as we will explain, 9 July 2024, the Respondent granted the Claimant the right to work permanently/full time from home).

5 May 2022 – Claimant's sick leave commences

100. The day after Mr Sparano issued his appeal outcome the Claimant commenced the period of sick leave from which she had not returned at the date of the hearing [515]. She sent Mr Stewart and email saying [719]: "*Mark, I will not be in due to stress and anxiety and I can t cope with this*." That day Mr Stewart then sent his colleagues in HR and his own managers an email which read [720]: "*[Claimant] has advised me today that she is unable to work due to anxiety and stress. I presume this is connected to the banks refusal to accept her Flexible Working Request, however due to staff holidays the Nostro team is now operating with a single member of staff, Nick Potter. Given [Claimant] s history and sickness record I expect her absence to be prolonged and therefore temporary department cover will be urgently required to avoid the inevitably operational risks caused by running the department below capacity.Please urgently advise.".* A number of similar emails followed from Mr Stewart emphasising the pressures on his team and the need for additional resource [719, 825, 859]. His email of 10 May 2022 to Ms Della Morte and Ms Norton [730] included the following:

Do you have any further update regarding the request you placed with HO for the approval to employ a temporary member of staff for the Nostro department?

As discussed and following the receipt of [Claimant] s doctors certificate, it is extremely likely that she will prolong her absence for as long as possible as proven on numerous occasions in the past.

As the department line manager, I must stress the impact this type of situation has and will cause to the remaining members of the team who are required to cover for [Claimant] s absence in the long term should suitable cover not be immediately forthcoming. You may remember [FEMALE MEMBER OF STAFF] was placed under considerable pressure during [Claimant] s extended absence in 2018-19 often required to cover the epartment alone due additional staff sickness and yet cover was never sanctioned by the bank. This cannot be allowed to happen again else I believe we will be left in a situation whereby the branch cannot field a functioning Nostro reconciliation function, a considerable operational risk you will agree.

On a personal note, I find it very difficult to accommodate a member of staff that clearly has no regard for the effect their actions have on their colleagues. I have had to repeatedly accept [Claimant] s careless attitude to her attendance over many years, regardless of the impact on her peers, simply to ensure adequate cover is available for the department.

In my opinion the bank now has to place the operational functioning of the branch before a specific individual else it will find itself in a situation of further staff absent from their duties due to stress and anxiety.

[…]

Announcement of compulsory return to the office policy

101. On 22 May 2022 the Respondent required employees to return to work in the office [PSWS/22]. Ms Della Morte issued an email saying [733]:

[…]

We are writing to inform you that with effect from 6th June 2022 attendance to the office will resume to 100%. At the same time the Bank will introduce a new Home Working Policy which will allow colleagues who wish to apply to work from home in the UK for up to 10 working days per calendar month (or for 46% of scheduled work days in the case of part-time workers).

[…]

102. The Respondent's policy on home working provided, from this date [735-738]:

[…]

3. Duration

Home working should be on an occasional basis only. Any agreement that you work from home is intended to be temporary and will be kept under ongoing review. The fact that home working may be permitted in one case does not give rise to any entitlement to work from home in the future and the Bank reserves the right to withdraw or amend the arrangements at any time including (but not limited to) any change in your role and/or duties, or any other change which means that home working is no longer suitable.

[…]

If you wish to work from home then this should be discussed and agreed at least one week in advance with your Line Manager/Head of Department. In accordance with the temporary and ad hoc nature of remote working under this policy, whilst the Bank will seek to accommodate the request, any arrangement may be subject to change taking into account the needs of the business (for example, if a particular task/project means that it is no longer practicable for you to work from home on a particular day). The relevant Line Manager/Head of Department will not be able to accept home working requests if home working would affect the continuity and effectiveness of the Department. Home working for fractions of the day may also be requested where commuting time does not interfere with normal working hours.

As home working under this policy is intended to be occasional only, no more than 10 days per calendar month (or 46% of scheduled work days in the case of part-time workers) will be permitted. The Bank expects home working requests to be made on an 'ad hoc' and 'as necessary' basis (e.g. not every Friday or Monday).

103. As is clear from this wording, the policy did not provide any long term commitment that employees' could rely on the policy remaining as stated. Employee's in Mr Stewart's team needed to log their request for home working in a spreadsheet circulated by Mr Stewart [743].

104. The next day the Claimant submitted a fit note citing stress and anxiety [728]. She submitted a fit not in august 2022 citing stress, depression and anxiety [824].

105. An email of 21 June 2022 from Mr Stewart included the following and we accept that the Nostro team was clearly under pressure and unhappy with the shortfall in their resources [826].

As repeatedly outlined to you, both the Nostro team and myself are extremely unhappy at the situation and the apparent lack of concern towards both the operational needs and mental wellbeing of the department. Unless the authority to replace [Claimant] is forthcoming I fully expect to lose further staff to long term sickness rendering the

branch without a functioning Nostro reconciliation control.

106. On 8 July 2022 Ms Della Morte asked the Claimant to undergo an OH assessment [850].

107. At the end of July 2022 Ms Della Morte left the Respondent and was replaced by Ms S Sobhy Abdelmajed.

108. An email from Mr Stewart chasing for a response to his emails raising concerns about resourcing of the Nostro team included the following on 8 August 2022 [826]:

> *Given R. Sutherland s absence history I nor indeed the bank should expect her return anytime soon therefore a replacement should be sought as a matter of urgency.*

109. The Claimant's fit note of 11 September 2022 cited stress, anxiety and depression [847].

110. Not having had a response to the 8 July 2022 request for consent to undergo an OH assessment, Ms Tout chased the claimant on 16 September 2022 [849]. The Claimant submitted her consent form on 23 September 2022 [856].

111. The Claimant's fit note of 30 September 2022cited "depressed mood" and "stressed" [861].

112. On 12 October 2022 Ms Tout sent a summary of the timeline with respect to the Claimant (which we do not reproduce fully here) to Ms S Sobhy [862]. It included the following comments and included Mr Stewart's ("MS" below) sentiments on the situation:

> *Line manager (Mark Stewart) was generally supportive of RS s FW request however, the Bank's stance was a requirement to return to the office and adhere to the hybrid working scheme*
>
> *MS now very upset that RS has taken 6 months fully paid sick leave and said he didn't support her return Io his team – he said there would be 'mutiny."*

113. This report by Ms Tout to Ms Sobhy of Mr Stewart's sentiments features in a number of the Claimant's complaints.

114. On 24 October 2022 Ms Tout and Ms Sobhy had a welfare call with the Claimant. The next day Ms Tout sent Ms Sobhy an email with her notes of the meeting [867-868]. It included the following which we accept as an accurate record of what was discussed:

> *[…]*
>
> *• HT emailed RS on 24/10/22 at 17.00 to request a follow up to HT's email dated 19/10/22 which proposed a call with RS to discuss her options when her company sick pay exhausted on 31/10/22.*

[…]

• RS referred to her 24 years' service and said how upset she was with the Bank's treatment (towards her flexible working request / appeal)

• RS was very emotional, SS suggested postponing the call but RS wished to continue

[…]

• RS stated it wasn't that the Bank "can't" allow her to work remotely, it "won't" allow her to, she was just wanting this for an extra 2 years while her son / the school needed her close by for additional support

• RS said her son is on an EHCP – Education, Health and Care Plan and was developing anxiety, probably something he got from her, sometimes she is called to go to the school 5 minutes away for example to hold his nose due to a nose bleed. She said David (Kidney) knew this.

• RS said she was treated so badly after 24 years' service and doing her job so well from home

• RS mentioned other colleagues who are permitted to work remotely, eg. [JC]

• SS explained that the outcome of the appeal allowed extra flexibility with hybrid working, eg. working 10 days from the office per month, coming in late, going home early and making up the hours when working remotely, a trial for 6 months

• RS said this still wasn't acceptable, she couldn't work in the office on Fridays anyway

• SS said there was flexibility to allow her to work remotely on Fridays too

• RS said the hours would be impossible for her to do her job effectively as most of the work was done in the morning and her colleagues would still have to cover her

• RS said what she requested (working remotely) suited everyone except the Bank and HR

• HT said that the FW process was closed and the purpose of the call was not to revisit the appeal, but to find a way forward and support her with this

• HT asked if RS had considered what her options were when her company sick pay ended on 31/10/22

• RS said no, and asked "you tell me what my options are?"

• HT said that as RS was still declining the FW schedule stated in the appeal letter and didn't seem ready to return to work (not fit to work and ongoing childcare matter), and it was likely her fit note would be extended, RS had outstanding holiday that could be paid in November 2022 – 28 days – 6.5 taken = 21.5 days outstanding. HT asked RS if she wished the 21.5 days holiday to be paid and RS replied yes please. HT said she'd ensure the 22 days in November were processed as holiday and paid.

• RS mentioned that she was having therapy, HT asked how long she'd had this for and RS said about 3 months, it took a while to set up with her GP

• RS said it was ridiculous she was in this situation, all she was requesting was work remotely for an extra 2 years

• HT asked if RS had explored any support options via PMI and RS said no, HT offered to explore what services were available and RS agreed

• HT said moving forward, it was possible that RS may wish to consider a PHI claim, it was something RS had accessed in 2018. HT asked if RS wished to make a claim and RS agreed

• HT said she would send RS the relevant paperwork asap as the claim needed to be completed and assessed

• HT asked if RS had heard from Medigold (OH assessment), RS said no, that took 1 month – HT said there was a lot of information to gather and a long questionnaire to complete, plus she'd tried to call Medigold about RS's appointment without success (nb. there was delay from RS in responding too)

• HT said she would follow up in the next few days and keep in touch with RS […]

115. On 28 October 2022 Ms Tout contacted the Claimant by email to provide her with forms that the Claimant would need to complete in order to make a PHI claim [869]. In a separate email of the same date Ms Tout also reminded the Claimant of the position with respect to expiry of her sick pay and access to the Respondent's EAP services and said [871]:

> *Also in the call, we asked you if you wished to be paid all your outstanding accrued holiday for 2022, ie. 21.5 days, and you agreed to this. Your holiday pay will be processed in the November payroll.*
>
> *We have sent your information to Medigold for you to complete an Occupational Health assessment with a Consultant in order to obtain an update on your current health and explore any support or adjustments which may assist your recovery and you should hear from Medigold directly soon. Please let us know if you haven't heard back by 31st October*.

116. On 31 October 2022 Mr Stewart passed a further fit note submitted by the Claimant to HR and asked again about the position with respect for cover for his team [1007].

117. On 7 November 2022 the Claimant chased Ms Tout saying that she had not heard from the PHI providers she said [1588]:

> *Please be advised I have yet to receive any email from UNUM*
>
> *I have previously voiced my concerns regarding Intesa's delay in dealing with my Flexible Working request which took 7 months Also the Occupational Health forms which took you a month to submit I now see from the email below that even AON have commented on your delay regarding my claim.*
>
> *"if the claim is submitted late this can have a more detrimental effect In terms of the claim assessment process being more difficult and if admitted, a delay in benefits being paid "*
>
> *All of the above has had a serious effect on my wellbeing, mental health and possibly now my financial status I have had no support from from Intesa and your actions throughout this whole process could be deemed very questionable in a court of law*

118. Ms Tout replied [1588]:

> *[…]*
>
> *I'm sorry to hear you've not heard from Unum yet. I asked them again yesterday to contact you directly with the relevant online forms. In the meantime I also posted you the forms. If you're completinq the printed copies please scan and send to [CONTACT AT AON] with us in cc. If you don't have a scanner please take clear photos and send by email.*
>
> *Regarding Aon's email please note that this is standard wording regarding all claims.*
>
> *Regarding delays, respectfully Assunta Della Morte, (previous HR Manager) wrote to you on 8/7/22 regarding an occupational health assessment with a consent form to return and also sent you the consent form by post on 15/7/22 and we hove no record of a response from you. When Assunta left the Bank I discussed this matter at the earliest opportunity with Sarah Sobhy, new HR Manager. I then sent you an email on 16/9/22 to follow this up and we've been supporting you as much as possible ever since including the completion of OH and PHI paperwork, numerous calls with OH and Aon plus a 45 minute phone call with you from the office at 18:00 on Monday 24/10/22. when we discussed your holiday pay, PHI claim and EAP*
>
> *Please note the OH paperwork took longer to collate and write up than anticipated and we're now liaising with the supplier to ensure your appointment is scheduled as soon as possible. We also contacted*

another OH supplier as we were concerned with the delay. Please note that the GP's medical evidence is the primary source of information when a PHI claim is assessed and wouldn't hold up a claim assessment

Please let us know if you have any further questions or wish Io arrange a call

119. On 8 November 2022 Ms Tourt submitted documents for the Claimant's PHI claim to Aon [1119].

120. On 1 December 2022 OH prepared a report following an assessment with the Claimant on 23 November 2022 which was at [1590-1592] of the bundle. This OH Report was sent to the Claimant on 15 December 2022 for her approval and release to the Respondent [1589].

121. On 19 December 2022 the Respondent's insurer refused the Claimant's PHI claim saying [1157-1160]:

We are assessing Miss Sutherland's ability to perform her own occupation, which is as an Officer, Reconciliations Unit.

The policy terms and conditions that relate to our decision, and a list of the evidence considered, are detailed in the decision enclosure letter.

Miss Sutherland first became incapacitated on 5 May 2022, and our commencement date for liability was 13 weeks later on 4 August 2022. This is the period of time we have used to assess the claim and determine whether Miss Sutherland satisfies the definition of incapacity.

Please note that this claim was late notified to us by 98 days after the commencement date of the claim. On this occasion we have waived our late notification clause as this has not prejudiced our ability to assess the material time of the claim. However; this does not set a precedent for future claims.

The evidence that we have obtained as part of this assessment indicates that Miss Sutherland has reported problems with perceived work stress, as well as domestic psychosocial stressors. She has requested flexible working hours and has reported that sustaining childcare for her son is a barrier to her returning to work.

We note that she has been prescribed medication to help with her mood and has had some counselling sessions.

Although Miss Sutherland's reaction is understandable, the medical evidence does not document reporting of a symptom complex suggestive of generalised anxiety or a depressive illness.

The evidence does not support that Miss Sutherland's symptoms would have prevented her from undertaking the material and substantial duties of her occupation throughout the material time of the claim. Miss Sutherland does not fulfil the definition of incapacity under the policy and

we are therefore declining liability for her claim.

[…]

Evidence considered:

Please note that a General Practitioners medical certificate or fitness to work certificate on its own is not sufficient evidence to support a claim for incapacity. To assess whether or not a member meets the definition of incapacity under the policy we may also require medical records, consultant reports, diagnostic tests and any other relevant information, evidence, test, evaluation or report.

• Employer and Employee claim forms received on 9 November and 15 November 2022 respectively.

• Copies of Miss Sutherland's medical records from her GP received on 1 December 2022.

122. The Claimant was told about this refusal on 29 December 2022 [1143].

123. The Claimant had a further meeting with the OH consultant on 19 December 2022 (the Claimant had not agreed the release of the OH report) [CWS120-121]. On 29 December 2022 OH send an updated report to the Claimant for approval saying [1598, 1599-1600]: "*Please find attached the report from our review appointment on the 19th December. I have added in an overview regarding [Claimant's son] which provides additional information to your current situation. Please can you confirm if I can send this report and my initial report to Aslihan in HR. I recognise that we are waiting for your GP to send me information, but I would suggest it is helpful to let HR have an understanding of the challenges and concerns you have at this stage.*". The updated report was at [1599-1600] of the bundle.

124. On 28 December 2022 the Claimant declined the OH request to release their report to the Respondent because she wanted to wait until GP records for herself and her son had been sent to OH [1593].

125. On 20 January 2023 there was correspondence between Ms Tout and the Claimant with respect to the question of whether the Claimant wanted to appeal the PHI decision [1141-1142] and the Claimant alleged that OH had made unspecified inappropriate comments to her. The Claimant continued to refuse to release the OH report.

24 January 2023 Second Flexible Working Request (FWR2)

126. On 24 January 2023 the Claimant made her second flexible working request which read as follows [1148-1150]:

[…]

This is a Statutory Flexible Working request on 24.01.2023 to continue working from home on a permanent basis, effective immediately (when fit to do so) (official date to be discussed).

This is to supersede my previous request which commenced on the 01.09.2015 and my request of the 21.09.2021 to continue working from home.

During the pandemic my 10 year old son's childcare provider, which closed at 7pm, cancelled the school run service. Although alternative childcare had been arranged with his school, this service closes one hour earlier. Therefore, working in the office in London, including travelling time, will mean I will not be able to collect him by closing time, nor have childcare in the school holidays.

In addition to this my son [SON's NAME] will be commencing senior school in September 2023 which presents further issues as he is classed as a vulnerable child by his current school and supported by his EHCP. We are also awaiting an appointment with The Lighthouse for a possible ADHD/autism diagnosis, he is believed to suffer from one or both of these conditions.

I will need to be available to take him to senior school and collect him which will not affect my workload when working from home.

Working from home for 2 years from March 2020 had been 100% successful. Therefore, for me to continue working from home would have no adverse effect on my employer or colleagues.

Being away from the London pollution whilst working from home has seen a great improvement regarding my asthma attacks. Not having to walk 40 minutes a day inhaling the traffic fumes has meant a decrease in the need for prescribed steroids. During that time my absence from work showed a marked decrease, a comment which was made by my senior manager in my appraisal.

Being made to return to work in London is of great concern with regard to my health.

Furthermore, you have given permission for a male member of staff, also with a lung condition, to work 100% from home.

During the 2 years working from home the staff had extra work created by BREXIT, and my department had numerous days of online training with Milan and other branches for a new reconciliation system.

This was possible with the modern technology the Bank has available.

Since the FWR refusal letter dated 01.04.2022 the same senior manager authorised my 2 male colleagues to leave the department unmanned for 2 weeks each month while they both worked from home. Yet when I, as a working mother with a childcare problem asks, I am presented with the following rejection reason "We therefore require enough employees to be available day to day (on the ground), otherwise we consider there will be a detrimental effect on the ability to meet internal clients demands".

In accordance with the ACAS FWR procedure this whole process should be completed within 3 months, ensuring disability discrimination, sex discrimination or indirect sex discrimination does not occur.

My request on 21.09.2021 took yourselves 7 months to complete which had a detrimental effect on my mental health.

[…]

P S The form you have provided has spaces that are too small for me to complete.

However, all relevant points are covered in this e-mail with the exception of 2a and 2b which are covered here

2a - Contractual 09:15 - 16:45 half hour for lunch Monday to Friday - at the office in London.

Since March 2020 - 09:00 - 17:00 Monday to Friday - working from home.

2b - To work from home on a permanent contract from 09:00 - 17:00 Monday to Friday.

127. On 6 February 2023 Ms Tout sent the Claimant a copy of the refusal letter issued by the PHI insurers and addressed other questions raised by the Claimant [1151, 1157-1160].

128. On 8 February 2023 Ms Tout wrote to the Claimant in response to FWR2 as follows [1618, 1164]

[…]

I have been passed your flexible working request as Aslihan has now left the Bank.

Thank you for submitting your flexible working request and explaining how your circumstances have changed. In support of your request, it would be helpful to have a copy of your son s diagnosis (when available), this will of course be treated confidentially.

We would also like a clearer idea of when you want the requested flexible working arrangement to take effect, as we are looking at the position now and not at some point in the future when things may have changed. We would also want to consider any recommendations we should take into account from any OH viewpoint. I am aware that you are currently off with a stress related condition, and you have also mentioned an asthma condition. So that we can have a meaningful discussion around timing and support / adjustments, would you let us have the report from the OH provider. I understand there were some comments you were unhappy to have included, and I have addressed this in my other email to you on 6/2/23.

I look forward to hearing from you.

[…]

129. On 15 February 2023 the Claimant replied to Ms Tout saying [1616-1618, 1163]:

[…]

Thank you for your email dated 08/02/2023.

With regard to my son's diagnosis, this was started by his school in 2016 (document attached - Private and Confidential).

Unfortunately, the waiting list for a Lighthouse assessment is very long, and the outcome will be sent to you when available

As you will appreciate, I am currently signed off as being unfit to work until 24/02/2023. However, I have a consultation with my doctor on 25/02/2023, and I am sure you will appreciate it would be difficult to predict when I will be declared fit. To date, my circumstances remain the same and have not changed.

You state I have also mentioned an asthma condition. This has been ongoing since 2008.

With regard to the OH provider where we discussed I was unhappy with three comments made by her, I find it strange she voiced these strong views but have not included them in her report, and I also find it strange you have not asked me what those comments were.

Yet, another comment that she did include in the report was never discussed with me by her or by yourselves. I asked her to delete this comment, but she said she had to include it because that was the information provided by yourselves.

When she originally wanted to send her report to you she was not in possession of my medical records. Now, do you understand why I would not give her permission to send her report to you?

Once this matter has been dealt with you will be able to challenge Unum's decision, especially as I am experiencing financial difficulties.

As you will appreciate this whole matter is causing extra pressure on my mental health. Please ensure my Flexible Working Request is completed within the 3 month timeframe as your delay in dealing with my previous Flexible Working Request is the reason for my current medical condition.

130. On 22 February 2023 there was a call between Ms Tout and OH and Ms Tout then sought written confirmation of a number of matters from OH on 24 February 2023 [1171]. Ms Tout then sent an email to the Claimant saying [1175]: *We have asked the OH provider whether they wish to update the report having been provided with your medical records and whether they can delete the contentious*

comment without materially changing their opinion. If so, they will provide an updated report for you to review and release to us. As your OH assessment is a confidential conversation between you and the assessor, we do not think it appropriate to interfere or ask what has been discussed, but to wait until the agreed report is released. We are of course happy to assist move the process along as per the above."

131. On 1 March 2023, the date from which the Respondent concedes that the Claimant's mental health condition met the Section 6 EqA test of disability, the Claimant told the Respondent that she would be challenging insurer's decision [1187-1188]. On the same date the Claimant and OH exchanged the following emails which continued to 7 march 2023 [1180]:

OH to the Claimant

[…]

I can confirm that I have received the report from your GP on the 20 th February and I am just completing my summary of it to come to you for consent to be sent to Intesa along with the previous two reports. Intesa asked me for an update as to where I am up to report wise and I have confirmed that I was witing my summary of the medical report I received. I hoped to have this with you on Friday this week.

[…]

Please can you confirm what you feel I have omitted from my reports?

Many thanks

Please can you confirm your consent for me to share this report with HR/management It will hopefully enable a further discussion to find a way forward for you and the Company Please remember my role is to suggest and advise, all decisions lie with the Company.

Claimant to OH

[…]

When I asked you to remove the comment regarding the offer of 12 days that neither you nor my employer discussed with me you said you had to include it.

However three comments you made to me during the zoom meetings were -

1 . When I mentioned I could continue working from home, you said "if they don't do flexible working, they don't do flexible working' . Incorrect.

2. You said "looks like you could do with getting a job closer to home". How does that solve the problems I have?

3. You said "I think it's time you suggest to your employer about having a private conversation . Really!

I have expressed my need to continue working from home (which has been successful for 2 years) yet this appears to be overlooked by all parties.

[…]

OH to the Claimant on 2 March 2023 [1182-1183]

[…]

Please find attached the report relating to the medical report I have received from your GP I have incorporated the points you raised in your email with the exception of me asking whether you had considered a role nearer home. I always try to cover all possible options as part of my OH remit, but that does not mean that you might want to pursue it.

Claimant to OH 7 March 2023 [1182]

I am concerned that this is now the third time I have had to discuss the wording in your report.

I too have the doctors report and upon comparison with your report I do not understand why you have quoted the majority of the doctor's report, yet one part, not only have you omitted it, you have changed the wording.

Then with regards to my son's school report, you have omitted his bowel condition which needs medication and also his vulnerability regarding road awareness and willingness to talk to strangers.

These are some of the reasons for my flexible working request, as based on this information I will need to take and collect him from senior school.

Where in the school report does it say "but this may lessen when he goes to senior school'?

Also, I explained to you how my asthma affects me when working in London and how I was off sick approx 5 weeks a year and how this has dramatically reduced since working from home. You leave this out of your report and say "Prior to Covid, [Claimant] was successfully attending the office on a regular basis". How have you come to the conclusion that this was successful?

I give you the opportunity to amend your report accordingly, and I give my permission for you to attach both the doctor's report and school report to your report (when I'm satisfied it is correct) so my employer can refer to them.

Therefore, at present, I do NOT give my permission for you to send your report to my employer as you have given an incorrect impression of the

key facts.

I am finding this whole situation very stressful and without the support of my mother and legal advice from my solicitor I feel I would not be able to cope with this.

132. On 10 March 2023 the Respondent told the Claimant that, as the policy holder, the Respondent not the Claimant would need to lodge any appeal [1185]. On 14 March 2023 the Claimant therefore sent Ms Sobhy a GP report of the same date which said [1185, 1189]:

[Claimant] is suffering from multiple medical problems which she has asked us to offer clarification on, following a recent unsympathetic report recently offered by the Occupational Health Team.

May 2022 – [Claimant] noted to have work related stress, tearful and insomnia, with fleeting thoughts of suicide but no actual plans shared.

June 2022 – patient commenced on Mirtazapam which was subsequently increased as it was not helping her symptoms. Counselling was offered at that time.

The patient subsequently presented with ongoing depressed mood, ongoing stress related symptoms.

The GP continues to feel that the patient is not fit to work with most recent medical certification issued in February 2023 for a month, with review on 25th March 2023, likely to be further extended.

The patient also has asthma diagnosis with exacerbation and chest infections.

[Claimant] also has a son with special educational needs and anxiety which adds to her current difficult situation.

Any assistance offered to her would be appreciated.

133. On 15 March 2023, OH sent the Claimant a further OH report incorporating points from their three previous reports which said as follows [1606, 1607-1609 / 1205-1208]:

A medical report has now been received from [Claimant]'s General Practitioner (GP) which have reviewed alongside the report from the school regarding her son as well as my Initial assessment in November 2022.

Assessment in November 2022:

[Claimant] reports that when the pandemic started, like all of her colleagues, she was sent to work from home and has done so for the last two years. She reports that it was hard to start with, but that she found that it worked well for her.

During the period of Covid, [Claimant]'s childminder stopped looking after her son, and she moved him into after-school care which runs until 6 pm each evening.

Once Covid lockdown was over, [Claimant] reports that Intesa Sanpaolo requested all staff to return to the office, allowing people to work from home for 10 days per month. Effectively [Claimant] was asked to come in two days one week and three days the next (five days every two weeks).

Due to childcare issues, [Claimant] requested flexible working, asking to work from home permanently. I understand that this was declined, and when she appealed this was again declined

Provision was made for [Claimant] to come in late and finish early making up her hours at home, and in addition, she was offered 12 days working from home instead of the 10 that is the current norm at Intesa Sanpaolo. ([Claimant] has reported that she was not aware of the additional two days being offered).

I have since discussed flexible working requests with [Claimant] and explained that while a company has a requirement to carefully consider a request from an employee to change their work practices, they will have their own policies, practices and business needs to consider at the same time. I cannot comment on Intesa Sanpaolo's decisions as these are HR and management decisions.

[Claimant] describes herself as the main breadwinner. She reports that her husband is a lorry driver, doing 12 hours shift work, so all childcare responsibilities are hers. [Claimant] reports that her son has Special Educational Needs, and that she can get called to the school to support him.

Health

[Claimant] tells me that she first went off sick from work in May 2022, with stress/anxiety/depression. She reports that she has been prescribed medication by her General Practitioner (GP) and has had online therapy for a short period.

In terms of her general health, I note that [Claimant] reports having asthma for which she uses inhalers and has had chest infections to which she appears more prone due to her asthma.

From a lifestyle perspective, [Claimant] reports that she stopped smoking in 2003. She rarely drinks alcohol, and her only exercise is walking the dog locally. I note that she does not sleep well and has sleep apnoea. She has a CPAP machine for use at night but docs not use it currently as she does not get on with it.

Medical report from GP

[Claimant]'s GP has confirmed the following:

o [Claimant] first presented to the GP in May 2022 with work related stress and associated symptoms of tearfulness, not sleeping and generally feeling unwell. In addition, she was having to cope with childcare and mental health issues related to her son. She was commenced on medication.

o in June 2022, the GP reports that the medication wasn't helping, and the dose was increased. [Claimant] agreed to counselling.

o In July 2022, the GP reports that [Claimant] had an exacerbation of her asthma and was given medication and advice.

o In August 2022, the GP reports that [Claimant] was seen with depressed mood and reported feeling unsupported in her workplace. In addition, the GP reports that [Claimant]'s son was needing support and an FHCP care plan was in place

o In September 2022, the GP reports that [Claimant]'s ongoing stress was not improved, and her son was under the care of the Child Mental Health Services.

o In November and December, the GP reports that [Claimant] was seen with a? chest infection/chesty cough and an exacerbation of her asthma.

*o **Prognosis** - the GP feels that [Claimant] is unfit for work and had issued a further certificate for a month on the 25 th January 2023 for a month*

The report from the GP is consistent with the initial assessment I undertook in November last year.

Report from Winter Gardens Academy:

[Claimant] has also provided me with a copy of a report from her son's school dated 01/12/2022 regarding his Special Educational Needs and the challenges he currently faces.

The report confirms that [SON NAME] has attended Winter Gardens Academy since 2016. During this period, he has struggled to manage his social communication and sensory needs, and this has continued to be a challenge between him and his peers

I note that an Education, Health and Care Plan (EHCP) has been applied for to enable him to have additional educational support and will allow [Claimant] and her husband to select a special school for secondary education if they choose to do so. The school recommends that serious consideration is given to this as [SON NAME] is socially vulnerable. He lacks awareness of road safety and has a willingness to believe and talk to strangers.

Regarding his sensory needs, the school reports he is hypersensitive to touch and can be very distressed when everyday injuries occur and

needs significant help to manage this and become calm. Loud or busy environments can overwhelm him. Social conversation can be challenging and unstructured time such as lunch and play overwhelming.

[SON NAME]'s anxiety can manifest physically such that he can have stomach an bowel problems that mean he has to leave school part way during the day due to pain. He finds it difficult to deal with day-to-day illnesses and can become distressed, such that [Claimant] keeps him at home where he feels more secure, to protect his mental wellbeing.

I note from the report that the school is becoming increasingly concerned about [SON NAME]'s mental health. The school reports that he is receiving support from Children's and Adolescent's Mental Health Services (CAMHS) having weekly counselling sessions, and he also has a referral to the Lighthouse Paediatric Centre for further investigations.

Suggested Adjustments/Advice for Management to consider as part of their discussions with [Claimant] to enable a successful return to work:

o in view of what is known about [Claimant]'s current health conditions, it is likely she would meet the requirements of the Equality Act 2010, although this is a legal rather than medical decision Account should be made of the following:

o [Claimant] is under significant strain, trying to balance care for her son and being in the office.

o The challenges [Claimant]'s son faces as reported by the school as significant, and [Claimant] believes that she needs to be at home to support; her son. She also believes that she can do her job successfully at home and there is therefore no need for her to work in the office.

Based on the report from the school, [Claimant] has increased responsibilities in supporting her son currently, but this may lessen when he goes to senior school which will be within the next two years. However, this would need to be reassessed at that time.

• [Claimant] reports that her asthma is better controlled, and she has had fewer chest infections since she has worked at home. She was attending work prior to Covid on a regular basis, and I am unclear from the GP report whether her asthma has changed significantly. [Claimant] reports that she is concerned about travelling to London and the effect the pollution will have on her asthma on her 20-minute walk to the office. Were [Claimant] to return to the office you could consider whether it would be reasonable for her to work from home on days when high levels of pollution are recorded.

• I would encourage HR/Management to further discuss and explore all possible options with [Claimant] for a successful return to work/way forward. This would include further consideration of flexible working arrangement.

I would be happy to discuss the attached report once [Claimant] has consented for it to be shared with HR/Management.

134. On 16 March 2023 the Claimant told the Respondent that she would not communicate with OH in future saying [1190 and 1196]:

[…]

Please be advised I have just informed [OH NAME] at Opus that, as her report is once again factually incorrect, I will NOT give her permission to send her report to yourselves.

I have given her multiple opportunities to amend her report to give a true reflection of the facts, but to no avail.

Like yourselves, [OH NAME] is fully aware of my mental health issues and vulnerability, yet her actions have only added to this.

Therefore, I will no longer be communicating with her.

135. On 20 March 2023 Ms Tout sent the Claimant the following email [1235]:

[…]

Thank you for sending us through the information from Winter Gardens Academy, which will of course be treated in confidence.

Although we are focused on the PHI appeal to Unum, we have been giving your application for flexible working some thought and involving Paolo Sparano, Deputy General Manager, who would like to arrange a meeting with you to get your views on some questions we have about how this would work, we are also looking at the staffing and structure of the team more generally and would like to discuss this with you. I am conscious that you are unwell at the moment, so will be guided by you as to an appropriate time to speak.

Although, we believe some presence in the office is important for the reasons outlined in our original decision, in the light of the additional information you have given we would like to explore if we can accommodate your request for a permanent working from home arrangement to give you the flexibility you have requested to support your son, for example:

• When you want the working pattern to commence; and I appreciate that is difficult given that you are on sick leave. At the moment, we have not recruited a replacement for you as we have found that the work can be dealt with by two team members. We may look at restructuring the department in the future, but would not want to start this process until you are ready to return or have a final decision about your PHI application. Ideally, we would consider your request and look at the needs of the department at that time as our needs may change.

• If your request cannot be accommodated within your current team, would you be open to looking at other departments which may be able to accommodate your suggested working pattern.

• Flexibility you can offer. For example, providing occasional cover for pre-arranged leave which would involve some days in the office (provided you were given good notice of this), and to attend the office on your return to work for refresher training/training, and integration with the team/new team.

These are just some thoughts and I expect you will have others.

Finally, I just wanted to address a couple of the points made in your request. The employee with a lung condition who works permanently from home does so following express guidance received from his doctor, he is not in your department and does not perform the same role as you. The two colleagues in your department work from home on some of the same days so that they can also overlap on the days they are office based. Given there are only the two of them carrying out this role at the moment we believe that having company in the office is important.

Looking forward to hearing from you.

[…]

136. The Claimant replied to Ms Tout's email on 24 March 2023 as follows [1234/1615]:

Dear Helen,

Thank you for your email.

I will come back to you when I am able to do so.

[…]

137. Ms Tout later that day thanked the Claimant for her reply and said "Looking forward to hearing from you" [1614].

21 August 2023 - ET1 lodged

138. On 23 August 2023 the Claimant submitted her claim to the Tribunal.

October 2023 – Report on the Claimant's son

139. On or about 9 October 2023 a neurodevelopmental ASD school age diagnostic assessment report was sent to the Claimant's GP surgery [1525-1530]. The agreed chronology said that this report was then sent by the Claimant on 1 March 2024 to the Respondent.

5 June 2024 email from Ms Tout to the Claimant

140. On 5 June 2024 Ms Tout sent the following email to the Claimant [1613-1614]:

I hope this finds you in better health.

I wanted to write to you to follow up our email exchange from March 2023 when you indicated you would respond when you could, to our email to arrange a meeting to discuss your flexible working request, and questions we wanted to discuss regarding the request. Since our last exchange, I am aware that your application for PHI was turned down, and that you have commenced a tribunal claim against the Bank.

My purpose in writing to you is that we understand from the list of the issues in your tribunal claim you do not believe that your email to us amounted to an agreement to postpone the decision on your flexible working request; as per your communication below, we understood you would be discussing your flexible working request "when you felt able to do so". Now we have this clarification, we want to continue the process and invite you to meet with us, or alternatively, submit your responses to our questions; and we will make a decision on your request.

If you wish to meet with us either in person or by Videocon please let me have any available dates between now and 14th June 2024 and your preference for the meeting. The decision maker in this process is Mr Paolo Sparano, Deputy General Manager.

Alternatively, if you wish to submit your responses in writing, the questions are:

1. Confirm the working pattern you would like (days per week; hours per day), or any changes to your original request.

2. Is there any flexibility you can offer? For example, providing occasional cover for pre-arranged leave which would involve some days in the office (provided you were given good notice of this), and to attend the office on your return to work for refresher training/training, and integration with the team/new team; any office attendance on a fixed day per fortnight/month/quarter.

3. If your request cannot be accommodated within your current team, would you be open to looking at other departments which may be able to accommodate your suggested working pattern.

4. Commencement: I appreciate you may not be able to say when you want the working pattern to commence, and this would be against the background of medical advice; but if you are able to give an indication this would be helpful.

In the meantime, I note we have not had a fit note from you since September 2023 and would be grateful if you would forward an updated fit note.

Please feel free to contact me if we can be of further assistance.

141. On 14 June 2024 the Claimant replied to Ms Tout saying [1473-1474]:

[…]

I am still not well due to your treatment and my treatment by the company. Thank you for checking in on my health after 19 months since the welfare call on 24 October 2022 . As you may imagine, no contact for such long periods of time and no progression or interest in my flexible working requests does not engender a sense that you or the company genuinely care, rather it gives the impression that you are just trying to tick a box.

I am both bewildered and frustrated by your comment "My purpose in writing to you is that we understand from the list of the issues in your tribunal claim you do not believe that your email to us amounted to an agreement to postpone the decision on your flexible working request; as per your communication below, we understood you would be discussing your flexible working request "when you felt able to do so". Now we have this clarification, we want to continue the process…". Clearly you want to create a false narrative via these emails, so let me summarise the real scenario and some facts:

1 . I think you are fully aware that what you are saying above is false, you are being disingenuous and I think you know that. I cannot believe you really genuinely believe what you are actually saying as it doesn't make sense In the 20th March email below, you did not ask me if I consented to delay the time for you to respond to my flexible working request, nor did you mention timescales or postponement periods for flexible working at all in fact. How can it possibly be said or even reasonably interpreted that me saying I would "come back" to you, was me saying - yes I am perfectly fine for you extend the normal timescales set out in flexible working legislation (for a second time) when that question was never asked or answered? It very clearly was not. Anyway, it is pretty obvious to me, and probably you, what the Tribunal are going to find - I will just leave them to decide rather than debate black is white with you.

2. The comment "Now we have this clarification, we want to continue the process" is honestly beyond belief. You are deliberately making it sound like this has just occurred, that this is news to you, that you have just found out that your false claim that you thought an extension had been agreed was disputed. My Tribunal claim was submitted on 2 1 08.23 and made it explicitly clear that I had never agreed to an extension. When you say "now we have this clarification"- you had that "clarification", to use your words, about a year ago. It has taken you about 4 times longer than the entire flexible working decision period (which is three months) to progress literally anything in respect of my flexible working request. How do you think that makes me feel as an employee, what impression do you think that gives as to how seriously ISP are taking my request, what care and respect they have for me as a person? Writing to me saying "now we have this clarification", is misleading and upsetting.

To provide you with a written response:

1. *Confirm the working pattern you would like (days per week,*

hours per day), or any changes to your original request. ***- No changes needed to my original 24 January 2023 request (submitted 1 year 5 months ago).[Other than, you are aware my son was since diagnosed with autism, has started senior school, is on a EHCP, and has complex needs like being unable to walk to school by himself.]***

2. Is there any flexibility you can offer? For example, providing occasional cover for pre-arranged leave which would involve some days in the office (provided you were given good notice of this), and to attend the office on your return to work for refresher training/training, and integration with the team/new team; any office attendance on a fixed day per fortnight/month/quarter. ***Whilst my request was to work from home as the standard/default position, it has never been the case that I have refused to step foot in the office in the future. It has a negative impact on me and my health travelling to London and being in the office, hence my default is that I work 100% from home as the standard. As an aside, of course I would worry about integration back into the team, I would be reluctant to return to the office given how I have been affected. Who wouldn't when it is recorded that my manager didn't support my return to his team and there would be "mutiny" if I ever returned because I have had time off owing to my disability? I would want to know how discriminatory conduct like this would be dealt with. It would be good to know what action has been taken internally (I suspect none)?***

3. If your request cannot be accommodated within your current team, would you be open to looking at other departments which may be able to accommodate your suggested working pattern. ***Yes, potentially as per my flexible working request to continue to work from home full time.***

4. Commencement: I appreciate you may not be able to say when you want the working pattern to commence, and this would be against the background of medical advice; but if you are able to give an indication this would be helpful. ***This is very difficult to say due to the way I have been treated and really has had a huge impact on my life. It has really broken me - I think it is such a shame as it was really avoidable. Your recent email seems to me to be just a continuation of the same approach.***

As you ceased requesting fit notes in 2023, it wasn't made clear that I had to continue to provide them. However, I have booked an appointment with my doctor at the earliest possible opportunity which is in July. After my appointment I will update you accordingly, and going forward, I will keep you up to date with my fit notes.

With Regards to the DSAR received 20 July 2023, please send me clean copies asap by return email as this is to assist at the Tribunal. Should

this not be in your remit please ensure the relevant person is informed and their contact details are relayed back to me by 18 June 2024.

9 July 2024 - the Respondent grants the Claimant a permanent working from home arrangement

142. On 9 July 2024 Mr Sparano wrote to the Claimant as follows:

In a cover email [1610]:

Thank you for coming back us.

In my capacity of being ISP London Branch's Deputy Generat Manager, and the decision maker for your request, I have agreed that given your extenuating circumstances in needing to provide care for your child in the absence of any appropriate facilities in your local area, in principle the Bank will agree to a permanent working from home pattern as set out in the attached letter.

I understand you are unlikely to be fit enough to return in the foreseeable future; while we can currently keep the role open for you, if circumstances change we will consult with you at such time. If we identify any other positions in the Bank that may be suitable for your skills, experience and home working pattern, we will also notify you.

As your litigation against the Bank is ongoing and you know the Bank's position I will not reiterate it here. I hope you will take this letter in the spirit in which it is meant, which is as an opportunity to move forward.

Your managers and colleagues support the Bank's decision. We are happy to discuss any concerns you have about integration and/or to facilitate a meeting with your managers if that would be helpful as and when you feel ready.

Finally, thank you for arranging to update your fit notes. I understand you have been liaising about the tribunal bundle direct with the Bank's solicitor, so please continue to address any requests for missing documents to them.

The that Mr Sparano intended to attach to this email (but which was sent separately about half an hour later) read [1621]:

[…]

Following receipt of your flexible working request of 24th January 2023 and your email dated 14th June 2024, and in light of the additional information you have provided regarding the challenges faced by your son and needing to provide care for your child in the absence of any appropriate facilities in your local area, I am pleased to confirm that, we are able to accommodate your request, which is working permanently from your home address in UK.

With the exception of these changes, your current employment terms

remain unaffected; save that we may move you to a different position should a suitable alternative be available.

Your new working arrangements will begin on your return from sick leave, subject to any return to work recommendations from your GP.

You will receive a hard copy signed version of this letter to sign and return to confirm your agreement to the variation of your contract terms.

The changes set out above will be permanent changes to your terms and conditions of employment. You will have no right to revert back to your previous working pattern. You are entitled to make two requests for flexible working under the statutory procedure in any 12-month period.

If you would like to discuss any aspect of this letter or the new arrangements, including how they may be reviewed going forward, please contact the HR department, […]

THE LAW

Time limits – the EqA

143. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.

144. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

145. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.

146. In **Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686**, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably. An example is found in the case of **Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/17** where it was determined that the respondent's decision to instigate disciplinary proceedings against the claimant created a state of affairs that continued until the conclusion of the disciplinary process.

147. It is not necessary to take an all-or-nothing approach to continuing acts. The tribunal can decide that some acts should be grouped into a continuing act, while others remain unconnected **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548**; The tribunal in ***Lyfar*** grouped the 17 alleged individual acts of discrimination into four continuing acts, only one of which was in time.

148. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).

149. It is for the claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the *rule (**Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576**).*

150. The tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23,** the best approach is for the tribunal to *assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay, but might, depending on the circumstances, include some or all of the suggested list from the case of* **British Coal Corporation v Keeble [1997] IRLR 36** as well as other potentially relevant factors.

151. Where the reason for the delay is because a claimant has waited for the outcome of his or her employer's internal grievance procedures before making a claim, the tribunal may take this into account (**Apelogun-Gabriels v London Borough of Lambeth and anor 2002 ICR 713, CA**). Each case should be determined on its own facts, however, including considering the length of time the claimant waits to present a claim after receiving the grievance outcome.

152. In the case of **Harden v (1) Wootlif and (2) Smart Diner Group Ltd UKEAT/0448/14** the Employment Appeal Tribunal reminded employment tribunals that we must considering the just and equitable application in respect of each respondent separately and that it is open to us to reach different decisions for different respondents.

Time limits – the ERA

153. For reasons we explain below, we have not needed to consider time limits under the Employment Rights Act 1996 we do not set out the applicable law here.

Section 80F, 80G, 80H and 80I ERA – Flexible Working Requests

154. Section 80F sets out the extent of the right to make a flexible work request. The section is headed "Statutory right to request contract variation" and provides,

> *"(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if – the change relates to –*
>
> *the hours he is required to work,*
>
> *the times when he is required to work,*
>
> *where, as between his home and a place of business of his employer, he is required to work, or*
>
> *such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations*

(2) An application under this section must –

(a) state that it is such an application,

(b) specify the change applied for and the date on which it is proposed the change should become effective, and

(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with.

(4) If an employee has made an application under this section, he may not make a further application under this section to the same employer before the end of the period of twelve months beginning with the date on which the previous application was made.".

155. Section 80G ERA goes on to provide:

"(1) An employer to whom an application under section 80F is made – shall deal with the application in a reasonable manner

(aa) shall notify the employee of the decision on the application within the decision period, and

(b) shall only refuse the application because he considers that one or more of the grounds applies –

(i) the burden of additional costs,

(ii) detrimental effect on ability to meet customer demand,

(iii) inability to re-organise work among existing staff,

(iv) inability to recruit additional staff,

(v) detrimental impact on quality,

(vi) detrimental impact on performance,

(vii) insufficiency of work during the periods the employee proposes to work,

(viii) planned structural changes and

(ix) such other grounds as the Secretary of State may specify by regulation.

(1A) If an employer allows an employee to appeal a decision to reject an application, the reference in subsection (1)(aa) to the decision on the application is a reference to-

(a)the decision on the appeal, or

(b)if more than one appeal is allowed, the decision on the final appeal.

(1B) for the purposes of subsection (1)(aa) the decision period applicable to an employee's application under section 80F is-

(a) the period of three months beginning with the date on which the application is made, or

(b) such longer period as may be agreed by the employer and the employee.

(1C) An agreement to extend the decision in a particular case may be made-

(a) before it ends, or

(b) with retrospective effect, before the end of a period of three months beginning with the day after but on which the decision. That is being extended came to an end.

(1D) an application under section 80F is to be treated as having been withdrawn by the employee if-

(a) employee without good reason has failed to attend both the first meeting arranged by the employer to discuss the application and the next meeting arranged for that purpose, or

(b) where the employer allows the employee to appeal a decision to reject an application or to make a further appeal, the employee without good reason has failed to attend both the first meeting arranged by the employer to discuss the appeal and the next meeting arranged for that purpose,

and the employer has notified the employee that the employer has decided to treat that conduct of the employee as a withdrawal of the application.

156. Section 80H states:

"*80H Complaints to employment tribunals*

(1) An employee who makes an application under section 80F may present a complaint to an employment tribunal-

(a) that his employer has failed in relation to the application to comply with section 80G(1),

(b) that a decision by his employer to reject the application was based on incorrect facts," ….

> *"(5) An employment tribunal shall not consider a complaint under this section unless it is presented- (a) Before the end of the period of three months beginning with the relevant date, or (b) Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*
>
> *(6) In subsection (5)(a), the reference to the relevant date is a reference to the first date on which the employee may make a complaint under subsection (1)(a), (b) or (c), as the case may be.*
>
> *(7) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (5)(a)."*

157. The relevant part of section 80I ERA states:

> *"(1) Where an employment tribunal finds a complaint under section 80H well-founded it shall make a declaration to that effect and may – (a) make an order for reconsideration of the application, and (b) make an award of compensation to be paid by the employer to the employee.*
>
> *(2) The amount of compensation shall be such amount, not exceeding the permitted maximum, as the tribunal considers just and equitable in all the circumstances."*

Flexible Working Regulations 2014

158. Regulation 4 of the Flexible Working Regulations 2014 provides,

> *"A flexible working application must – (a) be in writing; (b) state whether the employee has previously made any such application and, if so, when; and (c) be dated"*

159. Regulation 6 of the Flexible Working Regulations 2014 provides,

> *"For the purposes of section 80I of the 1996 Act (remedies) the maximum amount of compensation is 8 weeks' pay of the employee who presented the complaint under section 80H of the 1996 Act."*

ACAS Code of Practice

160. Tribunals should take into account when considering complaints under section 80H the ACAS Code of Practice - Handling in a reasonable manner requests to work flexibly (2014) "code". The Code contains helpful guidance to employers, it states:

> *"6. You should discuss the request with your employee. It will help you get a better idea of what changes they are looking for and how they might benefit your business and the employee…*
>
> *8. You should consider the request carefully looking at the benefits of the requested changes in working conditions for the employee and your*

business and weighing these against any adverse business impact of implementing the changes ...

12. If you reject the request you should allow your employee to appeal the decision."

161. The Tribunal acknowledges that these are points of good practice and not legal requirements imposed on the Respondent.

162. ACAS advice says it is good practice to "*deal with an appeal impartially*".

'Reasonable manner'- section 80G(1) (a) ERA

163. Some helpful insight may be gained from the Employment Tribunal's approach in the ET case of **Whiteman v CPS Interiors Ltd and ors ET Case No.2601103/15** to what amounts to a reasonable manner under section 80G(1)(a) ERA. The ET considered that reasonableness in this context referred more to the decision-making process rather than the substance of the decision. It took the view that section 80G(1)(a) referred to dealing with the application in a reasonable manner, rather than making a reasonable decision. The ET also observed that, the ACAS Code states that requests must be handled — as opposed to decided — in a reasonable manner. The tribunal noted that the Code has '*next to nothing to say*' about the substance of the decision, beyond reminding employers that they must not unlawfully discriminate and that if a request is rejected it must be on one or more of the potentially permissible bases or 'grounds' set out in section 80G(1)(b) ERA.

'Incorrect facts' -section 80H (1) (b)

164. In **Singh v Pennine Care NHS Foundation Trust EAT 0027/16** the EAT held that it is not for an employment tribunal to judge the reasonableness of an employer's refusal to provide flexible working in a S.80H(1)(b) claim: it simply needs to investigate the facts on which the decision was based.

165. In **Commotion Ltd v Rutty 2006 ICR 290**, EAT, The EAT held that: *"[I]n order for the tribunal to establish whether or not the decision by the employer to reject the application was based on incorrect facts, the tribunal must examine the evidence as to the circumstances surrounding the situation to which the application gave rise. In doing so, the tribunal are entitled to enquire into what would have been the effect of granting the application. Could it have been coped with without disruption? What did other staff feel about it? Could they make up the time? and matters of that type. We do not propose to go exhaustively through the matters at which a tribunal might wish to look, but if the tribunal were to look at such matters in order to test whether the assertion made by the employer was factually correct, that would not be any misuse of their powers and they would not be committing an error of law.*"

'Just and equitable'

166. The Employment Tribunal case of **Coxon v Landesbank Baden-Wurttemberg ET Case No.2203702/04** provides some parameters of when the 8 week compensation made not be awarded. In that case, the employment tribunal held that an employer had 'patently failed' to observe the requirements set out in the

(now repealed) Flexible Working (Procedural Requirements) Regulations 2002 SI 2002/3207 and, as a result, was minded to make the maximum award of eight weeks. However, in view of the fact that, had serious consideration been given to the Claimant's request to work flexibly it would have been rejected by any reasonable employer, the tribunal decided that it would be just and equitable to reduce the award to six weeks' compensation.

Discrimination under the EqA

167. The Equality Act 2010 (EqA) protects employees and applicants for employment from discrimination based on or related to a number of 'protected characteristics' (section 4). These include disability (section 6).

Disability

168. We accept the Respondents' submission in respect of the authority given by paragraphs 24-26 of the Court of Appeal's decision in **All Answers Ltd v W [2021] EWCA Civ 606**, as folllows:

> *"24. A person has a disability within the meaning of section 6 of the 2010 Act if he or she (1) has a physical or mental impairment which has (2) a substantial and (3) long term adverse effect on that person's ability to carry out day to day activities. In the present case, the respondent accepts that, as at 21 and 22 August 2018, each claimant had a mental impairment which had a substantial adverse effect on that claimant's ability to carry out day to day activities. The only issue in this case is whether the impairment had a "long term" substantial adverse affect.*
>
> *25. Paragraph 2(1)(b) of Schedule 1 to the 2010 Act defines long term, so far as material to this case, as "likely to last at least 12 months". "Likely" in this context means "could well happen": see Boyle v SCA Packaging Ltd. [2009] UKHL 37, [2009] ICR 1056, per Lord Hope at paragraph 4, and Lord Rodger at paragraph 42, Baroness Hale at paragraphs 70 to 72 (with whom Lord Neuberger agreed at paragraph 81), Lord Brown at paragraph 77.*
>
> *26. The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer LJ at paragraphs 30-35. That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph*

> *2(1)(b) of the Schedule. I note that that interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 months, "account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood".*

Discrimination arising from disability - section 15 EqA

169. Section 15 EqA provides: "(1) A person (A) discriminates against a disabled person (B) if— (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim. (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".

170. As to what constitutes "unfavourable treatment", the Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230** held that it is first necessary to identify the relevant treatment and it must then be considered whether it was unfavourable to the Claimant.

171. The Court said that little was likely to be gained by differentiating unfavourable treatment from analogous concepts such as "detriment" found elsewhere in the Act, referring to a relatively low threshold of disadvantage being needed. One could answer the question by asking whether the Claimant was in as good a position as others.

172. What caused the unfavourable treatment requires consideration of the mind(s) of alleged discriminator(s) and thus that the reason which is said to arise from disability be more than just the context for the unfavourable treatment. There need only be a loose connection between the unfavourable treatment and the alleged reason for it, and it need not be the sole or main cause of the treatment, though the reason must operate on the alleged discriminators' conscious or unconscious thought processes to a significant extent **(Charlesworth v Dronsfield Engineering UKEAT/0197/16).**

173. By analogy with **Igen**, "significant" in this context must mean more than trivial. Whether the reason for the treatment was "something arising in consequence of the Claimant's disability" could describe a range of causal links and is an objective question, not requiring an examination of the alleged discriminator's thought processes.

174. Simler P in **Pnaiser v NHS England [2016] IRLR 170, EAT**, at [31], gave the following guidance as to the correct approach to a claim under **section 15 EqA**:

> '*(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
>
> *(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the*

mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see ***Nagarajan v London Regional Transport [1999] IRLR 572****. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.*

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely, to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in ***Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb)*** *a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) There is a difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and

does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment."

175. The burden of establishing a proportionate means defence is on the Respondent. When assessing whether the treatment in question was a proportionate means of achieving a legitimate aim, the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: **Hardys & Hansons plc v Lax [2005] IRLR 726** per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: **Hardys & Hansons plc v Lax [2005] IRLR 726, CA**.

176. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** it was said, approving Mummery LJ in **R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293**, that what is required is: first, a real need on the part of the Respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end.

177. It is also appropriate to ask whether a lesser measure could have achieved the employer's aim – **Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice [2017] UKSC 27**.

178. A complaint of discrimination arising from disability will also be defeated if the Respondent can show that at the time of the unfavourable treatment, it did not know and could not reasonably be expected to know that the Claimant was a disabled person.

Reasonable Adjustments

179. By section *39 (5) EqA* a duty to make adjustments applies to an employer. By section *21 EqA* a person who fails to comply with a duty on him to make

adjustments in respect of a disabled person discriminates against the disabled person.

180. *Section 20(3) EqA* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

181. Under s.20(5) EqA the obligation to make reasonable adjustments with regard to an auxiliary aid is set out as follows:

> 'The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary *aid'*

182. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs.

183. The duty to make reasonable adjustments only arises where the employer has knowledge (actual or constructive) that its employee is disabled and likely to be placed at a substantial disadvantage as (Paragraph 20 (1)(b) Schedule 8 of the Equality Act 2010).

184. In **Environment Agency v Rowan 2008 ICR 218** and **General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4** the EAT gave general guidance on the approach to be taken in reasonable adjustment claims. A tribunal must first identify:

184.1 the PCP applied by or on behalf of the employer

184.2 the identity of non-disabled comparators;

184.3 the nature and extent of the substantial disadvantage suffered by the Claimant in comparison with the comparators.

185. Once these matters have been identified then the tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as matter of fact, not whether it failed to consider them.

186. The phrase PCP is interpreted broadly. The EHRC Code of Practice on Employment (2011) ("**the Code**") says at paragraph 6.10:

> "*[It] should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions*."

187. The Code goes on to provide at Paragraph 6.24, that *"there is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask);* At paragraph 6.37, *that Access to Work does not diminish or reduce any of the employer's responsibilities under the 2010 Act.* At paragraph 6.28 the factors which might be taken into account when deciding if a step is a reasonable one to take:

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

188. In **Lamb v The Business Academy Bexley EAT 0226/15 the EAT** commented that the term "PCP" is to be construed broadly "having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability".

189. It is also generally unhelpful to distinguish between "provisions", "criteria" and "practices": **Harrod v Chief Constable of West Midlands Police [2017] ICR 869**.

190. There is no formal requirement that the PCP actually be applied to the disabled Claimant. The EAT said in **Roberts v North West Ambulance Service [2012] ICR D14** that a PCP (in this case, hot desking) applied to others might still put the Claimant at a substantial disadvantage.

191. There are some limits to what can constitute a PCP. In particular there has to be an element of repetition, actual or potential. A genuine one off decision which was not the application of policy is unlikely to be a "practice": **Nottingham City Transport Ltd v Harvey [2013] All ER(D) 267 (Feb), EAT**. In that case the one-off application of a flawed disciplinary process to the Claimant was not a PCP. There was no evidence to show that the employer routinely conducted its disciplinary procedures in that way.

192. In **Ishola v Transport for London [2020] ICR 1204** the Court of Appeal said that all three words "provision", "criterion" and "practice" "..carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."

193. The test of reasonableness imports an objective standard. The tribunal must examine the issue not just from the perspective of the Claimant, but also take into account wider implications including the operational objectives of the employer.

194. It is not necessary to prove that the potential adjustment will remove the disadvantage; if there is a "real prospect" that it will, the adjustment may be reasonable. In **Romec v Rudham [2007] All ER (D) 206 (Jul)**, EAT: HHJ Peter Clark said that it was unnecessary to be able to give a definitive answer to the question of the extent to which the adjustment would remove the disadvantage. If

there was a 'real prospect' of removing the disadvantage it 'may be reasonable'. In **Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)**, EAT: HHJ McMullen said that 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage'. In **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10, [2011] EqLR 1075**, the EAT said that, when considering whether an adjustment is reasonable, it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage.

195. Schedule 8 EqA (Work: Reasonable Adjustments) - Part 3 limitations on the duty provides:

> *S. 20. Lack of knowledge of disability, etc*
>
> *(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know— (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement. Under Part 2 and an interested disabled person includes in relation to Employment by A, an employee of A's.*

196. If relied upon, the burden is on the Respondent to prove it did not have the necessary knowledge. The Respondent must show that it did not have actual knowledge of <u>both</u> the disability <u>and</u> the substantial disadvantage and also that it could not be reasonably have been expected to know of <u>both</u> the disability <u>and</u> the substantial disadvantage.

Harassment (disability)

197. Section 40 of the EqA renders harassment of an employee unlawful.

198. Section 26 EqA 2010 provides: *(1) A person (A) harasses another (B) if- A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of - violating B's dignity, or creating an intimidating, hostile, degrading, 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— the perception of B; the other circumstances of the case; whether it is reasonable for the conduct to have that effect*.

199. The Tribunal is therefore required to reach conclusions on whether the conduct complained of was unwanted and, if so, whether it had the necessary purpose or effect and, if it did, whether it was related to disability.

200. If the Claimant proves any of the conduct they complain about, it was unwanted. There is no need to say anything further about that.

201. It is clear that the requirement for the conduct to be "related to" disability needs a broader enquiry than whether conduct is "because of disability" like direct

discrimination Bakkali v Greater Manchester Buses (South) Limited UKEAT/0176/17.

202. What is needed is a link between the treatment and the protected characteristic, though comparisons with how others were or would have been treated may still be instructive. In assessing whether it was related to disability, the form of the conduct in question is more important than why the Respondent engaged in it or even how either party perceived it.

203. The question of whether the Respondent had either of the prohibited purposes – to violate the Claimant's dignity or create the requisite environment – requires consideration of each alleged perpetrator's mental processes, and thus the drawing of inferences from the evidence before the Tribunal **GMB v Henderson [2016] EWCA Civ 1049**.

204. As to whether the conduct had the requisite effect, there are clearly subjective considerations – the Claimant's perception of the impact on her (they must actually have felt or perceived the alleged impact) – but also objective considerations including whether it was reasonable for it to have the effect on this particular Claimant, the purpose of the remark, and all the surrounding context. That much is clear from section 26 and was confirmed by the Employment Appeal Tribunal in **Richmond Pharmacology Ltd v Dhaliwal [2009] ICR 724**. The words of section 26(1)(b) must be carefully considered. Conduct which is trivial or transitory is unlikely to be sufficient.

205. Mr. Justice Underhill, as he then was, said in that case:

> *"A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard … whether it was reasonable for a claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt …"*
>
> and
>
> *"…We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of*

> *hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"*

206. Similarly in the case of **HM Land registry v Grant [2011] EWCA Civ 769**, Elias LJ as he became said, when discussing the descriptive language of subparagraph 1:

> "*Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment*."

207. In the case of **Greasley-Adams v Royal Mail [2023] EAT 86** for harassment to have occurred, the person must have been aware that it had happened in order to perceive that it was harassment. Therefore, if comments are made behind an employee's back that they become aware of later on, for example because of an investigation into their grievances about other matters, to determine whether harassment has taken place, the correct approach is to look at the Claimant's perception of the situation at the date time the alleged harassing incident took place. Consequently, if the Claimant was not aware of the harassment at the time, they could not perceive that they had been harassed at the time.

208. Further, if they then later found out about the harassment event, it could well still amount to harassment at the time they find out about it. However, whether it is reasonable for the Claimant to believe that they have been subject to harassment in accordance with section 26 (4) (c), that question is to be determined in the context of events taking place at the time the Claimant finds out about the harassing event. In the context of **Greasley-Adams**, this meant that finding out about a harassment event during an investigation meeting into his grievances and claiming this was violating his dignity, was unreasonable in the context of the employer investigation the Claimant's concerns in good faith.

209. It is for the Claimant to establish the necessary facts which go to satisfying the first stage of the burden of proof. If they do, then it is plain that the Respondent can have harassed them even if it was not its purpose to do so, though if something was done innocently that may be relevant to the question of reasonableness under section 26(4)(c).

210. Violating and intimidating are strong words, which will usually require evidence of serious and marked effects. An environment can be created by a one-off comment, but the effects must be lasting. Who makes the comments, and whether others hear, can be relevant, as can whether an employee complained, though it must be recognised that is not always easy to do so. Where there are several instances of alleged harassment, the Tribunal can take a cumulative approach in determining whether the statutory test is met **Driskel v Peninsula Business Services Ltd. [2000] IRLR 151**.

211. In addition, if what the issue alleged by Claimant as amounting to a breach of the EqA would not be unlawful under the EqA, then it cannot be a protected act for example see **Waters v Metropolitan Police Comr [1997] IRLR 589**.

212. The employee must be subjected to a detriment, which has been decided to mean placed at a disadvantage **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230**. Unfavourable or less favourable treatment arguments are not in accordance with the correct statutory wording of section 27. Detriment is established if treatment is of a kind that a reasonable worker would or might take the view that in all the circumstances it was to their detriment: **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL.** Therefore, for detriment to be proven, it is for the Claimant to show that they were or would have been, in their subjective view, placed at a disadvantage and that it was objectively reasonable for them to have held that view.

213. Detrimental treatment of a Claimant will not be because of a protected act if the detrimental treatment is caused by the way in which the protected act is done or the behaviour of the Claimant whilst communicating the protected act or gathering information for it. For example see **Woods v Pasab Limited [2012] EWCA Civ 1578** and **Martin v Devonshire Solicitors [2011] ICR 352.**

214. The detriment relied upon by the Claimant, must be linked to the protected act. The same test for causation in direct discrimination, is therefore relevant to victimisation because the statutory wording is the same.

Direct sex discrimination

215. Section 39(2) of the Equality Act 2010 prohibits an employer discriminating against one of its employees by dismissing him or by subjecting the employee to a detriment. This includes direct discrimination because of a protected characteristic as defined in section 13. Section 4 makes clear that sex is a protected characteristic and Section 11 provides that in relation to sex:

> *(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;*
>
> *(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.*

216. Section 13 of the Equality Act 2010 provides that 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others'.

217. Under section 23(1), where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.

218. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the Claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.

219. We must consider whether the fact that the Claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the

decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.

220. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of sex. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as she was.

221. Section 136 of the Equality Act sets out the relevant burden of proof that must be applied. A two-stage process is followed. Initially it is for the Claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent committed an act of unlawful discrimination.

222. At the second stage, discrimination is presumed to have occurred, unless the Respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the Respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the Claimant's sex. The Respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

223. Guidelines on the burden of proof were set out by the Court of Appeal in **Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258** and we have followed those as well as the direction of the court of appeal in **Madarassy v Nomura International plc [2007] IRLR 246, CA**. The decision of the Court of Appeal in **Efobi v Royal Mail Group Ltd [2019] ICR 750** confirms the guidance in these cases applies under the Equality Act 2010.

224. The Court of Appeal in Madarassy, states:

> 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.' (56)

225. It may be appropriate on occasion, for the tribunal to take into account the Respondent's explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (**Laing v Manchester City Council and others [2006] IRLR 748; Madarassy**) It may also be appropriate for the tribunal to go straight to the second stage, where for example the Respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A Claimant is not prejudiced by such an approach since it effectively assumes in his/her favour that the burden at the first stage has been discharged (**Efobi v Royal Mail Group Ltd [2019] ICR 750,** para 13).

226. In addition, there may be times, as noted in the cases of **Hewage v GHB [2012] ICR 1054** and **Martin v Devonshires Solicitors [2011] ICR 352**, where we are in a position to make positive findings on the evidence one way or the other and the burden of proof provisions are not particularly helpful. When we adopt such an approach, it is important that we remind ourselves not to fall into the error of looking only for the principal reason for the treatment, but instead ensure we properly analyse whether discrimination was to any extent an effective cause of the reason for the treatment.

227. Allegations of discrimination should be looked at as a whole and not simply on the basis of a fragmented approach **Qureshi v London Borough of Newham [1991] IRLR 264, EAT**. We must "see both the wood and the trees": **Fraser v University of Leicester UKEAT/0155/13** at paragraph 79. Our focus "must at all times be the question whether or not they can properly and fairly infer… discrimination.": **Laing v Manchester City Council, EAT at paragraph 75**.

Indirect* sex *discrimination

227. Section 19 EqA provides:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are— age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; sexual orientation."

Meaning of provision, criterion or practice "PCP"

228. The phrase Provision, Criterion or Practice is to be construed widely in accordance with the EHCR Code. "Provision" means any contractual or non-contractual provision or policy. "Criterion" means any requirement, pre-requisite, standard, condition or measure applied whether desirable or unconditional. "Practice" means the employer's approach to a situation if it does happen or may happen in the future. All that is necessary here is that there is a general or habitual approach by the employer **Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 589**.

229. Generally PCP's suggest that there is a state of affairs that exists or would exist if the situation were to occur again. It means that there are things that an employer does do or would do should the issue arise in the future. A one off decision can also be a provision **Starmer v British Airways Plc [2005] IRLR 862 EAT**. This may include a one off act or decision only applied to one person, but similarly, one off acts and decisions are not automatically PCPs **Ishola v Transport for London [2020] EWCA Civ 112** (see also 'reasonable adjustments' below).

Group disadvantage

230. For a case of indirect discrimination to succeed, there must be both personal disadvantage and group disadvantage to those who share their protected characteristic(s).

231. The correct test for this is not whether there was an adverse effect on the group, but whether a seemingly neutral requirement has a discriminatory impact **Eweida v British Airways Plc [2010] EWCA Civ 80**.

232. In doing so, the Claimant does not need to prove why a PCP is having the effect of disadvantaging the group they belong to, they just have to prove that the PCP was having that effect. Also, the Claimant does not need to prove that all people belonging to the comparison pool are in fact disadvantaged. Some will be some who will not be. What is for the Claimant to prove on balance is that the group is particularly disadvantaged as a result of the PCP whether or not it actually affects all of that group **Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice [2017] UKSC 27**.

233. The Claimant must also show that those who share the same protected characteristic were put at a particular disadvantage, which is not defined by the Equality Act 2010. This has been determined by the ECJ as meaning "that it is particularly persons [with the relevant protected characteristic] who are at a disadvantage because of the measure at issue" **Chez Razpredelenie Bulgaria AD v Komisia za Zashtita ot Diskriminatsia C-83/14 [2015] IRLR 746**. It has nothing to do with how grave the disadvantage is or that the disadvantage has to be unique to that particular group. The group simply has to be at more of a disadvantage compared to a comparator group who have also been subjected to the PCP.

234. The comparator group or pool of people must be people who do not share the protected characteristic relied upon, but who are in circumstances that are not materially different from the particularly disadvantaged group **Statutory code of practice paragraph 4.18**. In addition, the pool must be one that realistically tests the allegation of indirect discrimination being made by the Claimant **Ministry of Defence v DeBique [2010] IRLR 471 EAT**. Ultimately, regardless of the pleaded case and submissions by the parties, the Tribunal has the ultimate discretion to decide what the correct pool is because if the tribunal gets the pool wrong that has been found to be an error of law **Naeem v Secretary of State for Justice [2014] IRLR 520 EAT**.

Personal disadvantage

235. The Claimant must also prove that the PCP put them at the disadvantage complained about and that the disadvantage they have is the same as the disadvantage their group has because of the words “that disadvantage” in s19 (1)(c).

Causation

236. Both the group disadvantage and the personal disadvantage must be caused by the application of the PCP rather than because of any particular characteristic. In **Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice [2017] UKSC 27** Lady Hale said at paragraph 25:

> “*A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot”.*

237. If the Claimant is not affected by the PCP themselves, for example by there being a height restriction of 5ft 9 inches or above, and they are taller than this, then their claim fails. Similarly, if on average the group relied upon was taller than 5ft 9 inches, then it cannot be said that the PCP caused the group to be disadvantaged either. So in cases where the PCP does not produce a simple outcome of having two result for the group, namely compliance or non compliance, but has a scale of effect, then, following **McNeil and others v R&C Comrs [2019] EWCA Civ 1112**, the correct approach is to look at the average impact over the group.

238. **Giles v Cornelia Care Homes ET Case No.3100720/05** is a case in which, at first instance, a Tribunal found that a requirement to work full time in the office or at least 25 hours a week in the office was a PCP for the purposes of indirect sex discrimination.

Justification defence

239. **Seldon v Clarkson Wright and Jakes (A Partnership) 2012 ICR 716, SC,** is authority for the position that focus should be on the justification of the PCP itself rather than its application to the Claimant and their individual circumstances. Her Honour Judge Eady QC held in **Rajaratnan v Care UK Clinical Services Ltd EAT 0435/14** that this applies more generally to the justification of indirect discrimination. **NSL Ltd v Zaluski 2024 EAT 86** cautions against a tribunal

placing too much weight on the challenges posed by a PCP to the Claimant as an individual. The Tribunal must weigh the impact of the PCP on the group generally.

240. The Tribunal draws the following principles from the relevant case law, some of which concerned justification of discrimination arising from disability but the defence is the same for both types of discrimination:

240.1 The burden of establishing this defence is on the Respondent.

240.2 The Tribunal must undertake a fair and detailed assessment of the Respondent's business needs and working practices, making clear findings on why the aims relied upon were legitimate, and whether the steps taken to achieve those aims were appropriate and necessary.

240.3 What the Respondent does must be an appropriate means of achieving the legitimate aims and a reasonably necessary means of doing so. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** it was said, approving Mummery LJ in **R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293**, that what is required is: first, a real need on the part of the Respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end.

240.4 In **Hardy & Hansons plc v Lax [2005] ICR 1565** it was said that part of the assessment of justification entails a comparison of the impact upon the affected person as against the importance of the aim to the employer. It is not enough that a reasonable employer might think the treatment justified. The Tribunal itself has to weigh the real needs of the Respondent, against the discriminatory effects of the aim. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.

240.5 It is also appropriate to ask whether a lesser measure could have achieved the employer's aim – **Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice [2017] UKSC 27**.

240.6 In summary, the Respondent's aims must reflect a real business need; the Respondent's actions must contribute to achieving it; and this must be assessed objectively, regardless of what the Respondent considered at the time. Proportionality is about considering not whether the Respondent had no alternative course of action, but whether what it did was reasonably necessary to achieving the aim.

Victimisation

228. Section 27 EqA provides: "*(1) A person (A) victimises another person (B) if A subjects B to a detriment because— (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act. (2) Each of the following is a protected act— (a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act. (3) Giving false*

evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith. (4) This section applies only where the person subjected to a detriment is an individual. (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

229. The starting point is that there must be a clear allegation amounting to a protected act. Therefore an allegation that something might be discriminatory rather than is actually discriminatory, will not be sufficient **Chalmers v Airpoint Limited and Others UKEAT/0031/19**.

230. The respondent cited Lord Neuberger at paragraph 68 of **Derbyshire v St Helens Metropolitan Borough Council [2007] ICR 841** "*An alleged victim cannot establish "detriment" merely by showing that she had suffered mental distress: before she could succeed, it would have to be objectively reasonable in all the circumstances*."

Whistleblowing Detriment S.47B ERA

Public Interest Disclosures

231. Whistleblowers are protected from suffering any detriment or dismissal from their employer as a consequence of making a public interest disclosure of alleged wrongdoing. The ERA defines a public interest disclosure in the following way:

Section 43B of the ERA states:

> *Disclosures qualifying for protection*
> *(1) In this Part a "qualifying disclosure" means any disclosure of information which in the reasonable belief of the worker making the disclosure, is made in the public interest and, tends to show one or more of the following:*
> *[…]*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, […]*
> *(d) the health or safety of any individual has been, is being or is likely to be endangered*

43C provides:

> *Disclosure to employer or other responsible person*
> *(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith:*
> *(a) to his employer. […]*

47B provides:

> *Protected disclosures*
> *(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*
> *(1A) A worker ("W") has the right not to be subjected to any detriment*

by any act, or any deliberate failure to act, done—(a) by another worker of W's employer in the course of that other worker's employment, or (b) by an agent of W's employer with the employer's authority,on the ground that W has made a protected disclosure.
(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.
(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker— (a) from doing that thing, or (b) from doing anything of that description.
(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if— (a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and (b) it is reasonable for the worker or agent to rely on the statement. But this does not prevent the employer from being liable by reason of subsection (1B).]
(2) … this section does not apply where— (a) the worker is an employee, and (b) the detriment in question amounts to dismissal (within the meaning of [Part X]).
(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K.

232. A protected disclosure may be made during the employment, but also after its termination (***Onyango v Berkley Solicitors [2013] IRLR 338 EAT***).

233. In ***Babula v Waltham Forest College [2007] 346*** the Court of Appeal held that:

'An Employment Tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the subsections in ERA 1996, section 43B(1)(a)-(f). The second is to decide objectively whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith'. The 'reasonable belief' statutory test is a subjective one. The ERA states that there must be a reasonable belief of the worker making the disclosure (Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT). In Korashi the Court of Appeal stated 'as to any of the alleged failures, the burden of proof is upon the Claimant to establish upon the balance of probabilities, any of the following, (a) there was in fact, and as a matter of law, a legal obligation or other relevant obligation on the employer in each of the circumstances relied on; (b) the information disclosed tends to show that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject.' The Court continued, 'Belief seems to us to be entirely centred upon a subjective consideration of what was in the mind of the discloser. That again seems to be a fairly low threshold.'

234. In ***Simpson v Cancer Fitzgerald Europe [2021] IRLR 238*** an individual presented whistle blowing claims based on the assertion that he had made protected disclosures in respect of traders engaging an illegal practise is known as 'front running'. The Tribunal rejected the allegation that there was any causal link between these matters and the treatment of the Claimant. It did so on the basis that the communications contained ambiguity and the Claimant had not, as had been his duty as an FCA approved professional, reported his concerns to Compliance. The Court of Appeal, Bean LJ stated *'obviously it was open to the Tribunal to find that his failure to make any explicit report to Compliance indicated that he did not genuinely, unconscious, conscientiously believe that there had been any such breaches*'.

235. Qualifying disclosures must involve a disclosure of information, i.e. they must convey facts, rather than merely raise an allegation. There must be the disclosure of information. In ***Williams v Michelle Brown AM [2019] UKEAT/0044/19*** the EAT stated:

> '*If the Tribunal properly concludes that the factual content of the claim disclosure cannot reasonably be construed as tending to show a criminal offence [or other relevant breach of section 43B(1)] then that conclusion will by itself be fatal to the proposition that there was a qualifying disclosure relying on section 43B(1). That will be so regardless of what the Claimant subjectively believed, and regardless of whether or the other elements are shown*'.

236. The distinction between information and comment or assertion was illustrated by Slade LJ in ***Cavendish Munro Professional Risks Management v Geduld [2010] IRLR 38*** as follows:

> *'the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information.'*

237. The question is whether there is sufficient by way of information to satisfy Section 43B. This will be very much a matter of fact for the Tribunal. The more the statement consists of unsupported allegation, the less likely it will be to qualify, but this is as a question of fact, not because of a rigid information/allegation divide (***Kilraine v London Borough of Wandsworth [2018] ICR 1850***). For a statement to be a qualifying disclosure, there must be sufficient factual content and specificity to show that one of the listed matters in Section 43B(1) is engaged. '*If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure that he makes has a sufficient factual content and specificity such that it is capable of tending to show that matter listed, it is likely that his belief will be a reasonable belief*'.

238. It is then necessary to determine that the worker has a reasonable belief that the disclosure is in the public interest and tends to show one of the six statutory categories of 'failure'. The definition of a qualifying disclosure is '*disclosure of information which, in the reasonable belief of the worker, is made in the public interest*'. Disputes that are essentially personal contractual disputes are unlikely to qualify (***Millbank Financial Services Ltd v Crawford [2014] IRLR 18, EAT***). It is not sufficient that the Claimant has simply made allegations about the wrongdoer especially where the claimed whistleblowing occurs within the Claimant's own employment, as part of a dispute with his or her employer (***Cavendish***).

239. There must be an actual or likely breach of a legal obligation. Under paragraph (1)(b) there must be an actual or likely breach of the relevant obligation by the employer (***Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540, EAT***). The word 'legal' must be given its natural meaning. The fact that the individual making the disclosure thought that the employer's actions were morally wrong, professionally wrong or contrary to its own internal rules may not be sufficient (***Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT***). The source of the obligation should be identified and capable of certification by reference for example to statute or regulation. 'Likely' means probable or more probable than not. It is not sufficient that the Claimant reasonably believed that the relevant disclosure of information tended to show that a person 'could' fail to comply with a legal obligation, or that there was a possibility or risk of non-compliance (***Kraus v Penna Plc [2004] IRLR 260***).

240. In ***Norbrook*** Slade J said '… *an earlier communication can be read together with a later one as embedded in it, rendering the later communication of protected disclosure, even if taken on their own, they would not fall within section 43B(1). Accordingly, two communications can, taken together, amount to a protected disclosure. Whether they do is a question of fact*'.

241. An employee wanting to rely on the whistleblowing protection before a tribunal bears the burden of proof on establishing the relevant failure (***Blackbay Ventures Ltd v Gahir [2014] IRLR 416, EAT***). As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following: (a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on; and (b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

242. In the event that a qualifying protected disclosure was not made in good faith, at the remedy stage 'the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the worker by no more than 25%'.

Detriments

243. It is for the Claimant to show that he was subjected to a detriment by an act or a deliberate failure to act by his employer or co-worker. The claim would only be made out if the Claimant was subjected to the detriment on the ground that he had made the protected disclosure. The relevant test is whether the protected

disclosure materially influenced, in the sense of being more than a trivial influence, the treatment of the Claimant (**Fecit & Others v NHS Manchester [2011] IRLR 111**).

244. Section 48(2) of the Act states that the onus is on the employer to show the ground on which the act or deliberate failure to act is done. The 'on the ground that' test focuses on the relevant decision-makers mental processes. The test is not satisfied merely because there was some relationship between the protected disclosure and the detriment complained of, or because the detriment would not have been imposed but for the disclosure (***London Borough of Harrow v Knight [2003] IRLR 140***).

245. The Court of Appeal decision in ***Jesudason v Alder Hay Childrens NHS Foundation Trust [2020] IRLR 374*** stated '*It is now well established that the concept of a detriment is very broad, and must be judged from the view point of the worker. There was a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment'*.

246. The decision to dismiss can itself be a detriment imposed by the dismissing officer for which that dismissing officer can be personally liable under Section 47B(1A) ERA and **Timis and anor v Osipov (Protect intervening) 2019 ICR 655, CA**.

Health and safety detriments

247. Section 44 (Health and safety cases) ERA provides:

> (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities, (b) being a representative of workers on matters of health and safety at work or member of a safety committee—(i) in accordance with arrangements established under or by virtue of any enactment, or (ii) by reason of being acknowledged as such by the employer, the employee performed (or proposed to perform) any functions as such a representative or a member of such committee, [(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise), (c) being an employee at a place where— (i) there was no such representative or safety committee, or (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety, (d), (e) …
>
> (1A) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the

ground that—(a) in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work, or (b) in circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.

(2) For the purposes of subsection (1A)(b) whether steps which a worker took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) A worker is not to be regarded as having been subjected to a detriment on the ground specified in subsection (1A)(b) if the employer shows that it was (or would have been) so negligent for the worker to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did.

(4) … this section does not apply where the worker is an employee and the detriment in question amounts to dismissal (within the meaning of Part X).

ANALYSIS AND CONCLUSIONS

248. We have changed the order of the issues as presented in the List of Issues in our analysis and conclusions to one which we thought more logical. Whilst we have we have structured our analysis and conclusions by issue, we were also careful to look at the evidence 'in the round' to determine whether it suggested that the Claimant had been subjected to the unlawful treatment of which she complains (this is particularly important when it comes to allegations of direct discrimination, victimisation and harassment). Having done so we did not find cause to change our decisions on any issue or issues.

Breach of Flexible Working Rights – Section 80F Employment Rights Act 1996

FWR1

249. Notwithstanding that no complaint arises for us to determine under the ERA with respect to FWR1, it is appropriate, because of the important context it provides for FWR2, for us to pass comment on the Respondent's handling of FWR1. There was unreasonable delay in the Respondent's handling of FWR1 and in large part, particularly when it came to giving the Claimant an initial decision (prior to appeal), the responsibility for that delay sits with the Respondent.

250. A material part of the delay on the part of the Respondent was the fact that Mr Stewart was not happy to put his name to the decision because he thought it indicated that he was the only decision maker.

251. Taking into account that later, on 12 October 2022, Ms Tout recorded [862] "*Line manager (Mark Stewart) was generally supportive of RS s FW request however, the Bank's stance was a requirement to return to the office and adhere to the hybrid working scheme", w*e do not find that he disagreed with the decision, we find that he did agree with it (as was his evidence). We accept that Mr Stewart thought there were legitimate grounds for refusing the request in the terms sought by the Claimant. He also thought that the Respondent's policies could set out clearer, more specific grounds for refusing a flexible working request. He did not understanding at that point that the policy just reflected the wording of the law (which for obvious reasons is generic in its description of the grounds on which a flexible working request can lawfully be rejected by an employer). However, he considered that the way in which the outcome letter was worded by HR misrepresented the decision as his when he thought that in reality the decision was his, the department's and the Bank in general [MSWS28]. In our experience it is very normal for an operational manager such as Mr Stewart (rather than a support function, such as legal or HR, which is there in an advisory capacity) to be required to make a decision factoring in the broader needs of a department and an organisation. That is part and parcel of operational management responsibility. Mr Stewart's objection to this caused delay which impacted the Claimant. The Claimant was not prejudiced by the delay in so far as she was not required to come into the office over that period but she clearly and reasonably wanted to know what the decision was because of the significant impact it would have on her (given the position of her son and the school hours constraints).

252. Mr Stewart nonetheless lawfully rejected FWR1, as far as ERA 80G is concerned, in concluding that the Claimant not coming to the office at all would, in a small team, have a detrimental impact on the quality and performance of work in the team [WS31].

253. The Claimant's asthma did not feature in any material way in leading the Claimant to make FWR1. The reason for FWR1 was the difficulties that the Claimant had with her childcare arrangement (availability of childcare out of normal school hours having diminished through the pandemic). It was not mentioned on the form by her and we do not accept that she could not have included reference to it. She also later made clear that she only needed full time home working for a period of a two/three years when there was no suggestion that her asthma would have been resolved by then.

FWR2

254. The parties agreed that FWR2 (made on 24 January 2023) was compliant with requirements of section 80F ERA 1996. The Claimant complains that the Respondent then failed to deal with it in a reasonable manner pursuant to section 80G (1) (a).

255. Ms Tout's email of 20 March 2024 [1235] was some time after FWR2 was raised by the Claimant and could have been sent sooner but it was nonetheless a considered email that opened the door to discussion with the Claimant and raised positive points that the Claimant should have engaged with (in the same way that she was able, at the time, to engage in a PHI application to Unum).

256. The Claimant had made clear that she wanted FWR2 to be dealt with quickly on 24 January 2023 [1148] and on 15 February 2023 [1238]. Ms Tout having sent her email of 20 March 2023 and the Claimant having responded on 24 March 2023 [1234] with the words "*I will come back to you when I am able to do so*" we find that the Respondent was entitled to treat progression of the flexible working request as being in the Claimant's hands and it amounted to agreement between the parties to extend the decision period. Delay after that point was not of the Respondent's making. Comparison was made between the fact that the Respondent did not then chase the Claimant to progress a meeting when it was prepared to chase her for her sick notes. However, we accept the Respondent's position that that is a false equivalence. The fit notes were something that the Respondent needed (presumably to process any entitlement to statutory sick pay and to understand the Claimant's state of health) and fit notes should have been easy for the Claimant to provide. In contrast FWR2 was something sought by the Claimant and required more engagement from the Claimant. The Respondent could have followed up with the Claimant and it would have been best practice to do so – but the fact that the Respondent did not do so does not in our view lead to a finding that the Respondent had not handled FWR2 reasonably.

257. Whilst substantially outside the claim period (which ended on 21 August 2023 when the Claimant brought her claim), what happened after the Claim period is reflective of the Claimant's approach during the claim period and we accept the Respondent's submissions as follows:

257.1 Miss Tout wrote to the Claimant regarding FWR2 on 5 June 2024 [1613-1614], seeking to meet to progress her FWR2, or to communicate via questions if a meeting was not possible. An in person or video meeting was offered. The questions were set out.

257.2 The Claimant replied on 14 June 2024 [1473-1474] refusing to meet, and Mr Sparano issued his decision, allowing her to work from home entirely, on 18 July [1601, 1621] in light of new evidence regarding the Claimant's son.

258. As regards the Claimant's specific complaints about the Respondent's approach to FWR2:

258.1 The Respondent did not fail to arrange to talk to the Claimant about the application or fail to arrange any substantive discussion. Ms Tout was proposing a discussion and it was the Claimant's failure to come back to the Respondent which led to a discussion/talk not happening.

258.2 The Respondent was not responsible for and did not unreasonably delay in dealing with the application for the reasons we have explained and by the Claimant's email of 24 March 2023 there was agreement between the parties to extend the decision period.

258.3 The Respondent did not fail "*overall to consider the application with care and logic*". As we have said, the 20 March 2023 email was considered and opened the door to a discussion.

258.4 The Respondent did not fail to engage in the process of considering the application in a reasonable and sensible manner or fail genuinely to consider the application and we do not repeat our findings above.

258.5 The Respondent did not fail to notify the Claimant of a decision in respect of the flexible working request within the statutory 3 month decision as required by subsection 80G(1) (aa) because they had proposed matters that they wanted to discuss with the Claimant and she then failed to respond to take the process forward, having said that she would do so when she was able and in circumstances when she was on sick leave due to poor mental health. It was better that the Respondent waited for dialogue with the Claimant rather than, for example, turning the request down on the information available to them and under the statutory rules, simply to give the Claimant a decision with in 3 months. As we have said, by the Claimant's email of 24 March 2023 there was agreement between the parties to extend the decision period.

Disability

259. The Respondent concedes that the Claimant's asthma constituted a disability throughout the period relevant to this claim.

260. The Respondent concedes that the Claimant had a mental impairment of stress, anxiety and depress from 1 March 2023 ("**the Mental Impairment**"). It does not concede that the mental impairment had been long term at that date but concedes that it was apparent by that date that it was likely to last more than 12 months.

261. In this respect the Tribunal was asked to determine whether the Claimant had the Mental Impairment and whether it was a disability as defined in section 6 of the Equality Act 2010 before 1 March 2023 and during a period relevant to the complaint.

262. The Claimant made clear at the hearing on 27 September 2024 that, as regards the Mental Impairment she had stress and anxiety with the necessary impact on her day to day activities from the point at which she went on sick leave (5 May 2022) and depression became part of the Mental Impairment from 8 August 2022.

263. The Respondent accepted in submissions that, because the Claimant's mental health was preventing her from working, it was having a significant effect on her day to day activities from 5 May 2022 but that it was not at that point likely that her mental ill health would last a year or more. We agree with this submission but find that it was likely that it would last more than a year from a date earlier than 1 March 2023. **We find that date to be 1 November 2022 for the following reasons**.

264. The Respondent submitted [para 7] that "*Mr Stewart's sardonic email on notification of the Claimant being signed off on a month long email does not prove that he knew she had a significant impairment that would last a year or more. Instead it reflected his past experience of the Claimant having a number of phases of sickness – some of fairly long duration. He wasn't to know when she was likely to recover (or not) at that point.*". We accept that submission but also note here as regards that email of 10 May 2022 [730]:

264.1 Mr Stewart was clearly not happy with the Claimant's attendance record from previous years and was concerned about the impact of her absence on other team members. The appropriate thing to do about that was to seek additional resource from the Respondent;

264.2 It was not reasonable for Mr Stewart to say that it was (our emphasis added) "*extremely likely that she will prolong her absence for as long as possible as proven on numerous occasions in the past*". If there had been evidence of that being the case then he/the Respondent should have managed that situation with the Claimant at the time.

264.3 It was equally unreasonable to then go on to say that the Claimant had: "*no regard for the effect [her] actions have on [her] colleagues*" and that he had had repeatedly to accept the Claimant's "*careless attitude to her attendance over many years, regardless of the impact on her peers*". He may have found it difficult to manage/accommodate the Claimant's absence but that was his role as a manager with the support of HR. The Respondent has chosen to give employees generous sick pay benefits (6 months of full pay). We were taken to no evidence that suggested that the Claimant was not genuinely ill (and that was not the Respondent's case) or that she had been careless or had no regard as to the impact of her absence on others (then or in the past).

265. By 1 November 2022 the Claimant had been on sick leave for very nearly six months, her sick pay expired on 24 October 2022, there was no suggestion that her symptoms were improving and the Respondent submitted a PHI claim to Unum which said [866]:

> *[…]*
>
> *On 5th May 2022, Ms Sutherland informed her manager that she would not be able to work due to stress and anxiety and on 6th May 2022, she submitted a fit note signing her off work. Since then, she has been on sick leave and not returned to work.*
>
> *Each fit note provided by Ms Sutherland from 6th May 2022 states her condition as Stress, Anxiety or Depressive Mood.*
>
> *An occupational health assessment request was submitted to Medigold Health on 19th October 2022, however this has not yet been completed.*
>
> *On 24th October 2022, Helen Tout, HR Business Partner had a welfare phone call with Ms Sutherland During the call, Ms Sutherland sounded very upset and advised that she had been having counselling for about 3 months arranged through her GP.*

266. The Claimant remained on medication and the Respondent's grounds of resistance says (emphasis added): "*In November 2022, as the Claimant had been absent for 6 months and was **not likely to return in foreseeable future**, the Respondent began the process of making a claim for benefits for the Claimant under its permanent health insurance*

(PHI) policy.".

267. Ultimately Unum rejected the application for PHI benefits and the Respondent reported this to the Claimant as follows [1402]: "*Unum advised us that the application for PHI was turned down as the medical evidence provided did not fulfil the definition of incapacity under the policy 'as it was not suggestive of generalised anxiety or depressive illness.' It noted that the fit notes are not sufficient to evidence a claim of incapacity and suggested 'medical records, consultant reports, diagnostic tests and similar*.'"

268. The Unum decision letter of 19 December 2022 [1157-1158] said amongst other things "*The evidence does not support that Miss Sutherland's symptoms would have prevented her from undertaking the material and substantial duties of her occupation throughout the material time of the claim. Miss Sutherland does not fulfil the definition of incapacity under the policy and we are therefore declining liability for her claim.*".

269. The Claimant appealed and the appeal letter said, amongst other things [1296] **"***Though this documents that Miss Sutherland has had a number of CBT appointments from June to October 2022, the overriding narrative is one of workplace stress and personal stressors. We note that her request for flexible working has been declined and she is unable to meet childcare requirements as a result. The new medical evidence does not alter our original understanding of Miss Sutherland's medical and functional status and her absence remains contextual to her personal circumstances. We have therefore maintained our decision to decline liability for her claim*.".

270. The application for PHI failed on the evidence of the condition and reasons for it, but not on the basis of the long term nature of the Claimant's medical position. The Respondent does not dispute the substantial adverse effects of the Claimant's mental impairment on her day to day activities from May 2022 onwards. We find that, given that there was no apparent improvement in the Claimant's condition or progress towards resolving what must have been a substantial barrier to her mental health improving (namely the question of the Claimant's difficulties with caring for her son and attending the office as required by the Respondent), by November 2022 it must have been likely that the Claimant's mental impairment was going to last 12 months or more.

The PCP's

271. The Claimant relies upon the same PCP's in her failure to make reasonable adjustments and indirect sex discrimination claims.

272. The Respondent imposed the general requirement for all its London office employees to return to the office from 22 May 2022 and at the same time the Respondent introduced its home working policy/Hybrid Working Policy (which was not contractual in nature, could be revoked and therefore did not give the long

term certainty sought by the Claimant in making a formal flexible working request). As we note above that policy said:

> *As home working under this policy is intended to be occasional only, no more than 10 days per calendar month (or 46% of scheduled work days in the case of part-time workers) will be permitted. The Bank expects home working requests to be made on an 'ad hoc' and 'as necessary' basis (e.g. not every Friday or Monday).*

273. As regards the Claimant, she was offered a contractual arrangement (subject to a trial period) as a result of Mr Sparano's decision on her FWR1 appeal to take effect a day later, from 23 May 2022, which provided:

> *"[…] we will put in place an alternative working pattern which will address both your need for flexibility to do the school run and meet the Bank's requirement to have all staff attending the office at least 2-3 days a week, as follows:*
>
> *• You may work a minimum of 10 days' per month in the office.*
>
> *• The days you attend the office are at your discretion but should be agreed in advance with your manager. We suggest 2-3 days per week in the office, but this is up to you and your manager.*
>
> *• On the days that you are in the office you may arrive later and leave earlier than the Bank's usual core hours to enable you to do the school run.*
>
> *• You are required to work 35 hours per week (excluding your lunch break). You can make up any shortfall in working hours on your working from home days or by logging on from home later in the day on your office working days.*
>
> *• We will trial the new arrangements for 6 months to evaluate how well this is working.*
>
> *[…] You will note I have suggested a 6 month trial period before this is made permanent and I encourage you and your managers to discuss any issues as they arise and work to resolving them, for this reason I am not precluding you from suggesting any modifications during this period, for example, if you wanted to reduce your contractual hours, or if you found childcare during this time and wanted to increase your office hours. […]*

274. The Respondent submitted that it applied neither PCP and that: "*The Claimant was amongst the staff who worked from home during the pandemic. She was never forced to come back in. A hybrid working policy was introduced for the general return to work in May 2022 [PS/80/22] but staff who had particular medical or other relevant needs were not required to comply with that policy. In particular, the Claimant has been granted a work pattern (in the appeal decision on her first FWR) which neither required her to work in the office for at least 50% of the time, nor to work from the office on at least some regular days*.

*PCP: employees work from the office on at least some regular days ("**PCP1")***

275. As regards the alleged PCP "*that employees work from the office on at least some regular days*", there are two possible interpretations of this phrase:

275.1 The first (which appeared to be adopted by the Respondent) is that employees would be required to attend the office on specific days of the week (e.g. a Monday, Wednesday and Thursday). Whilst in November 2021 Mr Kidney had expressed a view that the two days on which the Claimant would be required to attend the office "*should be constant (ie. Every Tue & Thur, Mon & Wed etc)*" no such stipulation was in fact made for the Claimant when the Respondent issued its appeal decision on FWR1 to take effect from 23 May 2022.

275.2 We consider a PCP requiring employees to attend the office on particular days of the week would have been more properly put as '*attend the office on at least some fixed days of the week'*. This was not a PCP applied by the Respondent. There was no suggestion that employees under the hybrid working policy or the Claimant under the alternative offered to her had to attend on fixed days of the week and it would not be a logical interpretation of the PCP alleged, given the circumstances of this claim.

275.3 The second interpretation is that employees had regularly to attend the office for work. We consider that this is the more natural meaning and was the one intended by the Claimant. Her claim form, in describing her indirect sex discrimination claim referred to [42]: "*Requiring that employees must work from the office a minimum of 50% of the time (or alternatively some of the time) each working week*". The Claimant's disability impact statement said (emphasis added): "*I was facing the daunting prospect of reverting back to needing to be in the office on regular days, something I knew would have a detrimental impact on*".

275.4 We consider that this PCP was applied by the Respondent to the Claimant and to those who did not share her protected characteristics. The PCP was applied by the Respondent from 6 June 2022 (not 23 May 2022 when the email was issued – see [733]) and from which date employees' attendance to the office resumed at 100% subject to employees being allowed to work from home under the new Home Working Policy for up to 10 working days per calendar month [733 – 738]. The Claimant had of course already, on 4 May 2022, been granted a variation of this (in anticipation of the introduction of the Flexible Working Policy) through Mr Sparano's decision on her appeal against Mr Stewart's decision on her flexible working request. Mr Sparano's variation is set out above [716-718].

275.5 Rather than being allowed to work from home up to 10 working days per calendar month the Claimant was required to attend the office a minimum of 10 days per month. There are normally 260 working days in a year. Divided by 12 that gives an average figure of 21.6 working days per calendar month. Employees of the Respondent who applied to work under the new hybrid working policy were therefore required to attend the office

on average a minimum of 53.7% of the time (((21.6-10)/21.6) x 100). That is an average of 2.68 days per week in the office. The Claimant was required to be in the office on average a minimum of 46% of the time (((21.6-11.6)/21.6) x 100) albeit with her start and leave times adjusted. Either way, employees more generally and the Claimant were required to attend the office on at least some regular days.

*PCP that employees work from the office at least 50% of the time ("**PCP 2**")*

276. As regards the PCP that employees work from the office at least 50% of the time, this was a PCP applied by the Respondent to its London office workforce from 6 June 2022. By a slim margin it was also applied to the Claimant because from 4 May 2022 the requirement on her was that she work a minimum of 46% of her time in the office (subject as we say to adjusted arrival and departure times). However, this was a minimum requirement and conceivably she might have been subject to essentially the same requirement as other employees if in fact her manager had frequently insisted on 3 days in the office per week.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

277. The Respondent accepted that it knew that the Claimant had asthma and that it amounted to a disability throughout the period relevant to this claim. As regards the Claimant's mental health impairment, for the reasons explained above under 'disability', we find that Respondent could reasonably have been expected to know that it amounted to a disability from 1 November 2022 when it made the PHI application.

278. The Claimant's case is that the PCP's put her at a substantial disadvantage compared to someone without the Claimant's disabilities (asthma and her mental health impairment), in that it resulted in a barrier to her returning to her job. As regards her mental health Impairment the Claimant had stress and anxiety from 5 May 2022 and stress, anxiety and depression from 8 August 2022.

Asthma

279. As we have said, asthma was not a material focus in FWR1. The reason for FWR1 was the childcare difficulties we have described. The Claimant increasingly sought to bolster her request to work permanently from home on the grounds of her asthma (in particular in her FWR2 of 24 January 2023 [1148-1150]). However, the Claimant had on a number of occasions made clear that she was asking for a time limited adjustment. For example, on 24 October 2022 the Claimant in call with Ms Tout said [868] ""*it was ridiculous she was in this situation, all she was requesting was work remotely for an extra 2 years*". Asthma is a lifelong condition and had the Claimant thought that the PCP's put her at a substantial disadvantage, as an asthma sufferer, she would have wanted it to be a permanent adjustment.

280. Someone might be expected to suffer fewer colds and infections or asthmatic episodes when their contact with other people reduces (by not attending an office or using public transport) or if they were in less polluted air and that might mean that an asthma sufferer has fewer difficulties.

281. However, we were not persuaded that the PCP's (which in themselves reduced the Claimant's exposure to viruses and pollution to substantially below pre-pandemic levels) put her at a substantial disadvantage as an asthma sufferer.

282. Even working from home fully the Claimant still continued to get chest infections. In her disability impact statement the Claimant said she "*I would estimate I suffer from 2-3 chest infections a year, with my last infection in mid-December 2023 which lasted through to the end of January 2024. This resulted in my asthma nurse prescribing a change in my asthma preventer inhaler*" [96].

Mental health impairment

283. The Claimant's mental health impairment did not constitute a disability at the time that the Respondent applied the PCP's because it had not been and was not likely to be long term at that point. However, by 1 November 2022 the PCP applied to the Claimant and her mental health impairment amounted to a disability.

284. However, from 1 November 2022 we find that the Respondent did not know and could not reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage by the PCP as a disabled person with her mental health impairment. It was not the Claimant's mental health that meant she had difficulty complying with the PCP, it was the change in the Claimant's son's school arrangements and the cover provided outside normal school hours that caused her difficulties and the impact that had on the Claimant's ability to travel in to London.

285. It must have been challenging for the Claimant to care for her son's particular needs and stressful to deal with the difficulties that the reduction in suitable childcare arrangements caused her in meeting her contractual obligations to the Respondent to attend the office in London. The decline in the Claimant's mental health was clearly contributed to by this but the PCP did not itself put the Claimant at a substantial disadvantage as someone suffering with her mental health impairment. The Claimant's requests to disapply the PCP's were not to address disadvantages caused to her by those PCP's as regards her mental health. We do not consider that we have evidence on which to conclude that the Claimant suffered substantial disadvantage from the PCP's applied to her. It was the Claimant's childcare needs which, in combination with the PCPs, caused the Claimant difficulties.

286. On this basis the Claimant's complaints of failure to make reasonable adjustments are not well founded.

Indirect sex discrimination (Equality Act 2010 section 19)

297. We note here the particular challenges faced by the Claimant in attending the office in accordance with the PCPs because it is potentially relevant to the question of whether women more generally were subjected to a particular disadvantage by the PCPs and also because it is important to acknowledge the challenges faced by the Claimant in working to the arrangements proposed for trial by Mr Sparano in May 2022 in his appeal decision:

    297.1 The Claimant's working hours were 09.15 to 16.45 with 30 minutes for lunch Monday to Friday. That is seven hours of work plus a 30 minute lunch break.

297.2 In practice, on the days the Claimant had to be in the office in accordance with the PCP's, she would have arrived at 10:30 and would have had to have left at 16:00 pm to collect her son. That is five hours of work with a further 30 minutes for lunch and a shortfall of two hours that the Claimant would have had to make up under Mr Sparano's proposal.

297.3 If the Claimant was required to attend the office two days a week then that would give rise to a deficit of four hours that would need to be made up on other days.

297.4 The deficit would rise to six hours if she was required to attend the office on three days in a week.

297.5 Those deficits would have caused the Claimant significant practical difficulties because we find that it would have meant that she would have had to work much longer days on her non-commuting days, particularly in a week where she was required to come in to the office on three days.

297.6 For example, in the most difficult scenario of at three day office attendance week, and assuming that the Claimant did not manage to make up any hours on an office attendance day, the Claimant would need to work a 10 hour day on the remaining two working from home days (three days in the office is a six hour shortfall, six divided by two is three, 7 hours plus 3 hours is 10). In a 'two days in the office week' the corresponding figure would be 8 hrs 20 minutes of work on each of the three remaining working from home days. We consider that this would have been challenging for the Claimant.

297.7 We accept her evidence that there were also practical difficulties associated with the fact that the systems she needed to work on were not generally operational outside standard office hours and that that sometimes, without warning, the Claimant would be asked by the school to collect her son.

298. We find that the Respondent's proposal did not fully address the challenges faced by the Claimant in this regard. Indeed, as regards the Claimant's individual circumstances, there was a degree of closed-mindedness on the part of the Respondent. For example, Mr Stewart, on 22 September 2021, when the Claimant made FWR1, commented in an email to Ms Rumi [392] "*This is the type of request we can expect to receive from those staff that do not want to return to the office*". This displayed an unwarranted cynicism on the part of Mr Stewart about the genuineness of the reasons for the Claimant's request. Mr Stewart also had the view that, if the request was granted, it would "*open the floodgates*" [MSWS29 and [469]. If it had prompted others to make requests which could not be accommodated because the Claimant had got there first, then it was his responsibility as a manager to handle that situation but it was not a reason for the request not to be granted (we refer to this elsewhere as the "**Mr Stewart Opinion**"). There was no evidence that the floodgates did in fact open.

299. However, the new Hybrid Working Policy (and in particular PCP 2) marked a significant loosening (albeit a non-contractual one), as compared to the position before the pandemic, of the requirement to attend the office.

Application of the PCP's to men and to women at the Respondent's London Office

300. The Respondent disputed that the PCP's were applied to the Claimant but otherwise relied on its ability to justify them. As we have explained, we find that the PCP's applied to:

301. women and to men whose place of work was the Respondent's London office; and

302. the Claimant from the date of Mr Sparano's appeal decision, being 4 May 2022.

303. The Claimant was not required, before that date, to attend the office pending a decision on her appeal against Mr Stewart's decision [1618-1620].

Disadvantage – both PCP's

304. The next point that we need to address is whether the PCP's put women in the Respondent's London office based workforce at a particular disadvantage when compared with men who also had the Respondent's London office as their place of work .

305. It was accepted that, and we consider that, women are more likely to take a greater responsibility for childcare and thus are more likely to need flexible working arrangements.

306. The question of disadvantage, in respect of both PCP's, needs to be viewed in the context of a workforce that, prior to the pandemic, would have predominantly been required to attend the office full time (subject to any flexible working arrangements that individuals had agreed).

307. We are in no doubt that, as regards both PCP's, the Claimant did find it very challenging to attend the office. This was because of her son's particular and challenging needs, because following the pandemic his school reduced its after school service provision and because the Claimant had a long commute.

308. It may be the case that others with childcare responsibilities, in common with the Claimant, found that following the pandemic schools reduced the level of after school cover they were able to provide. However, we were not presented with evidence of this. Nor were we presented with evidence that, as was perhaps feared by Mr Stewart [392], many employees (or more particularly women) from June 2022 made flexible working requests to work solely from home or on a greater basis than envisaged by the Hybrid Working Policy.

309. It is not enough that the PCP's put the Claimant at a particular disadvantage. The test is whether women more generally, bearing the greater burden of childcare responsibilities, were put a particular disadvantage by the PCPs.

Disadvantage – PCP 1

310. We find that a requirement that employees attend the office on at least some regular days would put women at a particular disadvantage. On the days they have to travel into the office they are likely to have to:

310.1 drop their child/children off at school or nursery;

310.2 travel to and from work in central London (albeit they may not have commutes that are as long as the Claimant's);

310.3 Pick their child/children up and then get them home and look after them.

311. Having to travel into central London for work and the time that commute consumes does put women with childcare responsibilities at a particular disadvantage as compared to men. Of course it is not just children for whom women tend to bear the greater burden of care, it can also be elderly or other relatives.

312. Disadvantage – PCP 2

313. As regards the PCP that employees work from the office at least 50% of the time we find that, for the same reasons as PCP 1, women were put at a particular disadvantage as compared with men.

Proportionate means of achieving a legitimate aim

314. In its closing submissions the Respondent said that the PCP's were justified and supported in particular by the evidence of Ms Tout (page WSB54 paras 13-14, page WSB56 para 22) and Mr Sparano (page WSB78-79 para 15).

315. We have taken into account the evidence we heard that ultimately the strains on the Nostro team's capacity reduced and the Nostro team was managing with only two team members and that on 9 July 2024 the Respondent told the Claimant that she would be allowed to work from home full time. Whilst this happened outside the claim period it clearly reflects what might have been offered at the material time. We have taken into account that these events potentially undermine the proportionality of the PCPs given that this concession to the Claimant was explained by reference to additional information the Claimant provided with respect to her son's care needs (rather than developments in the needs of the business with respect to the pleaded legitimate aims) [1621, 1610].

316. As we have explained, the difficulties that the Claimant had with complying with the PCP's were particular to her, and were more significant and not representative of a particular disadvantage faced by women more generally (i.e. her long commute, the reduction in school services provided by her son's school and her son's more complex needs). Had the difficulties faced by the Claimant been representative of the difficulties faced by women more generally, then the Respondent would have needed to go further in justifying the PCP's (on the basis that a more serious indirectly discriminatory impact requires a stronger justification).

Legitimate aims

317. We accept, as a matter of common sense, that enabling teamwork, collaboration, training and support, and building corporate identity and culture are legitimate aims.

318. **From this point as regards the indirect sex discrimination complaint this judgment reflects the findings of EJ Woodhead and Tribunal Member Mr Simon. We record in italics, after that majority decision, the decision of Tribunal Member Mr McLaughlin.**

PCP's as a means of achieving those aims

319. We accept the witness evidence of Ms Tout at HTWS13 (from "*The Bank has a 'pro-office' culture),* HTWS14 and HTWS22 and that of Mr Sparano at PSWS15. Face to face, in the office contact between colleagues can help achieve all of the aims that the Respondent sought to achieve in applying the PCP's and which we have found to be legitimate. We find that the Claimant took an unreasonably intransigent stance in not acknowledging that something was lost through her working remotely all the time. Whilst she and her teams had been performing effectively during the pandemic we accept that when everyone worked fully from home, teamwork, collaboration, training and support, and building corporate identity and culture suffered.

320. We consider that there are a number of benefits to meeting colleagues in person (rather than online):

320.1 Communication can be more effective because attention can be held more easily and colleagues can pick up on the various forms of non-verbal communication that are lost in online interactions. This can facilitate greater understanding between colleagues.

320.2 If colleagues meet in person for a formal meeting then there is also value to the interactions, even if small, that can take place before and afterward if the meeting takes place face to face (for example, discussion of other work matters that do not happen to be the focus of the meeting for which individuals are in attendance).

320.3 Colleagues are better able to establish or reestablish rapport with their colleagues if they meet face to face (this can be particularly valuable between managers and their subordinates and visa versa).

320.4 Colleagues are better able to gauge the wellbeing and state of mind of each other if they meet in person. That can assist with speedier identification of workplace stress and disputes and allow the causes to be addressed more quickly and effectively.

320.5 If physically in the office colleagues are better able to time and judge the appropriate tone of a conversation (this can be more important when a performance or contentious issue needs to be discussed). If colleagues communicate online, or via email or instant messaging service, then there is a greater risk of misunderstanding and for working relationships to deteriorate. This is particularly but not exclusively so when more difficult conversations (such as about underperformance) are needed.

321. All of these benefits contribute to improved teamwork and collaboration and can help with corporate identity.

322. Routine training often now takes place online but other less formal and even spontaneous training takes place more readily in person. It is also particularly important to those early in their careers or who are new to a workplace to have the opportunity to meet people in person. Being in the office allows those who need support the ability to gauge who to approach and when. It also helps them establish themselves as part of the team, understand the team culture and dynamics and gives them greater opportunity for spontaneous mentoring and support.

Proportionate means

323. The concession to the Claimant that she could work from home full time and the circumstances of the Nostro team in particular are only part of the picture. The question that we must answer is whether the particular disadvantage to which women more generally working at the Respondent's London office were put was nonetheless justified. This is a point that we discussed at length.

324. The question of the proportionality of the PCPs in achieving the Respondent's legitimate aims is difficult to assess. The disadvantage cannot be given a numeric score, neither can the effectiveness of the PCP's in achieving the legitimate aims.

325. We have taken into account that the lower the proportion of the working week that employees are in the office the lower the chance of them happening to be in the office on the same day as each other (and the Hybrid Working Policy did provide that people should not always work from home on a Monday or Friday).

326. There might have been periods when nobody from a particular team was in the office during a week (in fact we heard that this was the case in the Nostro team). However, if nobody is in the office from a particular team during a particular week that does not mean that the aims are not met over a broader sweep of time when they would be expected to be in.

327. We find that particularly (but not exclusively) because the PCP's represented a significant loosening of the pre-pandemic requirement for employees to attend the office and that there was no significant increase in requests for flexible working arrangements after the Hybrid Working Policy was introduced that the disadvantage caused by the PCP's to women was not significant (albeit it was significant to the Claimant herself). We consider that there is no effective substitute or less discriminatory means of achieving the Respondent's legitimate aims than the PCP's it applied. As we have said applying a lower threshold to office attendance would just make it less likely that the Respondent's legitimate aims would be achieved.

328. Considering all the circumstances we find that the PCP's were appropriate to achieving the objectives and no more than was necessary to that end (weighing the needs of the Respondent against the discriminatory effects of the PCPs).

Tribunal Member Mr McLaughlin's decision on the indirect sex discrimination complaint:

PCP's as a means of achieving those aims

329. *Mr McLaughlin noted that Mr Stewart, as the Claimant's line manager, did not appear to follow the pro-office culture with his 'mutiny' comment to Ms Tout.*

330. *Mr McLaughlin did not agree that much is lost from meetings being conducted on line rather than in person in the context of an international bank. He did not consider that, if employees were only required to attend meetings 50% of the time, there would be any guarantee that all attendees for a meeting would attend in person (unless there was a specific management requirement for employees to do so on a particular occasion).*

331. *Mr McLaughlin considered that the fact that the Claimant had not seen anyone from the Respondent face to face at any point since the first pandemic lockdown, demonstrated that the Respondent did not genuinely value in person interaction, particularly with the Claimant (in respect of who they needed to have difficult discussions).*

Proportionate means

281. *Mr McLaughlin did not consider that the Respondent had evidenced sufficiently how effective the PCP's were in achieving its stated aims. Mr McLaughlin considered that it was unlikely (because employees had to apply under the policy) that if all the Respondent's London Office based employees took up the Hybrid Working Policy to work from home 50% of the time that they would in fact have been granted it.*

Direct sex discrimination (Equality Act 2010 section 13)

Refusal of FWR1 on 1 April 2022

287. The Respondent admits that Mr Stewart refused the Claimant's FWR1 on 1 April 2022 [649-650] and the Claimant says that he did so because she is a woman.

288. The Claimant pointed to another male employee (Mr JC) who was allowed to work from home. We do not consider that Mr JC is a valid comparator. Mr JC had a serious medical condition and a medical recommendation that he work from home. Ultimately he retired on ill health grounds. The Claimant has not shifted the burden of proof in respect of this alleged act of direct sex discrimination and she declined to put the allegation to Mr Stewart in cross-examination.

289. We do not consider that Mr Stewart declined the Claimant's request because she is a woman nor do we think that his decision was tainted by direct sex discrimination to any degree. He declined the request for the reasons he gave in his outcome letter [649-650] and because of the matters encapsulated in Mr Stewart Opinion referred to above.

290. On this basis this complaint of direct sex discrimination is not well founded.

No outcome on FWR2 by 21 August 2023

291. The Respondent admits that it had not, at the date of the Claim (21 August 2023), notified the Claimant of a decision in respect of FWR2. The Claimant has not shifted the burden of proof on this allegation and we accept the Respondent's submission that the Respondent did not decide FWR2 by that date because 'the

ball was in the Claimant's court' (as we have explained above). There is no evidence to suggest that the failure to provide a decision by the time of this claim was because the Claimant is a woman (i.e. that a hypothetical man seeking a FWR for 100% working from home - but not having provided the relevant evidence etc., and having gone off sick with stress and anxiety and having told Miss Tout that he would respond when he felt able to do so - would have been treated more favourably).

292. On this basis this complaint of direct sex discrimination is not well founded.

Not allowed the Claimant to WFH by 21 August 2023

293. We reach the same conclusions in respect of this complaint as we do in respect of the 'No outcome on FWR by 21 August 2023' complaint. Mr JC was not a valid comparator, the Claimant has not shifted the burden of proof and there is otherwise no evidence to suggest that the failure to give the Claimant her working from home arrangement by 21 August 2023 was because the Claimant is a woman (i.e. that a hypothetical man seeking a FWR for 100% working from home - but not having provided the relevant evidence etc., and having gone off sick with stress and anxiety and having told Miss Tout that he would respond when he felt able to do so - would have been treated more favourably).

294. On this basis this complaint of direct sex discrimination is not well founded.

2020 overtime claim

295. The Claimant alleged, by a permitted amendment to her claim, that Mr Stewart set a cap of 1 to 1.5 hours per day on the amount of overtime which the Claimant was permitted to claim for the period of August 2020, in circumstances where Mr Meltzi (a man) was permitted to claim 32.5 hours overtime in July 2020, and Nick Potter (a man) was allowed to claim 20 hours overtime in August 2020. She says this amounted to direct sex discrimination.

<u>July 2020</u>

296. In July 2020 Mr Meltzi did claim 32.5 hours and was not challenged on it by Mr Stewart. However, we accept Mr Stewart's evidence that Mr Meltzi in July was not in materially the same circumstances as the Claimant was when she came to make her claim in August 2020 [MS2WS13-14]. Mr Meltzi was working intensively on a particular merger related project and 3.5 hours of this time was on a Saturday (18 July 2020) making it easier to justify the level of time being claimed. Mr Melizi's claim covered a period of 21 days (including 3.5 hours on Saturday 18 July 2020). Excluding the 3.5 hours worked that day, he was claiming for 1.45 hours per day on average, and balancing two separate work activities (which we accept the Claimant was not required to do).

297. We note here that in July 2020 Mr Potter claimed 10 hours across 10 days giving an average claim of one hour per day.

298. In that month the Claimant claimed an unchallenged 3.5 hours across two days giving an average of 1.75 hours per day claimed.

August 2020

299. In August 2020:

299.1 Mr Meltzi claimed 14 hours across 13 days, i.e. an average of 1.08 hours per day [page 238]. We accept Mr Stewart's evidence that (i) he deemed this to be an expected and acceptable figure given Mr Meltzi's role and reflective of the exceptional nature of his July claim and (ii) by August 2020, the merger had completed and Mr Melizi was no longer in a different position to the Claimant and Mr Potter.

299.2 Mr Potter claimed overtime for the two week period that Mr Kidney was away (3 to 14 August 2020) totalling 20 hours, averaging two hours per day. Mr Potter did not claim overtime for the final week of August 2020 (albeit the Claimant was herself away that week).

300. The Claimant sought to claim 32 hours for the first three week period of August 2020 (3 to 24 August 2020) which was 16 days over 3 weeks. That averaged out at 2 hours per day.

301. It appears to us that Mr Stewart could have been clearer to the Claimant as to the limitations and expectation on claiming overtime when he sanctioned it.

302. Mr Stewart sent his email questioning the level of the Claimant's overtime claim and she then claimed 24 hours for August (an average of 1.5. hours per day).

303. Mr Stewart clearly did approve the Claimant claiming more than 1.5 hours on individual days and we find that it was the total level of time claimed in August by the Claimant in the absence of the justification that applied to Mr Meltzi that caused Mr Stewart concern. In August Mr Potter claimed an average of two hours for each day but his total was substantially lower than that which the Claimant sought to claim in August and we accept that it would have drawn less attention and would therefore have been less likely to be challenged by Ms Rumi (in circumstances where Mr Stewart felt less able to justify it than he did with regard to the different circumstances presented by Mr Meltzi in July). In addition Mr Stewart did not tell the Claimant that she could not make her claim of 32 hours [653] (albeit we accept that his comment about pragmatism would have come across as a strong suggestion that she should not). The Claimant was robust in her reply indicating that she would have been able, had she felt it was entirely unjust, to insist on claiming the hours and see what the response was from Ms Rumi whose role it was to approve (or not) the requests.

304. We have noted what the parties said with respect to the Claimant's email of 4 August 2020 [227] but to not consider it necessary to pass comment here.

305. We accept the Respondent's submissions that Mr Stewart did not "set a cap of 1 or 1.5 hours per day", the Claimant made a choice to proceed with a claim for 24 hours and Mr Stewart was not under any duty to go back to her following that email to discuss the issue further.

306. We do not consider that Mr Stewart treated the Claimant less favourably because she is a woman and accept his explanation that he commented on her claim

because of the total time being claim for the month (including claiming the same overtime for the week after the two period week for which he had indicated that overtime would be justified).

307. On this basis this complaint of direct sex discrimination is not well founded.

Discrimination arising from disability (Equality Act 2010 section 15)

308. The something said to arise in consequence of the Claimant's disability is her period of ill health sickness absence from 5 May 2022 to the date of the Claim. We find, for the reasons set out elsewhere in this judgment, that the Claimant's sickness absence did not arise in consequence of disability until 1 November 2022 (the date from which it can be said that the substantial adverse effects on her ability to carry out day to day activities were likely to be long term). For simplicity we call this "**the Something**".

Mutiny email – arising from complaint LOI 5.2.1

309. The Claimant complains that she was subjected to unfavourable treatment when on 12 October 2023 Ms Tout sent an email to her new manager (replacing Ms Della Morte) Ms S Abdelmajed/Sobhy with a timeline summary of the position with respect to the Claimant which included the following report of a comment by Mr Stewart "*MS now very upset that RS [the Claimant] has taken six months fully paid leave and said he didn't support her rerun to the team - he said there would be a mutiny"* [862] ("**the Mutiny Email**"). In the context of the other findings that we have made on comments made with respect to the Claimant and his views on her sickness absence we find that he did use the words recorded in Ms Tout's email. The comment came to the Claimant's attention when it was disclosed to her, on 20 July 2023, in response to a DSAR she had made.

310. We conclude that when it was said privately to Ms Tout and then passed on by email to Ms Sobhy it did not constitute unfavourable treatment of the Claimant. Ms Tout did not document it to Ms Sobhy because the Claimant was on sick leave and at that time the Claimant's absence was not disability related because at that time she did not have a long term mental impairment. Ms Tout also did not send the email because the Claimant was on sick leave (disability related or otherwise). She understandably wanted to appraise Ms Sobhy of the sentiment of the Claimant's manager's manager, Mr Stewart. The Claimant's complaint is therefore not well founded.

311. The Claimant does not complain that it amounted to unfavourable treatment when it was disclosed to her on 20 July 2023 (by which point she was on disability related sickness absence). In any event the disclosure of it to her on that date was not because of the Something, it was disclosed to her in response to her DSAR. It would have been a difficult comment for the Claimant to read but needs to be read in its context. It was a private email update to Ms Tout's manager about a private opinion expressed by Mr Stewart without any suggestion that he intended the Claimant to see it.

312. Whilst he may not have expected the comment to be documented and ultimately shared with the Claimant, we do not consider that it was professional of Mr Stewart to have made the comment to Ms Sobhy (Mr Stewart having made the comment she was entitled to document it). That he made the comment is consistent with

the tenor of the other things he said in emails and on which we have commented. Whilst the Claimant's absence for a time put a strain on the team's resources, there was no basis for taking the view that she was not genuinely ill. It was for Mr Stewart, as the manager, to handle any mutinous sentiment towards the Claimant in those circumstances.

313. On this basis this complaint of discrimination arising from disability is not well founded.

Alleged threat of redundancy LOI 5.2.2

314. The Claimant complains that she was subjected to unfavourable treatment when on 20 March 2023 Ms Tout sent her email to the Claimant and which the Claimant says threatened that the Claimant's job was no longer needed and implied that she may be dismissed for redundancy [1235]. She says that this alleged unfavourable treatment was because of the Something. By the date of this email the Claimant was on disability related sick leave. This complaint is about the first bullet point in the email which says:

> "*When you want the working pattern to commence; and I appreciate that is difficult given that you are on sick leave. At the moment, we have not recruited a replacement for you as we have found that the work can be dealt with by two team members. We may look at restructuring the department in the future, but would not want to start this process until you are ready to return or have a final decision about your PHI application. Ideally, we would consider your request and look at the needs of the department at that time as our needs may change.*"

315. This was not unfavourable treatment. It was appropriate for the Respondent to be open with the Claimant about the situation in her team and that it was coping with its current resource level. It did not threaten the Claimant with redundancy. In any event the information was potentially helpful to the Claimant in deciding what she wanted to do (the email also raising the question about work in other areas of the business – which might have been more attractive to the Claimant in the knowledge that a Nostro team of three, on her return, might be over-resourced).

316. Even if this did constitute unfavourable treatment is was not done because of the Something, it was done because it was appropriate to keep the Claimant appraised of the situation in the workplace so that a more fully informed discussion could be had with her. It was therefore also justified.

317. On this basis this complaint of discrimination arising from disability is not well founded.

Alleged delay to outcome on FWR2 LOI 5.2.3

318. The Claimant complains that she was subjected to unfavourable treatment with respect to the alleged delay in an outcome on FWR2. The Claimant says that the delay arose from 24 April 2023 (the date three months after the Claimant's second flexible working request dated 24 January 2023 [1148-1150]) to the Claim Date (21 August 2023).

319. As we have explained in our findings on FWR2 above, this was not the Respondent's delay, it was the Claimant's who had said that she would come back to the Respondent when she was able. The complaint is therefore not well founded.

320. If we are wrong and it was the Respondent's delay then:

320.1 it was still not unfavourable treatment; and

320.2 there is no evidence that the Respondent delayed because of the Something; and

320.3 it was a delay because the Respondent wanted to have the Claimant's input which she had indicated that she would give when she was able.

321. In March 2023 the Respondent had shown their desire to progress, not delay, and it was better to delay pending a response from the Claimant than to make a decision in the absence of further dialogue or inadequate information from the Claimant.

322. On this basis this complaint of discrimination arising from disability is not well founded.

Harassment related to disability (Equality Act 2010 section 26)

Mutiny email – harassment LOI 7.1.1

323. We do not repeat our findings in respect of the Mutiny Email as set out in our analysis and conclusions on the Section 15 EqA claim. The Claimant makes the same complaint under Section 26 (disability harassment).

324. The sending of the email by Ms Tout to her manager was not unlawful harassment of the Claimant because at that time she did not see the email and at that time her mental health impairment did not constitute a disability because it was not then long term. Further the comment did not have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant nor could it have had that effect because it was not seen by the Claimant at that time.

325. The Claimant does not complain that the Mutiny Email constituted harassment of her when it was sent to her in response to her DSAR. However, when it was disclosed to her in response to her DSAR it did not constitute unlaw disability harassment because the comments, whilst clearly difficult for the Claimant to read and creating a risk that she would not feel welcome in her team:

325.1 Were not made for the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant (they were a record of a private conversation and disclosed to her to respond to her DSAR);

325.2 Did not reasonably have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her because they were not sufficiently linked to her mental

health impairment to have that effect as a disabled person with a mental health impairment; and

325.3 The email needed to be read in its proper context – a comment which clearly had been made in private by Mr Stewart to Ms Tout and then documented by her without the intention of the Claimant seeing it.

326. On this basis this complaint of disability harassment is not well founded.

Alleged threat of redundancy – harassment LOI 7.1.2

327. We do not repeat our findings in respect of the corresponding arising from disability claim. We find that this was unwanted conduct in that it was not welcome news to the Claimant that a two person Nostro team appeared to the Respondent to be adequate and that there might be a need for a restructure. However, there was no link in what Ms Tout said to the Claimant's impairments and the comment was clearly not made for the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The purpose was as we have explained in respect of the corresponding discrimination arising from disability complaint. It was also not reasonable for the comment to have had that effect for the same reasons.

328. On this basis this complaint of disability harassment is not well founded.

Alleged delay to outcome on FWR2 – harassment LOI 7.2.3

329. We do not repeat our findings in respect of the corresponding arising from disability claim. The Respondent did not delay its decision on FWR2, it was the Claimant that caused the delay. The alleged conduct was also not unwanted because the Claimant knew or should have known that the onus was on her to take things further. The conduct, if it was unwanted, was not sufficiently related to the Claimant's impairments and, in any event, there is no evidence that the purpose of any delay was to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant and it was not reasonable for it to have had that effect. The purpose, if it was the Respondent's delay, was as explained in the corresponding discrimination arising from disability complaint.

330. On this basis this complaint of disability harassment is not well founded.

Protected disclosures

331. The Respondent admits that the Claimant did the following things:

331.1 On **24 January 2023** (second flexible working request) [1148-1150] told the Respondent that: "*In accordance with the ACAS FWR procedure this whole process should be completed within three months, ensuring disability discrimination, sex discrimination or indirect sex discrimination does not occur... My request on 21.09.2021 took yourselves seven months to complete which had a detrimental effect on my mental health*." ("**Disclosure 1**");

331.2 On **15 February 2023** sent an e-mail to Ms Tout of the Respondent in which she informed her [1616-1618, 1163]: *"Please ensure my FWR is completed*

within the three month timeframe as your delay with my previous FWR is the reason for my current medical condition" ("**Disclosure 2**").

332. The Claimant says that Disclosure 1 and Disclosure 2 qualified for protection under section 43B(1) ERA because they disclosed information which in her reasonable belief was made in the public interest and tended to show that

332.1.1 a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (43B(1)(b) ERA);

332.1.2 the health or safety of any individual has been, is being or is likely to be endangered (43B(1)(d) ERA).

333. In this regard she said that the disclosures tended to show that:

333.1 the Respondent had failed to comply with its legal obligation to notify the Claimant of its decision in relation to her first application for flexible working within the decision. Contrary to Section 80G(1) (aa) ERA;

333.2 the Respondent was likely to fail to comply again to each decision in respect of the second application for flexible working within the decision period. Contrary to sections of the employment rights act;

333.3 the Respondent had endangered the health and safety of the Claimant as a result of their failure to comply with their legal obligations in relation to her first flexible working request and contrary to discrimination legislation.

333.4 the Claimant's health and safety was likely to be further endangered by the Respondent's likely failure again to comply with its legal obligations in relation to her second flexible working request as the Claimant thought the Respondent would again fail to deal with it within the decision period, contrary to the employment rights act and discrimination legislation.

334. The Respondent submitted that these were not protected disclosures because (i) "*each did not "disclose information" to the Respondent, and (ii) the Claimant cannot have held a reasonable belief that either was made in the public interest, because it was her who had caused the delay in the second request – or the Respondent had acted reasonably and with appropriate regard to her health and safety in waiting for her input in circumstances where she was already off sick and had the offer of the work pattern as per the appeal decision in the first FWR*."

Disclosure 1

335. The words "*In accordance with the ACAS FWR procedure this whole process should be completed within three months, ensuring disability discrimination, sex discrimination or indirect sex discrimination does not occur*..." did not disclose information to the Respondent, the Claimant simply set stated the law. The words "*My request on 21.09.2021 took yourselves seven months to complete which had a detrimental effect on my mental health*" did disclose information to the Respondent about delay in the handling of FWR1 and the impact she said that delay had had on her. The Claimant did not explain on what basis she believed the disclosure of information was made in the public interest and we

find that she did not have a reasonable belief that the disclosure was in the public interest, it raised matters personal to her. We find that the disclosure did tended to show that the Respondent had failed to comply with a legal obligation and that the health or safety of the Claimant had been endangered and the Claimant held a reasonable belief that it tended to show these matters.

336. Notwithstanding that the disclosure was not protected because it did not meet the reasonable belief in public interest requirement, we have nonetheless gone on to consider whether the Claimant suffered the alleged detriments on the grounds of Disclosure 1. For the reasons we explain in our findings on the corresponding discrimination arising from disability claim, we find that she did not suffer detriments or, if she did suffer the alleged detriments, she did not suffer them on the grounds that she had made Disclosure 1. The Claimant's claim of protected disclosure detriment not well founded.

Disclosure 2

337. We find that the words "*please ensure my FWR is completed within the three month timeframe"* was not a disclosure of information, it was a request that the Respondent follow the timescales provided for in legislation with respect to flexible working requests. However the words "*as your delay with my previous FWR is the reason for my current medical condition*" was a disclosure of information about the delay and the impacts of that delay in the handling of FWR1. As per Disclosure 1 the Claimant did not explain on what basis she believed this disclosure of information was made in the public interest and we find that she did not have a reasonable belief that the disclosure was in the public interest, it raised matters personal to her. We find that the disclosure did tended to show that the Respondent had failed to comply with a legal obligation and that the health or safety of the Claimant had been endangered and the Claimant held a reasonable belief that it tended to show these matters.

338. Again, notwithstanding that Disclosure 2 was not protected because it did not meet the public interest requirement, we have nonetheless gone on to consider whether the Claimant suffered the alleged detriments on the grounds of Disclosure 2. For the reasons we explain in our findings on the corresponding discrimination arising from disability claim, we find that she did not suffer detriments or, if she did suffer the alleged detriments, she did not suffer them on the grounds that she had made Disclosure 2. The Claimant's claim of protected disclosure detriment not well founded.

Protected disclosure detriments

339. The Claimant alleged that she was subjected to the following detriments (replicated in her arising from disability discrimination, harassment, victimisation and health and safety detriment complaints) on the grounds that she made Disclosure 1 and/or Disclosure 2:

339.1 *Comments made by Ms Tout of the Respondent via an e-mail to the Claimant on 20 March 2023 [1235] threatening that the Claimant's job was no longer needed, implying that she may be dismissed for redundancy ("**Detriment 1**")*;

*339.2 The Respondent delaying the outcome of a decision on the Claimant's second flexible working request. The Claimant says that the delay arose from 24 April 2023 (the date three months after the Claimant's second flexible working request dated 24 January 2023 [1148-1150]) to the Claim Date (21 August 2023) ("**Detriment 2**").*

Detriment 1

340. For the same reasons that Detriment 1 was not unfavourable treatment in the Claimant's arising from disability claim, it was not a detriment. If it was a detriment it was not done on the grounds that the Claimant had made Disclosure 1 or Disclosure 2. We accept the Respondent's submission that causation was not put to the Respondent's witnesses. The complaint is therefore not well founded.

Detriment 2

341. For the same reasons that Detriment 2 was not unfavourable treatment in the Claimant's arising from disability claim, it was not a detriment. If it was a detriment it was not done on the grounds that the Claimant had made Disclosure 1 or Disclosure 2. We accept the Respondent's submission that causation was not put to the Respondent's witnesses. The complaint is therefore not well founded.

342. The list of issues (at 12.1) also referred to 47E ERA which provides:

> *(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by the worker's employer done on the ground that the worker—*
>
> *(a) made (or proposed to make) an application under section 80IA to the employer,*
>
> *(b) brought proceedings against the employer under section 80ID, or*
>
> *(c) alleged the existence of any circumstance which would constitute a ground for bringing such proceedings.*
>
> *(2) This section does not apply where—*
>
> *(a) the worker is an employee, and*
>
> *(b) the detriment in question amounts to dismissal within the meaning of Part 10.]*

343. We consider that the reference to 47E ERA in 12.1 of the LOI was an error because it was referred to under the heading 'Protected disclosure', the case was not advanced under this section by the Claimant nor was it addressed by the Respondent. Any claim under this section therefore fails. If we are wrong on this then any claim under this section also fails because the Claimant was either not subjected to the detriments alleged in 13 of the LOI or was not subjected to the detriments on the ground of any of the matters in Section 47E ERA (the grounds being as we have explained in respect of the Claimant's discrimination arising from disability claim).

Victimisation (Equality Act 2010 section 27)

344. The Respondent accepts that the Claimant did a protected act by making Disclosure 1. The Claimant says that she was subjected to Detriment 1 and Detriment 2 because of that protected act. We accept the Respondent's submission that there is no evidence, and it was not put to any of the witnesses, that Detriment 1 and/or Detriment 2 were done because the Claimant had done a protected act. We find that there was no causal link between Disclosure 1 and Detriment 1 or Detriment 2. We repeat our findings, including in respect of causation, as set out on the Claimant's corresponding discrimination arising from disability complaint and for the same reasons the complaints of victimisation are not well founded.

Health and safety detriments

345. The Claimant says that by making Disclosure 1 and Disclosure 2 and being an employee at a place where:

345.1.1 there was no representative or safety committee; or

345.1.2 there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means;

she brought to the Respondent's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety (section 44(c) ERA). She said that she was then subjected to Detriment 1 and Detriment 2 on the grounds that she had brought those circumstances to the Respondent's attention.

346. The Respondent submitted that by making Disclosure 1 and Disclosure 2 the Claimant did not bring to the Respondent's attention circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health and safety and that, in any event, she did not put to the Respondent's witnesses that she had been subjected to Detriment 1 and Detriment 2 on the grounds that she had done so.

Disclosure 1

347. The words "*In accordance with the ACAS FWR procedure this whole process should be completed within three months, ensuring disability discrimination, sex discrimination or indirect sex discrimination does not occur*..." did not bring to the Respondent's attention circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety, the Claimant simply set stated the law. The words "*My request on 21.09.2021 took yourselves seven months to complete which had a detrimental effect on my mental health*" was only loosely connected to the Claimant's work and we have some doubt as to whether it is the sort of matter which was intended to be covered by this statutory provision. Nonetheless we consider that there is a public interest in the provision being interpreted broadly. Consequently we do find that it brought to the Respondent's attention circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety. We consider that it could be potentially damaging to health, particularly in personal

the circumstances faced by the Claimant, for there to be substantial delay in the handling of a flexible working request. We have taken into account the fact that the Claimant then caused a delay in the handling of FWR2 and the doubt that this could be said to cast on the reasonableness of the Claimant's belief.

Disclosure 2

348. We find that the words "*please ensure my FWR is completed within the three month timeframe"* did not bring to the Respondent's attention circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety, it was a request that the Respondent follow the timescales provided for in legislation with respect to flexible working requests. However the words "*as your delay with my previous FWR is the reason for my current medical condition*" was, as with Disclosure 1, only loosely connected to the Claimant's work. We make the same findings on this element of the Disclosure 2 as we did on the second element of Disclosure 1.

Detriment 1 and Detriment 2

349. We accept the Respondent's submission that there is no evidence, and it was not put to any of the witnesses, that Detriment 1 and/or Detriment 2 were done on the grounds that the Claimant had raised health and safety concerns. We find that there was no causal link between Disclosure 1 or Disclosure 2 and Detriment 1 or Detriment 2. We repeat our findings as set out on the Claimant's discrimination arising from disability claim and for the same reasons the complaints of health and safety detriment under Section 44 ERA are not well founded.

Time limits

350. As the complaints have been unsuccessful we have not gone on to consider whether they were brought within the applicable time limits.

_____

Employment Judge Woodhead

20 January 2025

Sent to the parties on:

23 January 2025

.....

.....

For the Tribunals Office

Appendix

AGREED LIST OF ISSUES

1. ***Time limits***

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 13 March 2023 may not have been brought in time.

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

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

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

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

1.3 Were the detriment complaints made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. ***Breach of Flexible Working Rights – Section 80F Employment Rights Act 1996***

2.1 The parties agreed that by a written request made on 24 January 2023 the Claimant submitted a statutory flexible working request that was compliant with requirements of section 80F ERA 1996 including the requirements of sections 80F(2) and (4) and that the Claimant is a qualifying employee for the purposes of section 80F(8).

2.2 Did the Respondent fail to deal with the second flexible working request of 24 January 2023 **[1148-1150]** in a reasonable manner pursuant to section 80G (1) (a)? The Claimant will contend that the Respondent failed to do so by reason of the following matters;

2.2.1. the Respondent failed to arrange to talk to the Claimant about the application at all

2.2.2. the Respondent failed to conduct any substantive discussion with the Claimant about the application

2.2.3. the Respondent unreasonably delayed dealing with the application

2.2.4. the Respondent failed overall to consider the application with care and logic

2.2.5. the Respondent failed to engage in the process of considering the application in a reasonable and sensible manner

2.2.6. the Respondent failed genuinely to consider the application.

2.3 Did the Respondent fail to notify the Claimant of a decision in respect of the flexible working request within the statutory 3 month decision as required by subsection 80G(1) (aa)? The Respondent accepts it has not to date made any decision in respect of the flexible working request.

2.4 The Respondent contends that the Claimant, in commenting she would "come back", via email on 24 March 2023 **[1234]**, to the Respondent on the subject of her statutory flexible working request, the Claimant had agreed for the Respondent to delay the statutory decision period indefinitely or until the Claimant "came back" to the Respondent on some or all of the points made in its email of 20 March 2023 **[1235]**. In this regard

2.4.1 The Respondent asserts that it reached this view in light of: (a) its perceived "lack of clarity around timing"; (b) that the Claimant had stated in her email of 24 March 2023 that she would "come back" to the Respondent's email of 20 March 2023 when she was able; (c) it alleges that the Claimant had not come back to the Respondent "at all", or asked the

Respondent to take the decision without her input; and (d) her continuing ill health.

2.4.2 This is disputed by the Claimant who contends that an email merely confirming she would "come back" to the Respondent on the content of its email of 20 March 2023 (which related to several topics) quite clearly cannot be sensibly interpreted as anything other than just that, an indication she intended to respond to the Respondent email at some point.

3. ***Remedy for breach of flexible working rights***

3.1 Should the Tribunal make an award of compensation to be paid to the Claimant? If so, the Tribunal will need to consider what is just and equitable in all the circumstances.

4. ***Disability***

4.1 The Respondent concedes that the Claimant's asthma constituted a disability throughout the period relevant to this claim.

4.2 The Respondent concedes that the Claimant had a mental impairment of stress, anxiety and depress from **1 March 2023** ("**the Mental Impairment**"). It does not concede that the mental impairment had been long term at that date but concedes that it was apparent by that date that it was likely to last more than 12 months.

4.3 In this respect the Tribunal is asked to determine whether the Claimant had the Mental Impairment and whether it was a disability as defined in section 6 of the Equality Act 2010 before 1 March 2023 and during a period relevant to the complaint? The Tribunal will decide:

4.3.1 Did the Claimant have the Mental Impairment: The Claimant made clear at the hearing on 27 September 2024 that, as regards the Mental Impairment she had stress and anxiety with the necessary impact on her day to day activities from the point at which she went on sick leave (**5 May 2022**) and depression became part of the Mental Impairment from **8 August 2022**.

4.3.2 Did it have a substantial adverse effect on their ability to carry out day-to-day activities?

4.3.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

4.3.4 Would the impairment have had a substantial adverse effect on their ability to carry out day-to-day activities without the treatment or other measures?

4.3.5 Were the effects of the impairment long-term? The Tribunal will decide:

4.3.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

4.3.5.2 if not, were they likely to recur?

5. ***Discrimination arising from disability (Equality Act 2010 section 15)***

5.1 Did the following thing arise in consequence of the Claimant's disability:

A continuing period of ill health sickness absence from 5 May 2022 to date? **The Claimant relies upon her Mental Impairment (stress and anxiety from 5 May 2022 and stress, anxiety and depression from 8 August 2022.**

5.2 Did the Respondent treat the Claimant unfavourably by:

5.2.1 An internal e-mail sent within R's organisation dated 12 October 2022 (disclosed to the Claimant via a DSAR response on 20 July 2023) in which the Claimant's manager stated he was "now very upset that RS [the Claimant] has taken six months fully paid leave and said he didn't support her rerun to the team - he said there would be a mutiny" if she returned. **[862]**

5.2.2 Comments made by Ms Tout of the Respondent via an e-mail to the Claimant on 20 March 2023 that threatening that the Claimant's job was no longer needed, implying that she may be dismissed for redundancy; **[1235]**

5.2.3 The Respondent delaying the outcome of a decision on the Claimant's second flexible working request. **The Claimant says that the delay arose from 24 April 2023 (the date three months after the Claimant's second flexible working request dated 24 January 2023 [1148-1150]) to the Claim Date (21 August 2023).**

5.3 Was the unfavourable treatment because of that sickness absence?

5.4 Was the treatment a proportionate means of achieving a legitimate aim?

5.4.1 The Respondent says that the delay in the process of making a decision on the second flexible working application was done to facilitate input from the Claimant in the decision making process when she returned to work.

5.5 The Tribunal will decide in particular:

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

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the Claimant and the Respondent be balanced?

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

6. ***Reasonable Adjustments (Equality Act 2010 sections 20 & 21)***

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

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

6.2.1 the requirement that employees work from the office at least 50% of the time;

6.2.2 or alternatively that employees work from the office on at least some regular days.

6.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that it resulted in a barrier to her returning to her job? **The Claimant relies upon her Mental Impairment (stress and anxiety from 5 May 2022 and stress, anxiety and depression from 8 August 2022) and her physical impairment of asthma.**

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

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

6.5.1 The Claimant asserts that the Respondent should have made the adjustments she requested which were contained in:

(a) her first flexible working request submitted on 21 September 2021 **[392] (Asthma)** – by allowing her to work from home on a permanent contract;

(b) her second flexible working request submitted on 24 January 2023 **[1148-1150] (Asthma and Mental Health)** – by allowing her to work from home on a permanent contract; and

(c) following the recommendation made by her doctor in which

any assistance would be appreciated - by enabling her to work from home habitually or significantly more than other employees. **[14 March 2023 final paragraph 1189]**

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

6.7 Did the Respondent fail to take those steps?

7. ***Harassment related to disability (Equality Act 2010 section 26)***

7.1 Did the Respondent do the following things:

7.1.1 Sending an internal e-mail sent within R's organisation dated 12 October 2022 **[862]** (disclosed to the Claimant via a DSAR response on 20 July 2023) in which the Claimant's manager stated he was "now very upset that RS [the Claimant] has taken six months fully paid leave and said he didn't support her return to the team - he said there would be a mutiny" if she returned. **The Claimant relies upon her Mental Impairment (stress and anxiety from 5 May 2022 and stress, anxiety and depression from 8 August 2022).**

7.1.2 Comments made by Ms Tout of the Respondent via an e-mail to the Claimant on 20 March 2023 **[1235]** threatening that the Claimant's job was no longer needed, implying that she may be dismissed for redundancy; **The Claimant relies upon her Mental Impairment (stress and anxiety from 5 May 2022 and stress, anxiety and depression from 8 August 2022).**

7.1.3 The Respondent delaying the outcome of a decision on the Claimant's second flexible working request. **The Claimant relies upon her Mental Impairment (stress and anxiety from 5 May 2022 and stress, anxiety and depression from 8 August 2022) and her physical impairment of asthma. The Claimant says that the delay arose from 24 April 2023 (the date three months after the Claimant's second flexible working request dated 24 January 2023 [1148-1150]) to the Claim Date (21 August 2023).**

7.2 If so, was that unwanted conduct?

7.3 Did it relate to disability? **See above for the disabilities relied on in respect of each alleged act of harassment.**

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

7.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and

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

8. ***Direct sex discrimination (Equality Act 2010 section 13)***

8.1 The Respondent admits that it did the following things:

8.1.1 Mark Stewart refused the Claimant's first flexible working application on 1 April 2022 **[649-650]**;

8.1.2 the Respondent **had not to the date of the Claim (21 August 2023)** notified the Claimant of a decision in respect of her second flexible working application **(The Respondent says it granted the application on 9 and 18 July 2024 [1621 and [1610])**;

8.1.3 the Respondent **had not to the date of the Claim (21 August 2023)** allowed the Claimant to work from home 100% of the time (albeit with occasional office attendance). **(The Respondent says it granted the application on 9 and 18 July 2024 [1621 and [1610]).**

8.2 **[Added 26 September 2024 by amendment:** Did the Respondent do the following: Mr Stewart set a cap of 1 to 1.5 hours per day on the amount of overtime which the Claimant was permitted to claim for the period of August 2020, in circumstances where Mr Meltzi (a man) was permitted to claim 32.5 hours overtime in July 2020, and Nick Potter (a man) was allowed to claim 20 hours overtime in August 2020?

8.2.1 If so, were Mr Meltzi and/or Mr Potter in materially similar circumstances to the Claimant at the relevant time?]

8.3 Were such things as were done, and described at 8.1 and 8.2 less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The Claimant says she was treated worse than [Mr C] or if he is not a true comparator, the Claimant will say she was treated worse than a hypothetical comparator and that [Mr C]'s treatment is evidential or indicative of the treatment that the hypothetical comparator would have received.

8.4 If so, was it because of sex?

9. ***Indirect sex discrimination (Equality Act 2010 section 19)***

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

9.1.1 Requiring that the Claimant must work from the office a minimum of 50% of the time; or

9.1.2 alternatively, that she must work from the office some regular working days each week.

The Claimant says that both of these PCP's applied to her from 1 April 2022 [649] (the date of the Respondent's decision on her flexible working request of 1 November 2021) and continued with the appeal decision letter of 4 May 2022 [1618-1620] to the end of the Claim Period on 21 August 2023.

9.2 Did the Respondent apply the PCP to the Claimant?

9.3 Did the Respondent apply the PCP to men, or would it have done so?

9.4 Did the PCP put women at a particular disadvantage when compared with men, in that:

Women are more likely to take a greater responsibility for managing childcare needs and thus more likely to need flexible working arrangements.

9.5 Did the PCP put the Claimant at that disadvantage?

9.6 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

9.6.1 Enabling teamwork, collaboration, training and support, and building corporate identity and culture.

9.7 The Tribunal will decide in particular:

9.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

9.7.2 could something less discriminatory have been done instead;

9.7.3 how should the needs of the Claimant and the Respondent be balanced?

10. ***Victimisation (Equality Act 2010 section 27)***

10.1 Did the Claimant do a protected act as follows:

10.1.1 Refer the Respondent to her right not to be discriminated against by stating on 24 January 2023 **[1149]**:

> *In accordance with the ACAS FWR procedure this whole process should be completed within three months, ensuring disability discrimination, sex discrimination or indirect sex discrimination does not occur... My request on 21.09.2021 took yourselves seven months to complete which had a detrimental effect on my mental health".*

10.2 Did the Respondent do the following things:

10.2.1 Comments made by Ms Tout of the Respondent via an e-mail to the Claimant on 20 March 2023 threatening that the Claimant's job was no longer needed, implying that she may be dismissed for redundancy **[1235]**;

10.2.2 The Respondent delaying the outcome of a decision on the Claimant's second flexible working request **The Claimant says that the delay arose from 24 April 2023 (the date three months after the Claimant's second flexible working request dated 24 January 2023 [1148-1150]) to the Claim Date (21 August 2023).**

10.3 By doing so, did it subject the Claimant to detriment?

10.4 If so, was it because the Claimant did a protected act?

11. ***Remedy for discrimination or victimisation***

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

11.2 What financial losses has the discrimination caused the Claimant?

11.3 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

11.4 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

11.5 Should interest be awarded? How much?

12. ***Protected disclosure***

12.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B or 47E of the Employment Rights Act 1996? The Tribunal will decide:

12.1.1 The Claimant says she made disclosures as follows which the Respondent admits.

A. On 24 January 2023 (second flexible working request) **[1148-1150]** the Claimant informed the Respondent that:

"In accordance with the ACAS FWR procedure this whole process should be completed within three months, ensuring disability discrimination, sex discrimination or indirect sex discrimination does not occur... My request on 21.09.2021 took yourselves seven months to complete which had a detrimental effect on my mental health."

B. On 15 February 2023 by the Claimant sending an e-mail to Ms Tout of the Respondent in which she informed her **[1616-1618, 1163]***:*

"Please ensure my FWR is completed within the three month timeframe as your delay with my previous FWR is the reason for my current medical condition".

12.1.2 Did the Claimant disclose information?

12.1.3 Did the Claimant believe the disclosure of information was made in the public interest?

12.1.4 Was that belief reasonable?

12.1.5 Did the Claimant believe it tended to show that:

12.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation;

12.1.5.2 the health or safety of any individual had been, was being or was likely to be endangered;

12.1.6 Was that belief reasonable?

12.2 NOTE: the Claimant argues that the disclosures tended to show that:

12.2.1. the Respondent had failed to comply with its legal obligation to notify the Claimant of its decision in relation to her first application for flexible working within the decision. Contrary to Section 80G(1) (aa) ERA

12.2.2. the Respondent was likely to fail to comply again to each decision in respect of the second application for flexible working within the decision period. Contrary to sections of the employment rights act;

12.2.3. the Respondent had endangered the health and

safety of the Claimant as a result of their failure to comply with their legal obligations in relation to her first flexible working request and contrary to discrimination legislation.

12.2.4. the Claimant's health and safety was likely to be further endangered by the Respondent's likely failure again to comply with its legal obligations in relation to her second flexible working request as the Claimant thought the Respondent would again fail to deal with it within the decision period, contrary to the employment rights act and discrimination legislation.

12.3. If the Claimant made a qualifying disclosure, it was a protected disclosure because it was made to the Claimant's employer.

13. Detriment (Employment Rights Act 1996 section 48)

13.1. Did the Respondent do the following things:

13.1.1. Comments made by Ms Tout of the Respondent via an e-mail to the Claimant on 20 March 2023 **[1235]** threatening that the Claimant's job was no longer needed, implying that she may be dismissed for redundancy;

13.1.2. The Respondent delaying the outcome of a decision on the Claimant's second flexible working request. **The Claimant says that the delay arose from 24 April 2023 (the date three months after the Claimant's second flexible working request dated 24 January 2023 [1148-1150]) to the Claim Date (21 August 2023).**

13.2. By doing so, did it subject the Claimant to detriment?

13.3. If so, was it done on the ground that the Claimant made a protected disclosure?

14. Remedy for Protected Disclosure Detriment

14.1. What financial losses has the detrimental treatment caused the Claimant?

14.2. What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?

14.3. Has the detrimental treatment caused the Claimant personal injury and how much compensation should be awarded for that?

14.4. Is it just and equitable to award the Claimant other compensation?

14.5. Did the Claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the Claimant's compensation? By what proportion?

14.6. Was the protected disclosure made in good faith?

14.7. If not, is it just and equitable to reduce the Claimant's compensation? By what proportion, up to 25%?

15. Health and safety detriments

15.1. Did the Claimant bring to the attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to her health and safety - section 44(c) employment rights act 1996

In this regard the Claimant relies on the disclosures as follows (in 24 January 2023 second flexible working request **[1148-1150])**:

"In accordance with the ACAS FWR procedure this whole process should be completed within three months, ensuring disability discrimination, sex discrimination or indirect sex discrimination does not occur... My request on 21.09.2021 took yourselves seven months to complete which had a detrimental effect on my mental health."

On 15 February 2023 by the Claimant sending an e-mail to Ms Tout of the Respondent in which she informed her **[1616-1618, 1163]***:*

"Please ensure my FWR is completed within the three month timeframe as your delay with my previous FWR is the reason for my current medical condition".

15.2. If so was the Claimant subject to the following detriments on the grounds that she made such health and safety disclosures?

15.2.1. Comments made by Ms Tout of the Respondent via an e-mail to the Claimant on 20 March 2023 threatening that the Claimant's job was no longer needed, implying that she may be dismissed for redundancy **[1235]**;

15.2.2. The Respondent delaying the outcome of a decision on the Claimant's second flexible working request. **The Claimant says that the delay arose from 24 April 2023 (the date three months after the Claimant's second flexible working request dated 24 January 2023 [1148-1150]) to the Claim Date (21 August 2023).**

16. Remedy

16.1. How much should the Claimant be awarded?