EMPLOYMENT TRIBUNALS

Claimant: Miss Charlene Friend

Respondent: MHS Homes Ltd

Heard at: London South Croydon, in public, in person

On: 21-25 October 2024 & 28-30 October 2024 in Chambers (final day by CVP)

Before: Employment Judge Tsamados
Members:
Mr G Anderson
Mr D Newlyn

Representation

Claimant in person, assisted by hr mother, father and brother
Respondent: Mr D Stewart, Counsel

RESERVED JUDGMENT

The **unanimous** judgment of the Employment Tribunal is as follows:

1) The complaint of direct disability discrimination is not well-founded and is dismissed;

2) The complaint of discrimination arising from disability in respect of paragraphs 4.1.1, 4.1.2, 4.1.3, 4.1.4 and 4.1.6 is well-founded. The complaint in respect of paragraph 4.1.5 is not well-founded and is dismissed;

3) The complaint of failure to make reasonable adjustments is well-founded;

4) The complaint of harassment related to disability is well-founded;

5) The complaint of unfair dismissal is not well-founded and is dismissed;

6) The complaint of unauthorised deductions from wages is not well-founded and is dismissed.

REASONS

Background

1. The Claimant, Miss Friend, was employed by MHS Homes Ltd, the Respondent, as a Customer Liaison Officer from 18 June 2018 onwards. She presented a claim against the Respondent to the Employment Tribunal on 5 July 2022, following a period of early conciliation between 25 April and 6 June 2022. Her claim contained complaints of disability discrimination and unlawful deductions from wages. At this time she was still employed by the Respondent.

2. In its response, the Respondent denied the claim in its entirety.

3. On 2 December 2022, the Tribunal sent notice of the dates set for the full hearing and Suggested Case Management Orders to the parties. The full hearing was originally listed for 4 days from 22 October 2024. In addition, notice of a Preliminary Hearing for Case Management was sent.

4. The Preliminary Hearing for Case Management took place on 25 August 2023 and was conducted by Employment Judge (“EJ”) Rice-Birchall. At that hearing, the EJ indicated that a nine-day hearing was required which she timetabled and set a number of Case Management Orders for in order to prepare the case for that hearing. This included: the Claimant to provide further and better particulars of her claim; the Respondent to thereafter amend its response; as well as the usual steps required for disclosure of documents, provision file of documents and exchange of witness states.

5. EJ Rice-Birchall identified the complaints of discrimination arising from disability under section 15 of the Equality Act 2010 (“EQA”), failure to make reasonable adjustments under sections 20 & 21 EQA, harassment related to disability under section 26 EQA and unauthorised deductions from wages under section 13 of the Employment Rights Act 1996 (“ERA”).

6. With regard to disability, the issues recorded that the Respondent accepts that the Claimant has the cognitive impairment of this dissociative seizures and satisfies the definition of disability within the EQA. What remained to be determined was the question of whether the Claimant was also disabled because of PTSD and anxiety because of a traumatic brain injury and fibromyalgia (which is linked to the seizures). The Respondent subsequently conceded that these matters formed part of the Claimant’s disability in its amended grounds of resistance.

7. At the time that the Claimant presented her claim form, she was still employed by the Respondent. She indicated at the Preliminary Hearing that her employment would be terminated from 8 September 2023 and that she may seek to either amend her existing claim or bring a new claim in respect of that termination.

8. The Claimant subsequently made an application to add a complaint of unfair dismissal and provided a document setting out the particulars of claim.

9. On 11 June 2024, the Tribunal wrote to the Respondent asking it to confirm within seven days whether it agreed for the unfair dismissal complaint to be included in the current claim.

10. The Respondent provided amended grounds of resistance to its response on 14 June 2024. This included a defence to the unfair dismissal complaint.

11. The Claimant provided further and better particulars of her claim on 10 September 2024 and the Respondent then provided further amended grounds of resistance on 9 October 2024.

12. Notice of hearing originally set for nine days commencing 21 October 2024 was sent to the parties on 5 October 2023. However the length of hearing was subsequently reduced to seven days in the light of the actual number of witnesses indicated as attending.

Documents and Evidence

13. The Respondent provided us with the following hardcopy and electronic documents: a bundle consisting of 900 pages; and a bundle containing the witness statements. We will refer to any documents in the bundle of documents with the prefix "B" followed by the relevant page number.

14. At 4.01 am on 21 October 2024, the Claimant emailed the Tribunal and the Respondent some additional documents. These are dealt with below under the heading Preliminary Matters.

15. On 24 October 2024, the Claimant provided a hardcopy diagram of the office layout with an explanatory narrative and two electronic photographs. In additional, the Respondent provided two hardcopy photographs of the office.

16. Both parties provided written submissions at the end of the evidence.

The issues

17. The issues were identified at the hearing in front of EJ Rice-Birchall and set out within her record of that hearing at B47-51. However, this did not include the Claimant's subsequent complaints relating to her dismissal..

18. I indicated on the first of the hearing that I would draft an amended list of issues to include the direct disability discrimination and unfair dismissal complaints. I provided this to the parties on the second day. This document is appended to this Judgment.

19. I indicated that these are the issues that we will be dealing with and there would be no departure from them unless there were exceptional circumstances.

Evidence

20. We heard evidence from the Claimant, and on her behalf from Lorraine Looker, Clare Southworth and Amanda Brooker, by way of written statements and in oral testimony. The Claimant's witnesses' attendance was secured by way of Witness Orders.

21. We heard evidence on behalf of the Respondent from Cheryl Bell, Claire Morris and Nuala Beattie.

Conduct of the Hearing

22. The hearing took place over seven days commencing 21 October 2024.

23. In view of the Claimant's medical condition, which in part affected her sight and mobility, she was accompanied to the hearing by a number of members of the family, namely her mother, father and her brother. Her mother and brother also assisted her in the presentation for case.

24. The Tribunal made a number of adjustments to the conduct of the hearing at the Claimant's behest. These were as follows: the provision of a high chair with arms for the Claimant to use; additional breaks; that her mother and brother could put questions to the Respondent's witnesses in cross examination; and that questions would be repeated to the Claimant if needs be. These were agreed and in addition it was agreed that the process would take a slow and gentle pace.

25. The Claimant had asked for the hearing to take place in person rather than by way of video link so that the Tribunal could observe first-hand the extent of her disabilities. On the first day of the hearing given the obvious practical difficulties for the Claimant in attending, I asked her whether she would prefer for the hearing to take place by video link for practical reasons and also if she would find this less confrontational. Her preference was to continue in person.

26. On 21 October 2024, we dealt with housekeeping and preliminary matters and we then adjourned to read the witness statements and referenced documents. In particular, we were directed to read the following documents: B372 the Consultant Neurologist letter dated 29 November 2021; B388 Grievance letter dated 11 April 2022; B654 the grievance outcome letter dated 27 June 2022 and B704 the grievance hearing notes.

27. On the second day of the hearing, I provided the parties with the amended list of issues to include the unfair dismissal complaint and these were agreed and we dealt with the Claimant's additional documents.

28. We heard evidence firstly from the parties from 22 to 24 October 2024 and submissions from the parties on 25 October 2024. We then sat in privately in chambers to deliberate and reach our decision, the remainder of that day and on 28-30 October 2024.

Preliminary Matters

29. As indicated above, early in the morning of 21 October 2024, the Claimant emailed additional documents. In her email, she said that these were documents which had been sent to the Respondent but not included in the final bundle which she received the previous Saturday. The email further explained that they need to be included "as they form the witness statement key evidence for Lorraine Looker".

30. There are two attachments to that email, one entitled "Camscanner" consisting of 55 pages, the other entitled "part two supplementary bundle" consisting of 23 pages.

31. Mr Stewart agreed he would consider these documents during our reading adjournment and let us know his position as to whether he objected to their late admission. I had explained to the Claimant that when documents were produced belatedly we had to decide their relevance and whether the other party would be prejudiced by their late admissions in terms of responding to the contents.

32. On 22 October 2024, we dealt with the issue of whether the documents should be admitted in evidence or not.

33. Mr Stewart objected to their admission essentially for the following reasons: these documents were only disclosed at 4 am on 21 October and there has only been limited time to consider them and to take instructions; they are not documents that are missing from the bundle; the Camscanner is an extraction of only 55 pages out of 139 pages of the Claimant's NHS patient notes; it was extracted on 31 May 2024 and yet it has only been provided on 21 October; page 52 refers to privileged discussions between the Claimant and her legal advisers and so raises the danger for the Claimant that she will waive privilege by relying upon it; the Word document entitled "part two supplementary bundle" contains a series of emails referenced as points within Ms Looker's witness statement; they are not copies of the original emails but what appear to be cut-and-paste versions; the concern that raises is that they night might not be accurate or full reproductions of the original emails; it was not possible to correlate them to emails within the bundle at such short notice; whilst the Claimant also provided a list of the bundle page references within the witness statements, this again was provided very late in the day. If the Tribunal were minded to accept these documents, then the Claimant should provide a complete set of documents, original copies of the emails and also be ordered to disclose her legal advice.

34. I allowed the Claimant to respond but essentially she repeated her position as set out in her email attaching the documents.

35. I asked the Claimant why she needed these documents given that Ms Looker's witness statement was more of her narrative of events which was not directly involved in with the documents provided in support. I also explained that the documents in themselves were not complete, not original copies and did not obviously add anything.

36. I also explained to her the issue of legal privilege and that the danger she faced of relying on a document that was essentially private and should not be

brought to the attention of a Tribunal, is that she risked waving privilege so that the Respondent would be entitled to ask to see the underlying legal advice.

37. I stressed that under the Tribunal's rules of procedure I need to take a fair but proportionate view and my concern was not to spend a disproportionate amount of time dealing with this matter in less it obviously went to fairness.

38. We then took a short adjournment for the Claimant's party to consider her position. On resuming the hearing, the Claimant indicated that she was not going to rely on the documents. I told her that I thought that was probably for the best.

39. I would add for the sake of completeness that the Claimant sent an email to the Tribunal marked for my attention and copied to the Respondent's solicitor on 6 November 2024. Given that this was sent after the end of evidence and submissions, I did not believe it was appropriate to consider it (although it may become appropriate to do so as part of remedy).

Findings of Fact

40. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.

41. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

42. It is necessary so as to understand the context in which the Claimant's disabilities arose to set out the following matters which we understand are distressing to the Claimant and her family. The Claimant (and other members of her family) was the victim of a violent gang assault occurring in November 2024 which resulted in her sustaining serious injuries. She was stabbed in the head (referred to as a "machete attack") and also received blows to her head with a baseball bat. As a result she sustained a left parietal skull fracture and there was also a large extracranial haematoma in the left parietal occipital region. This information has been taken from the letter from her CBT Physiotherapist at B313-314.

43. In October 2021, the Claimant was diagnosed with cognitive impairment of dissociative seizures (at B372-373). This condition first manifest itself when she had a seizure at work in July 2021. It is described in the letter from her Consultant Neurologist, Dr Robert Hadden (at B373) as "almost certainly non-epileptic seizures, which may partly be caused by delayed psychological trauma and mental health issues". A further letter from Dr Motaz Helall dated 20 June 2022 (at B646-648):

"(The Claimant) told me that she used to work, but since July she developed the episodes of seizures which has been diagnosed as dissociative seizure during them she cannot control her body, her eyes will roll up and flicker, she had difficulty with her speech. I can see that she had this episode today

during the whole clinic time, her eyes were flickering and she was stuttering, she was fully aware and able to communicate.

She said that her episodes are on daily basis and she thinks that the stress at work is the trigger for her episode, after the previous assault in 2014, she sustained some cognitive problem (sic0 and according to her, she has been bullied at work and they told her she will lose her job, because she is not quick enough. She thinks that was the trigger for her seizures."

44. The Claimant also has the following impairments: PTSD; anxiety; and fibromyalgia.

45. The Respondent accepts that the Claimant is a disabled person within the Equality Act 2010 with regard to these impairments.

46. The Claimant describes that she suffers from problems with her memory, retaining and processing information and that it takes her longer to complete and organise tasks.

47. As she presented during the Tribunal hearing, she was virtually unable to see and had to be guided and led by the arm by members of her family in and out of the Tribunal room, her head was raised towards the ceiling for the majority of the time she was in attendance, her eyes were rolling within her eye sockets and her eyelids fluttering. Towards the end of her employment with the Respondent (that is from July 2021 onwards), we understand that this is how she presented at work. As the Claimant described it, she was in a constant state of seizure which she asserted was due to the way in which she had latterly been treated at work.

48. Moving onto the events relevant to the claim.

49. On 18 June 2018, the Claimant commenced employment with the Respondent as a Housing Officer in the Income Team, at which time her Team Leader was Mrs Cheryl Bell. We were referred to the Claimant's Statement of Particulars of Terms and Conditions of Employment at B75-83. She was initially employed on a six month contract.

50. The Respondent is an independent social landlord which employs 290 staff from one site in Chatham. We were told that they are the most significant social landlord in the area in which they operate. The Respondent has an inhouse HR team.

51. It would appear that at that time, the Claimant completed a post-offer questionnaire form which sets out her cognitive impairments and PTSD (at B85-86). These impairments arose from the near fatal attack resulting in a head injury in 2014 as referred to above.

52. Mrs Bell was aware of the head injury, having been told of this by the Claimant, but was not aware of the impairments arising from it.

53. On 27 June 2018, the Claimant attended an Occupational Health ("OH") Review conducted by Sue Morley, an OH clinician. We were not provided with a copy of this report but it is referred to in the outcome letter of the Claimant's later grievance at B655. This states that:

“Upon investigation my findings have led me to belief that had the Occupational health assessment been picked up from on-boarding stages when Charlene Friend first joined MHS Homes. The key details of head injury and PTSD with the adjustments required would have been outlined to MHS.”

54. The Claimant was meeting the expectations in her role as of 17 October 2018. This is evidenced in a performance review undertaken by Mrs Bell which is at B111-113.

55. The Claimant’s contract was then extended until 31 March 2019 (as at B114).

56. In January 2019, the Respondent undertook a restructuring exercise as a result of which the role of Housing Officer was deleted and replaced by the role of Customer Adviser.

57. The Claimant was advised of the proposed changes in a letter dated 29 January 2019 at B120-121.

58. Mrs Bell conducted a further review of the Claimant’s work on 21 March 2019 at which the Claimant again met expectations (at B123-125). In this document, Mrs Bell set out a summary of the year as follows:

“You have fitted in really well and picked up our systems quickly; you fit in with the team. You are not afraid to ask questions or to challenge decisions and admit if you make a mistake. I am really please with your work over the last year and I think it is great that you have been offered a permanent role. With the new changes ahead there is more challenging times ahead, but also a lot more opportunities. I think that where your confidence has grown, you will embrace these changes. You have been happy to help not just team members but also customers.

I am really pleased your progress over the last year and I am confident this will continue.”

59. This ultimately led to the Claimant being awarded a bonus for 2018/19 of £1720 (as at B146-147).

60. In essence, the new role involved undertaking multi functions rather than focusing on specific areas assigned by what were referred to as “patches”.

61. The Claimant was offered a permanent position as Customer Liaison Officer Level 2. Mrs Bell’s evidence was that this role required managing moderately complex customer cases within a three-tiered customer service system. It required addressing issues such as tenancy sustainment, debt management, anti-social behaviour, and housing needs.

62. The Claimant accepted the permanent position and commenced employment in that role in May 2019. Her Team Leader became Ms Lisa Gilbert. There was no handover between Mrs Bell and Ms Gilbert.

63. The grievance outcome letter, already referred to above, states that there was an Employee Impact Assessment undertaken as part of the consultation process during the restructuring exercise. This states “Disability: None of the employees in the affected group had declared a disability” (at B656). The outcome letter also states that there was no evidence that there was any discussion with the Claimant about her PTSD and how it could potentially impact on her in either of her roles (at B657).

64. Towards the second half of May 2019, the Claimant raised concerns about her ability to cope with the training for the new role. We refer to an exchange of emails at B126-139 between the Claimant and Sarah Cole, HR Business Partner and Colin McCarthy, HR Manager. The Claimant was distressed at the amount of training which she had to attend over a short period of time and on-the-job learning, given her cognitive impairment and short-term memory issue. HR engaged with her concerns and referred her to its Employee Assistance Programme and to OH.

65. On 1 June 2019, the Claimant's brother was re-attacked and hospitalised by one of the original attackers from 2014 and suffered a head injury. Whilst the matter was referred by the CPS to the Crown Court, the defendant absconded and failed to attend the hearing and this resulted in a warrant for his arrest. The Claimant found this very distressing not least because it re-triggered the events of the original attack in her mind. She needed to stay in close contact with the Police at that time including by telephone and had to explain the position to the Respondent's HR and Ms Gilbert (the latter being critical of the time it was taking her away from her work).

66. On 10 June 2019, the Claimant was referred by Ms Cole to the Respondent's OH advisers, KB Occupational Health Services (at B143). This attached a copy of the post-offer questionnaire form, which we have referred to above.

67. On 26 June 2019, Ms Morley provided an OH report in the form of Advice to Manager on Fitness to Work (at B148). Ms Morley notes that the Claimant has a disability that is likely to fall within the Equality Act 2010. In the box headed "Further Comment", Ms Morley recited the Claimant's medical history and identifies a number of recommended adjustments relating to the training and to the position of her desk (ie where she should sit).

68. Ms Morley noted that the Claimant has lost control of her diary following the recent reorganisation and this has left her feeling insecure and vulnerable. This highlights to us that this is the first indication that the new way of working was causing the Claimant psychological difficulties.

69. In addition, Ms Morley recommended that the Claimant be referred for an expert assessment of her neurological difficulties, that she would make some enquiries and revert back. Ms Morley suggested that in the meantime a joint meeting with HR, the Claimant and her direct line manager may help her manager understand her day to day difficulties and make the Claimant less anxious about the training and her future role. We were not referred to in evidence of such a meeting taking place.

70. On 28 June 2019, an email was sent from an OH practitioner (the name is redacted but it is most likely to again be Ms Morley and this is acknowledged later on by Talia Cruz, the grievance officer) to Ms Cole with regard to the recommended referral to a neurological specialist (at B484). Ms Morley suggested three different agencies with regard to the Claimant and suggested a GP report or an independent report regarding the neurological reference. In particularly, she suggested an organisation called Psicon in respect of the latter. The Claimant did not see this email at the time but only

saw it as result of a later Subject Access Request made under data protection legislation.

71. The Claimant completed a consent to contact her GP or treating psychologist form on 5 July 2019.

72. The grievance outcome letter, we have referred to above, states that the matters raised by Ms Morley in her email were not actioned (B658-659).

73. As a result of the machete attack (which was to the back of her head) the Claimant she was extremely concerned about the possibility that someone was approaching her from behind. This is said to be a symptom of her PTSD. As a result, the Claimant required a designated chair in a specific location within the office, at the corner near the window. This would allow her to have her back to the nearest wall so that she could see anyone approaching her. On occasions when she was not sitting with her back towards a wall and was surprised by a person approaching her from behind, this caused a startled response and made her jump or go into what she describes as "fight or flight mode". In addition, being seated in her desired place lessened the surrounding noise and this helped her concentration.

74. We were provided with evidence in the form of a floor plan and photographs of the office with regard to where the Claimant needed to sit.

75. In evidence it was quite clear that Mrs Claire Morris (at the time known as Ms Carter), Ms Gilbert's line manager, thought that the Claimant wanted to sit somewhere quite different to where the Claimant actually needed to sit. She said in evidence that she could not understand why the Claimant wished to sit there (ie where she believed the Claimant wanted to sit) but seemed unaware of the location which would have met the Claimant's requirements. Ms Carter was mistaken or unaware of what had been recommended by OH and as to where the Claimant needed to sit.

76. The Respondent explained that they operated a hot-desk system which precluded the Claimant from always sitting at her preferred location. The Claimant's evidence was that there was one person who was in a wheelchair who had a permanent desk and another who had a special chair sited at a permanent desk but she was not provided with a designated desk.

77. The Claimant wanted to sit at the desk in the corner by the Letting Key Cupboard with the window behind. There was no thoroughfare in this part of the office and so no one could walk behind her. Ms Carter had on at least once occasion walked behind the Claimant when she was sitting at a bank of desks and had startled her. The Claimant appeared to have had to sit in an number of different places because she could not always sit in her preferred seat when it was occupied and given that she started work later than others.

78. Whilst the Respondent made exceptions for others as to where they could sit, the Claimant was simply provided with a laminated sign which said "Please do not use this desk" which she was told to carry around and use. The Claimant found this demeaning.

79. The grievance outcome letter states at B663 that there was a concern that the Claimant was isolating herself by not sitting with the team. This was raised with the Claimant by Ms Gilbert in a meeting. The letter states that employee raising this concern was unaware of the Claimant's impairments and Ms Gilbert should have managed the inappropriate comment and addressed it with the employee at the time. The grievance outcome letter concludes that there were no discussions on how to communicate with the team about the Claimant's needs and how the team might be able to integrate with her whilst implementing the adjustment.

80. On 31 July 2019, an OH review was undertaken by Kim Boggins (at B173). This refers to a GP report having been provided but we were not taken to a copy of it. The OH review records that the change of desk position has been actioned and has mainly been useful. Notwithstanding the previous OH report and email from Ms Morley as to enquiries into referral to a neuropsychologist, Ms Boggins puts this onto the Claimant to action.

81. On 31 July 2019, Ms Gilbert conducted an "On Track" quarterly meeting with the Claimant (at B169-172). This appears to be the Respondent's performance review process. It is unclear from this document whether the Claimant's SMART targets were adjusted to reflect her impairments or whether Ms Gilbert was even actually aware of the need to do so. Certainly, her later interview as part of the Claimant's grievance investigation indicates that she was not. Further, the summary of the last quarter indicates that Ms Gilbert believed that the Claimant had received support from OH and counselling in order to cope with issues "outside of the workplace" and states "we are working together to find the best way to manage this without it impacting on her workload" (at B171-172). There is no indication as to how this will be achieved though and no indication that the Claimant's workload is any different to anyone else's.

82. On 3 August 2019, the Claimant's father was rushed into hospital requiring emergency attention, having attempted to commit suicide. As a result, the Claimant needed to spend some time with her parents and she requested part of Monday 5 August off work to be at home with her family. She had to discuss this with Ms Gilbert which she found harrowing and she also found her response to be very judgemental.

83. Indeed, at the time that this happened, Ms Gilbert took the Claimant into one of the office side rooms and told her that she felt that people with mental health issues and people who commit suicide are attention seekers. The Claimant was disgusted by these comments, could not understand why anybody would ever say such a thing, let alone say it out loud, and was so hurt by what she said that she went to the toilet and cried.

84. The Claimant attended a further OH assessment on 27 August 2019 with Ms Boggins (at B178). This indicates that the onus to obtain a referral to a neuro psychologist had been placed firmly onto the Claimant. The report also states that the Claimant continued to find having an allocated desk useful and it has not been an issue with other team members. The email exchange between the Claimant and Ms Cole at B179-180 confirms this. We assume that reference to the seating arrangement is at the desk that the Claimant wanted

to sit at. This seemed at odds with the Claimant's position as to the lack of provision of her preferred desk.

85. On 9 September 2019, the Claimant attended a further OH assessment with Ms Boggins at B183-184). This indicates that the Claimant's GP had referred her to a neuro psychology service at Sevenoaks Hospital, her scoring for depression and anxiety remained high, that she had started taking medication and s/he had noticed some improvement in her symptoms.

86. On 10 September 2019, the Claimant attended soft skills training but had to leave the room and could not complete it because by coincidence it contained a case study of a girl who got stabbed by a machete. Given the similarity to her own situation, she could not cope with it. In response to her email apologising for leaving the training and explaining why, Ms Cole expressed her concern and said that the trainer would take this into account when putting together any case studies for future training materials (at B185-186). From the correspondence, it is clear that Ms Gilbert was aware of the circumstances of this matter.

87. On 1 October 2019, the Claimant attended her monthly 1-1 with Ms Gilbert (at B187-190). This document indicates that the Claimant was struggling to manage her time in her new role and Ms Gilbert recorded this as linked to the Claimant's previous head injury and difficulties in concentration. Ms Gilbert berated the Claimant for spending too much time away from her desk being distracted by Clare Southworth, a work colleague, but the Claimant pointed out that this was work related. This was confirmed by Mrs Southworth in her oral evidence. We would also note that given the position of the Claimant's allocated seat (when she got it), she had to get up and move to interact with other members of the team.

88. On 19 December 2019, the Claimant attended a performance review meeting with Ms Gilbert. We were not taken to any notes of this meeting. The outcome of the meeting is contained within a letter from Ms Gilbert to the Claimant dated 23 December at B199.

89. The Claimant's evidence as to this meeting is as follows. It was an impromptu meeting at the end of the day in a side room when nobody else was in the office. Ms Gilbert advised her that it was a formal meeting which sent the Claimant into a state of panic. She was told that she was being placed on a Capabilities Performance Improvement Plan and that she needed to take it seriously because, whilst Ms Gilbert said that she hoped it did not come to it, it could mean the Claimant losing her job. Ms Gilbert referred specifically to an allegation that the Claimant had been driving around wasting her time (a reference to when the Claimant had difficulty finding the address of one of the Respondent's tenants). Indeed, the Claimant goes into some detail about this at paragraphs 54 (second 54) to 60 of her witness statement. In addition, Ms Gilbert told the Claimant that the rest of the team were not happy to have to carry her, she was not a team player, she made no effort to interact with the team, and it was unfair to make the rest of the team come over to her (the reference being to the Claimant sitting at her preferred seating position). Ms Gilbert also told the Claimant that her work was not good enough, that she was too slow and she was not happy about it. She further stated that she was

placing the Claimant on the Capabilities Performance Improvement Plan/Note because she felt that the Claimant's inability to manage the workload was the main problem. Ms Gilbert ended by stating that she would be sitting with the Claimant on a daily basis to monitor her work. The Claimant said that she felt worthless, demoralised and totally victimised by what happened. We have no reason to dispute the Claimant's evidence.

90. The Claimant subsequently asked to see Ms Cole on 23 December 2019. We were referred to her file note of this meeting at B409. This records that the Claimant was very upset and felt that the Improvement Note was not fair. In the note, Ms Cole records that the Claimant had concerns about communicating with Ms Gilbert and that she felt that she would be able to work more effectively with one of the other Team Leaders, although she further records that the Claimant said that she had no personal issues with Ms Gilbert. Subsequently, Ms Cole spoke with Ms Carter and agreed that whilst the Claimant would continue to report to Ms Gilbert from a line management perspective, her performance would be reviewed by Ms Bell. The arrangements were to commence from 2 January 2020.

91. The letter of 23 December 2019 states that the meeting was held under stage 1 of the Improving Performance (Capability) Policy and attached a copy. The relevant section of this policy is at B89 and sets out examples of support to be considered, which includes "a review of workload". In her interview, as part of the later grievance investigation, Ms Gilbert stated that she was aware of the Claimant's disabilities but was not aware of how badly they affected her (at B565). She further stated that she was advised by Ms Cole to issue the Improvement Note, although she said that she did not understand what this was (at B566). Ms Cole was aware of the Claimant's disabilities and the adjustments that were required but does not appear to have told Ms Gilbert of these whilst instructing her to issue the Improvement Note.

92. The support measures set out in the letter do not address workload or time management. This does seem at odds with what Ms Gilbert has identified in the meeting held on 1 October 2019. Indeed, it is hard to see how some of the measures even amount to support given that the Claimant is, in a number of respects, simply being asked to keep a record of the work she is doing more to monitor whether she is undertaking enough work rather than with a view to reviewing the amount of her workload. As such and given the Claimant's evidence of the tone of the meeting this does not appear and would not be perceived as being supportive.

93. On 24 December 2019, Ms Cole referred the Claimant for a further OH Assessment (at B201-202), the resultant report of which is contained within an email to her from Ms Boggins dated 9 January 2020 (at B204-205). We are unclear whether this was provided to the Claimant at the time but it was copied to Ms Gilbert on 16 January 2020.

94. We note from Ms Boggins' email in particular:

"Charlene expressed some concern about if her Team Leader current and new, fully understood the nature of a head injury and how this possibly affects cognitive function and possible impact on her ability to undertake some aspects of the role, this she feels is having an impact on her performance. I would therefore suggest that it maybe useful if we agree a meeting with HR, the Team Leaders OH and

Charlene to discuss this and hopefully provide further information about the impact of Charlene's head injury. Charlene said she would be happy to do this so if this is something you and the Team leaders would find beneficial I would suggest we agree a time when I'm next on site in February.

Charlene did advise that she found useful reporting to a new Team Leader and that having her desk away from the main team can be useful as she does find it difficult to concentrate so I would suggest that this support remains in place."

95. On 11 February 2020, the meeting suggested by Ms Boggins took place. This was between the Claimant, Ms Gilbert, Ms Boggins and Ms Cole. We were not taken to any notes of this meeting. Reference is made to the meeting in an email exchange between the Claimant and Ms Cole at B209-210. In her email to the Claimant on 12 February 2020, Ms Cole thanks the Claimant for attending the meeting and asks if she found it useful. In response, later that day, the Claimant responds yes, states that Ms Boggins was brilliant and she felt that Ms Boggins managed to say those things that she had not been able to say. In addition she states that Ms Boggins has agreed to write a letter for her doctor regarding reference to a neuro specialist, which is something she has been attempting to get actioned for some time. The email ends: "so I know I have been a mess and cried lots but today felt like a massive weight of my mind so thank you for arranging it I feel a lot better."

96. Ms Boggins' letter to the Claimant's GP is at B213-214. In particular, we set out the first paragraph on page B214:

"These issues are impacting on Charlene's work performance another both myself and her manager have tried to provide solutions to this challenges I now feel that having a better understanding of how injury may affect her normal cognitive function may prove to be very useful.

I would therefore be very grateful if you could assist Charlene further in this matter and see if a referral to the Neuropsychology service can be expedited."

97. In March 2020, the UK was put under the first Covid-19 lockdown, The Claimant was working from home (as indeed was everyone else) and was self-isolating for a period (which we understand to have been 12 weeks) due to her asthma and her underactive thyroid.

98. On 15 May 2020, a further OH report was sent by Ms Boggins (at B218). This contains an update of the Claimant's medical position and how she was coping with working from home. It contains a recommendation that an individual risk assessment needs to be undertaken and any issues identified addressed on the Claimant's return to the office. However, as far as we are aware, this assessment never took place.

99. On 1 June 2020, Ms Gilbert held a further Performance Review meeting with the Claimant. We were not shown any notes of this meeting but reference is made to it in the follow up letter dated 9 June 2020 (at B219). The letter extends the Improvement Note given the Covid-19 lockdown and repeats the support measures contained in the previous letter save for the reference to Police contact. We find nothing untoward in the extension of the Improvement Note in itself.

100. On 24 June 2020, the Claimant is sent for a further OH assent and the report is at B221. Whilst this refers to a risk assessment of the Claimant and her team resuming home/site visits, this is not an individual risk assessment of

the Claimant as envisaged by Ms Boggins in the previous OH report. The report contains a reference to the Claimant stating that she was going to speak to her manager about a request to start work at 9 am rather than 10 am as she feels her energy levels in the morning are higher again now that she started treatment for her underactive thyroid.

101. On 29 July 2020, the Claimant attended a further performance review meeting with Ms Gilbert and Ms Cole, the notes of which are at B468-470. We note in particular paragraphs 14-15 which suggest that the issue is one of quality but in reality it appears more to do with quantity of work. Indeed, at paragraph 27 Ms Gilbert raises the issue of quantity and puts onto the Claimant to identify if she might have too much work, rather than carrying out an analysis of how much the Claimant can do.

102. We were referred on a number of occasions by the Respondent's witnesses to the Claimant only having to undertake 70% of the work provided to others. However we were unable to find any documentary record of this 70% figure.

103. On 26 August 2020, the Claimant attended a further meeting with Ms Gilbert and Ms Cole, the notes of which are at B464-465. We note in particular paragraphs 32 and 36 which again put the onus on the Claimant to indicate if she has to much work to complete or requires more time to complete it.

104. We also note the email dated 27 August 2020 from Ms Cole to the Claimant at B222:

> *"In terms of the capability process- we're still managing and supporting you under the informal stage of this process. This will involve structured weekly review meetings with Lisa to be held on 4 Mondays from 7" September, and will include a review of the CRM report that allows us to look at performance across the team. I'm not sure that there is anything in particular that Lisa needs you to do in order to prepare for the meeting- it may be best for you to check this with her. By completing these reviews, Lisa will consider whether this should be referred to the formal stage of the capability process, in which case a formal meeting would be held with you. Lisa is very committed to continuing to support you, so please do speak to her if you have any concerns or issues at any stage."*

105. On 16 September 2020, the Claimant attended a further OH assessment with Ms Boggins, the report of which is at B224. We note from this that the Claimant has advised Ms Boggins that her performance monitoring has been extended until December 2020. Ms Boggins records that she tried to reassure her as to the process but the Claimant said that she knows how to do her job but can still at times feel overwhelmed when her anxiety levels are high. Ms Boggins states that she knows that the Claimant's manager is very supportive of her and she suggests that this support continues on a regular basis and that the Claimant is encouraged to discuss how her psychiatric treatment may currently be affecting her in any impact it is having on our work activities. This passage seems to be directed at the reader of the report rather than reflecting what Ms Boggins said to the Claimant during the assessment.

106. On 24 September 2020, the Claimant overheard a private telephone conversation taking place in the next room. The conversation had been put on speakerphone and was between Ms Gilbert and Ms Carter. It was a discussion of the performance of members of the team including the Claimant. The Claimant was very upset by what she heard about herself

and wrote a long email to Ms Cole the following day and went off sick (B225-228).

107. In essence, the Claimant relates this within her further particulars at B63 as follows. That Ms Gilbert told Ms Carter that the Claimant was lazy and underperforming and went into examples of the Claimant's struggles due to her disability. She further stated that she had decided that the Claimant was incapable of doing her job, that she would not be holding her hand and that she had to find a way to let her go. Ms Gilbert added why can she not be easy to deal with and have no issues just like other staff members. These phrases are placed in quote marks. Hearing this conversation, the Claimant's anxiety was triggered and she left the office and she started crying as a result of the negative comments about her. She then contacted her GP the same afternoon was signed off work for seven weeks.

108. Whilst the Claimant's evidence and the email do not specifically identify what was said, the Claimant does state that she heard reference to herself as not being able to do her job and that they have to find a way to let her go. Indeed, the Claimant was so upset at what she heard, she got her bag and left the office.

109. In evidence, Ms Carter said that she does not recall the specifics beyond having a discussion with Ms Gilbert about members of the team, including the Claimant, and their under performance.

110. There is further detail of the conversation overheard by the Claimant at B884, but we were not taken to it by the parties and do not know what this document is or when it was created. It is part of the document that runs from B884-888. With regard to the overheard conversation, it goes further than the email to Ms Cole the following day and the Claimant's witness statement but reflects what is set out in the further particulars.

111. It was clearly unfortunate that the Claimant overheard what was intended to be a private conversation between managers. However, we can see that this would reinforce the Claimant's belief that Ms Gilbert intended to get rid of her and would have caused much distress to the point of having suicidal thoughts.

112. The Claimant was off sick from the date of that overheard conversation for a period 7 weeks due to stress at work. We were referred to her fit note at B234.

113. On 22 October 2020, the Claimant attended a further OH assessment with Ms Boggins at B230. The report makes reference to the overheard conversation, as well as a comment made during a training session on suicide that upset her and brought back some difficult memories about her father. The report records that the Claimant wants to return to work but does not feel able to come back and work with her current manager. The report suggests that in order to support an early return to work, consideration should be given to a possible temporary move to a new team.

114. On 27 October 2020, the Claimant attended a meeting by Microsoft Teams with Ms Cole and Ms Carter, the notes of which are at B236-237. In an email from Ms Cole to the Claimant dated 2 November 2020, Ms Cole sets out what was proposed as a result of the meeting, in particular that they were willing to agree to her request to report to a different Team Leader. This was expressed to be an exceptional measure and a further example of the adjustments that they were putting in place to support the Claimant. The Claimant was to report to Mrs Bell upon her immediate return to work and that this arrangement would be reviewed after a one-month period. In addition, it was suggested that the Claimant takes annual leave when certificate expires and return to work 16 November 2020 (B235). The email ended that Mrs Bell will continue with the Claimant's performance review which Ms Gilbert was completing and will go through this on the Claimant's return. The email reminded the Claimant that the Improvement Note was valid until 9 December 2020, at which point a decision would be made as to whether the formal stage of the capability procedure would be put in place.

115. On 11 November 2020, the Claimant attended a further OH assessment and the report is at B239. This records Claimant happy to be returning to work with Mrs Bell.

116. On 16 November 2020, the Claimant returned to work. Mrs Bell took over as Claimant's line manager.

117. Between mid to the end November 2020, two 1:1s took place between the Claimant and Mrs Bell. These are at B240-255. Whilst there are numerous references to quality of work, there are also numerous references to quantity and no indication of any adjustment to the Claimant's workload in respect of her impairments.

118. On 2 December 2020, the Claimant attended a further OH assessment the report of which is at B257. This mentions, in the context of the Claimant's speed of work, that previous OH advice did indicate that an adjustment regarding workload maybe something that may need to be considered as these issues maybe related to the Claimant's brain injury. However, we could not find any previous mention of this and there is no recommendation of what action the Respondent should take and the report ends that no review is necessary unless there are any future concerns.

119. A further 1:1 took place between the Claimant and Mrs Bell between 30 November and 4 December 2020 (at B258-288). We repeat our findings with regard to the 1:1s undertaken between mid to end November 2020.

120. On 31 December 2020, the Respondent sent a letter to the Claimant inviting her to a performance review meeting (in fact more properly called a formal capability meeting) to be held on 8 January 2021 (at B289-290). The letter states that the meeting will discuss concerns regarding the Claimant's performance and the support measures which have been put in place for her. Those concerns were said to include: gaps in working day; customer care; including change of appointments; and use of systems including Service Connect. We would note that the reasonable adjustments listed at the bottom

of B289 and continuing over the page do not include reducing the Claimant's workload.

121. On 6 January 2021, the Claimant attended a further OH assessment, the report of which is at B295-296. We note that this report makes reference to Ms Boggins writing to the Claimant's GP because she felt that a more detailed assessment of any cognitive dysfunction related to the Claimant's original brain injury which might provide some understanding of her ongoing difficulties having an impact on aspects of her work, for example "speed of working".

122. We would also note that in a later capability meeting held on 8 September 2023, the minutes state at paragraph 17 on B820:

"CF (the Claimant) feels that her mental health and physical disabilities have been completely ignored and not taken into consideration. The Occupational Health consultant stated that if a member of staff receives 10 pieces of work then CF should receive five pieces. By having the reduction in work, this will relieve some of the pressure and CF will get faster over time. There was supposed to be a reduction in work but in fact CF was given the most amount cases and was treated unfairly when compared to other team members."

123. On 8 January 2021, the Claimant attended a formal capability meeting at which Ms Carter, Mrs Bell, and Ms Cole were present. Mrs Morris conducted this meeting.

124. The meeting was said to be held to discuss the concerns in relation to the Claimant's performance and also the support measures which had been put in place by way of reasonable adjustments taking into account her health conditions.

125. The notes of this meeting are at B297-300. At paragraph 78 and 79 on B300, Ms Carter is recorded as stating that she will continue to make reasonable adjustments for the Claimant however this needs to be a "two-way street" and that she is happy for the Claimant to take short breaks during the day if this would be useful, and to receive other support, however the Claimant will need to "meet us half-way". This would appear to indicate that perhaps Ms Carter did not understand the meaning of reasonable adjustments.

126. On 15 January 2021, Ms Carter sent a letter to the Claimant as to the outcome of the meeting (at B301-303). The Claimant was issued with a written warning in respect of timekeeping and training, valid for six months, but this letter does not spell out what the Claimant needs to do, particularly in respect of time management.

127. We would note that in her witness statement at paragraph 25, Mrs Bell refers to the Claimant's patch level as being the same as others in her role but due to her performance review she was only expected to complete 70% of her work compared with 100% required of the other officers. This was slightly confusingly put in evidence but this is what we take it to mean. However, we found no other reference to this in writing either in the notes of any meetings, any 1:1s, or in this outcome letter.

128. On 9 March 2021, the Claimant attended a further OH assessment, the report of which is at B304-305. This records that the Respondent is looking at identifying time management training (albeit some two months after the above warning was issued).

129. In March 2021, Ms Gilbert becomes the Claimant's line manager again.

130. On 23 April 2021, a Retention Initial Assessment was undertaken in respect of the Claimant. This is at B308-312. It has been undertaken by a Vocational Specialist called Ami Smallwood) and contains a summary of the Claimant's personal factors at B311, as follows:

- *In the office I need to be near a wall so I have less distractions and there is nobody behind me as this can be triggering for me*
- *I need to have a reduced workload to allow me to process the task initially*
- *it would help for my employer to be better in educated on the impact trauma and cognitive impairments can have on my ability to do my role so I can be treated more equally in not be expected to maintain the same level of someone without a brain injury"*

131. It appears that the Claimant has been referred for this assessment by a CBT Psychotherapist but to whom it is subsequently provided to is unclear.

132. There is a letter from the CBT Psychotherapist to a Consultant Clinical Neuro Psychologist dated 7 May 2021 at B313-314 making a referral for the Claimant to have a neuro psychological/cognitive assessment. That letter refers to having managed to access an out of area specialist vocational worker to support the Claimant and ensure her employers are following all necessary methods/adjustments to support her (at the bottom of B323). Thus it appears that the intention was to give the above assessment to the Respondent but there is no evidence that it was.

133. In May 2021, the Respondent slightly amended its working structure so that Team leaders supervised a particular function as opposed to being generic officers. So in effect, they stopped being patchless.

134. On 12 May 2021, the Claimant attended a further OH assessment, the report of which is at B315-316. This makes reference to the Claimant advising that her Psychiatrist has referred her to a Vocational service which can provide work support. It also states that the Claimant has moved teams again recently and that the type of work she will be doing will be more focused on Housing and not Income. The report continues that the Claimant is happy with the move to the new team, has no concerns about the type of work she will be doing and that she continues to remain very positive about work.

135. On 14 June 2021, the Claimant received a letter from the Respondent stating that given her scoring in the end of year review she was not going to receive a bonus (at B319).

136. On 13 July 2021, the Claimant attended a performance meeting conducted by Ms Carter. Also in attendance were Mrs Bell and Ms Cole. The notes of the meeting are at B321-323. Whilst the notes refer to "LG" (Ms Gilbert) we were told in evidence that she was not in fact present the meeting. The

Claimant said in evidence that these notes were not an accurate record of the meeting.

137. At paragraph 32 (at B322) Ms Carter states that she feels that there has been a noticeable difference in the Claimant's performance and that she does not have any issues regarding her capability to perform her role. We note that this meeting is just 2 days shy of 6 months since the Claimant's written warning was issued. On balance of probability this indicates to us that the written warning was at a end and we would have expected to see a letter confirming this.

138. On 20 July 2021, the Claimant had a seizure at work and was taken to hospital. We were referred to photographs of taken of her at work and at hospital at B325-329.

139. The Claimant alleges that Ms Gilbert regularly referred to her as "Regan", the central character in the film "The Exorcist", who was possessed by the Devil. She further states that she informed HR of this. We note that the Claimant did not raise this as part of her grievance and we cannot see any contemporaneous documents that mention it.

140. However, the Claimant's further particulars of her harassment claim indicate that the name calling started at that point and continued thorough August and September 2021. We refer to B61-62 at paragraphs 12-17 which set out extensive detail of this name-calling and as to the seizures that the Claimant suffered.

141. The most tangible documentary evidence we do have is a text exchange between the Claimant and Ms Gilbert on 14 September 2021 at B331-334. There is no suggestion that these text were not sent as they appear in the bundle. Mr Stewart asserted in cross examination that, given the use of an "x" (ie a kiss) at the end of the Claimant's messages, the conversation was in fact friendly. The Claimant denied this. Further, we note that it is only at the end of the text exchange that Ms Gilbert actually calls the Claimant "Regan" and also reproduces a poster and a still from the film. Indeed, we set out the Claimant's evidence from her first witness statement at paragraphs 123 to 124 which is emphatically poignant:

> *"123. 4.9.2021 at 18:36 Received a text message from LG I am explaining I have needed to go to hospital but there are serious delays, LG responded calling me Ragan, this is the name she would call me when I was in the office, I felt terrible when she would call me this name, I am a Christian and I take spiritual matters very seriously, I believe in demonic possession and when she would tell me I needed an exorcism it broke my heart. I have not been able to attend my church meetings because of my seizers and the fear of how I look and how LG said that's how I look, it continually makes me feel ashamed and worried of how people see me. See pages 331 to 336*
>
> *123. I hate my seizers, but I cannot stop them, so it makes me not want to even leave my bed because of how I look. LG added pictures of the Exorcism film where the girl is foaming green stuff at the mouth and is levitating from the bed. I do not know what I have done to LG to make her hate me so much, but this really really broke my heart.*
>
> *124. Medically there has been a hard struggle for Dissociative Seizures to be believed but to hear LG constantly mock me for something out of my control and to laugh at me yet on every occasion I had previously asked her for help I was told I was too lazy and not fast enough but to now denote that I had some type of evil spirit in me, this has remained with me and psychologically I cannot get past it. On multiple occasions, when CC/CM was in the office I would still say to her please can I talk to you, she would brush me of saying she was busy, it was extremely difficult to get her attention."*

142. Mrs Brooker said in oral evidence that on several occasions she overheard conversations in the office where the Claimant was referred to as “Regan” and Ms Gilbert saying that the Claimant need to get over it, letting out huge sighs when the Claimant spoke and stating, what is she going to feed me this week?

143. Whilst Ms Carter and Mrs Bell said in evidence that they did not witness such name calling, there is no reason to suppose that it did not happen, simply because they did not hear it. And of course we do not have Ms Gilbert as a witness.

144. We accept the Claimant and Mrs Brooker’s evidence.

145. Indeed, we are of the view that such name calling and the sending of such images are both unwanted and offensive as well completely inappropriate in the circumstances, particularly from a line manager. We can well imagine how hurtful and distressing the Claimant would find this particularly given the seizures that she was experiencing.

146. On 6 October 2021, Ms Looker, the Claimant’s Vocational Specialist, sent an email to Ms Cole raising her concerns about the with regard to the way in which the Claimant was being treated at work. This is at B348.

147. On 14 October 2021, the Claimant underwent a further OH assessment, the report of which is at B337-338. In this report, Ms Boggins records that the Claimant has no issues with manager, no work related concerns. However, this is clearly at odds with the contents of Ms Looker’s email.

148. Indeed, the Claimant said on several occasions that her meetings with Ms Boggins were lengthy and the reports are very brief and did not always reflect what she had said and were phrased in such a way as to favour her employers.

149. However, there is no contemporaneous challenge to the accuracy of these reports and we cannot go as far as agreeing with the Claimant. But it does seem unlikely, given Ms Looker’s email, that the Claimant is happy with everything at work as Ms Boggins’ report indicates.

150. On 10 November 2021, the Claimant attended a review of her work with Ms Gilbert (at B350). As far as we can determine, there is no apparent reduction in workload in respect of her impairments. Under the heading “ Any other comments” at B367 Ms Gilbert states:

> *“We went through Charlene’s work and what is outstanding to do. She will do these actions as a priority. I am really impressed at the improvement in Charlene’s work output. I can see she is still having some issues with system input but the quality of the work she has done is considerably better. She also received a compliment from another L2 re the quality of information she provided regarding a case.*
> *Charlene feels that being able to focus on her workload is much better for her and she has received good support from her team with training etc.*

I would like her to focus on the system work and her understanding of the contact management work actions– eg: mx and complaints in order to have a better knowledge base for when the other work types go into this."

151. However, this is at odds with what Ms Gilbert states in the last paragraph at B370:

"Unless Charlene can start to manage her work in a timely manner she will continue to receive complaints due to lack of contact with customers following on from initial cases. I want her to think about ways this can be done as I cannot see she is using her diary as she agreed.

Charlene to review comments in red and do any outstanding actions asap as discussed then forward to me what she has done. We will have another meeting in 2 weeks when we will also do her ontrack. This is booked in for 24/11/21. I have sent her the form and I would like her to complete her part prior to our meeting."

152. We were unclear as to when the document had been completed or indeed whether it had been completed on an ongoing basis. It appears to go back to June 2021 and then up to 10 November 2021.

153. On 11 November 2021, Ms Carter sent an email to the Claimant with regard to her approval of the Claimant attending a time management course (at B371). We were somewhat surprised that having identified this issue some time ago, it still had not been booked.

154. By letter typed on 29 November 2021, the Claimant finally received her neurological report (at B372-373). This is in the form of a report from Dr Hadden, Consultant Neurologist. This letter succinctly describes the Claimant's condition, including the more recent seizures:

"You have never been right since traumatic head injury in 2014, although have managed to hold down a job with only mild cognitive impairment and ongoing mental health problems with PTSD and depression. The new problem has been seizure like episodes, with episodes of stuttering of the speech and cognitive slowing. The seizures started in July 2021 at work and have been happening most days since then. Typical episodes consist of jerking of the head and uprolling of the eyes with preserved consciousness, lasting 3-5 minutes with feeling exhausted afterwards.

You are also getting frequent headaches most days associated with sensitivity to light and noise, sometimes pressure in the nose, lasting at least 20 minutes.

During the consultation, your eyelids were fluttering a lot, and you had several of your typical seizures. During these, there was rapid side to side movement of the head and face, inability to speak, but preserved awareness, preserved ability to follow commands, the head tending to look upwards and these do not look epileptic."

155. Dr Hadden's set out his opinion as follows:

"These are almost certainly non-epileptic seizures, which may partly be caused by delayed psychological trauma and mental health issues. You also have chronic migraine, which may be made worse by addiction to taking paracetamol too often (mediation overuse).

| have reassured you that none of this is anything medially serious and there is a good chance it will all improve."

156. The letter then sets out a plan for further referral and treatment. This includes referral for an EEG test at King's College Hospital and to neuropsychiatry at Sevenoaks Hospital and adjustments to the Claimant's medication. The letter ends:

"Medication is not going to help these non--epileptic seizures; the best treatment is understanding them in the treatment for your mental health and possibly CBT."

157. By letter dated 15 December 2021, Dr Izekor, a Locum Consultant In neuro psychiatrist wrote to Dr Khan, Consultant Neurology (at B374). This letter related to Dr Khan's referral of the Claimant to the West Kent & Medway Neuropsychiatry Service. Whilst the letter declines the referral on the basis that the other services currently involved in the caplets care will be able to address some of the issues triggering/perpetuating her seizure episodes, it does set out following:

"She (the Claimant) is having some difficulties at work, in that she feels unsupported in this matter, in addition to their other life experiences, are likely to have triggered these seizure episodes in her Erin if the episodes are confirmed to be non-epileptic in nature)."

158. On 15 December 2021, the Claimant undergoes another OH assessment. The report, again provided by Ms Boggins, is at B375-376. In particular, she reports that the Claimant has advised her that she does not have any concerns at work at this time and she does feel she's been well supported and that no further support has been suggested at this time.

159. On 24 January 2022, the Claimant has a further OH assessment the report of which is at B378-379. This report simply sets out the medical advice contained in Dr Hadden's letter dated 29 November 2021. Simply records the medical evidence.

160. On 8 February 2022, the Claimant undergoes a further OH assessment. The report is at B380-381. This report is somewhat vague. It states that the Claimant she has now returned to working in the office (without clearly identifying the period of time that the Claimant was working from home). It states that there are issues about her seating arrangements related to her anxiety as to sitting in a position where people can approach from behind (in vaguer details than an earlier report). The report also refers to the suggestion that the Claimant has an independent assessment regarding her health issues, funded by the Respondent, which the Claimant has agreed to. But it does not indicate who is going to arrange it or what in particular it is about. The report also refers to a number of other matters that it is suggested that the Claimant speak to HR about but without identifying what they are.

161. On 30 March 2022, Ms Gilbert undertook the Claimant's On Track end of year meeting. The form recording this is at B383-387. We note that the Claimant was rated a 2, which means that she would not qualify for a bonus. Further, the SMART targets are very much about quantity with some assessment of quality by reference to "satisfaction". However, we do not know how satisfaction is measured. Further, we do not know if these targets are adjusted in comparison to others. The Line Manager's summary indicates concerns to do with caseload and timeliness and as to putting off further review until the Claimant gets the "all clear" from the hospital. We also note the last box on B387 which refers to a "Wap plan and any adaptations as per occ health / neurologist etc".

162. By letter dated 11 April 2022, the Claimant raised a formal grievance related to her ongoing disability discrimination. This is at B388-398 and was drafted by the Claimant with the assistance of Ms Looker.

163. This is a very lengthy letter and goes into the history in some detail of the past events which are to a great extent covered within this Judgment. It also incorporates, by way of cut-and-paste, other letters and emails sent at various times as well as references to disability discrimination rights and obligations. At B395, the Claimant sets out the recommendations made by Ms Boggins, which would allow her to perform her role, and at B396, her attempts to resolve the matter. She then makes the point that she is not satisfied the outcome and hence her grievance by way of seeking a resolution as soon as possible.

164. On 13 April 2022, the Claimant attended a further OH assessment the report of which is at B399-400. This refers medical developments. In particular it refers to the above meeting that the Claimant attended with Ms Gilbert on 30 March 2023 and talks about the Claimant's intention to consider making a grievance (which of course she has already done by then).

165. On 28 April 2022, the Respondent sent the Claimant a letter headed Receipt of Grievance (at B535-547). This letter states the arrangements that have been made to hear the Claimant's grievance and then sets out what is said to be a summary but which runs to a total of 12 pages. It is also a very confusing letter which jumps from writing in the third person to first person (which appears to be cut-and-paste from the original grievance letter and an incomplete attempt to convert it to the third person).

166. On 28 April 2022, did not attend work due to ill health. We refer to her fit note at B548 which is dated that same day and indicates the cause of unfitness to work is " seizures awaiting neurologist". Whilst this is dated for a period of one month, this was in fact the last day on which the Claimant attended work.

167. On 3 May 2022, the grievance meeting took place. This was conducted by Talia Cruse, the Respondent's Health and Safety Manager. The Claimant attended and was represented by Ms Looker. The notes of this meeting are at B553-562.

168. On 9 May 2022, Ms Cruse conducted a grievance investigation meeting with Ms Gilbert, the notes of which are at B563-576. We have made references to this meeting above. What is very clear from the meeting is that Ms Gilbert was never told about the Claimant's impairments in a structured fashion and what those impairments meant in practical terms. Further, that she perceives OH referrals as a tick box exercise and that they make just recommendations, and it felt like they kept getting done because they had to be done not because the Respondent needed to get guidance. Indeed, what she says is very dismissive of the whole process.

169. On 10, 12, 19 May 2022, there are blank records of grievance investigation meetings held with Ms Carter, Ms Bell and Mr McCarthy (at B577-586). It would appear that for some reason the actual notes of these meetings were either not saved or not retained.

170. At B592-641, there is a draft grievance outcome letter dated 26 May 2022.

171. On 30 May 2022, the Claimant attended a grievance outcome meeting at which Ms Cruise went through the draft grievance outcome letter, amending it as she did so. We refer to the notes of that meeting at B704-770.

172. On 27 June 2022, the Claimant was sent the grievance outcome letter (at B654-701). This is the actual letter that was sent to the Claimant as opposed to the draft we have referred to above. It is fair to say that this is an unwieldy letter. It is very comprehensive and it deals with everything extensively. It reflects a very thorough investigation and the lengthy interviews with the Claimant and Ms Gilbert and, to the extent that we know the times, of the interviews, with the others. We do not propose to set out the detail of this letter but we do reproduce this summary from its start (on B654):

"- Disability Discrimination - Upheld - The absence of a specialist OH assessment (since 2019) - Upheld

- Performance sanctions causing anxiety - Upheld

- The failure to award yearly bonuses (x3 years) - Upheld

- Genuine reasonable adjustments not made and specific OH recommendations not being followed - Upheld

- Suggestions that Charlene's actions isolated her from colleagues - Upheld

- Overhearing Lisa and Claire discussing Charlene's ability not being good enough - Upheld

- MHS delaying for 8 months to take protective measures (wfh) following Charlene suffering seizures. Charlene suggests that the seizures have stopped since wfh was implemented. – Upheld

- Informal meetings with management actually being formal meetings, including capability - Upheld

- Pursing capability procedures when recommended adaptions to work had not been implemented - Upheld

- Unfair treatment resulting in further depression and anxiety, including suicidal thoughts, aggravating PTSD and sleep deprivation. - Upheld

- Being allocated the highest caseload in the team – Partially Upheld

- Performance being measured against colleagues who do not have medical conditions. - Upheld

- Feeling bullied and harassed - Upheld

- Suggesting that having to take calls from the Police during working hours was unacceptable interference with her work. - Upheld

- Being required to collate evidence of her performance and report the same on a daily basis. – Upheld"

173. By letter dated 12 October 2022, Dr Hadden wrote to whom it may concern, c/o the Claimant, certifying that she suffers from dissociative non-epileptic seizures, explaining what this was and that a further referral had been made to a Consultant Neuro Psychiatrist for treatment as well as a probable prognosis. This letter is at B783.

174. On 15 June 2023, the Claimant underwent her final OH assessment, a face-to-face consultation conducted by Dr Frixos Kopsachielis and is at B807-811. This stated that the Claimant is not currently fit for work; he does not

anticipate a return before her seizures are under control; that the Claimant says it would be psychologically unsafe for her to return to her previous working environment; that there is no amount support that could be offered to her; that on the one hand all litigation has to be concluded and on the other the Claimant has to have completed treatment and feel sufficiently resilient psychologically to consider a return.

175. The Claimant was required to attend a capability meeting held on 8 August 2023. This was conducted by Nuala Beattie, the Assistant Director of People, Talent and Communications. The Claimant attended the meeting with her mother and father, and a Vocational Rehabilitation Assistant. This meeting would appear to have focused on a discussion of the final OH report referred to above.

176. A further capability meeting took place on 8 September 2023 conducted by Ms Beattie with the Claimant, her mother and father, and the Vocational Rehabilitation Assistant again accompanying her. We refer to the notes of these meetings at B812 & B817.

177. By letter dated 13 September 2023, Ms Beattie wrote to the Claimant advising her of the outcome of the meeting of 8 September 2023. This letter is at B822-823. However, in reality this is not a letter setting out a final outcome. It sets out a summary of what was discussed at the meetings and ends with the following conclusion:

> *"It was clear to all parties that you are not fit for work at present and as I confirmed during the meeting, I need to give further consideration as to the next steps in this complex situation. I will therefore be in touch again soon to advise you of my findings."*

178. We refer to correspondence between the Respondent and the Claimant and then latterly the Claimant's mother's from the end of November to mid December 2023, which relates to attempts to arrange a further meeting at which to resolve the grievance and what Mrs Friend clearly perceives to be foot-dragging by the Respondent. We do not propose to go into this but would note that the run of email is between B826 and B850, although it is not in date order and some of the emails are repeated. Suffice to say, that Mrs Friend is clearly extremely concerned about the way in which the Respondent is behaving and believes is blocking her attempts to move the matter forward and to allow access to the Respondent's Chief Executive Officer.

179. On 18 December 2023, the Respondent wrote to the Claimant inviting her to attend a further capability hearing to be held on 4 January 2024 (at B852-854). The letter indicates that the Respondent suggested obtaining an up-to-date OH report but the Claimant had declined.

180. On 4 January 2024, the capability hearing took place but the Claimant did not attend.

181. On 11 January 2024, Ms Beattie wrote to the Claimant as to the outcome of the capability meeting (at B861-863). This letter advised the Claimant of her dismissal on the grounds of incapability due to ill-health with five weeks' notice of her dismissal. The letter stated that in summary, the Claimant was not currently medically well enough to return to work and there was no

foreseeable prospect of her being medically well enough to return to work. Further the letter stated, that even if the Claimant were or became medically fit enough to return to work, she had clearly confirmed that she never had any intention to return to work.

182. The letter notified the Claimant of her right of appeal however the Claimant did not exercise this right.

183. The Claimant's employment ended on expiry of her five weeks' notice on 16 February 2024.

184. In her evidence, the Claimant suggested that the Respondent should have medically retired her. Mrs Beattie confirmed in her evidence that the Respondent had no applicable policy that would have offered the option of ill-health retirement and that she had made such enquiries before considering the options available to her.

Submissions

185. Both parties provided written submissions which they spoke to orally. We have not referred to the submissions in any detail unless appropriate to do so but would reassure the parties that we considered them and took them into account in reaching our Judgment.

Essential Law

186. Section 13 of the Equality Act 2010:

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

187. Section 15 Equality Act 2010:

"(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."

188. Section 20 Equality Act 2010:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature 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.
(5) 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.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format…"

189. Section 21 Equality Act 2010:

"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

190. Section 26 of the Equality Act 2010:

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

191. Section 27 of the Equality Act 2010:

"(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…"

192. Section 95 & 98 of the Employment Rights Act 1996:

"Section 95

For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2). . . , only if)—
(a)the contract under which he is employed is terminated by the employer (whether with or without notice)…

Section 98

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or if more than one, the principal reason) for the dismissal and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3)In subsection (2)(a)—
(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

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

Conclusions

193. We have set out our conclusions by reference to the List of Issues which is appended to this Judgment. Paragraph numbers refer to those contained within the List of Issues unless otherwise stated.

Time limits

194. Paragraph 1 of the List of Issues asks us to consider whether we have jurisdiction to determine the Claimant's complaints under the Equality Act 2010 ("EQA").

195. This requires us to consider a number of matters: were each of the complaints presented to the Tribunal within the requisite time limits; if any of them were not, do they form part of a continuing act; or would it be just and equitable for us to extend time so as to allow us jurisdiction to determine those complaints?

196. Section 123 governs time limits under the EQA. It states as follows:

"[Subject to sections 140A and 140B,] proceedings on a complaint within section 120 may not be brought after the end of—
the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable…
For the purposes of this section—
conduct extending over a period is to be treated as done at the end of the period;
failure to do something is to be treated as occurring when the person in question decided on it.
In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
when P does an act inconsistent with doing it, or if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it".

197. In essence then, a claim has to be presented within a period of 3 months, plus any extension of that period by operation of the ACAS Early conciliation process, of the act complained.

198. However, any discriminatory conduct which "extends over a period" shall be treated as done at the end of that period under section 123(3) of the Equality Act 2010.

199. Turning then to the position under section 123(3). In some situations, discrimination continues over a period of time, sometimes up to the date of leaving employment. If so, the time limit in which to present a claim form to the Employment Tribunal runs from the end of that period. The common, although technically inaccurate, name for this is "continuing discrimination".

200. In Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96, the Court of Appeal held that a worker need not be restricted to proving a discriminatory policy, rule, regime or practice, if s/he could show that a sequence of individual incidents were evidence of a "continuing discriminatory state of affairs".

201. In addition, a Tribunal has the discretion to allow a claim outside the time limit if it is just and equitable to do so. This is a process of weighing up the reasons for and against extending time and setting out the rationale.

202. Paragraph 1 identifies that any complaint about something that happened before 26 January 2022 may not have been brought in time.

203. We will deal with each complaint individually where we have concluded that the complaints were brought in time.

204. With regard to those complaints that we decided to exercise our discretion so as to extend the time limits, we set out our findings and conclusions below.

205. We have decided to extend time in respect of the following complaints:

    a. Paragraph 4.1.2 – withholding the Claimant's yearly bonus. She was not awarded a bonus for 2022/23 (at B800) but we believe it just and equitable to extend time;

    b. Paragraphs 6.1.1 to 6.1.4 – harassment related to disability. These complaints arise from incidents on the following dates respectively: 14 September 2021; 24 September 2021; 19 September 2019; September 2021. So on the face of it they are all out of time. But we believe it just and equitable to extend the time limits for each;

206. We made the following findings from the evidence that we heard and the documents before us from which we then reached our conclusion to extend time.

207. The Claimant's disability includes impairments that affect her cognitive abilities. She was experiencing personal issues with both her brother and father. She was trying to continue in work and to resolve the issues at all times. She was constantly referred to OH. She was unaware of the time limits. She had limited access to advice although she did receive assistance from her family members. She received advice from Ms Looker, who then

helped her to draft her grievance which brought everything to a head. This then led to formal legal advice. The Claimant had seizures and was off sick from work from April 2022 and did not return.

208. The Respondent is not taken by surprise given that the almost all of these complaints were raised through the grievance process.

209. To refuse to extend time would prevent the Claimant from bringing forward what on the face of it are meritorious complaints of discrimination and harassment of a very serious nature.

210. The Respondent did not challenge the Claimant's evidence on time limits and offered no submissions on the issue.

The Equality Act complaints

Burden of Proof

211. Under section 136 EQA, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

212. We have taken account of the guidelines set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof. The Court of Appeal said the Tribunal must go through a two-stage process. At stage 1, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent had discriminated against the Claimant. In deciding whether the Claimant has proved these facts, the Employment Tribunal can take account of the Respondent's evidence. At stage 2, the Respondent must prove s/he did not commit that discrimination. Although there are two stages, Employment Tribunals generally hear all the evidence in one go, including the Respondent's explanation, before deciding whether the requirements of each stage are satisfied.

213. The full guidelines (as adapted for the EQA) are as follows:

    a. It is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful under the 2010. These are referred to below as 'such facts'.

    b. If the Claimant does not prove such facts s/he will fail.

    c. It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few Respondents would be prepared to admit such discrimination, even to themselves. In some cases the discrimination

will not be an intention but merely based on the assumption that "s/he would not have fitted in".

d. In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

e. It is important to note the word 'could' in section 136(1). At this stage, the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage, a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

f. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

g. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw from an evasive or equivocal reply to a questionnaire or any other questions that fall within the Equality Act 2010.

h. Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

i. Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on grounds of a protected characteristic or act, then the burden of proof moves to the Respondent.

j. It is then for the Respondent to prove that s/he did not commit, or as the case may be, is not to be treated as having committed, that act.

k. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of a protected characteristic or act, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive 97/80/EC.

l. That requires a Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

m. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the

Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

214. We have also taken into account Madarassy v Nomura International plc [2007] IRLR 246, CA which found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be "something more". There has to be enough evidence from which a reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

215. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondent's explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

216. We have also taken into account the guidance from the, then, House of Lords, in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL. The House of Lords considered the classic Tribunal approach to discrimination cases, which is to first assess whether there has been less favourable treatment, and if so, consider if the treatment was on grounds of the relevant prohibited conduct and stated that it may be more convenient in some cases to treat both questions together, or to look at the reason why issue before the less favourable treatment issue.

217. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so.

The complaints

218. The Claimant has brought a number of complaints under the Equality Act 2010 ("EQA"): direct disability discrimination under section 13; discrimination arising from disability under section 15; failure to make reasonable adjustments under sections 20 and 21 and harassment related to disability under section 26.

219. These are set out within the List of Issues referred to at the start of this Judgment, a copy of which is appended hereto. References to paragraph numbers refer to those contained within that document.

Disability

220. In its amended response at B73, the Respondent accepts that the Claimant meets the definition of disability within section 6 EQA in respect of: cognitive impairment of dissociative seizures; PTSD, Anxiety; and Fibromyalgia.

Direct disability discrimination

221. Under section 13 EQA, it is unlawful to treat a worker less favourably because of a protected characteristic, which includes disability, by reference to an actual or hypothetical comparator in the same or similar circumstances.

222. This complaint is set out at paragraph 3 of the list of issues.

223. Paragraph 3.1 asks us to determine whether the Respondent did the following thing, namely dismissed the Claimant. Clearly the Respondent did dismissed the Claimant. This was on 16 February 2024 and so this complaint was brought within the requisite time limit.

224. Paragraph 3.2 asks us to determine whether this is less favourable treatment. Clearly dismissing a person is less favourable treatment. We have to decide whether the Claimant was treated worse than someone else was treated, there being no material difference between their circumstances and that of the Claimant's.

225. However, there was nobody in the same circumstances as the Claimant and so we have not been pointed towards a named comparator.

226. The hypothetical comparator is identified as someone who had been off work since April 2022, who was not disabled, who was unfit to return, who was not able to return within a foreseeable period of time and who agreed that they were not able to return to work. However, there is no evidence before us to support the finding that a hypothetical comparator would have been treated differently to the Claimant.

227. In any event, we would not be able to reach the conclusion that any differential of treatment was because of disability. Our findings indicate that the Claimant was dismissed because the above comparative factors and the resultant ongoing absence from work.

228. We therefore find that the complaint of direct disability discrimination is not well-founded and is dismissed.

Discrimination arising from disability

229. Under section 15 EQA, discrimination arising from a disability is essentially where a Claimant alleges that she has been treated unfavourably as a result of something arising from her disability. The Respondent must know or have been reasonably expected to know that the Claimant had the disability. It is a defence to such a complaint if the employer can prove the unfavourable treatment was a proportionate means of achieving a legitimate aim.

230. This complaint is set out at paragraph 4 of the list of issues.

231. Paragraph 4.1 sets out a series of allegations of unfavourable treatment which we are asked to determine individually or cumulatively.

232. Paragraph 4.1.1 is placing the Claimant on formal and informal performance reviews repeatedly (and extending the reviews) since 2018.

233. We find that the performance reviews began on 19 December 2019 for a period of six months which was then extended by a further six months because of the Covid-19 pandemic. Then in January 2021, the Claimant was placed on a formal performance review, which then resulted in the issuing of a written warning live for six months, which by July 2021 had expired with no capability issues outstanding. However it does not appear that the Respondent told her of this, and so it would have continued to cause the Claimant anxiety. We find that this is a continuing course of conduct of which continued beyond 26 January 2022 and so falls within the request time limit. In the alternative we would find it just and equitable to extend time.

234. Clearly, this is unfavourable treatment.

235. Paragraph 4.1.2 is withholding the Claimant's yearly bonus. As we have indicated we have extended time on a just and equitable basis.

236. Clearly, to withhold the yearly bonus does amount to unfavourable treatment.

237. Paragraph 4.1.3 is not implementing the recommendations made by the OH assessor despite referring the Claimant for an assessment on 15 occasions. The first OH report was on 26 June 2019 and the failure to implement the recommendations was continuing.

238. Again, clearly this amounts to unfavourable treatment.

239. Paragraph 4.1.4 is failing to refer the Claimant to a specialist as recommended by OH.

240. This would appear to be the recommendation within the OH report dated 26 June 2019 at B150. It was a continuing failure. It crystallised when the Claimant got her own report on 29 November 2021.

241. From our findings, we conclude that there were mixed messages as to what was required and how was to be implemented and in the end the onus shifted to the Claimant to do this. So it is unclear that the Respondent knew who was going to proceed beyond the recommended options or made a decision on how to proceed. In this respect we refer specifically to an email from Ms Morley to Ms Cole dated 28 June 2019 (at B484-485). Although we hasten to add that Ms Morley does say that referral to an organisation called Psicon is the preferred route. So, it is a strong steer to the Respondent if not a formal recommendation.

242. Thereafter OH put it back onto the Claimant and even wrote a letter for her GP for the referral. But the referral to Psicon was not followed up by the Respondent (we refer to the grievance outcome letter at B599). Ultimately, the Claimant got the report but it should not have taken in the region of four years to do so.

243. So in conclusion, we do find this amounts to unfavourable treatment.

244. Paragraph 4.1.5 is delaying the Claimant's approval to work from home at the time her seizure attacks increased.

245. We could not find anything that indicated that the Claimant had asked to work from home; this seemed to follow from the requirements to work from home arising from her vulnerable person status (with regard to asthma and underactive thyroid).

246. Paragraph 4.1.6 is dismissing the Claimant. This took place on 16 February 2024 and so clearly is in time. Clearly this does amount to unfavourable treatment.

247. At paragraph 4.2 we are asked to consider a number of "things" and whether they arose in consequence of the Claimant's dismissal.

248. At paragraph 4.2.1, the first of these is the Claimant's inability to manage and complete her workload. Given our findings, this seems absolutely apparent to be something arising from disability.

249. At paragraph 4.2.2, the Claimant's decreased concentration due to her seating plan not being arranged as per the OH recommendations (leading the Claimant to continuously fear her environment). From our findings we conclude that the Respondent did not adhere to the seating plan recommended and indeed asked for by the Claimant and the evidence indicates that they were not even clear where she wanted to sit. Certainly, the arrangement of simply handing her a sign to place on a desk was not the same as designating a particular seat for her to use. We would add that that it was clear from the evidence that the Claimant also suffered the anxiety or fear of someone coming up behind her and her concentration was also reduced due to the noise if she was not sitting in her required seat.

250. At paragraph 4.2.3, the Claimant working at a slower pace. From our findings we conclude that this was something arising from the Claimant's disability and indeed it is akin to her inability to complete her workload.

251. At paragraph 4.2.4, the Claimant's requirement for extra support (as recommended by OH). We were not sure what this meant. Clearly from our findings, extra training was mentioned, particularly in respect of time management at a number of 1 to 1s and in emails. That course took an inordinate amount of time to arrange and was unclear why it took so long. However, we were not aware that OH had made such a recommendation.

252. So whilst the Claimant required extra support, certainly in terms of her difficulties in completing her workload which arose from her working at a slower pace because of her disabilities, this was not necessarily something that had been recommended by OH.

253. At paragraph 4.2.5, in respect of the dismissal, the Claimant's seizures. We find that the Claimant's seizures are something arising from disability. The Claimant was at work until April 2022 but had remained at work from July 2021 onwards, when she first had a seizure, the report that she received marking her as a two, triggered her raising a grievance and the seizures came

after that. So when the Claimant went off sick permanently, it was a combination of all these things.

254. At paragraph 4.3, we are asked to determine whether the unfavourable treatment was because of any of those things. From our findings we conclude that the answer is yes.

255. At paragraphs 4.4 and 4.5, we are asked to consider whether the treatment was a proportionate means of achieving a legitimate. We heard no evidence or submissions on this.

256. At paragraph 4.6, we are asked to determine whether the Respondent knew or could it reasonably have been expected to know that the Claimant had a disability and from what date. We conclude that the Respondent was fixed with knowledge of the Claimant's disability from the date that she commenced employment, from the first OH report in July 2018 and the fact or as well as the diagnosis of seizures.

257. We therefore find that the Claimant's complaint of discrimination arising from disability is well-founded.

Reasonable adjustments

258. Under sections 20 and 21 EQA, there is a duty upon employers to make reasonable adjustments to the workplace. Failure to do so constitutes unlawful discrimination. Where an employer applies a provision, criterion or practice ("PCP") which puts a disabled person at a substantial disadvantage compared with people who are not disabled, the employer must take such steps as are reasonable to avoid the disadvantage. The purpose of the adjustment is to address the disadvantage. The adjustment has to be reasonable. The Respondent must know or have been reasonably expected to know that the Claimant was likely to be placed at the disadvantage?

259. This is set out at paragraph 5 of the list of issues.

260. With regard to paragraph 5.1, we have already dealt with knowledge above and repeat after conclusions here.

261. The PCPs that the Claimant relies upon our at paragraph 5.2. Dealing with each of these in turn

262. At paragraph 5.2.1, the Claimant relies upon the PCP of formal and informal capability procedures. The Respondent accepts that it did have such a PCP.

263. At paragraph 5.2.2, the Claimant relies upon the PCP of requiring her to attend work (on-site and meetings). This should be phrased more neutrally than this is and should be requiring employees or staff to attend work (on-site and meetings). The difficulty for the Claimant, accepting paragraph 45 of Mr Stewart's submissions, is that we could not find any evidence that she had requested to work from home, despite this being one of her complaints, beyond casual requests, which were granted. During the Covid19 lockdown she was permitted to work from home for 12 weeks given her medical

condition of asthma and underactive thyroid. After she had seizures, whilst these did not occur everyday, these must have been distressing to her as well as to other members of staff, but there was nothing explicit that the Claimant was required to work in the office and her site visits were ended at some point. Ultimately, after eight months she was allowed to work from home. We therefore do not find that such a PCP was applied.

264. At paragraph 5.2.3, the requirement to manage and/or complete her workload in a timely manner. The Respondent accepts that it did have such a PCP.

265. At paragraph 5.2.4, requiring the Claimant to work under her current team leader, Lisa Gilbert. The Respondent accepts that it did have such PCP.

266. At paragraph 5.2.5, requiring the Claimant share a desk with other staff. We take this to mean that the Claimant was required to share a desk as in the sense of the Respondent operating a hot desk office.

267. From our findings we conclude that the Claimant was allowed to sit in her preferred seat where she wanted to but was not consistently given her preferred allocated seat. That is, the only seat that would have met the OH recommendation and the Claimant's own requirements. She was then criticised for sitting on her own. So whilst the Respondent did not require the Claimant to share a desk with others, it did criticise her for sitting on her own. This was either explicit criticism by Ms Gilbert or the Claimant felt that she was under criticism for doing so. As Mr Stewart put it at paragraph 46 of his written submissions, the Respondent did not require the Claimant to sit anywhere other than where she chose to sit (that is from the available seats when she arrived at work at 10 am each day). However, the Respondent never implemented the recommendation to allow the Claimant to sit at the only suitable seat.

268. Whilst there appears to be some criticism of the Claimant for not making her position clear, we concluded that it was only when the Claimant had the support of Mr Looker and drafted her grievance that she was able to articulate how she felt about these various matters, including seating. We formed the view that the Claimant was simply not able to assert herself until she had an advocate to assist. We also formed the view that the Claimant was a compliant person, almost grateful for what she was given, and not wishing to complain or come across as difficult. From what we could tell of Ms Gilbert's approach from the evidence before us, she came across as a forceful and abrupt person with a very jaundiced view of OH being a tick box exercise.

269. So we find that the Respondent did operate such a PCP.

270. At paragraph 5.2.6, requiring the Claimant to sit away from the desk wall or in a separate room. This is at odds with the PCP at paragraph 5.2.5 and we could not find any evidence that the Claimant was required to do so. It may have arisen as a consequence of paragraph 5.2.5 or simply as a result of the Claimant's concerns about noise or distraction.

271. At paragraph 5.2.7, that a person on a performance review would not be awarded bonus. The Respondent did not award bonuses to staff if their

performance was marked one or two the end of year review. So it was possible to beyond the performance review during the year but if your performance was three or more you would get a bonus. So our conclusion is a qualified yes this PCP.

272. At paragraph 5.3, we are then asked the question did the PCPs (which we have found existed) put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability. Dealing with each of these in turn.

273. The PCPs at 5.2.1 and 5.2.2, self-evidently yes.

274. The PCP at 5.2.4, Ms Gilbert either did not know about or appreciate the full extent of the Claimant's disability is (she says as much in the grievance interview) and she made adverse comments about mental health issues, the value of OH, and called the Claimant "Regan" and sent a text message calling her by this name with images from the film The Exorcist.

275. The PCP at 5.2.5, the substantial disadvantage was that the Claimant was not given the seat that she needed to have to address matters arising from her impairments and ignoring at OH recommendation to that effect.

276. The PCP at 5.2.7, self-evidently yes.

277. At paragraph 5.4, we find that the Respondent new or could reasonably be expected to know that the Claimant slide to be placed at the above disadvantages.

278. At paragraph 5.5, we are asked to determine what steps could have been taken to avoid the disadvantage and we've considered the suggestions that the Claimant is put forward. Dealing with each in turn.

279. At paragraph 5.5.1, altered the Claimant's workload. This ought reasonably to have been implemented on 26 June 2019 onwards. Whilst, the Respondent asserted that it had altered the Claimant's workload, we could not find any evidence to support this and we certainly could not see any adjustment. We could not find any evidence to support the specific assertion that her workload had been reduced by a percentage. The focus appeared to be on quality rather than quantity of work which was the real issue. Indeed, the finding within the grievance at B679 clearly illustrates this.

280. At paragraph 5.5.2, altered the Claimant's team leader. The Respondent altered the Claimant's team leader after she had overheard the telephone conversation between Ms Gilbert and Ms Carter. This change had a positive effect on the Claimant's performance but it was only a temporary change and there appeared no reason not to continue with the arrangement. Indeed, there appeared no obvious reason not to do it soon once the Claimant began to raise concerns about Ms Gilbert. The change was made from 16 November 2020 and was then ongoing from March 2021 when the team leader again became Ms Gilbert.

281. At paragraph 5.5.3, not instigated the capability procedures. The list of issues says "either the capability procedures" which we think must have been intended to state formal or informal. This would appear to be from 31 December 2019 on a continuing basis. Whilst it is apparent that the written warning expired by the effusion of time, this was never acknowledged to the Claimant. From our findings, we conclude that if the Respondent had modified the Claimant's workload, then either she would have performed to an acceptable standard and then there would be no need to instigate the capability procedures or, she would not, and then they would instigate the capability procedures. However, we simply cannot say which way it would have gone. But that does not mean it is not a reasonable adjustment that could have been made.

282. An employer has to have a means of addressing capability but one would expect disability issues to be taken into account. It would be better to say that in this instance the Respondent should not instigated the capability procedures without first implementing the OH recommendations and then if there were capability issues gone ahead and done so.

283. At paragraph 5.5.4, implemented the recommendations made by OH. This was from 26 June 2019 report, on a continuing basis. We would comment that these reports are not perfect and at times seem odds with the outlying evidence. However, if there was any uncertainty arising from the OH reports and recommendations, the Respondent should have queried them by saying what do you mean? But instead, it appears that the Respondent has simply filed them away. The OH recommendations that we have identified are as follows: the seating arrangement; the Claimant's workload; the need for training; a risk assessment on the change of the working structure.

284. At paragraph 5.5.5, dividing the training sessions into two parts to help Claims, the ability i.e. lack of focus and concentration. This was a matter that was identified in the June 2019 OH report and was continuing. A reasonable adjustment is more about tailoring any training to the Claims needs whenever the issue arose. It does appear that the Respondent put the Claimant on any training, be it in-person or remote, without any consideration of her needs. Apart from, perhaps in relation to the machete case study and the suicide issues, albeit that was something only arose after the Claimant had been through the training had distressing experiences as a result. In addition, the Respondent could have identified the Claimant's training needs. We did not see any evidence of any systematic approach to putting the Claimant on training, aside from some suggestions as to diary management and making "to do" lists, which did not address the Claimant's cognitive issues. The only targeted training was the suggestion for her to go on a time management course which even then was belatedly booked and in the event never actually took place.

285. At paragraph 5.6, we are asked the question was it reasonable for the Respondent have taken those steps and when? We find that each of the matters at 5.5 were reasonable steps for the Respondent to have taken. Dealing with each of the above at 5.5 in turn.

286. Paragraph 5.5.1, altered the Claimant's workload. The Claimant's grievance suggests that this was something that should have been implemented from day one. We find that it was when OH stated that the Claimant had started to struggle in her new role.

287. Paragraph 5.5.2, altered the Claimant's team leader. The Claimant overheard the telephone conversation between Ms Gilbert and Ms X on 27 September 2020, went off sick, took annual leave, and returned on 16 November 2020 at which point Ms Bell took over as her Line manager given that the Claimant so affected by what she heard Ms Gilbert say. That remained the case and so what was it the change that made it reasonable to change her line manager back to Ms Gilbert? We could not find that anything had changed such as to make reasonable to do so.

288. Paragraph 5.5.3, not instigated the capability procedures, this step should have been taken on 31 December 2019.

289. Paragraph 5.5.4, implemented the recommendations made by OH. We find that such steps should have been taken from 26 June 2019 OH report. This contains explicit references to seating requirements and to training. Implicitely, it raises issues as to how the Claimant was managing in her job, which includes workload, given her cognitive issues. The report never clearly sets out to say that these are the adjustments that are required for all to see and the Respondent does not seek any clarification.

290. Paragraph 5.5.5, divide the training sessions into two parts to help with the Claims cognitive ability. Again issues to do with training were identified within the 26 June 2019 OH report.

291. Finally, paragraph 5.7, asks us to determine did the Respondent failed to take those steps. The answer to this is yes.

292. We therefore find that to the extent indicated above the Claimant's complaint of failure to make reasonable adjustments is well-founded.

Harassment

293. Harassment is defined under section 26 of the Equality Act 2010. A person "A" harasses another "B", if "A" engages in unwanted conduct related to a protected characteristic, or of a sexual nature, which has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the unwanted conduct has such purpose or effect, the Tribunal must consider the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

294. We took into account that where conduct complained of does not have that purpose, i.e. where it is unintentional in that sense, it is not necessarily unlawful just because the worker feels his dignity is violated etc. We also took into account, as required, the other circumstances of the case and whether it is reasonable for the conduct to have that effect as well as the perception of the worker bringing the complaint. The starting point is whether the worker

did in fact feel that his dignity was violated or that there was an adverse environment as defined in the section and that it is only unlawful if it was reasonable for the worker to have that feeling or perception. But not forgetting that nevertheless the very fact that the worker genuinely had that feeling should be kept firmly in mind (Richmond Pharmacology v Dhaliwal [2009] ICR 724).

295. We were also guided by ECHR Employment Statutory Code of Practice at paragraph 7.18:

"In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

296. The complaint of harassment is set out at paragraph 6 of the list of issues.

297. The incidents of harassment that the Claimant alleges are at paragraph 6.1. Dealing with each in turn.

298. At paragraph 6.1.1, name-calling, i.e.Regan from The Exorcist movie. From our findings we conclude that this took place from the end of July until at least 14 September 2020.

299. At paragraph 6.1.2, Ms Gilbert, talking through loudspeaker in a phone call with Ms Carter, regarding the Claimant's performance in open office. From the findings we conclude that this did occur on 24 September 2021, albeit the Claimant was in an adjacent room and overheard the conversation.

300. At paragraph 6.1.3, Ms Gilbert treating the Claimant differently though other staff struggled with the same task. From our findings we conclude that this relates to the comments made by Ms Gilbert on 19 September 2019 that she was driving around wasting her time.

301. At paragraph 6.1.4, Ms Gilbert threatening to give the Claimant's home address to a client if the Claimant finish a certain task on time leaving the Claimant feeling guilty and scared due to her past attack. From our findings we conclude that this took place in September 2021 (reference to the Claimant's further and better particulars at B65).

302. Then at paragraph 6.2, we are asked to determine whether if these allegations are made out which indeed may have found they are, did that amount to unwanted conduct. We conclude that the answer is yes in respect of all.

303. At paragraph 6.3, we are asked whether these matters related to disability. We again find the answer to be yes.

304. At paragraph 6.4, where asked to determine whether the conduct complained of had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. It is very difficult for us to say some because we never had any direct evidence from Ms Gilbert. Perhaps the clearest incident that could be found to have been done that purpose is the name-calling.

305. At paragraph 6.5, we asked to determine whether if the answer to paragraph 6.4 is in the negative, did the conduct complained of have that effect. At this stage we are required to take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for conduct had that effect. From our findings and taking into account the above guidance set out from case law and the EHRC Code, we conclude that the answer is yes.

306. We therefore find that the complaint of harassment related to disability is well-founded.

<u>Unauthorised deductions from wages</u>

307. A complaint of unauthorised deduction from wages arises under section 13 ERA. Essentially, we have to determine what was properly payable to the Claimant, what she was actually paid, and if there is a shortfall, whether this amounts to an unauthorised deduction. Authorised deductions include those made in respect of income tax, national insurance, pension contributions and other amounts that have either been agreed by the parties in advance or signified in writing in advance by the employer.

308. The complaint relates to unauthorised deductions from the Claimant's wages in respect of her bonuses in 2019, 2020, 2021 and 2022. It is set out at paragraph 8.

309. The Respondent operates a performance bonus scheme. This is set out at clause 21 (v) of the Claimant's written statement of employment terms and conditions at B81. This states as follows. Subject to the achievement of agreed targets, an employee may receive a performance bonus payment. Bonuses are paid for the period 1 April to the following 31 March, calculated on an annual basis and paid in arrears. The targets are agreed by the Respondent's board and communicated to staff each year. There are rules relating to bonuses paid to part-time employees.

310. The Claimant received a bonus for 2018/19 on 18 June 2019 of £1720 (at B146-147). In 2020/21, the Claimant was told in a letter dated 14 June 2021, that she would not receive a bonus on the basis of her On Track rating on 2 (at B319). Similarly for the year 2022/23, in a letter dated 19 June 2023, the Claimant was told that she would not receive a bonus, but on the basis that she had been on long-term sickness since 28 April 2022 and so an On Track review had not taken place (at B800).

311. There are a number of difficulties with this complaint. The first is that there is what is known as a two-year backstop. This means that deductions can only be considered that have taken place within the period of two years prior to the presentation of the complaint. This would mean only the deductions occurring after 5 July 2020 could be considered. The second and greater difficulty is that rightly or wrongly what was properly payable to the Claimant was what she did or did not receive each year. It is not our function in a complaint of unauthorised deductions from wages to determine whether the scores on which the bonuses were awarded were incorrect or whether it was wrong not to award a bonus for a period during which the Claimant was not at work due to ill-health. We can only determine entitlement by reference to the contractual right to payment. Put simply, the Claimant got what was properly payable to her.

312. It may be that this is a matter that is more properly an issue arising as part of the possible remedy for the discrimination and harassment complaints that we have upheld. Indeed, we do note that in the grievance outcome letter, the failure to award the Claimant yearly bonuses for 3 years was upheld (at B654).

Unfair dismissal

313. Section 98 ERA sets out how an Employment Tribunal should decide whether a dismissal is unfair.

314. There are two basic stages. Firstly, the employer must show what was the reason, or if more than one, the principal reason, for the dismissal. The reason must be one of the four potentially fair reasons set out in section 98(2) or some other substantial reason of a kind such as to justify dismissal. Secondly, the Employment Tribunal must then decide in accordance with section 98(4) whether it was fair to dismiss the employee for that reason.

315. Paragraph 9 of the List of Issues sets out the matters we have to determination in relation to this complaint.

316. There is no dispute that the Claimant was dismissed, as we are asked to determine at paragraph 9.1.

317. Paragraph 9.2 deals with what was the reason or principal reason for dismissal. The Respondent alleges that this was by reason of capability and in the alternative some other substantial reason.

318. It is clear that incapability can stem from sickness, what is necessary is that the sickness or ill-health impacts upon the Claimant's capability to do his job which can arise from resultant lack of attendance at work or inability to return to work.

319. The letter to the Claimant (at B822-824) clearly sets out the basis on which Mrs Beattie took the decision to dismiss her.

320. We find that the reason shown to us by the Respondent is capability on health grounds.

321. We then turned to consider whether the Claimant's dismissal satisfied the test of reasonableness under section 98(4) ERA. The factors we are asked to consider are at paragraph 9.3.

322. The basic question in determining whether the test of reasonableness has been met in a case of dismissal arising from a single period of prolonged absence is whether in all the circumstances the employer could be expected to wait any longer and, if so, how much longer? Each case must be considered on its own facts and an employer cannot hold rigidly to a predetermined period of sickness after which any employee may be dismissed.

323. One expects an employer to have taken steps to have found out the true medical position and to have consulted with the employee before making a decision. A medical report on the implications and likely length of illness should generally be obtained from the employee's GP or an OH adviser or company doctor or independent consultant. Where the employer obtains a report from an OH adviser or a company doctor, the employer should also be willing to consider a report from the employee's own GP or specialist. Whereas the former may be more familiar with working conditions, the latter may be better placed to judge the employee's health.

324. Having apprised itself of the medical position, the employer's decision to dismissal ought to be based on the following factors:

    a. the nature and likely duration of the illness;

    b. the need for the employee to do the job for which he was employed and the difficulty of covering his absence. The more skilful and specialist the employee, the more vulnerable he is to being fairly dismissed after a relatively short absence;

    c. the possibility of varying the employee's contractual duties. An employer will not be expected to create an alternative position that does not already exist nor to go to great lengths to accommodate the employee. However, a large employer may be expected to offer any available vacancy which would suit the employee. What is reasonable very much depends on the facts;

    d. whether or not contractual sick pay has run out is just one factor either way;

    e. the nature and length of the employee's service may suggest the employee is the type of person who is likely to return to work as soon as he can, but length of service would not necessarily be relevant in any other way.

325. It is also important for the employer to have discussions with the employee and for the employee to know when his/her job might be at risk.

326. Mrs Beattie took the decision to dismiss the Claimant taking into account the OH report (at B807-811) which was informed by the views of the Claimant herself and her medical advisers. Indeed, the Claimant clearly stated that she would not return to work at the capability meeting held on 8 September 2023 (paragraph 11 of the notes of that meeting at B819). In considering the options available to her, Mrs Beattie looked into the possibility of medical retirement but this was not available to the Claimant.

327. We are satisfied that the Respondent acted reasonably in the way in which it conducted the dismissal process as well as the decision reached in dismissing the Claimant. It investigated the matter fully. It offered the Claimant the opportunity to attend the final hearing and also offered her the variety of options in terms of her ability to participate at the hearing. It consulted with the Claimant and her family and had attempted to obtain up-to-date medical advice as to the Claimant's position. Ultimately, the Respondent reasonably reached the conclusion that it was not possible for the Claimant to return to work within a reasonable period of time, there was no prognosis as to when the Claimant would be able to return and there was no position that the Respondent could leave open indefinitely given the impact on its operational services.

328. The Claimant was offered the right of appeal against the decision to dismiss her but did not exercise this right.

329. Dealing with the element s of paragraph 9.3 in the light of our above findings we conclude as follows:

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

    b. The Respondent adequately consulted the Claimant;

    c. The Respondent carried out a reasonable investigation, including finding out the up-to-date medical position. The Claimant declined a further OH assessment and it is a reasonable conclusion to reach that this would have said the same thing as the previous OH assessment in any event;

    d. The Respondent could not have reasonably been expected to wait longer before dismissing the Claimant. Further, the Claimant accepted that she could not return to work. It was not reasonable to expect the Respondent to await the outcome of this litigation and the resolution of the issue of her seizures or whether one would have positively impacted on the other;

    e. Dismissal was within the range of reasonable responses open to a reasonable employer in these circumstances.

330. We therefore conclude that the complaint of unfair dismissal is not well-founded and it is dismissed.

331. We would add that whilst we have found that the Claimant's dismissal was something arising from her disability, this does not render her dismissal unfair given that clearly the principal reason for dismissal was that we was unable to return to work and there was no foreseeable prospect of her being well enough to do so. Further, the Claimant had indicated that even if she were (or became) fit enough to return, she confirmed that she never had any intention to return to work for the Respondent.

Further disposal

332. The parties are invited to resolve the matter as to remedy between themselves and if this is not possible to inform the Employment Tribunal if they require a remedy hearing by 4 April 2025. In that event, a remedy hearing will be listed for the first available date with a time estimate of one day and will take place by CVP. Case Management Orders to allow for preparation for that hearing will be issued in due course.

Attached: Amended List of Issues

Employment Judge Tsamados
28 January 2025

Public access to Employment Tribunal Judgments
All judgments and written reasons for the judgments are published online shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case. They can be found at: www.gov.uk/employment-tribunal-decisions.